Articulation of Law for Contemporary Muslim Societies

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Abstract

The purpose of this article is to identify the basic elements of the Islamic legal system. The article begins with an overview of the nature of the Islamic legal system. This will be followed, by the methods of literal interpretation and a description of the sources of Islamic Law. The research proves that the judge trained in modern law, with a little effort on his part, can easily deal with Islamic legal materials. It will help him feel comfortable within the Islamic legal domain. Likewise, a qāḍī asked to decide cases within the common law environment will realize that the legal materials he is evaluating for purposes of decision are not entirely alien. The materials may be divine in one case, and more or less secular in the other, but the underlying concepts and the human mental processes are the same.

Keywords: Analogy, Interpretation, *Dalalat*, Jurisprudence, *Fiqh*

A brief introduction to Islamic law and the Islamic legal system:

Islam, like Judaism, is essentially a legalistic system. All its teachings whether ethical, moral, mystic, cultural and others revolve around its legal rules, or surround the legal rules, and are directly or indirectly linked to this essential legal core. The term *sharī'ah* means the law itself, while the term *fiqh* literally means the understanding of this law, or its jurisprudence. The term *fiqh* has come to be applied to the corpus of law (substantive and procedural) derived by the jurists through the sources of Islamic law.

The Formal Structure of Islamic law:

The formal structure of Islamic law is studied by the Muslim jurists under the title "the *ḥukm shar'ī."* Which deals with the conceptual structure of Islamic law that attempts to answer the following questions:

- What is Islamic law?
- What is the nature of rules in this legal system?
- How many kinds of rules are there and how do they unite with each other to give rise to the Islamic legal system?
- What is legal capacity and how does it interact with the operation of the rules?
- What kind of rights underlie the various kinds of rules?
- How are these rights secured through the legal framework and machinery of Islamic law?….

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The Methodology of the *Mujtahid* and the *faqīh:*

The *mujtahid* is an independent jurist who is qualified to derive the law directly from the sources of Islamic law, like the *Qur'ān* and the *Sunnah*. The *mujtahid*, performs the legislative function within the Islamic legal system, whereas, *faqīh* is not an independent jurist, as he is dependent upon the work of the *mujtahid*. The *faqīh* performs the judicial function in Islamic law. The modern judge and lawyer must both master the methodology of the *faqīh* and acquire the ability to extend the law through reasoning from Islamic legal principles. It may be mentioned here that the works of jurists like al-Dabūsī (d. 430 A.H./1039 C.E.), al-Sarakhsī (d. 483 A.H./1090 C.E.) and others are outstanding models.[1]

This has led some to believe that the *sharī'ah* is different from this corpus of the law, which is its human understanding.[2] This is not a valid assumption as the *sharī'ah* and *fiqh* are the same thing due to which the terms are sometimes used interchangeably. The *sharī'ah* is found in the legal texts of the *Qur'ān* and the *Sunnah* and *fiqh* or Islamic law is the interpretation by the jurists of these texts. There is no other way of acquiring knowledge of the *sharī'ah*. There is no such thing as *Shari'ah* separated from human understanding through interpretation; if there was such a separation, *Shari'ah* would be something inaccessible.[3] Unfortunately, it is some of the acclaimed Muslim scholars who may be held responsible for the confusion."[4] Nothing can be farther from the truth. There is no way of knowing what the *sharī'ah* is other than human understanding. This is what the schools have done,[5] and they have done so according to established systems of interpretation that are accepted by the masses, and in which the common people have faith.

Fiqh is the understanding of the *sharī'ah* and that the two are not separate in any way. The earlier jurists,[6] who continue to hold sway over the meaning of the *sharī'ah* as expressed through *fiqh*, have never understood the *sharī'ah* in the sense the modernists.

The Sources of Islamic Law:

The true source of all laws in Islam, as stated in the *Qur'ān*, is God Almighty. This meaning is understood from the verse, "The *ḥukm* (command) belongs to Allāh alone,"[7] This basic

[1] *Id.* at 14–16

[2] It is not our purpose to enter into the details of the "debate" whether *sharī'ah* and *fiqh* are two separate things with *sharī'ah* being God's law and *fiqh* its man-made understanding, which is subject to change over time. The discussion has been started by some modernists, especially those in the West. The main idea is to eliminate, remove or lessen the hold of the traditional schools of law over the minds of Muslims so that a foundation can be laid for "modernizing" Islam on a more rational basis. It is stated that the *sharī'ah* is clearly expressed in the *Qur'ān* being confined to a few fundamentals, while *fiqh* or the law of the schools is speculative reasoning that has provided a detailed legal system. If the distinction is accepted, the modernists think, then the hold of the old schools can be broken paving the way for a modern and more "enlightened" legal system. The modernists have no system of interpretation that can replace the earlier schools or their understanding of the *sharī'ah*. Perhaps, it is for this reason that such attempts have failed with an adverse impact. In fact, these are seen as attacks on the *sharī'ah* that have led many, more vigorously, back to the schools and their folds.

[3] Id. at 3.

[4] Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah* in OXFORD HISTORY OF ISLAM (Oxford University Press, 2000) (Available at http://acc.teachmideast.org/texts.php?module_id=2&reading_id=210&sequence=2 accessed on January 7, 2016.

[5] And by this we mean all the schools of law, even those that have become extinct.

[6] Whose views and details are discussed below.

rule determines the character of Islamic law and gives direction to all interpretation and *ijtihād*. He elaborates that it is God's laws alone that are acceptable to the Muslim and no other sovereign or temporal authority can command his obedience; it forms a kind of "social contract" within a Muslim community.[8] When we say that it is God's law alone that is acceptable to the Muslim, the statement has tremendous consequences. It means that not only laws that are expressly stated in the *Qur'ān* are to be followed, but all laws must conform to the norms expressed in the *Qur'ān*, which is revelation or the word of God. It is in this sense that the statement "Islam is a complete code of life" is made.

To the above meaning, the *Sunnah* or the precedents laid down by the Prophet (pbuh), either through his statements, acts, or approvals, is added. The *Qur'ān* itself says, "O ye who believe! Obey Allah, and obey the Messenger, and the *ūli'l-amr* among you; and if ye have a dispute in *ANY MATTER*, refer it to Allāh and the Messenger, if ye are (in truth) believers in Allāh and the Last Day."[9] "Any matter" means any matter, and the Muslims are required to seek rulings from God, which means the *Qur'ān*, to seek rulings from the Prophet (pbuh), which means the *Sunnah*, and to seek rulings from those in authority. The word "*ANY*" indicates that this applies to all kinds of disputes, or to laws covering each and every activity. It is, therefore, not enough to apply the laws of Allāh in the areas of marriage, divorce, and inheritance, and call the state an Islamic state. The words *ūli'l-amr* means those in authority. According to the jurists this term means the jurists, who have also been directed by the *Qur'ān* to stay back and acquire knowlege when others go to war, so that they may teach them and issue rulings for them when they return from war. If the term means the rulers, even then it means jurists, because the *imām* or the head of the state is supposed to be a jurist (*mujtahid*).

The source of all laws in Islam is God Almighty, there are two primary material sources; namely, the *Qur'ān* and the *Sunnah*. We also conclude that to give meaning to the words "any matter" and to the statement "Islam provides a complete code of life," we have to extend the express meanings of the legal texts in these two primary sources, and we also have to extend the meanings of the legal norms or general legal principles provided by these sources. The extension takes place through what we call the secondary sources of Islamic law. The word primary sources of law as used in Islamic law is similar to the meaning assigned to "primary source" in law, but not completely. In law, the term means a source that is binding, like a constitution, statute and precedent.[10] In Islamic law, in addition to the source being "binding," there may be additional meanings involved. These additional meanings are meant to distinguish the meaning of such sources from other sources that may also be binding within a school, but are still treated as secondary sources.

The earlier jurists[11] classified the sources in different ways.[12] They first examined the sources from the perspective of transmission, that is, oral or written transmission down to a certain

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[7] *Al-Qur'ān*, *Al-An'am*:57

[8] "Each Muslim agrees to be a Muslim not only because he believes in the existence of one God and the truth of the mission of His Messenger, but also because the laws are prescribed by the Wise and Just Lord, and these laws grant him security from oppression and ensure justice and fair play in all dealings. A Muslim surrenders his will to Islam so that his life may be regulated in accordance with the *ḥukm* of Allāh."

[9] *Al-Qur'ān*, *An-Nisa*:59

[11] When we use the term "earlier jurists," we usually mean almost all the jurists who have lived in the past fourteen centuries and they are in thousands. Islamic law is a collective contribution of these jurists.

generation from the time of the coming into existence of the sources or the time of the Prophet (pbuh). Examined this way, the transmitted sources were the *Qur'ān*, the *Sunnah*, the consensus of opinion (*ijmā'*) of the Companions of the Prophet (pbuh), the rulings issued by the Companions (R),[13] and even the earlier Scriptures (Torah and Evangel, which are also sources of Islamic law, unless the law has been repealed or altered by the Islamic *sharī'ah*). The mode of transmission was then examined, and a transmission about which there could be no doubt or probability as to its being authentic was termed definitive (*qaṭ'ī*). This was the continuous narration also called the *mutawātir*. This standard was met only by the *Qur'ān* and some traditions. The bulk of the traditions, which contained the *Sunnah*, were deemed probable being individual narrations in the first three generations including the generation of the Prophet (pbuh). It is possible that some reports about the consensus of the Companions (R) and their rulings could also meet such standards. Finally, the jurists examined the agreement of the jurists over the acceptance of a source across school boundaries and within a larger group to which these schools belonged.

The Ahl al-Sunnah wa-al-*Jamā'ah* or the Sunnis as they are called unanimously agreed upon four sources: the *Qur'ān*, the *Sunnah*, consensus of opinion (*ijmā'*), and *qiyas* (syllogism; analogy). Those Sunni jurists who did not accept all these four sources as valid sources of law could not establish lasting schools, and their schools soon became extinct, for example, the *Ẓāhirī* school did not accept *qiyas* as a valid source. As distinguished from the Sunnīs, the Shiah schools have their own distinctions, but they did not accept *qiyās* and *ijmā* as valid sources.

The above analysis leaves us with three sources, which are treated as primary sources by the Sunni schools:[14] the *Qur'ān*, the *Sunnah* and *ijmā'*. All others are secondary sources. One important methodological attribute of the primary sources, besides their being binding, is that further extension can take place from the rules and principles in these sources through rational methods of extension. The secondary sources do not enjoy this quality.[15] Thus, we can summarize the attributes of the primary sources of Islamic law in these words: "Primary sources, then, are at once agreed upon, transmitted, definitive on the whole, and those upon which further extension can be based. This would mean that the Qurān, the *Sunnah*, and *ijmā'* are the primary sources, while the rest are secondary sources."

The characteristics that flow from such a description may be listed as follows:

- Primary sources are all agreed upon within the Sunni schools as binding sources.
- Primary sources are transmitted sources.

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[12] The meanings of the term source, as well as the various classifications followed by the jurists are found scattered in their works. One has to search through the different descriptions and draw out the meanings described below. For a few works that do give out such information in adequate detail, see SAYF AL-DĪN AL-'ĀMIDĪ (D. 631 A.H./1233 C.E), AL-IḤKĀM FĪ UṢŪL AL-AḤKĀM, 4 vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1985); FAKHR AL-DĪN IBN MUḤAMMAD AL-RĀZĪ (D. 606 A.H./1210 C.E.), AL-MAḤSŪL FI 'ILM UṢŪL AL-FIQH, ed. Tāhā Jābir Fayyāḍ al-'Alwānī, 6 vols. (Riyāḍ, 1979); 'UBAYD ALLĀH IBN MAS'ŪD ṢADR AL-SHARĪ'AH AL-THĀNĪ (D. 747 A.H.), AL-TAWḌĪḤ FĪ ḤALL GHAWĀMIḌ AL-TANQĪḤ (Karachi, 1979).

[13] The character R is an abbreviation for "God be pleased with him" and is the preferred abbreviation for this form of address.

[14] The meaning and ditinction between schools is discussed below.

[15] *See generally* MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 3rd ed. (UK: Islamic Texts Society, 2006).

- Primary sources are definitive on the whole and, therefore, binding on the whole. Thus, anyone who denies a primary source "on the whole" does not remain a Muslim anymore, and is attributed with unbelief.[16]
- Primary sources can be used as a basis for extending their legal content and norms to new cases by the use of rational methods, like *qiyās* (syllogism). This quality is not enjoyed by the secondary sources.

This shows that a primary source in Islamic law is not only binding but much more.

The secondary sources of Islamic law are mostly rational. Nevertheless, a few textual sources are also included in this meaning. These are the opinion of the Companion[17] and earlier scriptures.[18] The opinion or ruling of a Companion is treated as a transmitted source, because it has been transmitted to us in more or less the same way as the traditions from the Prophet (pbuh) were transmitted to us. In its origin, however, it may have been rational or it may have been an interpretation of the texts of the *Qur'ān* and the *Sunnah*. The secondary sources, which do not list this source as some schools of law do not consider it binding, consider the secondary sources to be rational.

To understand the nature of the secondary sources, the attributes described for the primary sources are reversed. Thus, to describe the characteristics of secondary sources, just reverse the characteristics listed above. For example, secondary sources are mostly rational sources, or they are mostly disputed sources, or that they depend on the primary sources for their content. The secondary sources include: syllogism (*qiyās*), breach of analogy for resolving a conflict in rules also called juristic preference (*istiḥsān*), extended analogy or dialectical reasoning (*maṣlaḥah mursalah*), blocking lawful means to an unlawful end (*sadd al-dharī'ah*), and presumption of continuity of the earlier ruling (*istiṣḥāb al-ḥāl*). The acceptance of these rational methods as sources of law differs with the school.[19] A complete list of sources, both primary and secondary, with reference to acceptance may be stated as follows:

1. **The *Qur'ān.*** It is accepted unanimously as a source of law by all schools. It is not permitted to deny it as a source of law, as that means moving out of the fold of Islam. The acceptance of the *Qur'ān* is not treated as part of law, but as subject of the discipline that deals with the tenets of faith.
2. **The *Sunnah.*** The *Sunnah* consists of precedents laid down by the Prophet (pbuh). It has been transmitted to us in the form of meticulously recorded and authenticated reports called *ḥadīth*. The *Sunnah* too is unanimously accepted by all schools as a binding source. It cannot be denied as a whole as a source without invoking grave issues of unbelief. Individual reports, however, may be examined and questioned with respect to authenticity and persuasive power for legal reasoning.

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[16] Quoting al-*Sarakhsī*, he records: "*Hishām* has related from Muḥammad ibn al-Ḥasan al-*Shaybānī* (God bless him) 'that *fiqh* is of four types: what is in the Qur'ān and what resembles it (by way of continuity *tawātur*); what has been laid down by the *Sunnah* and what resembles it (by way of being well-known (*mash'hūr*)); what is related from the Companions (by way of consensus (*ijmā'*)) and what resembles it (that is consensus of the jurists of each period); what is considered good by Muslims (by way of *ijmā'*) and what resembles it (knowledge of the people).' This contains an elaboration that the *ijmā'* of the Companions is at the same level of proof as the Book and the *Sunnah* with respect to its being definitive so that one who denies it is to be imputed with *kufr* (unbelief)."

[17] This is a ruling given on a legal issue and not opinions about matters generally.

[18] By earlier scriptures is meant the Torah and the Evangel.

[19] This means that even though all schools accept *qiyās* as a method, they disagree about the details and the occasions on which it operates. *Istiḥsān* is accepted by some and not by others, and so on.

3. ***Ijmā'*** (consensus of legal opinion). The consensus is always on a point of law, and it may also pertain to the meaning of a particular text. Issues settled by consensus cannot be reopened. For practical purposes such consensus usually pertains to the time of the Companions of the Prophet (pbuh) after his death. Consensus of the jurists of the later ages in the case of the first two or three generations is sometimes transmitted, but for later ages one has to rely on the claims of consensus made by individual schools. As indicated in the previous section, the *Sunni* schools are very strict about denial of this source as a source of law, because the consequences can be grave.
4. ***Qiyās*** (syllogism, analogy). It is usually referred to as analogy, but strictly speaking it is syllogism with many similarities to the form used in Aristotelean logic. This rational source too is accepted unanimously as a source of law withing the Sunni schools. The Sunni schools that did not accept it soon became extinct. The Shi'ahs reject it as a valid source; instead they rely on *'aql* (reason), but that is beyond the scope of the present study.[20]
5. ***Istiḥsān*** (juristic preference). This is a form of reasoning that prefers the stronger or established rule over a weaker analogy. Accordingly, Joseph Schacht called it "breach of analogy." It is accepted as a source by the Ḥanafī school as well as the Mālikī school. The Shāfi'ī and Ḥanbalī schools reject it; in fact, al-Shāfi'ī called it a total nullity and referred to it as the insertion of one's personal opinion into matters of divine law.[21]
6. ***Maṣlaḥah mursalah*** (jurisprudential interest). It is sometimes referred to as "public interest," but that is not an apt description, because it attempts to balance and reconcile the various interests sometimes upholding the individual interest and preferring it over public interest. The method is attributed to Imām Mālik, but al-Ghazālī tried to show that most schools use it in some form or the other even if they do so under different names.
7. ***Sadd al-dharī'ah*** (blocking lawful means to an unlawful end). This method is accepted by the Mālikī and Ḥanbalī schools. It is a method that tries to proble the inner intention of the subject. Where an unlawful intention is discovered, even ostensibly lawful acts are also prohibited. This is especially true in contracts where these schools follow the subjective theory of contracts. The other schools rely on the objective theory of contracts and do not try to probe the inner intention as it is not discoverable in their view. The Ḥanafīs and Shāfi'īs do not accept it as a valid source.[22]
8. ***Istiṣḥāb al-ḥāl*** (presumption of continuity of a rule). This source is a favourite of the Shāfi'ī school. It simply means that if there is no rule available for a certain set of facts, the original rule of permissibility applies and the act will be declared permissible. The Ḥanafī school does not permit this source for establishing a rule *ab initio*, and treats it more like a rule of evidence or a presumption of fact.
9. ***Qawl al-ṣaḥābī*** (the opinion of a Companion). The ruling of a Companion of the prophet (pbuh), especially the ruling issued by a jurist Companion, is considered binding by the

[20] AL-SARAKHSĪ, UṢŪL AL-SARAKHSĪ, 318 (Ed. Abū al-Wafā' al-Afghānī, 1973).

[21] For the details of the different approaches a good source is *al-Ghazālī, al-Mustaṣfā*, especially volume one.

[22] The objective theory of contracts is followed in English common law as well and, therefore, in most countries that adopted this law. For example, it is a view taken by American law that contracting parties shall only be bound by terms that can be inferred from promises made. Contract law does not examine a contracting party's subjective intent or underlying motive. Judge Learned Hand said that the court will give words their usual meaning even if "it were proved by twenty bishops that [the] party … intended something else." *Hotchkiss v. National City Bank of New York*, 200 F. 287 (2d Cir. 1911). It appears that in France the subjective theory is followed, because of which some Muslim countries that have been influenced by that law are inclined towards the subjective theory.

Ḥanafī school, and also by the Mālikī school. The Shāfi'īs do not consider it as a binding source; they deem it analogy on the part of the Companion, which can be repealed by the jurists themselves.

10. ***'Urf*** (custom). Custom is not really a source of law in Islam in the sense it is understood in Western systems. Primarily it is used to identify technical meanings as distinguished from their literal sense. If other ages and localities have their own terms for such meanings, the terms are recognized as valid. As far as practices are concerned, they have to be judged through the texts and general principles of Islamic law for granting such practices legal validity.[23]
11. **Earlier scriptural laws** in the Torah and the Evangel. These are generally considered to have been abrogated by the Islamic *sharī'ah*. Where they are followed in Islamic law is not due to their acceptance, but as laws that have been acknowledged and expressly approved by Islamic law.[24]

Systems of Interpretation and Schools of Law in Islamic Jurisprudence:

The schools of Islamic law are sometimes referred to as sects, as if the disagreements among the schools is based on disagreements about dogma or the tenets of faith.[25] This is not true as the schools of law are based on a scientific or methodological difference with respect to interpretation. Each school represents a unique theory of law. The theories dictate different methods of interpretation. For example, there are four major schools within the Sunni system. There are several schools of the Shi'ahs as well. The first four sources are considered binding by all the schools within the Sunni system. These are the *Qur'ān*, the *Sunnah*, *ijmā'* (consensus of opinion) and *qiyās* (syllogism). There is a disagreement among the schools about the remaining sources. For example, the Ḥanafī school considers the opinion of a Companion as binding and treats *istiḥsān* as binding and valid. The Shāfi'ī school does not consider the former as binding, while it treats the latter as a nullity. The source called *maṣlaḥah* (extended analogy) is accepted by the Mālikī school, while the other schools have different views about it. *Sadd al-dharī'ah* is not used as a source by the Ḥanafī school, but it is by the Mālikī and Ḥanbalī schools.

A school, when viewed from the perspective of the sources, appears as a unique set of sources, because the positition taken is the same as the other schools only with respect to the first four. Considered in this, the Sunni schools have four different sets of sources adopted by four separate schools. This fact alone is sufficient to consider them as independent theories of Islamic law. The different sets have a tremendous impact on interpretation and on the outcome of the final opinion on points of law.

The Methods and Strategies in the Interpretation of Texts, and their Application to Positive Legislation (*Dalālāt*):

The *Qur'ān* and the *Sunnah*, the two major and primary sources of Islamic law, have together created the Islamic legal system. It is not proper to say that such and such law is not found in the *Qur'ān*,[26] because the *Sunnah* acts not only as a commentary of the *Qur'ān* but also as an independent source of law. There is an integral bond between these two sources that the jurist will sever during his interpretation at his own peril. Indeed, it is a basic rule of interpretation in Islamic law that all meanings in the *Qur'ān* can only be clear when the explanation is taken from the

[23] For the details see KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE chapter on *'urf*.
[24] See AL-SARAKHSĪ, UṢŪL AL-SARAKHSĪ, vol.2, 47.
[25] This belief is held by the general public and even by lawyers who are not well acquainted with Islamic law.
[26] Such statements are made by many people, including lawyers who work within the legal system of Pakistan.

Sunnah. This foundational principle is referred to as the doctrine of elaboration or *bayān*. The development of the doctrine is attributed to al-*Shāfi'ī*,[27] but the real work in this area was done by the Ḥanafī jurist al-*Jaṣṣāṣ*[28] in the light of the teachings of his teacher al-*Karkhī*.

There are very few cases in which the meaning of the text of the *Qur'ān* is explicit (*naṣṣ*). When it is explicit in its meaning (in those rare cases) it has to be acted upon, but if it is apparent (*ẓāhir*) and yet has more than one meaning it is necessary to have recourse to its commentary, which is the *Sunnah*. It is here that the jurist has to be alert for the action being performed by the *Sunnah*, because there are many ways in which the *Sunnah* manifests its relationship with the *Qur'ān*. These various ways have been described by al-*Shāṭibī* in an excellent discussion.[29] We only have space to provide a very brief summary of this relationship.

The main idea is that even when the *Sunnah* appears to be dealing exclusively with a legal rule, it is in reality elaborating the principles found in the *Qur'ān*; the *Sunnah* is merely extending the meaning of these principles. This idea is elaborated in several points.

The first point is that the Sunnah is a commentary of the *Qur'ān*. The rules are often found in the *Qur'ān* in a general, undetermined, or an unelaborated form. The *Sunnah* elaborates, restricts, or qualifies these rules. For example, it elaborates the timings of prayer and their number as well as their *rak'as* (units of prayer). It elaborates the kinds of wealth in which *zakāt* (poor-due) is to be paid and the amount to be paid in each as well as the time of obligation. An example of restricting general meanings is found in the case of inheritance. Thus, the *Qur'ān* says "For the male two shares of the female." The *Sunnah* restricting this general meaning says that the murderer will not inherit. The *Qur'ān* lays down, in an absolute or unqualified way, the rule that the hand of the thief is to be cut. The *Sunnah* qualifies this meaning saying that the property of a certain minimum value must be removed from the *ḥirz* (place of safe-custody), and that it is the right hand that is to be cut.

Second, in certain cases the *Sunnah* links, what appears to be an additional rule, to a known principle. In other word, the *Sunnah* sometimes lays down rules that are not mentioned in the *Qur'ān*. These appear to be additions to the rules in the *Qur'ān* and cannot be considered as elaborations or qualifications as explained in the previous point. Jurists are of the view that on closer examination these rules are to be found as an elaboration in the sense of classifying a rule under a principle. Further, a case may vacillate between two principles and the *Sunnah* links up the case with one of these principles. For example, the *Qur'ān* has in a general way permitted all good things and has commanded the avoidance of *khabā'ith* (filthy things). The *Sunnah* has linked with the *khabā'ith* the consumption of animals with molars and birds with claws, just as it has prohibited the consumption of domesticated donkeys. The *Qur'ān* has permitted the consumption of seafood and prohibited carrion. The dead fish in the sea vacillated between these two principles. The *Sunnah* linked it with permitted food: "Its water is pure and its *maytah* (carrion) is permissible." The *Qur'ān* permitted a slaughtered animal and prohibited carrion. The separated foetus of an animal after slaughter vacillated between the two principles. The *Sunnah* linked it with the slaughtered animal: "The slaughter of the foetus is the slaughter of its mother."

Third, the *Sunnah* sometimes performs analogy on the basis of a rule in the *Qur'ān*. The *Qur'ān* sometimes lays down a principle or a rule without elaborating all the categories falling

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[27] See generally, MUḤAMMAD IBN IDRĪS AL-SHĀFI'Ī, KITĀB AL-RISĀLAH FĪ UṢŪL AL-FIQH, Ed. Aḥmad Muḥammad Shākir, (Cairo: 1358 AH).

[28] ABŪ BAKR AḤMAD IBN 'ALĪ AL-JAṢṢĀṢ AL-RĀZĪ, FUṢŪL FĪ AL-UṢŪL, 2 vols. (Kuwait, 1405 AH).

[29] The discussion is found in ABŪ ISḤĀQ IBN MŪSĀ AL-SHĀṬIBĪ, AL-MUWĀFAQĀT, vol. 4 (Cairo: 1922), 32–40.

under that principle or covered by the rule. The *Sunnah* links a resembling case with this rule, and this function appears to be similar to analogy. The *Qur'ān* prohibits marriage of two sisters to one man and then says that what is besides this is permitted. The cases of a woman along with her maternal or paternal aunt are also similar because of a common underlying cause. The *Sunnah*, therefore, prohibits such marriages too. The *Qur'ān* mentions that pure water descends from the sky and is preserved in the earth. The case of sea-water was not settled. The *Sunnah* declared that it is pure and even its carrion is lawful.

Fourth, it is one function of the *Sunnah* to lay down general principles. The *Sunnah* sometimes lays down a general principle the individual categories of which have been mentioned by the *Qur'ān*. For example, the *Sunnah* lays down the principle: "No injury is to be caused or borne." The *Qur'ān* mentions a number of cases in which injury to others has been prohibited, like injury to a parents because of their child or injury to wives and so on. The prohibition of injury or harm is a general principle that is formulated by the *Sunnah*.

Fifth, the *Sunnah* elaborates the meaning of words in the *Qur'ān*. An example of this the distinction of the white thread from the black thread during the month of Ramaḍān. The *Sunnah* explains that this is the light of day and the darkness of the night. The word *ribā* (interest), although its literal meaning is known, is found to lack detail in its legal sense. The *Sunnah* highlights the technical legal meaning and provides the detailed rules for transactions that may possibly be based upon *ribā*.

Finally, it is a general rule accepted by many of the earlier jurists that the Sunnah abrogates the *Qur'ān*.[30] *Al-Shāfi'ī* was of the view that the *Sunnah* abrogates the *Sunnah*, while the *Qur'ān* abrogates the *Qur'ān*; they do not abrogate each other. Some modern scholars deny the theory of abrogation altogether.

The General Structure of Literal Interpretation:

Al-Sarakhsī points out that the first thing to start with in the interpretation of the texts of the *Qur'ān* and the *Sunnah* are the literal forms through which the *ḥukm* is indicated.[31] The *ḥukm* is indicated through commands (*amr*) and prohibitions (*nahy*) or through reports (*akhbār*) in the text conveying commands and proscriptions.[32]

The commands or prohibitions are obviously expressed in words and words have different literal forms. Thus the word may be in a general form imposing the rule on a large number of people or it may be particular, imposing it on a specific class of people. This is the discussion of the general (*'āmm* or particular (*khāṣṣ*). A word may apply to a group where the exact thing is left undetermined or it may determine which thing is intended. This is the discussion of the *muṭlaq* (absolute or unqualified) and the *muqayyad* (qualified or determined). The meaning of the words used may be apparent, thus being confined to a core meaning, or it may be concealed somewhat thus applying to the meanings at the penumbra. This gives rise to a number of central and penumbral meanings. There are other literal forms too and they have their impact on the ultimate rule derived.

Determining the meanings above is a complex task which the jurist undertakes. The meaning, however, emerges and is finally revealed to the jurist through four broad methods. These four methods through which the *aḥkām* are established are called *dalālāt*. These are as follows:

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[30] *Id.*
[31] SARAKHSĪ, KITĀB AL-UṢŪL, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), vol. 1, 11.
[32] *Id.*

1. The *aḥkām* are established through *'ibārat al-naṣṣ* or obvious meanings revealed through a plain reading of the text.
2. The *aḥkām* are established through *ishārat al-naṣṣ* or the connotation of the texts.
3. The *aḥkām* are established through *iqtiḍā' al-naṣṣ* or through meanings required by the texts of a necessity so that the legal meaning may be completed.
4. The *aḥkām* are established through *dalālat al-naṣṣ* or through meanings implied by the texts.[33]

The above methods are used by the Ḥanafī school. The other schools, which are collectively referred to as the Mutakallimūn for this purpose, follow a somewhat different method and use different terminology to describe the methods. The Ḥanafīs consider these methods as *fāsid* (not valid). The methods may be referred to as the *mafhūmāt* where the word *mafhūm* means and understanding of the meaning. For example, one such method is the *mafhūm mukhālafah* or the contrary rule implied by the texts.[34]

The first method of interpretation deals with the core of a concept, while the remaining three methods deal with penumbral meanings of different kinds. The details of the various grades of meanings established through the four methods are actually indications of the different strengths of the penumbral meanings. Accordingly, a rule proved by *'ibārat al-naṣṣ* is the strongest, as this is the core meaning for which the text was laid down. This core meaning is followed, in strength, by a rule proved by *ishārat al-naṣṣ* or the indication of the text, which in turn is followed by *dalālat al-naṣṣ*. The rule proved by *iqtiḍā' al-naṣṣ* is comparatively the weakest. The significance of assigning these methods grades of strength is that the stronger will be preferred over the weaker in case of conflict. Islamic law in its methodology deals with the issue of the core and the penumbra in great detail even though it uses a different system and terms to indicate this. In fact, the detail with which Islamic law has dealt with such matters is not available in the law.

Conclusion:

The research shows that in addition to the adoption of unique sets of binding sources, the schools in Islamic Jurisprudence also differ with respect to rules or presumptions used for interpretation. The schools differ with respect to the individual rules of literal interpretation and also with respect to other detailed rules. This fact enhances the idea of the schools as different theories of interpretation. When these differences are manifested in the detailed rules of law derived from the texts the disagreements among the schools acquire a technical or scientific basis. It is, therefore, erroneous to assume that the differences among the jurists are based upon some kind of "personal opinion" or the use of reason. Conclusion drawn from the above research is that mental and rational processes of human beings working in the legal field are quite similar. They are independent of whether the materials they are dealing with are divine or secular, religious or man-made. For the judge the transition from one legal system to the other is not as difficult, and merger of ideas is also possible. In a country like Pakistan, or some other Muslim countries, such a comparison, interpretation and applicability of these sources is highly useful.

[33] KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE, 312.
[34] *Id.*