Are Judges the Makers or Discoverers of the Law?: Theories of Adjudication and Stare Decisis with Special Reference to Case Law in Pakistan

Muhammad Munir, Dr, International Islamic University, Islamabad

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Abstract

The debate about whether judges make or create the law is at the centre of any discussion about stare decisis. Modern authors have discussed the views of judges and jurists in the past. This work focuses on some of the notable judges and jurists of the twentieth century, such as Lord Denning, Lord Reid, Lord Devlin, Bodenheimer, Hart, Dworkin, from the Anglo–American legal systems. The views of the latter three jurists are very complicated and need particular attention. It is also pertinent to note that no one has explored the views of leading judges and jurists in Pakistan to know which theory of adjudication they support. This work analyses some of the prominent decisions given by some of the notable Pakistani judges such as Justice Munir, Justice Cornellius, Justice Hamoodur Rahman, Justice Saleem Akhtar, Justice Wajihuddin
Ahmad and others. Moreover, it discusses whether the declaratory theory or positivism can justify the binding effect of precedent. It is argued that judicial decisions may be accorded great weight in certain categories. However, granting them absolute authority is incompatible with both theories of adjudication.

Key Words: law making, law discovering, Lord, Denning, Lord Reid, Lord Devlin, Bodenheimer, Hart, Dworkin, Justice Munir, Justice Cornellius, Justice Hamoodur Rahman, Justice Saleem Akhtar, Justice Wajihuddin Ahmad, Stare Decisis, Precedent, Theories of Adjudication, Declaratory Theory, Positivism, Natural Law

I. Introduction

The debate about whether judges make or create the law is at the centre of any discussion about stare decisis. Modern authors\(^{(1)}\) have discussed the views of judges and jurists in the past. This work focuses on some of the notable judges and jurists of the twentieth century, such as Lord Denning, Lord Reid, Lord Devlin, Bodenheimer, Hart, Dworkin, from the Anglo–American legal systems. The views of the latter three jurists are very complicated and need particular attention. It is also pertinent to note that no one has explored the views of leading judges and jurists in Pakistan to know which theory of adjudication they support. This work analyses some of the prominent decisions given by some of the notable Pakistani judges such as Justice Munir, Justice Cornellius, Justice Hamoodur Rahman, Justice Saleem Akhtar, Justice Wajihuddin Ahmad and others. Moreover, it discusses whether the declaratory theory or positivism can justify the binding effect of precedent. It is argued that judicial decisions may be accorded great weight in certain categories. However, granting them absolute authority is incompatible with both theories of adjudication.

II. Theories of Adjudication

Precedent\(^{(1)}\) is treated as a general and formal source of law in the Anglo–American and the Indo–Pak Legal systems. This view is shared by lawyers, law teachers, law students and judges alike. The prevailing opinion of all those persons who deal with law in one way or the other in the Indo–Pak sub-continent or in the Anglo–American legal world is that a decision of a court of law, especially a court of last resort which explicitly or implicitly lays down a legal proposition, constitutes a source of law. The importance of precedent can be gauged merely by the fact that almost all authors from the above-mentioned regions treat precedent as a source of law.

The above view may be undisputed in our own times but historically and jurisprudentially, it has always been disputed. Ascribing authoritative force to a precedent is to some extent grounded on the assumption that court decisions are a source of law and that judges are entitled to make law in much the same sense as the legislator. The role of the judge in the process of adjudication as a law maker is the subject of disagreement and debate. Many famous jurists, among them Bacon, Hale, and Blackstone, were convinced that the office of the judge was only to declare and interpret the law, but not to make it.

At the other end of the spectrum equally great jurists as well as judges such as Bentham, Austin, Salmond, and Lord Dennining held the opposite view; that judges make the law (the creative theory). Thus, there seems to be two theories of the judicial process–declaratory and creative, respectively.

Sir Matthew Hale, a famous seventeenth century judge and probably the founder of the declaratory theory, said:

The decisions of courts do…. not make a law properly so-called (for that only the King and Parliament can do); yet they have a great weight and authority in expounding, declaring,

\(^{(1)}\) It may be defined as the practice whereby decisions of the higher courts are binding on the lower courts.
and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than an opinion of a many private persons, as such, whatsoever.(1)

Lord Mansfield asserted in the eighteenth century: “The Law of England would be a strange science if indeed it were decided upon precedents only.”(2) On another occasion he remarked: “The reason and spirit of cases make law, not the letter of particular precedents.”(3)

Sir William Blackstone, the last known and famous naturalist and judge of eighteenth century England, was probably the most authoritative exponent of the declaratory theory. In his Commentaries on the Law of England(4) he claimed that the ancient customs and usages of England are the essence of the common law, and that judicial decisions are merely the best evidence of such customs and usages. He described the common law as the “chief cornerstone of the laws of England, which is general immemorial custom …, from time to time declared in the decisions of the courts of justice.”(5) For him the central role of the courts was to reveal these customs and maxims and to determine their validity. He described judges as the “depositaries of the laws, the living

(2) Jones v. Randall (1774), Cowp. 37.
(3) Fisher v. Prince (1762), 3 Burr. 1363.
(5) Ibid.
oracles, obliged to decide in all cases of doubt according to the law of the land.” Their judicial decisions are “[T]he principal and most authoritative evidence that can be given, of the existence of such a custom as shall form part of the common law …. For it is an established rule to abide by former precedents, where the same points come again in litigation ….” The judge possesses delegated authority not to pronounce new law “but to maintain and expound the old one.” He does not alter or vary law which has been “solemly declared and determined.”

Justice Joseph Story of the United States echoed the same notion. He remarked that “in the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws.”

As late as 1892 Lord Esher expressed the same as follows: There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.

But the application of existing law to new circumstances cannot be distinguished from the creation of a new rule of law. Moreover, no one can deny the truth that the rules of equity laid down by the Court of Chancery owe their authority to the fact that they are judge made. Sir George Jessel remarked:

It must not be forgotten that the rules of courts of equity are not, like the rules of common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time–altered, improved, and refined from time to time. In many cases we

(1) Ibid., pp. 66–72.
(2) Swift v. Tyson, (1842), 16 Pet. 1, p. 17.
It is difficult for modern lawyers to agree with Justice Story and Lord Esher’s remarks. They would probably consider the statement of Mellish LJ who said that “The whole of the rules of equity and nine-tenths of the common law have in fact been made by judges.”

The judges’ practice of reasoning by analogy and what has been described as ‘the declaratory theory’ says that the decisions of the judges never make law, they merely constitute evidence of what the law is. Cross and Harris argue that:

The rule of *stare decisis* causes the judges to reason by analogy because the principle that like cases must be decided alike involves the analogical extension of the decision in an earlier case.

They trace back reasoning by analogy to the thirteenth century when Bracton opined that if anything analogous has happened in the past then that should be used to adjudge a new case.

According to Bodenheimer the proponents of this view seem to suggest that it is not the precedent itself but something behind it or beyond it which gives it its authority and force. Thus it is the reality of the ‘custom’ which has become embodied in the decision and not the will or fiat of the judges that validates the decision. But if this is the case then Allen is right to say that, “……. the ‘custom of the realm’ was in a very large measure the custom of the courts, not of the people.” Bodenheimer argues that ‘this

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(1) Re Hallett's Estate (1880) 13 Ch. D. 696 at 710.
(2) Allen v. Jackson (18720 1 Ch. D. 399 at 405.
(4) Id.
(5) Bodenheimer, op cit, p. 342.
position in basically incompatible with the view that a precedent forms a source of law, unless the latter term is used in a loose and un-technical sense.\(^{(1)}\) But why did the likes of Blackstone and Hale and so many others attach so much importance to custom? The reason could be that at the time of these great jurists law was not codified at all and cases were decided according to custom. The answer to any new legal question then was whatever the customs of the community indicated it to be and thus custom was the ‘essence of common law’ as Sir Blackstone remarked.

Allen argues that some types of legal regulations are inherently and completely outside the powers of judges. He observed:

By no possible extension of his office can a judge introduce new rules for the compensation of injured employees, for national health insurance, for the rate of taxation, for appropriation of public money ….\(^{(2)}\)

Lord Devlin is another staunch opponent of judicial law making or judicial creativity and vigorously supports the declaratory theory.\(^{(3)}\) He asserts that “judicial lawmaking is unacceptable because it is undemocratic.”\(^{(4)}\) He further states:

The Judges are the Keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The creative lawmaker is the squire or the social reformer and the equality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it.\(^{(5)}\)

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\(^{(1)}\) Bodenheimer, op cit. p. 342.

\(^{(2)}\) Allen, op cit. p. 309. His view will be explained in detail later.

\(^{(3)}\) He was a well known naturalist and vigorously opposed the libertarian approach towards law and morality. He strongly opposed H. L. A. Hart on this issue: hence the famous Hart–Devlin debate. For Devlin's views see Patrick Devlin, The Enforcement of Morals, (Oxford: Oxford University Press, 1965).


\(^{(5)}\) Ibid., at 16.
The view that judges do not make law rather they declare it and interpret it or that common law decisions are discovering existing law rather than making of new law, or that common law is a coherent body of rules, has come under scornful attack from a number of leading positivist jurists and judges. Bentham (1748-1832) poured scorn upon it for its apparent similarity to the method adopted by dog-owners when training their pets. He was a strong advocate of codification and described common law as no more than ‘mock law’, ‘sham law’, and ‘quasi law’. He denounced Blackstone’s view as cant and mystification. “Who has made the common law?” he asked contemptuously, if not “Mr. Justice Ashhurst and Co. without King, Parliament, or people.”

His attack was scathing “Not they, who then?” He vehemently opposed precedent as a body of rules and its retrospective application to actions that occurred at a time when that standard had not been clearly promulgated. He commented:

Do you know how they [judges] make it [the common law]? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him for it. This is the way you make laws for your dog, and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he should not do—they won’t so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it. What way, then, has any man of coming at this dog–law?

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(2) Id.

(3) Id, at 235.
To Bentham the retrospective effect of judicial legislation was a major
defect of the common law and he coined a peculiar phrase to describe it (“dog
law”).(1) The analogy is a misleading one, however, since criminal law (by
which punishment is applied) is largely laid down by statutes and not by case
law. His disciple, John Austin, castigated what he described:

The childish fiction employed by our judges, that judiciary or
common law is not made by them, but is a miraculous something,
made by nobody, existing, I suppose, from eternity, and merely
declared from time to time by the judges.(2)

Sir John Salmond took a similar line when he stated that judges
unquestionably make law and that one could recognize “a distinct law creating
power vested in them and openly and lawfully exercised.”(3) The common
law, asserted the positivists, existed (if it existed at all) because it was laid
down by judges who possessed law-making authority. Law was the product
of judicial will. It was not discovered but created.

According to Professor Peter “[I]t often appears that positivism has
carried the day.”(4) Despite the fact that the practice of reasoning by analogy
(the declaratory theory) is the same today as it has been for a long time,
the declaratory theory no longer holds sway. Justice Oliver Windell Holmes
wrote: “It is revolting to have no better reason for a rule of law than that so
it was laid down in the time of Henry IV”(5) and that the common law is not

(1) Lucke suggests that Bentham's criticism seems to have been aimed mainly at the
judge–made criminal law. See H. K. Lucke, ‘The Common Law: Judicial Impartiality and
(2) John Austin, Lectures on Jurisprudence, R. Cambell, (ed), (London: John Murray,
Review, at 379.
(4) Peter Wesley-Smith, op cit., at 74.
some brooding omnipresence in the sky,\(^{(1)}\) always present and correct.

One of the strongest supporters and advocates of judicial creativity had been Lord Denning who not only practiced it, but also occasionally preached it. While describing the changes that had taken place in law during his days at the hands of judges in a series of lectures he said:

The truth is that the law is often uncertain and it is continually being changed, or perhaps developed, by the judges. In theory the judges do not make law. They only expound it. But as no one knows what the law is until the judges expound it, it follows that they make it.\(^{(2)}\)

The late Lord Reid was also a supporter of this tradition as is evident from his remarks:

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the common law in all its splendour…….. But we do not believe in fairy tales any more.\(^{(3)}\)

Dias argues that “No Judge may refuse to give a decision. If no rule is at hand he invents one.”\(^{(4)}\)

**III. Theories of Adjudication and The Hart/ Dworkin Debate**

What theory does Dworkin support? He holds that judicial decisions, even in hard cases, are pre-determined, if not by clear-cut rules, by the weight and complex interaction of relevant principles which are to be found in great abundance in any advanced legal system and certainly in the common law.\(^{(5)}\)

\(^{(1)}\) Southern Pacific Co v. Jensen, 244 US 205, 222 (1917).


Dworkin opined:

If Hercules (Dworkin’s imaginary superhuman Judge) had decided to ignore legislative supremacy and strict precedent whenever ignoring these doctrines would allow him to improve the law’s integrity, judged as a matter of substance alone, then he would have violated integrity overall.\(^{(1)}\)

Moreover, his criticism of Hart’s Rule of Recognition on the basis of his (Hart’s) treatment of custom suggests that he too supports the declaratory theory. Hart in response attacks Dworkin’s position and holds that Dworkin’s theory is “an extension of Blackstone’s theory of common law, according to which judges decisions do not make the law but are merely evidence of what the law is.”\(^{(2)}\)

Hart perhaps ought not to be accusing Dworkin for siding with the declaratory theory because his own position is typically Blackstonian as we shall see below. Hart’s view on the issue seems very confusing on the issue for a beginner but if one separates the wheat from the chaff, Hart will be found to be standing firmly behind the founders of the declaratory theory. By mounting a scathing attack on Austin for saying that custom is not law until declared as such by a court,\(^{(3)}\) Hart believes that when a judge declares a custom to be law he does it because it is law—he merely declares it.\(^{(4)}\) He

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\(^{(4)}\) Hart states that "Why, if statutes made in certain defined ways are law before they are applied by the courts in particular case, should not customs of certain defined kinds also be so? Why should it not be true that, just as the courts recognize as binding the general principle that what the legislature enacts is law, they also recognize as binding another general principle: that customs of certain defined sorts are law?" Ibid, at 46. It is very clear that this is a re-statement of Blackstonian position.
remarked:

What absurdity is there”, he asks “in the contention that, when particular cases arise, courts apply custom, as they apply statute, as something which is already law and because it is law? [italics are mine].(1)

But this is exactly the position of the proponents of declaratory theory! On the other hand Hart holds that law consists of primary and secondary rules(2) and when faced with the problem ‘when a judge does not find an answer in the existing rules’, he suggests that he uses his judicial discretion, that is, he makes law.(3) He unreservedly says that there are cases where judges exercise their judicial discretion by acting as ‘judicial law makers’. (4) He talks of the delegation of limited legislative authority to the judiciary and “[I]n every legal system”, he asserts, “a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties … .”(5)

Hart’s views are certainly confusing; he seems to be changing his positions whenever faced with a different issue. For Hart the answer to the question: ‘what is law in a given legal system’ is whatever is validated by the ‘Rule of Recognition’ (Hart’s Master Rule) in that legal system. This is

(1) Id.

(2) Id., chapter five which is titled, "Law as the Union of Primary and Secondary Rules" at pp. 79–99, especially, at 91–97.


(4) Hart, ibid., at 6.

(5) Hart, above note, 37 at 136. Dworkin criticizes Hart's position and reminds him that discretion by courts will be applicable ex post facto. See Dworkin, above note 34 at 44; Also see Stephen Guest , "Two Strands in Hart's Theory of Law: A Comment on the Postscript to Hart's The Concept of Law" , in Stephen Guest, (ed), Positivism Today, (England: Darmouth, 1996), at 42. It must be noted, however, that Hart is not saying that the entire common law is based on custom. Only some part of it is based on it whereas judges use their discretion in interpreting the 'open texture' rules and not all the rules.
a re-statement of his positivistic position. Thus Hart does not believe that law is hidden somewhere in the legal system and judges discover it when a problem arises. However, Hart has no satisfactory rejoinder to Dowrikin’s scornful attack on his ‘Rule of Recognition.’ (1) Thus on the one hand Hart believes that custom is law even if it is not adjudicated. By this assertion Hart gives a big role to custom in the legal system – that role is similar to that given by other leading proponents of the declaratory theory. Once again this shows his, perhaps, unintentional association with natural law. Only a leading naturalist (2) (Hart) could attack a leading positivist (Austin). On the other hand he says that his Rule of Recognition lays down the criteria for the validity of every other rule of a legal system. This should necessarily include custom. However, this is against how he has described custom earlier and its validity whether it is adjudicated by a court or not.

Hart’s views on natural law are absurd. On the one hand he ridicules ideas of natural law theorists and on the other hand he asserts that every legal system must have the ‘minimum content of natural law’ otherwise it will be a very bad system. He states that, “The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other.” (3) Hart, therefore, compromises his positivistic position and the role of his Rule of Recognition. Although this may not be a big concession he has made to naturalists, it does undermine Hart’s positivistic stance.

Hart’s views about law and morality, positivism and natural law, are very bewildering when he gives his methodology for punishing the grudge Nazi informers in the post Second World War Germany. Informers who procured the punishment of those who were against the Nazi regime for

(1) Dworkin, above note 34 at 39-45.
(2) Hart must be called a naturalist (in this sense) for attacking the foundations of Austin's positivism.
(3) Hart, above note 37 at 193.
offences against monstrous statutes passed by the Nazis faced prosecution in the new Germany after the war. Hart believes that punishing them was against morality. He invokes the principle of *nulla poena sine lege* (there shall be no punishment without law) to declare that the decisions of the German courts were against this principle as they punished the informers without any law that provided for punishment for such an alleged offence. He suggested instead that the Germans should have made new law declaring the Nazi statutes invalid; that anyone who corroborated with the Nazis shall be punished; and that such laws should have been given retrospective effect.(1) Thus clearly Hart was 'shifting his goal posts.' He alleged that the German courts violated *nulla poena sine lege*. Yet in his method Hart violates the principle that laws shall not be retrospective. This second one is an application of the first one. In other words, to attack morality he used morality. It can be safely concluded that Hart was not consistent in his treatment of jurisprudential issues; he gave one answer on one occasion and a different one on another occasion. Given this incoherency it is surprising that Dworkin did not label Hart as a jurist with no 'integrity'.(2)

Cardozo takes a middle way between the two extremes. “I think the truth is midway between the [two] extremes…”(3) He considers as insignificant

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(1) Id., at 211.

(2) Hart seems a positivist when he attacks Austin's position on custom but then he makes concessions to naturalists in his 'minimum content of natural law' and invokes moral principles to criticize the decisions of the German courts and the position of Fuller, who supports those decisions. This confusion can be found throughout Hart's literature. For details of what Dworkin means by 'law as integrity', see Muhammad Munir, "How Right is Dworkin's Right Answer Thesis and his 'Law as Integrity' Theory" (2007) 2 Journal of Social Sciences, at 1-25.

(3) B. N. Cardozo, The Nature of the Judicial Process, (Yale: Yale University Press, 1961), at 124. Cardozo probably means that the existence of codified rules on each and every aspect of a case does not leave any room for a judge to make law and that in the absence of so much codified law he would be applying 'custom'.
“the power of innovation of any judge when compared with the bulk and pressure of the rules that hedge him on every side”.\(^{(1)}\) Stone argues that a judge has, as his duty, to choose between alternative decisions and modes of reaching them by the authoritative materials of the law. These materials may include settled law [precedent] and law which is widely open. In this sense the required judicial choice-making is …… “interstitial” in character.\(^{(2)}\) However, as Bodenhemier concludes, “In our own day the creative theory of law must be regarded as the most widely accepted view of judicial process, although disagreement may exist with respect to the volume and scope of judicial lawmaking.”\(^{(3)}\)

**IV. BODENHEIMER AND THE THEORIES OF ADJUDICATION**

Edger Bodenheimer denies that the question is whether judges are the makers or discoverers of the law and says that it can not be propounded in this way at all.\(^{(4)}\) He argues that “there are many different types of decisions and it is impossible to measure all of them with the same yardstick.”\(^{(5)}\) He distinguishes between five different situations.\(^{(6)}\)

Firstly, where there is a long–standing common–law rule or a clear statutory rule applicable to facts of the case before the judge, there is no creative activity on the part of the judge. In Dworkin’s parlance this is not a ‘hard case’ and the judge is not expected to make or discover the law. This situation can easily be criticized because this is not the situation where a judge may either discover the law (the Blackstonian approach), or create it

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\(^{(1)}\) Ibid., at. 136-137.
\(^{(3)}\) Bodenheimer, above note 1 at 439.
\(^{(4)}\) Id. at 439
\(^{(5)}\) Id.
\(^{(6)}\) His views are sometimes summarized and sometimes I have given new examples while on other occasions I have put his views in such a way so that they could be understood easily.
(the Benthamite approach). Every case that comes even to the highest court of law may not be a ‘hard case’ (in Dworkin’s words).

Secondly, where there is no precedent, past-case or statutory rule available for the case in point, the court, in order to arrive at a reasonable solution, can find direct guidance from the mass of reported decisions. In such a situation, argues Bodenheimer, “[T]he judge discovers proper law in an analogy which rests on a common social policy connecting the earlier cases with the rest at bar. *Ubi eadem legis ratio, ibieaden dispositiveio* (where the reason for the law is the same, the disposition must be the same).”

Let us analyze this situation. What the judge does in such a case may be analogized with what is called in Islamic law, *ijtihad*. Professor Nyazee defines *ijtehad* as the “effort of the jurist to derive the law on an issue by expanding all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue” by the judge.” Thus the *illah*, the underlying legal cause of a *hukm* (rule), in the previous case, its *ratio decidendi*, may be the same, on the basis of which the accompanying *hukm* (rule) is extended to other cases. However, Prof. Nyazee dispels the idea that *ijtehad* is a source of Islamic Law. “For the *mujtahid* (the judge), it is a process, for the derivation of the law. The result of the *ijtehad* is a source as it is the precedent required for later cases.

The third situation described by Bodenheimer is when a court has to decide a case according to the policy of the state. In such a situation judges may have to take into consideration the social and economic conditions of the people if they have to decide which law shall prevail while resolving such a case. His theoretical example is that if courts are allowed (in a state) to lay

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(1) Bodenheimer, above note 1 at 440
(2) I. A. K. Nyazee, Islamic Jurisprudence, (Islamabad: IIIT & Islamic Research Institute, 2000), at 395.
(3) Ibid.
(4) Id., at 341.
down what type of law should prevail to resolve a social issue, the court in such a situation finds the law after taking into account the pressing social and economic needs of that particular state. Bodenheimer’s judge in this situation seems to be looking at the collective good of the community rather than some individual gain to be obtained by one person at the expense of another. In doing so, the judge, sometimes may have to rule in favour of the public rather than the individual. An example in sight could be the famous American case of *Henningsen v. Bloomfeld Motors, Inc.*\(^{(1)}\) in which a New Jersey court had to decide whether an automobile manufacturer could limit his liability if the automobile is defective. Henningsen had bought a car, and signed a contract which stipulated that the manufacturer’s liability for defects was limited to ‘making good’ defective parts—'this warranty being expressly in lieu of all other warranties, obligations or liabilities.’ Henningsen argued that, at least in the special circumstances of his case, the manufacturer ought not to be protected by this limitation, and ought to be made liable for the medical and other expenses of persons injured in a crash. He was not however able to point to any statute, or to any established rule of law, that prevented the manufacturer from standing on the contract. The court nevertheless agreed with Henningsen. The court was influenced by the assertions by Frankfurter, J., who had famously asked “Is there any principle which is more familiar or more firmly embedded in the history of Anglo – American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?”\(^{(2)}\) “more specifically the courts generally refuse to lend themselves to the enforcement of ‘bargain’ in which one party has unjustly taken advantage of the economic necessities of other …."\(^{(3)}\) By analogy in Islamic law this is the concept of ‘*maslaha mursalah* – an interest

\(^{(1)}\) 32 N.J. 358, 161 A. 2d 69 (1960).

\(^{(2)}\) Ibid., at 389, 86 (quoting Frankfurter, J., in United States v. Bethlehem Steel, 315 U.S. 289, 326 [1942].

\(^{(3)}\) Id., at 397.
that is not supported by an individual text, but is upheld by the texts considered collectively.\(^{(1)}\)

In Bodenheimer’s fourth situation he talks of cases where judicial choice between two competing interests, such as, the right of free press and the right of privacy, is to be settled. He argues that the court in such situations, must consider the whole fabric of the social order, its prevailing social structure, and the ideals of justice before giving the decisions. However, he argues that this is the borderline area between ‘discovery’ and ‘judicial creativeness.’\(^{(2)}\) His position seems to be saying, albeit implicitly, that the judge has to consider the moral and ethical values of the society. This would necessarily mean that the views of the society may change from time to time and the judge has to keep on considering the current view rather than some old view. Is this situation, however, not very similar to situation three? Should not the judge look at the interest of the community as a whole versus the interest of a sole individual? Is it not collectivism versus individualism? If yes, then the judge should allow public interest to prevail over individual interest. Some good examples, from the United Kingdom’s jurisdiction would be, *Shah v. DPP* [1962] and *R v. Brown* [1993]. In the former case the accused had published a directory of prostitutes and the services they offered. He was found guilty, along with others, of conspiracy to corrupt public morals. Lord Simmonds claimed that the courts have the “residual power” to “conserve the moral welfare of the state.”\(^{(3)}\) The court thus ruled in favour of the collective good of the society. Although, the judge argued from an authoritarian point of view and this may not be the prevalent view in the UK today. In the later case, a group of sado-masochistic homosexuals were prosecuted for assault occasioning actual bodily harm after the police received a video they had made of their activities. Their defence was that since they had consented to

\(^{(1)}\) See Nyazee, op cit., at 397.
\(^{(2)}\) Bodenheimer, above note 1 at 441.
the acts in question there was no assault. The House of Lords upheld their conviction and ruled that consent could not be a defence to an assault of this kind. The conviction was justified on the basis of the harm done, not to the individual, but to society.

The fifth situation, discussed by Bodenheimer, is where there is a case on which no guidance is available from past cases and where the community does not seem to have formed an opinion about the issue, the court may then use the law creating technique but such cases may be very rare. This could be a situation where statutory rule or settled law is not available. It would have been interesting had Bodenheimer explained all these points with suitable case law. He confines the law-creating power of the judge to only this situation.

There may well be additions to the situations discussed by Bodenheimer such as, when a clear statutory rule will lead to an absurdity, then judges many have to decide the case in point according to standards other than rules. There are many examples of this in the Anglo–American jurisprudence, such as Riggs v. Palmer(1) in which a New York court, had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court held that all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims [principles](2) of the common law.(3) The court applied the principle that ‘no one shall benefit from his own wrong’ and held that the murderer shall not inherit under the will. The English case of R v. Re Sigsworth [1935](4) is similar to Riggs. Sigsworth had murdered his mother and claimed her money under The Administration of Estates Act 1925. The Act stipulates that the estate of a person who died intestate should pass to the

(1) 115 N.Y. 506, 22 N.E. 188 (1889).
(2) Since the court meant principles this is why I added it myself.
(3) 115 N.Y. 506, 22 N.E. 188 (1889) at 511.
next of kin. The court decided that applying the rule literally would lead to absurdity and choose to apply legal principle that ‘no one shall benefit from his own wrong.’

Furthermore what about the famous Grudge Nazi informer case in Germany, as it is known, (discussed above). In this case a Nazi soldier, who came home on holiday, and weary of the war, reportedly used offensive language against Hitler and the Nazi regime. His wife, who was an informer, reported him to the secret police. The soldier was prosecuted and given the death sentence but was not executed instead he was sent to the front lines to die in battle. He survived and sued his ex-wife for illegitimately depriving him of his liberty. The wife argued that she had done nothing wrong as she had a duty to obey the then valid Nazi’s law [a positivistic approach]. The husband argued that since the Nazi law was against the principles of morality and natural law it was not valid law and she had no duty to obey it (rather a duty to disobey it as the naturalists contended). Her action was therefore condemnable. The trial court agreed with the husband and the woman was convicted but her conviction was set aside by the appellate court on some other ground.

In all the above examples, (that we have added to Bodenheimer’s view), judges seem to have discovered law, such as in Riggs, and Re Sigswoth, and the Grudge Nazi informer case. As Pound argues it is true that law is not embedded or concealed in the body of the customary law and “[A]ll that judges did was to throw off the wrappings, and expose the statute over to view.” It is equally correct that the basic duty of the judge is not to make

(2) See the judgement of 27th July 1945, Oberlandesgericht Bamberg, 5 Suddeutsche Juristen-Zeitung, at 207; and Hart, above note 41, at 72-78.
law like the legislature. The correct view is probably taken by Oliver Windel Holmes when he said:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say ‘I think the doctrine of consideration is a bit of historical nonsense and I shall not enforce it in my court.’ No more could a judge exercising the limited jurisdiction of admiralty say ‘I think well of the common law rules of master and servant and propose to introduce them here en bloc.’ Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the states.(1)

Bodenhiemer echoes this view when he writes that “since the chief function of the judge is to decide disputes which have their roots in the past we cannot, as a matter of general principle, assign to him a full-fledged share in the task of building the legal order.”(2) Accordingly the judge may only extend existing remedies and occasionally invent a new remedy or defence where the demands of justice make this step imperative.(3) Thus, for Bodenheimer, if inventing law is the demand of justice then a judge is allowed to do it. However, if this is the condition for judicial lawmaking then it may also be that Bentham, Austin, and Salmond did have this condition in their minds: that when a judge invents law it is not against the demands of justice.

In modern times when every aspect of life, every business and economic activity or every transaction, be it in the sphere of civil, criminal or the family, is subjected to countless rules and regulations there seems to be nothing or at least very little left for the judges to legislate on. They,

(2) Bodenhemier, above note 1 at 442.
(3) Id.
thus, apply law and interpret it but do not change it or create it. Moreover, judges do not have the power to increase our salaries, decrease our taxes, improve our health or insurance facilities or provide education to the masses: this is why there is little room for making law. As a general rule the judge of today applies the law and does not make it; the exception being the case which is not covered by any existing statute (not easy to find) or previous decision. He does not discover either because we do not see any role for custom in our times. Every custom seems to be translated into a statutory rule or has become the settled law of the past. Precedent!

V. Theories of Adjudication and The Pakistani Legal System

It is unfortunate to admit that no literature is available in Pakistan about the theories of adjudication. Even our very good judges as well as great lawyers have not written exclusively about this topic. However, if one examines their treatment of certain issues in the leading cases of our legal system one can extract their inclination. It is necessary to endorse the view of Professor Nyazee at the outset that Shari’a and Natural law are not compatible\(^1\) because natural law has not always been associated with God. According to Professor Nyazee the basic question was whether an act recognized by reason as good or right in itself became binding on the subject; and was he to act upon it even in the absence of revelation or prior to it? An extreme view of the Mu’tazilah appears to be that the laws of Allah must conform to reason.\(^2\) He further argues that according to the majority of Muslim scholars if the Shari’a is silent on something then the law for that thing cannot be discovered through reason.\(^3\)

How could the theories of adjudication be explained in a legal system truly based on Islamic law? Let us suppose that a judge in such a state does not find the answer to a legal question in the Qur’an, the

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\(^1\) I. A. K. Nyazee, above note 57, at 86.

\(^2\) Id.

\(^3\) Id.
Sunnah and Ijma’. If he resorts to analogy or qiyas whereby he assigns the hukm (rule) of an existing case to the new case because of the underlying reason (because of which the original hukm has been laid down and because the new case has the same ‘illa (the ratio legis) in it).\(^{(1)}\) Is our judge in this case discovering or making the law? It seems that he is discovering it. This is view is backed by Moulana Maududi and Professor Nyazee. Maududi exclaims that “[T]here is no concept of ‘judge-made law’ in Islamic legal system.”\(^{(2)}\) Nyazee argues that “The creative theory of the law cannot be supported by Islamic law; it can be in a secular legal system. Judges have to discover the norms, principles and rules from the sources of Islamic law and declare the law.”\(^{(3)}\) Writing about the Pakistani legal system, he opines that since “[T]he laws have to be made in accordance with the Qur’an and the Sunnah, the creative theory cannot hold. The judges must discover the principles and norms of Islamic law and render judgement in the light of such principles.”\(^{(4)}\)

This means that judges must be well-versed in Islamic law, but this is not true in the case of Pakistan. Therefore, to know the position of individual judges, an empirical analysis of some of the major decisions of our superior Courts is carried out. Particular attention is paid to cases in which judges used the judiciary as a mean of Islamization of laws and

\(^{(1)}\) The constituents of qiyas are four: (1) the new case (far’); (2) the original case (asl) embedded in the primary sources—the Qur'an, the Sunnah and Ijma’; (3) the ratio legis (illa), the attribute common to both the new case and the original case; and (4) the legal norm or the rule (hukm) which is attached to the original case and which, due to the similarity between the two cases, is transferred from that case to the new one.


\(^{(4)}\) Id.
declared various laws repugnant to Islamic law\(^{(1)}\) and thereby null and void; should they be categorized as discoverers or makers? It is not easy to put them behind judges in the Anglo–American systems. Nevertheless, for the purpose of this article we have to schematize things (which may be a bit arbitrary). According to this scheme, judges who declared laws to be null and void because of their incompatibility with Islamic law (especially Article 2-A of the Constitution) could be considered as discoverers while those asserting that in case of a clash between Islamic law and state law the later shall prevail as positivists.

In *Dosso v. State*\(^{(2)}\), Chief Justice Munir articulated a theory of radical positivism that did not distinguish between legality and legitimacy but which validated any revolution as long as it was successful in replacing the old legal order. He said:

But if the revolution is victorious in the sense that the persons assuming authority under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law–creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution.\(^{(3)}\)

It is clear from the above assertion that Chief Justice Munir had relied on positivism and he could be categorized as a positivist. However, if this case would put him in one camp, his remarks in his previous decision given a year earlier would put him in with naturalists. Martin Lau argues that his remarks in *Dosso’s* case must have come as a surprise to his contemporaries.\(^{(4)}\)

\(^{(1)}\) However, other important cases are analysed as well.

\(^{(2)}\) PLD 1958 SC 533.

\(^{(3)}\) Id., at 539.

year earlier, he had strongly supported the fundamental right to freedom of
religion guaranteed under Article 18 of the 1956 Constitution, stating that it
cannot be taken away by a law.\(^{(1)}\) He seems very inconsistent and unreliable.

The powerful dissenting opinion of Justice Cornelius in the same case is a strong indication that he was supportive of the declaratory theory. He observed:

By the Constitution of 1956, the highest authority of an
overriding character, governing all laws and legislation in the
country, had been given to the principles which were set out
and enumerated as Fundamental Rights in Part II thereof. No
law could be made in contravention of those rights on pain of
validity.\(^{(2)}\)

In the opinion of Justice Cornelius human rights did not depend on a
written guarantee because these were elementary rights that did not disappear
only because the legal instrument that had contained them was no longer in
force. Thus, according to his scheme, certain human rights did not owe their
existence to any law-making act but they were inherent in every human being.
Justice Cornelius had based his arguments on natural law and his approach
had the advantage that he could continue to rely on human rights, although

\(^{6}\) YIMEL (1999-2000), at 51.

\(^{(1)}\) His remarks are worth quoting in full: "The very conception of a fundamental right
is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it
is not only technically inartistic but a fraud on the citizens for the makers of the Constitution
to say that a right is fundamental but may be taken away by the law. I am unable to attribute
any such intent to the makers of the Constitution who in their anxiety to regulate the lives
of the Muslims in Pakistan in accordance with the Holy Qur’an and [the] Sunnah could
not possibly have intended to take away from Muslims the right to profess, practice and
propagate their religion and to establish, maintain and manage their religious institutions,
and who in their conception of the ideal of a free, tolerant and democratic society could not
have denied a similar right to the non-Muslim citizens fo the State.” See Jibendra Kishore
Achharyya Chowdhury and 58 others v. Province of East Pakistan, PLD 1957 SC 9, at p. 41.

\(^{(2)}\) Ibid., at p. 533.
these had disappeared from the 1956 Constitution. Thus in *Dosso*’s case we find that Chief Justice Munir’s views were supportive of positivism while those of Cornelius of declaratory theory.

In *Asma Jilani v. The Government of Punjab*\(^{(1)}\) the dissenting opinion of Justice Cornelius was accepted by the Supreme Court of Pakistan when it overruled *Dosso*. However, unlike Justice Cornelius who resorted to natural theory to distance himself from martial law, Chief Justice Hamoodur Rahman referred to the Objectives Resolution in his search for a *Grundnorm* for Pakistan. After discarding Kelson’s theory of revolutionary legality, Rahman CJ held *obiter* that:

In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by him a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7\(^{th}\) of March 1949. This Resolution has been described by Mr. Brohi as the “corner stone of Pakistan’s legal edifice” . . . . This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or Civil. Indeed, it cannot be, for, it is one the fundamental principles enshrined in the Holy Quran, “Say, ‘O Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest; and Thou takest away sovereignty from whomsoever Thou pleasant. Thou exaltest whomsoever Thou pleasest and Thou abasest whomsoever Thou pleasest.”\(^{(2)}\)

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\(^{(1)}\) PLD 1972 SC 139.

\(^{(2)}\) Qur’an 3: 27, at 182.
Chief Justice Hamoodur Rahman has formulated a constitutional theory in which basic principles of Islamic law were immutable and unalterable norms although he began his deliberations about Pakistan’s Grundnorm with an ‘if’. It is very clear for the purpose of our discussion that the opinion of Chief Justice Hamoodur Rahman is supportive of declaratory theory.

In Ziaur Rehman v. The State\(^{(1)}\) Justice Afzal Zullah elevated the Objectives Resolution to a ‘supra Constitutional Instrument’ and stated that it cannot be repealed or abrogated and is permanent for all times to come.\(^{(2)}\) The remarks of Justice Kadri in locating the source of the basic structure in Objectives Resolution and Justice Zakiuddin Patel in Darvesh M. Arbey v. Federation of Pakistan\(^{(3)}\) are leading us to conclude that they have a declaratory theory. The same is true of Chief Justice Anwarul Haq, Justice Muhammad Afzal Cheema\(^{(4)}\) and Justice Muhammad Akram for their opinions in Begum Nusrat Bhutto v. Chief of Army Staff.\(^{(5)}\) In the same case the dissenting opinion of Justice Qaisar Khan was based on positivism when he bluntly rejected Islam as the basic structure of the legal system of Pakistan.\(^{(6)}\)

Other noticeable judges in the list of ‘discoverers of the law’ are Justice

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\(^{(1)}\) PLD 1974 Lah 382.

\(^{(2)}\) Ibid., at 390.

\(^{(3)}\) PLD 1980 Lah 206.


\(^{(5)}\) PLD 1977 SC 657.

\(^{(6)}\) Ibid., at 747. He said: "The [Objectives] resolution was the wish and ultimate aim for the realization of the Islamic order but it was not the Grundnorm in Pakistan." Ibid.
Tanzilur Rahman(1) Justice Khalil-ur-Rehman(2) and Justice Wajihuddin Ahmed.(3) Some of the leading judges having positivistic approach were Chief Justice Munir as mentioned above, Justice Ajmal Mian,(4) Justice Allah Nawaz,(5) Justice Shaifiur Rahman,(6) Chief Justice Naseem Hasan Shah(7) and

(1) In many of his decisions he had ruled that any law that was violative of Article 2-A of the Constitution of 1973 was repugnant to the injunctions of Islam and was thereby null and void. See for example, his opinion in the Bank of Oman Ltd. v. East trading Co. Ltd., PLD 1987 Kar 404 where he remarked: "The principles and provisions of the Objectives Resolution, by virtue of Article 2-A, are now part of the Constitution and justiciable. Any provisions of the Constitution or law, found repugnant to them, may be declared by a superior court as void ...." Also see his opinion in Irshad H. Khan v. Parveen Ajaz, PLD 1987 Kar 466; Mahmoodur-ur-Rahman Faisal v. Secretary Ministry of Law, PLD 1992 FSC 1 in which riba was declared repugnant to the injunctions of Islam; and Mirza Qamar Raza v. Tahira Begum, PLD 1988 Kar 169 in which he ruled that section 7 of the Muslim Family Law Ordinance 1961 was against the injunctions of Islam and thereby null and void. He was actively involved in Islamisation of Pakistan's legal system through Courts.

(2) In Shahbazud Din Chaudhry v. Services I. T. Ltd, PLD 1989 Lah 1 especially at 43 where he remarked: "[T]he question whether investment for deriving interest income is conducive to public interest, is to be answered. So, reference will have to made to the Holy Qur'an and [the] Sunnah." He ruled at 44 that the charging of interest was not in the public interest. Also see his decision in Ittefaq Foundry v. Federation of Pakistan, PLD 1990 Lah 121 and his main speech in the famous riba case reported as Dr M. Aslam Khaki v. Syed Muhammad Hashim, PLD 2000 SC 225


(4) See his views in Sharaf Faridi v. Federation of Islamic Republic of Pakistan PLD 1989 Kar 404. At 430 he held that: "[I]t is not open to this Court [the High Court] to hold that any of the constitutional provisions is violative of the Objectives Resolution".


(7) For his powerful speech in Hakim Khan v. Government of Pakistan, PLD1992 SC 595 in which he remarked: "And even if Article 2-A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the
Justice Saleem Akhtar.\(^{(1)}\) It should be noted that most of the cases discussed for the purpose of this article involved the role of Islam in our legal system. It is plain that the judiciary was deeply divided on this question till it was finally settled by the Supreme Court in \textit{Hakim Khan v. Government of Pakistan} in 1992.

In India there is one important case worth mentioning. In \textit{Delhi Transport Corporation v. DTC Mazdoor Congress}\(^{(2)}\) Chief Justice Mukherjee imported Austin’s phrase and declared that “[T]he court must do away with the childish fiction that the law is not made by the judiciary. The Court under Article 141 of the Constitution is enjoined to declare law and the expression ‘declared’ is wider than the words ‘found’ or ‘made’; it requires creativity.”\(^{(3)}\) Chief Justice Mukherjee was, therefore, a strong supporter of positivism.

The views of late A. K. Brohi and Khalid M. Ishaque – the two great lawyers from Pakistan are discussed below to know their affiliation. Mr. Brohi is inclined towards positivism as he considers our Courts (the higher Courts in Pakistan) to be “Courts of Law” rather than the “Courts of Justice.”\(^{(4)}\)

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\(^{(1)}\) For his opinion in Shela Zia v. Wapda, PLD 1994 SC 100 and especially in Mst Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 909. In the later case he distinguished between administrative actions taken under a law and the law itself. In his opinion the former could be invalidated by courts on the basis of Article 2–A and 227(1).


remarks in his *magnum opus* that:

A Judge is thus not free to decide as he pleases-he is bound by the *statute* or by the well-known technical rules that govern the application of judicial method. He is also bound by *decisions* of the superior courts. But having said that much it is necessary at once to add that, in each case, it is once again the Judge who gives effect to what *he* by the application of judicial method, considers is the meaning of the statute or the authority of the decision of a superior court.(1)

While answering the question as to what the Judge is to do in a case where there is neither legislative provision nor any judicial precedent which in his judgment furnishes an answer to the problem raised before him in the course of litigation, he suggests that he should either turn to persuasive precedents from other civilized systems of law or turn to text-books or in some cases to analogical reasoning.(2) His opinion on the development of judicial method is worth quoting in full. After a long discussion he opines:

From the foregoing discussion it would be clear that our courts are charged with the duty of administering *justice in accordance with the law*. It is true that abstract notions of justice cannot be allowed to stand in opposition to law for even the doctrine of public policy upon which judges more properly could be said to legislate judicially, is itself a part and parcel of the common law. Public policy as a concept of our jurisprudence is related to the interest of the community rather than to the parties before the court. It does not consist of any universal or immutable body of rules, but it is something elastic and its actual configuration depends on the logic of the changing conditions of the society.(3)

(1) Id., at 539.
(2) Id.
(3) Id., at 550.
Mr. Brohi has quoted leading positivists to prove his point. He is well aware of the debate between naturalists and positivists and after mentioning that Blackstone upheld the declaratory theory he brings in Austin’s scathing attack on it and asserts that “[T]he more generally accepted view now is the one advanced by Austin.”\(^{(1)}\) It is very clear that our great lawyer has a positivistic approach as his judge does not create the law rather he makes it.

In sharp contrast to Brohi’s view, Khalid Ishaq was of the opinion that justice (something denounced by Brohi) is “[P]artly achieved by the ordinary judicial processes, by virtue of the inherent limitations of the processes by which disputes are dealt with by judges.”\(^{(2)}\) Writing about judicial function in an Islamic state he remarked:

> It is noteworthy that the duty to obey is mentioned [in the Qur’an] after the command to the rulers to act justly. It is obvious that exercise of power within the community is circumscribed by the limits placed by the divine law. Therefore, judicial power has always had to play a crucial role. There is no escape from the fact that within the Muslim community judicial power must be available in some authority is not a creation of some legislative body within the community. Doubtless the community may by common consent form a hierarchy of judicial authorities, but the judicial power to ultimately pronounce on the validity of all acts of the highest legislative or executive authority must vest in some independent judicial tribunal. The judicial power either directly or indirectly, by not vesting the powers in any judicial authority to ultimately pronounce on the legality, on the basis of the criteria laid down by Allah and His Prophet, of all legislative and executive actions.”\(^{(3)}\)

\(^{(1)}\) Id., at 594.
\(^{(3)}\) Id.
From the powers and functions he is attributing to judges in our state it is clear that his views are totally against positivism as he wanted judges to exercise their functions as they would in a truly Islamic state. This view is similar to the declaratory theory.

VI. Conclusion

In conclusion it is important to discuss the status of *stare decisis*. The declaratory theory seems to require a strict adherence to precedent. But in reality this is not the case. Blackstone admitted some exceptions especially where the former determination is most evidently contrary to reason or divine law or when they are flatly absurd or unjust then in such cases precedents may not be followed. Deviation by judges in such cases would not be law making, but would be to vindicate the old case. Vaughan CJ in *Bole v. Horton* remarked that a court is bound to give a like judgment to one already given only if the first judgment was according to law.(1) Similarly, Park J asserted in *Mirehouse v. Rennell*, that he would always be ready to retract a judgment he was later convinced was wrong.(2) The House of Lords stated in 1852 that it possesses “[A]n inherent power to correct an error into which it may have fallen.”(3) It is, therefore, clear that individual judges as well as superior courts deviate from their own previous decisions and overrule them.

A judge should therefore *apply* the law and not another judge’s *determination* of it. In our legal system this is true of a judge in a similar or the same court but not of a judge in a subordinate court. However, if the duty of a judge is to find the law he *cannot* be bound by the opinion of another judge. But such a concept is incompatible with *stare decisis*. Previous cases do provide evidence of the law, but they cannot be conclusive. Under *stare decisis* subordinate courts are under

(1) (1673) Vaughan 360; 124 ER 1113.
(2) (1833) 1 C1 & F 527, 566.
(3) Bright v. Hutton (1852) 3 HLC 341, 388.
an obligation to apply a case unless it is decided *per in curiam*. The declaratory theory can offer no basis for the binding effect of previous decisions because a judge has to discover the law rather than make it. Applying a previous decision would mean that he is not discovering the law because he is bound by that decision. Thus neither of the dominant theories of adjudication is *able* to sustain the thesis that precedents are absolutely authoritative. In other words, whatever theory a judge adopts it will be incompatible with *stare decisis*. He should owe his fidelity to the law and not the distant wisdom of the past. He should be free to reject a precedent that does not represent the law.

The creative theory of law is not supported by Islamic law. In Pakistan, where the laws have to be made in accordance with the Qur’an and the *Sunnah*, the creative theory cannot hold. An analysis of leading Pakistani case law shows that judges are divided on the issue: some support the declaratory theory whereas others incline to the creative theory.