INTERPRETATION OF STATUTES: A CRITICAL ANALYSIS IN PERSPECTIVE OF ISLAMIC JURISPRUDENCE

By Naseem Razi

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*A CRITICAL ANALYSIS IN PERSPECTIVE OF ISLAMIC JURISPRUDENCE*

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**External Examiner**
ACKNOWLEDGMENT

I humbly praise and thank Allah Almighty, the most Merciful and the most Beneficial Who bestowed me health, thoughtful mind, talented teachers and above all a cooperative and supportive supervisor who always backup me to explore the facts of the subject. It is for these blessings that I could avail this opportunity to contribute to the vast field of legal knowledge.

I present a bundle of thanks to my supervisor Professor Dr. Muhammad Tahir Mansoori for his many years of patience, useful suggestions and invaluable support throughout the research work. His most affectionate attitude and constructive critics made it possible for me to complete this research within the time. I want to thank him again for his contribution to finalize this draft.

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Naseem Razi

International Islamic University,

Islamabad, Pakistan
STATEMENT OF DECLARATION

I hereby declare that this thesis, neither as a whole nor as a part thereof, has been copied out from any means. I never found any research regarding the topic that I have chosen for my PhD dissertation neither at IIUI nor at any other institution. Further, it is declared that this research has been accomplished by me on the basis of the study of the most authentic sources of the relevant subject under the supervision of my supervisor Professor Dr. Muhammad Tahir Mansoori. This research is completely based upon my own observations, evaluation and conclusions that I have been drawn from the related sources on the subject. I am exclusively responsible for the consequences if something found in this research against the rules of plagiarism.

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ABSTRACT

From pre-mature state to the modern development of law and legal institutions, the subject of statutory interpretation has been facing daunting challenges. The most burning legal issues of the 21st century facing all the legal systems of the world is the development of a legal thinking to establish some general and flexible interpretive principles applicable to all laws.

Talking about the Islāmic legal system, it is confronting a rigorous challenge of being out-moded, stagnated and as an inappropriate system to cope with the changes of the modern scientific development. Lack of up-dated knowledge, unscientific understanding of the contemporary socioeconomic problems, world politics, a system of global governance and above all lack of unity have made the Muslim world subservient and dependent in every walk of life. This situation has led the contemporary Muslim scholars and the researchers to establish a flexible legal theory to re-interpret the Qur’anic legal texts in the light of the changed context.

This phenomenon provided a significant opportunity for the scholars and students of law to compare different legal systems to find out the way to develop their own system. This research titled as “Interpretation of Statutes: A Critical Analysis in Perspective of Islamic Jurisprudence” presents a comparative analysis of the interpretive systems of English-common law and Islamic law. This work intends to explore that Islamic legal system consists of dynamic interpretive approaches which unfortunately are being neglected by the holders and made the whole system of the interpretation (ijtihād) static and retarded.

This work has been divided into five chapters. Each chapter has two sections. At the end of each chapter, a concluding Para has been added. Chapter, 1 addresses the
nature and the historical development of statutory interpretation of English-common law. It also throws light on the development of law, statute and legal text. Chapter, 2 elaborates historical development of statutory interpretation of Islamic law. Chapter, 3 describes interpretive system of English-common law. It describes both the classical and the contemporary theories of interpretation. Chapter, 4 consists of the discussion regarding interpretive policy of Islamic law. It explains the linguistic rules, the fundamental, the traditional and the modern legal theories presented by the Muslim jurists of the last two centuries. The last chapter consists of a comparison of both systems. Further some conclusions have been drawn in the light of the past and the contemporary approaches of interpretation of both systems and thus some suggestions have been given to make the existing structure of the law flexible.

It concludes that the theory regarding the re-interpretation of the Qur’anic legal texts and the Sunnah of the Prophet (PBUH) in the light of the changed context has not built in a day rather it has its roots in the interpretive policy of the Qur’an, the Sunnah (PBUH) and the early Muslim jurists among the companions and the traditional Muslim jurists. This work suggests that the contemporary Muslim jurists should adopt flexible approaches to re-construct the legal texts of the Qur’an and the Sunnah (PBUH) in the light of the objective and context of the text. This is the only way to combat the challenges of the modern world. It also opines that it is quite possible to establish a common legal theory of interpretation in the light of the common and general interpretive principles of both systems by considering fundamental differences between English-common law and Islamic law.
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<table>
<thead>
<tr>
<th>Long Vowels</th>
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<td>ٌ (e)</td>
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</table>

* emerges as elevated comma (’) followed by the letter representing the vowel it carries. However, when * stands at the beginning of a word it will be represented only by the letter representing the vowel it carries.

‘ is transliterated as elevated inverted comma (’).

ض as an Arabic letter is transliterated as (g), as a Persian/Turkish/Urdu letter as (d).

و as an Arabic letter is transliterated as (w), and as a Persian/Turkish/Urdu letter is transliterated as (v).

٠ is transliterated as (ah) in pause form and as (at) in construct form.

Article ١ is transliterated as (al-) whether followed by a moon or a sun letter, however, in construct form it will be transliterated as (‘l).

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<td>(Urdu)</td>
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</table>

٠ as a Persian/Urdu conjunction is transliterated as (–o) whereas as an Arabic conjunction ٠ is transliterated as (wa).

Short vowel (–) in Persian/Urdu possessive or adjectival form is transliterated as (–i).
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INTRODUCTION AND SCOPE OF THE TOPIC

Every aspect of human life is regulated by the instrument of law under the guidance of its legal system. A legal system not only deals with the internal problems of the nation but also concerns with the external problems of its people.¹ A coherent and consistent system of law is declared as a legal system. Technically, it is defined as an integrated body of the legal rules determined by their rationale meaning and aimed public interest.²

The development of any legal system is dependent upon the culture, common usages, customs and the religion of a particular nation. It is this reason that each nation has its own and as well as a distinguished legal system which deals with the ethical and legal attitudes of its people.³ The legal systems of the western world can be divided into three major categories such as a civil law system, common law system and the combined system.⁴ For example, English legal system is based on the common law system while the European legal system is based on the civil law system and juristic opinions.⁵ South Africa combines both the civil and the common law systems.⁶ The European civil law system has its origin in the 6th century Code of Justinian prepared under the Emperor Justinian of the Eastern Roman and declared as

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⁴ Ibid.
“Corpus Juris Civilis” (the body of civil law). The English legal system however, developed by the legal theories of the 12th century and declared as common law which means a unified system of law. Islāmic legal system on the other hand, has its origin in the divine provisions of the Qur’ān and the Sunnah of the prophet (pbuh).

A legal system consists of different legal theories such as theory of divine law, natural law theory, customary law and the theory of positive law. The term legal theory means a system pertaining to something. The modern legal theory contends that every legal system is composed of some primary rules and secondary rules of recognition, adjudication and change. The Primary rules are valid laws developed under a particular historical context and recognized in the systems to secure the fundamental rights of its followers. The Primary rules regulate the conduct of the citizens through demands, permissions and prohibitions while the secondary rules address the concerns of the primary rules. A rule of recognition is constituted by the norms that regulate the behavior of the system’s officials in an appropriate way and resolve uncertainties about the norms of the primary rules. Rules of adjudication specify how the disputes about the interpretation and the application of the primary rules be resolved to accommodate changed circumstances, beliefs, preferences, and

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7 Wilberforce, Statute Law (1881), 33; Buckland, A Text Book of Roman Law, 67-79.
the changed values of the society and the rules of change specify how the primary rules be modified to accommodate these changing.\textsuperscript{13}

The legal theory of any system deals with many legal sciences such as philosophy of the law, legislation, legal institutions and the ways of interpretation etc. The science which deals with the knowledge of law and legal philosophy is known as jurisprudence and has been defined as a science of the first principles of the civil law. The word jurisprudence is a Latin derivation and a combination of two words the \textit{juris} (law) and the \textit{prudentia} (knowledge), which means knowledge of law.\textsuperscript{14}

The development of western jurisprudence and its legal theories is based on the Greek philosophy and the Greek philosophers were the philosophical teachers of the western world. The Greek philosophers, however, studied all sciences such as legal (jurisprudence), physics and metaphysics under the same subject. For instance, Aristotle\textsuperscript{15} dealt with ethics, politics, physics and metaphysics equally in his study of philosophy and social sciences.\textsuperscript{16} The Romans however, were the first who succeeded to regard jurisprudence as a distinct branch of learning. The Roman jurisconsult developed the law by issuing their juristic opinions and by guiding their clients in the matters of law.\textsuperscript{17} During the early phase of its development, jurisprudence developed in England was different from the European Continental jurisprudence due to different approaches of law in the sense that English jurisprudence tended naturally to

\textsuperscript{13} Ibid.
\textsuperscript{15} Aristotle was born in 384 B.C. at Stageirus on the gulf of the Stramon. He lived half of his life at Athens and did professorship there for twelve years. He became a pupil of Plato and joined his academy for twenty years. He built his philosophy on Plato’s foundations. He differs from his master in the views of Ethics. His work may be divided in to two groups. One consisted of philosophical subjects and the other of scientific treaties. See for detail, Aristotle, \textit{The Nicomachean Ethics}, trans., H. Rackham M. A. (London: William Heinemann Ltd, 1956), ix-xii.
focus on the analytical and historical aspects of the jurisprudence and excluded study of ethics while jurisprudence in Europe concerned mainly with the ethical and metaphysical characters of the jurisprudence. Law in the English legal system means nothing but law and the corresponding term in European countries meant not only law but also right and justice. On the whole, until the late 19th century, the philosophers of the jurisprudence of English societies were not clear regarding the characteristics of the legal philosophy and its parameters.

The process to explain a legal enactment and to derive a legal rule is declared as explanation, interpretation and construction. It is defined as a process by which a judge or a court of law constructs from the words of the statutes, a meaning which he either believes to be that of the legislature or which he proposes to attribute to it.

So far as the Islāmic legal system is concerned, it is known as Sharī‘ah and is based on the divine provisions of the Qur‘ān and the Sunnah of the prophet (PBUH). The legal system of Islam may be defined as a body of the legal rules determined by the general and specific principles of the Qur‘ān and the Sunnah (PBUH) and aims public interest. God intended to develop an Islamic legal system to enable the Muslims to establish good and to eliminate corrupt beliefs and corrupt practices of the human beings on earth, so He ordered the Prophet (pbuh) to leave Makkah and to establish a Muslim state at Madinah. In this way, the legal system of Islam developed

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by the prophet (PBUH) and reached its apex of excellence within three centuries of Hijrah. Every legal system is based on certain objectives and aims to achieve them to develop a universal system. For a legal system to be universal, it is essential to possess a strong cultural and ethical base and to develop through six evolutionary universals of a society such as religion, comprehensive language, kinship organization, technology, pattern of legality and stratification.

It is important to note that Islāmic legal system embraces all these six composites necessary to establish a universal legal system. It is based on the religion of Islam, consists of divine provisions of the Qurʾān revealed in a comprehensive Arabic language and developed through the institutions of a strong family unit, practical bureaucratic organizations and democratic institutions etc. As God is the perfect being, so, is His law. God declares: “Verily, I have sent to you the Book in truth so that you may judge between the people as guided by God.”

Although the Qurʾān and the Sunnah (PBUH) do not consist of pure legal rules like the constitutions of the modern world yet they contain general legal principles of universal application applicable to the daily life problems confronted by the Ummah. On the basis of these general principles, Islāmic legal system established the concept of international law by declaring Muslim Ummah distinctive form the other nations of the world. It also introduced fundamental legal rights of the human beings, administrative principle of consultation, democratic form of the government, independence of the judicial system and guiding interpretive principles etc. The

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24 The Qurʾān: 4:105.
science which deals with the concept of the statute, legal text and legal theories is declared as *Uṣūl al-Fiqh* which means principles of Islamic jurisprudence. In fact, the term *Uṣūl al-Fiqh* was started to be referred by the legal philosophers of the 1st century of Hijrah although compiled in later centuries.\(^{25}\)

Like the English term jurisprudence, the term *Uṣūl al-Fiqh* is an Arabic term and a combination of two words, *Uṣūl* and *Fiqh*: The word *Uṣūl* is plural of the word *asl* and is defined as a base, a guide or a source of something upon which that thing is founded. The word *Fiqh* means knowledge or understanding of something.\(^{26}\)

Technically, the word *Fiqh* is used in the meaning of the knowledge of the legal rules of *Sharīʿah* derived by the Muslim jurists through interpretation and construction of the legal texts (general and specific) of the Qurʿān and the Sunnah of the prophet (pbuh).\(^{27}\) Generally, the term *Uṣūl al-Fiqh* is used to denote to the study of the legal texts of the Qurʿān and the Sunnah (pbuh) and to the study of the interpretive modes (pbuh), the companions, the traditional and the contemporary Muslim jurists etc. *Uṣūl al-Fiqh* deals with different sciences such as philosophy, Arabic lexicon and grammar, Qur’anic knowledge, legal theories and about the person who interprets the legal texts of the Qurʿān and the Sunnah (pbuh). In Islamic legal system, the process of interpretation is called *ijtihād* and has been considered by the Muslim jurists as the most important subject of *Uṣūl al-Fiqh*.\(^{28}\)

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26 Ibid.


28 Ibid.
In Islamic legal system, the term *ḥukm* is used corresponding to the term English law. In contemporary legal language, the term Islāmic law or *ḥukm sharʾī* may be defined as the law of the land which deals with the conduct of the people and enforced by the Muslim states in the administration of justice.

Interpretation of statutes is an important subject of the jurisprudence and consists of different theories and modes of interpretation which are incorporated by human agency and are subject to modification and abrogation if became outmoded or failed to interpret the law in the light of its objective. Talking about the historical development of this subject, it is a recent development in the western world and the whole phenomenon of the subject of statutory interpretation does not go beyond two hundred years in the past western legal history. The western world was quiet in the dark regarding the structure of the legal system, law, concept of the statute and its modes of interpretation. However, the scientific study of statutory interpretation developed during the late 19th century.

The law was existed before the dawn of Islām but the principles of interpretation were not existed anywhere in the world. Contrary to this, the Muslim philosophers and the jurists showed great zeal towards the development of this subject and established many theories of interpretation to interpret the legal texts of the Qurʾān and the Sunnah of the prophet (pbuh). The companions and the traditional Muslim jurists successfully framed and developed many principles of interpretation during the earlier centuries and thus, the subject of statutory interpretation developed

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29 Ibid.
30 To study Islāmic law and Islamic legal system one must keep in mind the difference between Sharʾīah (legal system) which is consisted of immutable and eternal legal provisions and *ḥukm sharʾī* (Islāmic law) which is a result of the interpretation and construction of these legal texts and thus, can be amended, repealed and abrogated if failed to to accommodate changed needs of the people.
in a systematic and elaborated form by the 4th century of Hijrah.\textsuperscript{33} The greatest contribution of the Muslim jurists towards the philosophy of the law is perhaps the subject of jurisprudence and theories of interpretation.\textsuperscript{34}

Like other social sciences, the development of this subject passed through different phases and different western jurists presented different theories regarding the interpretation of statutes. The traditional philosophers viewed that if the language of a statute is plain and admits only one meaning the task of the interpretation does not arise and that the question of interpretation arises only where literal or grammatical meaning leads to some absurdity or unreasonable result.\textsuperscript{35} The same concept was found among the traditional Muslim jurist that the interpretation concerned only with the discovery of what is not self-evident. It was based on the assumption that all words are presumed to convey their absolute, general and qualified meanings unless something indicates otherwise.\textsuperscript{36}

The contemporary theory of interpretation however, contends that interpretation is needed for a correct understanding of any enactment or legal text either by way of explanation, interpretation or construction. It is not necessary that a particular legal text must be ambiguous or have more than one meaning rather every piece of legislative enactment clear and unclear, plain and difficult, ambiguous and homonym needs interpretation for its proper understanding and appropriate


\textsuperscript{34} Muḥammad Hamīdullāh, The Emergence of Islām (Islamabad: Islāmic Research institute, 1993), 65. Ibid., 84-85.


application to a particular case. In western legal system, the primary objective of statutory interpretation is to discover true and correct intention of the legislature behind the enactment to derive intended meaning and to apply that meaning to the case at hand as the task of the court is to spell out its imputed intention even where no actual intention present. In the same manners, the primary objective of interpretation of Islamic law is to ascertain the meaning of the text according to the intention of the Law-giver which can be derived either by plain meaning or by way of inferences of the text. Here, the primary objectives of the interpretation are same under both systems.

Like the other legal systems where an interpreter or a judge is required to have a clear and deep understanding of the wording of a text, its background history, objectives of legislation and relevant circumstances and context of the enactment, a Muslim interpreter is also bound to have a thorough study of the sources of Islamic law. It is necessary for him to have a firm grasp over the language of the Qur’an and the Sunnah (PBUH). The interpreter (mujtahid) must take hold of the wording of the text and its precise meaning. The strength of the legal rule is largely determined by the language in which it is communicated, so, it is necessary for an interpreter to distinguish the clear words (wādīh) from the unclear words (khafī) and to determine the degrees of the clarity and ambiguity existed in the words and to resolve the

conflicts between different legal texts if existed. Further, it is quite possible that a word of any legal text bear more than one meaning here, the duty of the interpreter is to find out which of the many meanings is the most appropriate one and can be assigned to that word to express the true intent of the Law-Giver.\footnote{Muḥammad bin Ahmad bin Sahl, Al-Sarakhsī, Ḫūṣūl al-Sarakhsī (Cairo: Dūr Al-Kutub al-ʿArabī, 1372 A.H.), 1:10.} This discussion reveals that the system of interpretation in Islāmic legal system is based on the same policy as found in any other legal system in the developed world.

Unfortunately, the Muslim jurists of the later generations could not keep pace with the variety of the social needs of the people rather the disciples and the followers of the traditional Muslim jurists held to adhere to the juristic opinions of their predecessors and made them confined issuing \textit{fatāwā} on the basis of the precedents by way of analogy or amalgamation. The task of interpretation and re-interpretation of the legal texts of the Qur’ān and the Sunnah of the prophet (PBUH) was not touched upon by them rather \textit{ijtihād} was confined to the cases which were not existed at the time of the traditional Muslim jurists. Particularly, Muslim jurists of the Colonial States failed badly to resolve the contemporary social, economic and political problems of the Muslim societies arose due to changed legal system and changed circumstances of the people. Consequently, during the 11\textsuperscript{th}-19\textsuperscript{th} century's innovation of \textit{taqlīd} took precedence over the dynamic principle of \textit{ijtihād}.\footnote{ʿAbd al-Rahīm, Shāh Walī Allāh, \textit{Al-Muṣaffā}: Commentary of Al-Muwaṭṭā (Delhi: Fārūqī, 1893), 12.}

During the last two centuries, only a few of the Muslim philosophers, jurists and thinkers felt seriously the need for re-interpretation of the legal texts of the Qur’ān and the Sunnah of the prophet (pbuh) in the light of the changed context and insisted on to get rid of taqlid and to do fresh ijtihad in the light of the objectives of the texts and public interest. They suggested that \textit{ijtihād} should be considered as a
collective responsibility and should be performed by a legislative body consisted of the expertise of Islamic jurisprudence and contemporary scientific disciplines. They held that what was written in codified form was not enough to solve the contemporary issues of the Ummah.42

Unlike past at present the debate regarding purposive and contextual approaches of interpretation is a matter of great concern among the contemporary jurists and the judges of the English-common law system while the judges and the jurists of the Islamic world are still following principles of taqlīd, takhŷr and talfiqa. The contemporary interpretive methodologies prevailing in the Muslim countries are a mixture of the foreign and as well as of the traditional techniques and seem at the cross roads.

In this context, this research aims to provide a comparative analysis of the system of interpretation of Islam and as well as in English common law systems. By way of comparative research, different methodologies of interpretation of the western and Islāmic legal systems can be brought together to establish a thinking to frame a general policy of interpretation to guide the contemporary scholars and judges. This research aims to enhance the scope of this subject as the science of interpretation has been considered the most complicated issue of the contemporary legal studies. It will also helpful the contemporary jurists and the philosophers to understand the pros and cons of each interpretive system to replace existing modes of interpretation with more liberal and flexible approaches. It concludes that the process of interpretation is a complex task and this issue needs exclusive jurisdiction of the contemporary legal

philosophers, expert scholars, judges and the jurists of each legal system. It suggests that the prime concern of every legal system should be public interest and that the difficulties and the problems of the people of the 21st century should be solved by way of contextual and flexible approaches.

**Statement of the Research Problem**

As this research provides a comparative analysis of Islāmic and English-common law systems the statement of this research is based on the following questions:

(i) What is meant by interpretation or ḫādīd?

(ii) What is the scope of statutory interpretation and how it was developed?

(iii) Under what circumstances interpretation or ḫādād is required?

(iv) Whether traditional interpretive rules established under a special context are effectively applicable to the contemporary issues of the changed context?

(vi) Which type of interpretive techniques can provide a flexible and compatible interpretation?

**Hypothesis of the Research**

Hypothesis of the research are as:

(i) Traditional rules of the interpretation have been failed to resolve the scientific issues of the contemporary period and are no more required.

(ii) Traditional rules are needed to be modified in the light of the scientific understanding of the contemporary legal theories.

(iii) The Contemporary legal theories are based on the interpretive modes of the Prophet (PBUH) and his companions and are compatible with the challenges of the modern world and demand re-interpretation of the legal texts of the Qur’ān and the Sunnah (PBUH) in the light of the changed context.
Objectives of the Research

This research aims:

(i) To analyze critically the historical development of the science of statutory interpretation in English-common law and Islamic legal system.

(ii) To disclose that the dynamic and flexible approaches of the interpretation adopted by the Holy Prophet (PBUH) and the companion jurists are being neglected by the contemporary Muslim scholars.

(iii) To explain that due to stagnated attitude of the later Muslim scholars the contemporary Muslim world is facing many daunting challenges which are still unsolved and led to the modern development of re-thinking the Qur’anic legal texts.

(iv) To compare different theories of interpretation of both systems and to explore that all most all the modern approaches of the interpretation have their origin in the legal theories of Islamic jurisprudence.

(v) To suggest that the contemporary jurists and the judges should adopt flexible and contextual approaches of interpretation to ensure public interest that is the prime objective of Islamic legal system.

Research Methods

As the higher knowledge is acquired through the comparative method of research for, he who knows one knows none,43 this research aims to adopt the comparative method. So the comparative method is the chief appliance of this research. Further, this research intends to adopt:

(i) Descriptive and historical methods of research while collecting data

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(ii) Critical method to analyze statutory interpretation in perspective of Islāmic and English-common law systems and to investigate into the subject with an honest, humble and serious mode of research

(iii) Referencing method of research will be adopted to utilize library facilities. The researcher will look into the books, journals, and publications etc., And for this purpose will visit all approachable libraries of Pakistan to ensure a comprehensive research

(iv) Historical and documentary research method will be adopted to explain the origin and the historical development of the subject to demonstrate the devotion of both traditional and contemporary jurists towards the subject

(v) Concluding and suggestive methods will be adopted to suggest framing a general and harmonized policy of interpretation suitable for all the legal systems to utilize contemporary legal theories of interpretation in the light of the public interest.

**Literature Review**

The science of statutory interpretation is a recent phenomenon discussing by the philosophers and the jurists of the modern world. History reveals however, that Aristotle was the first one who presented the concept of equitable construction in his theory of law to remove the mischief arising from the generality and the rigidity of the legal rules. In case of hardship or injustice in an individual case, he suggested that the judges might depart from the strict literal interpretation of the law and decide the case in the light of the intent of the lawgiver. Likewise, a little mentioning about the statutory interpretation found in the commentaries of the sixth century Code of Justinian titled as “Digests” and was consisted of the Roman Statutes and their commentaries. There were almost two hundred rules of interpretation suggested by the commentators of the Code. These rules were similar to those found in the ancient
Hindu, Judaic, and Christian cultures. Until the twelfth century, these rules were being considered by the medieval jurisprudence as a source for further commentaries on the Justinian texts. During the first half of the 14th century, Professor Theodore F. T. Plucknett discussed in his treaty some types of statutes and the ways of their interpretation. During the 18th century, Sir William Blackstone wrote the first general textbook on English law titled as “The Commentaries on the Law of England (1765-1769). In this book, he adopted the method of organic (natural) and mechanistic (scientific) descriptions as if they were the working parts of a clock. The mechanistic description offered a need to be a scientific and organic metaphor or description offered to loving conviction.

For a long time, the jurists of the later period followed the theory of Blackstone and adopted any of the descriptions observed by him. For instance, rationalistic critics of the common law Hobbes and Bentham tended to employ the mechanistic description, while Tucker employed the description of organic (natural) growth. He was the first Blackstone’s American editor who wrote an American Commentaries in 1803.

During the nineteenth century, Mr. Theodore Sedgwick wrote Treaties about the rules to manage the interpretation and the construction of statutes and American Constitutional Law. In 1874, John Norton Pomeroy edited the work of Sedgwick. He first explained the technical terminologies belonged to the constitution and the statute law, then divided them into different types and finally described their modes of interpretation which he illustrated with the precedents. In the late nineteenth century, Wilberforce wrote a book “Statute Law” (1881). The first judicial dictionary prepared by Stroud in 1890 and titled as “Stroud’s Judicial Dictionary”.
In the beginning of the twentieth century (1910-1935), the philosophers of the jurisprudence started to review existing legal theories in perception of metaphysics, epistemology and philosophy etc. In the late of the twentieth century, the “Interpretation Act of 1978 of England” was passed by the Parliament to establish a systematic interpretive policy. Section 6 of the Act 1978 declares that a qualified jurist and his writings may be treated by the courts as credible sources and that the weight of this credible source depends on the reputation of the author.

Among the contemporary jurists who presented liberal theories of interpretation were Roscoe Pound, H. L. A. Hart and Ronald Dworkin etc. Roscoe Pound emphasized in the study of the sociological jurisprudence to provide a useful solution of the problems of the American society. He suggested some modes of liberal interpretation which the courts may adopt to deal with an innovation in the legislative enactment brought about by means of a statute. Likewise, H. L. A. Hart presented the theory of the “Model of Rules” and described his theory in perspective of those rules. Ronald Dworkin presented the concept of law in perspective of interpretation. He established his own theory of interpretation as “Unified Concept of Interpretation”.

Overall, until the second half of the last century, the jurists of the modern world could not recognize the importance of the subject of statutory interpretation and the majority of them rejected to consider this subject as a matter of debate and declared it obsolete and outdated subject.

At present, however, and after joining the European Community, the contemporary English courts and the Supreme Court of the United Nations tend to adopt liberal and purposive approaches of interpretation. Talking about the development of the subject of Islamic jurisprudence and statutory interpretation, the Muslim jurists however, showed great concern to the sciences of the law, legal theory
and the modes of statutory interpretation since the time of revelation. Among the companions of the prophet, Abu Bakr and some other jurists designed and discussed some rules of interpretation in their treaties. Imam Mālik discussed some principles of interpretation in his book “Al-Muwattā”. He also wrote “Tafsīr Gharīb al-Qur’ān” and constructed strange words of the foreign languages by his own methods of interpretation in the light of the public interest, ijmā’ Ahl al-Madīnah, istidlāl and customs of Medīna etc. Muhammad Būqīr was famous for his interpretive methodology and compiled several principles of interpretation of the legal texts of Qur’ān and Sunnah. Likewise, Hashshām bin al-Hakam compiled “Kitāb al-Alfāz” in which he discussed different types of words and modes of their interpretation. Yūnus bin ‘Abd al-Rahmān wrote a book on aḥādīth. He divided aḥādīth into different types, described contradictory aḥādīth and the ways of reconciliation and preference among them. He discussed problems coming under them and then prescribed some principles to interpret them.

The comprehensive and an independent compilation on this subject however, has been referred to the jurist Imam Abū-Ḥanīfah (80-150 A.H) who wrote Kitāb al-Rāy or Book of considered opinion in which he described the rules of logical reasoning which a judge or a jurist might adopt during the process of interpretation. Likewise, the second best known disciple of Abu-Hanifah, Muhammad Ibn al-Hasan al-Shaybānī, wrote a book Kitab al-Uṣūl and discussed many interpretive rules. Unfortunately, these books along with thousands of other books could not reach us and thrown into the river by Tigris during Haulage's sack of Baghdad. The most comprehensive, systematic and undisputed writing on the subject of statutory interpretation however, belong to the great Muslim jurist Muhammad bin Idrīs al-Shāfi‘ī, who established and framed many general principles of interpretation and
defined sources of legislation and interpretation in his treaty *Al-Risālah*. In his book, al-Shāfi‘ī framed a systematic policy of interpretation and explained different methodologies by using technical legal terms that are still current coin. In this way, Imām al-Shāfi‘ī founded a new science of jurisprudence and a guideline for the later jurists of all over the world. What the later jurists contributed and added in the field of statutory interpretation was nothing new except commentaries of *Al-Risālah*. In this way at the end of the 1st century of Hijrah, the Muslim jurists presented many different legal theories and each of them introduced and established a different interpretive methodology.

Among the Muslim jurist of the third century of Hijrah, Dā‘ud al-Zāhirī introduced and established legal theory of the strict literal interpretation while Wāṣil bin ‘Aṭū presented theory of logical interpretation. He observed that the human wisdom has capacity to judge and to decide what is right and what is wrong. He wrote an article regarding rational methodology of interpretation and defined the individual word in a legal text, its division and impact on the interpretation of that particular text. Another jurist Asbāgh bin al-frāj (d. 225A.H) explained and discussed some basic and primary rules of interpretation in his book *Kitāb al-Uṣūl*. Abū Ishāq al-Azdī (d. 282A.H) also discussed some principles of interpretation in his book *Kitab al Waṣūl*. Abu-Bakr Ibn Burhān Al-Fārsī (d. 305AH) wrote *Al-Dhakhīrah fī Uṣul-al-Fiqh* and indicated some rules of interpretation. Among the commentators of the Qurʾān, Muḥammad bin Jaʿrī al-Tabarī was the first one who investigated into the grammatical interpretation of the Qurʾān and deduced some rules of interpretation from the general principles of the Qurʾān. In his book “Jāmiʿ al-Bayān ʿan Tāʾwīl al-Qurʾān”, he presented an analytical study of the juristic opinions of the companions and adopted the stronger one to interpret the Qurʾānic verses. He thus provided a base
for the scientific Qur’anic interpretation. Likewise, Shu’bah bin al-Ḥajjāj, Sufyān bin ʿUyyīnah and Wakī’ bin al-Jarrāḥ wrote a commentary of the Qurʿān in the light of the contemporary rules of interpretation. During this period, the Qur’ānic commentaries were consisted of the interpretation of the verses in the light of their textual and contextual implications, factual realities, discussion regarding causes of revelations, rule of abrogation, linguistic canons, foreign and strange terminologies found in the Qurʿān and discussion on the miracles of Qurʿān etc. The most significant work of that period recorded in the index of the authors was Fehrist Ibn Naḍīm. Among the jurists of the 4th century of Hijrah ʿAlī bin Saʿīd al-Ḥūfī (d. 330 A.H) wrote on the grammatical construction of the Qurʿān titled as “Al-Burhān fi Tafsīr al-Qurʿān. Similarly, Muḥammad bin ʿAbd Allah al-mulaqqab bi Al-Ṣayrafi (d. 330 A.H) wrote a commentary of al-Risālah and discussed the interpretive rules and the qualification of an interpreter. Abu Maṣūr al-Māturīḍī wrote about the principles of interpretation in his book Kitab al Jadwal fi Uṣūl al-Fiqh. Likewise, Abu al-Ḥasan Al-Karkhī and Abu-Bakr Al-Jaṣṣāṣ (d. 370 A. H) wrote on the principles of jurisprudence and rules of interpretation.

Among the jurists and the commentators of the later generations, Abu al-Qūsim ʿAbd al-Rahmān (6th A.H) wrote about the ambiguous legal texts of the Qurʿān and the ways of their interpretation. Likewise, Ibn ʿAbd al-Salām wrote about the metaphors of the Qurʾan titled as Majāz al-Qurʿān during the 7th century of Hijrah in which he described some methods of allegorical interpretation. The most significant jurist of the 8th century of Hijrah was Badr al-dīn al-Zarkhashī (d.794 A.H.) who wrote “Al-Burhān fi Ulūm al-Qurʿān” regarding Qur’ānic statutory interpretation. Jalāl al-Dīn Bilqīnī (9th A.H) wrote “Mawāqiʿ al-Ulūm min Mawāqiʿ al-Nujūm” regarding the sciences and interpretation of the Qurʾān and identified fifty
different types of the knowledge of the Qur‘ān. Jalāl al-Dīn al-Suyūṭī (d. 911 A.H) was another eminent jurist of this century who wrote “Al-Taḥbīr fī Uṣūl al-Tafsīr” and discussed one hundred and two different sciences of the Qur‘ān. Later on, he compiled another book “Kitāb al-Itqān fī ‘Ulūm al-Qur‘ān” in the light of modern context, which founded for further research regarding the subject of statutory interpretation.

Maḥmūd bin Zayd al-Damishqī wrote Kitāb al-Bayān Kashf al-Alfāz and adopted an unprecedented mode of interpretation in the light of modern context. Amongst Mu‘tazila Al-Qadi, ʿAbdul-Jabbar bin Ahmad wrote many important writings, e.g. Al-Nihaya, Al-‘Amd and Sharah Al-Aamidi etc. Then Al- Mu‘tamid fī Usul al-Fiqh written by Abu Al-Hussain Al-Basri is also one of the best writings on this subject in which the writer described different kinds of words, contradictory texts, and the cases of abrogation etc. All these writings provided great help to understand the classical work of the Muslim Jurists.

Among the later jurists were Ibn Taymiyyah, Shah Walī Allāh and Jamāl al-Dīn afghānī who focused on the contextual and sociological theories of interpretation. Among the Muslim jurists of the first half of the 20th century, Muḥammad ʿAbduh and Rashīd Riḍā were the most influential jurists who established a systematic policy of interpretation of Islāmic legal texts in the light of both revelation and logical reasoning. ʿAbduh wrote “Tafsīr al-Manār” in 1900/01 and later provided “Tafsīr Sūrah al-Fātiḥah (1905)”, which contains an important general introduction to the Qur’ānic commentary. Shaykh Ṭahir al-Jazayrī wrote an important book on the topic named as “Al-Tibyān fī ‘Ulūm al-Qur‘ān.

Amongst the legal jurists and the thinkers of the second half of the 20th century were Wahab al-Zuhayli, Muḥammad Shaḥrūr, Muḥammad Saʿīd Ashmūwī,
and Fazlur Rahmān who wrote about interpretation and introduced flexible legal theories in the light of the changed context and objectives of Shariah. Al-Qarḍāwī is a living jurist of the Muslim world who tries to solve the contemporary issues of the people in the language and the needs of the modern age.

The nutshell of this review is that until now, no one presented a comparative research of Islamic and English common law system of interpretation in contemporary legal language to shed on the history and the contemporary development of this subject. We do not find such an academic research which explored and evaluated different theories and modes of interpretation to establish a legal thinking regarding framing of a common general interpretive policy which may reflect different cultures but acceptable to all the legal systems of the world.

In this context, the researcher aims to analyze critically the fundamental, the traditional and the contemporary interpretive theories of interpretation of legal texts from the perspective of Islamic and English-common law systems. This work will help the readers to understand the outlook of English-common law and Islāmic legal systems. This research has been planned in the English language to introduce the English readers to the interpretive system of Islām as Muslims have understood it. By this research an honest attempt has been made to compare both systems in the light of their true parameters and to arrive at an exclusive conclusion to make it beneficial not only for the students but for the experts on law, judges and the lawyers of the modern world. A special note of appreciation has been added by the researcher for the progressive approach of contemporary western and Muslim jurists and judges who are trying to facilitate their people by adopting flexible approaches of interpretation.
CHAPTER 1

STATUTORY INTERPRETATION IN
HISTORICAL PERSPECTIVE

Section One

Development of Interpretation in English Legal System

The existence of an interpretative system is inevitable for every legal system. The whole structure of a legal system is dependent upon its interpretive system which requires the existence of the courts of law and the judges. The general policy of the interpretation of every legal system is derived not from the foreign elements but from the constitution of that system. It is therefore, the constitution of every nation is consisted of guiding principles to help the courts to establish interpretive policy and to guide the administrative institutions. In western legal system, the subject of statutory interpretation has been considered as the most complicated subject of the legal studies and a matter of great debate among the contemporary legal philosophers, jurists and

the judges.²

1.1 Definition and Objectives of Interpretation

The term “interpretation” has a variety of meanings and is used in different senses. Therefore, the legal philosophers and the jurists have defined it according to their own perceptions. Prof. J.C. Gray³ defines the interpretation as a process by which a judge or a court of law constructs from the words of the statute, a meaning which he either believes to be that of the legislature or which he proposes to attribute to it."⁴ It is also considered as a process by which the court of law has to determine the meaning of the statutory provision for applying it to a particular situation before him. Construction on the other hand, deals with the ambiguous written text to derive a legal meaning of the text and to arrive at the true intent of the legislature.⁵

During the early phase of the development of statutory interpretation, both terms however, were to be considered in the same meaning as to find out the intended meaning of the text.⁶ The jurists of the last century however, took them as different

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³ John Chipman Gray was an American jurist of property law and founded a firm. He was born in 1839 and died on 1915. He was a professor at Harvard Law School and got honorary degree of Ph.D in law from Yale University in 1894 and then from Harvard University in 1895. His thoughts and writing about law have great influence over the thinking and writings of even contemporary scholars of law. In his writings are, Restraints on the Alienation of Property (1886), and The Nature and Sources of Law (1909), and The Rule against Perpetuities (1883). See for detail, http://bluepete.com/law/ Books/John Chipman Gray.
from each other and defined the interpretation as an art of finding the true meaning of
the word which the legislature intended to convey while the construction was
considered as a process to draw the conclusion lies behind the enactment beyond the
direct expression of the text.7 In Anderson v. City of Hattiesburg, it was held that “the
court will resort to interpretation when it endeavors to ascertain the meaning of the
word found in a statute which when considered with the other words in the statute
may reveal a meaning different from that apparent when the word considered
abstractly or when given its usual meaning. But when the court goes beyond the
language of the statute and seeks the assistance of extrinsic aids in order to determine
whether a given case falls within the statute, it resorts to construction”. 8 The
difference between the two is about the meaning and the objective.9

The contemporary view however, again is that it is difficult to understand both
terms in different paradigm and to declare them distinct and independent from each
other.10 In U.S. v Keitzel, it was held that “the difference between interpretation and
construction is often vague and so far as the courts are concerned apparently, has little
or no importance. Generally, the whole matter has been largely reduced in importance
to the realm of academic discussion since for most practical purpose, it is sufficient to
assign the whole process of ascertaining the legislative intent as either interpretation
or construction. This also appears to be the customary judicial practice.”11 This
difficulty further feels when the interpreter considers different methods of

interpretation. In this situation and according to the contemporary approaches, the term interpretation corresponds to construction. Both terms are interchangeable. They cannot stand without each other. The task of the interpretation cannot be completed without the support of the construction.12

Interpretation alone however, cannot set out the meaning of the word without regard to its effect and thus both are necessary to arrive at the true intention of the law-giver. It leads that interpretation must include construction and none of them can be dealt independently. There is however, a slight difference between the two. Interpretation deals with the clear and unambiguous text while construction deals with the ambiguous text. In this case, the interpreter needs to investigate into the context to find out the objective behind the legislation.

Interpretation in modern and broader sense may not be defined just as an inquiry to find out the true legislative intent. It may be defined as to give rational meaning to a given text which it bears in its language.13 In this sense the term interpretation corresponds to the term construction. Both are interchangeable and are used for the same purpose to explain and to construct the law according to the intent of the law-giver in the light of its object and context. Interpretation in fact is a complicated and technical process performed by a skilled man or an institution. An interpreter may be defined as a person or group of persons having the ability and authority to explain and to interpret a legislative enactment and to apply it to contemporary situation.14 In modern times, interpretation has been declared as an

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14 For further study see, Inyterpretation Act of England 1978, Sec, 6: Frances Bacon, New Organ, 333; Laski, Political Thought in England, 456; R. C. Van Caenegem, Judges, Legislators and Professors:
institutionsal task and almost in every legal system the function of the interpretation is performed by the courts of law. For instance, in English-common law system, the judges of the Supreme Court are appointed by the Crown on the advice of the Lord Chancellor. In USA, the judges of the Supreme Court are appointed by the president with the consent of the Senate. In Pakistan the Chief Justice of the Supreme Court is appointed by the president and other judges of the Supreme Court are appointed by the president with the consultation of the Chief Justice.\footnote{See, the Constitutions of UK, USA, and Pakistan.}

The traditional view of English-common law system regarding the interpretive role of the judges was that a judge must perform a subordinate role and that the court had no right to intervene the legislative function by adding its desire or opinion through interpretation. It was argued that the duty of the court is to apply the apparent meaning of the text made by the chosen representative of the government regardless of its own opinion. In case where no such clear legislation is found, the judges were bound to decide the cases according to what reflects the statute or what objective it had but not according to their own personal whim or discretion as the society would no longer tolerate the wisest judge who knows no master and decides the cases only according to his individual sense of justice.\footnote{Janosik, \textit{Encyclopedia of the American Judicial System}, 1:457; Stuckey, \textit{Procedure in the Juristic System}, 314; J. G. Sutherland, \textit{Statutes and Statutory Construction} (Chicago: Callaghan and Company, 1943), 2: 319; Reed Dickerson, \textit{Legislation Class \\& Material}, 430-431.}

The contemporary theory however, is different from the traditional theory and it is considered that the courts not only interpret and explain the existing laws but also have quasi-legislative (to make new laws by way of interpretation) power to create new laws through construction of the ambiguous text which is unable to cover the new case. In such a case, the function of the court is more than \textit{jus dicere} (to interpret...
law) and becomes *jus dare* (to make new law) to make law to cover the new cases which are not expressly covered by the provisions of the existing law.\textsuperscript{17} The judicial function of the courts regarding statutory interpretation may be divided into three types: Firstly it is duty of the court to lay down some general principles of interpretation, secondly, to apply the established rules of interpretation to a particular case and lastly, to decide whether an accepted construction of an enactment includes or excludes a particular set of facts.\textsuperscript{18}

During the process of interpretation an interpreter has to utilize different modes and techniques to derive the required legal rule from the given text to meet the demands of justice. The modern legal philosophers divided contemporary interpretive methodologies into two broad categories of interpretation, the subjective and the objective modes of interpretation.\textsuperscript{19} Subjective mode of interpretation is based on the notion of the legislative intent through strict literal interpretation. In subjective interpretation, the interpreter interprets a text according to its apparent meaning. Here the contribution of the interpreter is *jus dicer* not *jus dare*.\textsuperscript{20}

Objective mode of interpretation is based on the assumption that behind every enactment there is an object. In this case, the interpreter interprets a text according to its objectives and ignores its strict literal meanings. The cause behind the development of the objective approach was the difficulty in the application of the


\textsuperscript{19} Ibid.

strict literal meaning of a statutory enactment enacted many years before the creation
of the contemporary problem and which results in the stagnation and freezes the
import and the scope of the text and thus, the law appears as static, outmoded and fails
to solve the contemporary issues of the changed context. Primarily, the interpreter
starts his process through subjective interpretation and if the text gives a clear and
unambiguous meaning, the interpretive process is completed. But if the language of
the text is ambiguous and difficult to convey the true intent of the legislature, the
interpreter may inquire into the objectives of the legislation and gives that meaning to
the text which is more appropriate to the legislative intent.21

The paramount objective of the statutory interpretation is to arrive at the true
intent of the legislature. It is the duty of the court to determine the intent of the
legislature as accurately as possible.22 The contemporary legal writers however, argue
that the statutes should be construed in the light of the changed context and that the
meanings of the statutes should be modified and changed as times changed.
According to them a text should not be interpreted in the light of the old intention
rather it should be interpreted according to the intention of the modern legislature who
was in power at the time when the interpreter gives meaning to the text and thus a
different meaning may be assigned to that text.23

Along with this paramount object, Interpretation Act 1989 describes many
objectives of the statutory interpretation such as to establish a general principle of
tacit assumption that a singular includes plural and plural includes singular and that
the wording related to one gender includes the other gender and that a specific rule

21 Ibid.
22 Interpretation Act of England 1989, Section, 3; Stuckey, Procedure in the Juristic System, 345;
Sutherland, Statutes and Statutory Construction, 2: 319; Holds Worth, A History of English Law, 3:155;
Benion, Statutory Interpretation, 324; Salmond, Jurisprudence, 102.
23 Stuckey, Procedure in the Juristic System, 347; Dickerson, Legislation Class & Materials, 429; Vepa
may be utilized to draw a general rule. It also aims to change the meaning of an existing statute to make it accommodative to resolve the contemporary issue and to establish a new or different usage of an old word or to terminates an existing judicial rule. Lastly, it aims to enact new laws and to determine the boundaries of the effective legislation.24

1.2 Origin and Growth of Interpretation

In legal history, the Greek philosophers are considered as philosophical teachers of the west.25 Among the Greek philosophers, Aristotle was the first who got the conscious of the fact that in the administration of justice situations might arise where generality and rigidity of the legal rules might cause hardship in an individual case. To cure such hardship he proposed to use means of equity (epiekeia) and defined equity as a rectification of law where law is defective because of its generality. He suggested that when such situation might arise, the judge might depart from the letter of the law and decide the case in the light of equity as the law giver himself would have dispose of the matter.26 In this way, he presented the theory of equitable construction and drew the intention of the judges to avail that during the process of interpretation. In later period, the idea of Aristotle regarding equity was conceived as a correction of the rigid, inflexible English-common law.

Likewise, Roman jurist have a valuable contribution in the development of the statutory interpretation. The Roman jurisprudentialists pointed out the limited scope of the literal interpretation and declared that the statutes must often be interpreted to carry out their

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24 See for detail, Interpretation Act 1989, sections 2-4.
26 Aristotle, The Nicomachean Ethics, 104; The Politics, 45.
overall purpose rather than strict meanings. They introduced the concept of public interest in the realm of the justice which later provided a foundation for the modern legal science of interpretation.27

The English-common law system however, was ignorant of the statutory interpretation until the nineteenth century and in the most of the philosophical debates, the science of statutory interpretation was not the subject to discuss.28 The judges had to hold office at the pleasure of the existing King. They could be dismissed when the monarch so decided. Law at that time was not independent from the state in the form and the person of the monarch. Interpretive principles were totally absent from the court’s policy and the contemporary issues were to be decided in the light of their nature, merit and the inspiration for the moment without reference to any other case or precedent. This is what known as palm-tree justice in primitive societies.29

It was during the English medieval history, when some general interpretive rules of the Roman law and the civil law were started to be followed by the English courts. But the courts remained in confusion regarding the scope and restrictions of those rules which led the courts to exceed their limits and the scope of the statutes were frequently extended to the situations not covered by them. The judges were not bound to follow the wording of the statutes rather started to issue judgment in the light of their own perception in the guise of equity or justice.30 The exiting modes of

29 Ibid.
interpretation were based on merely the prescribed technical rules that were sometimes appeared contradictory and unable to help the interpreter to resolve the contemporary issue before him. 31 There were two cardinal problems faced by the judges in the realm of the interpretation of the constitutional provisions such as the question whether the uncertainties of the meaning should be resolved by recourse to the understanding of the provision which was prevailing at the time of its adoption or it should be interpreted in the light of the knowledge, needs and the experiences prevailing at the time when the interpretive decision was rendered? The second problem was pertaining to the recognition and the non-recognition of the informal sources of the constitutional adjudication. It was concerned with the issue whether the meaning of a positive constitutional command should be interpreted in the light of the principles of policy (which found no direct and immediate acknowledgement in the formal text of the constitution) or not?32

In the same manners, the courts of America had no interpretive policy and the subject of statutory interpretation was in the state of instability. Further, contradictory theories regarding the interpretation made it difficult to formulate any general theory of the interpretation. Whenever a statute contained a legislative innovation departing from the common law, the courts had to refuse to derive rule by way of analogy and interpreted the text in the most narrow and restrictive meaning. This attitude was similar to that of the English Courts.33

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31 Holds Worth, A History of English Law, 3:78; Sutherland, Statutes and Statutory Construction, 2:319; Freund, Interpretation of Statutes, 33; Cross, Statutory Interpretation, 21; Benion, Statutory Interpretation, 223; Barak, Purposive Interpretation in Law, 49.

32 Ibid.

To remove the rigidity of the common law and to make interpretive system flexible, rule of equity was introduced in the Heydon’s Case (1584) and it was held that the duty of the judges is to “add force and to put life to the wording of the text to provide remedy according to the true intent of the makers of the Act (‘pro bono publico’). Sir Edward Coke founded the development of the modern law of England. In his treaty on law (1628–44), he treated with the statutes, criminal laws of the land and the jurisdiction of the several law courts. He also discussed some rules of the statutory interpretation.

By the late Middle- ages, the natural law theory established which criticized the prevailing mode of the interpretation and emphasized on the mode of ethical interpretation. Certain steps were taken by the legislature to make sure to consider the intention of the Parliament and for this purpose section 4 of the 1762’s Act prescribed a penalty for things done contrary to the true intent and the meaning of this Act. Except the rule of equity, the freedom of unguided interpretation was gradually curbed and statutory norms and the principles came in to look upon as improper. With the victory of the Parliament and the establishment of the popular doctrine of sovereignty during the eighteenth century, the independence of the judiciary was confirmed in the Act of Settlement 1701. During the nineteenth century, however, the remaining force of the rule of equity again surrendered in England in favor of the

35 Sir Edward Coke was born in 1552 and died in 1632. He was a great solicitor and was appointed as a member of House of Common (1589), Speaker of the House (1593), Attorney General (1594), and Chief Justice of the Court of England during the period 1613. See for detail, Catherine D. Bowen, The Lion and the Thrown: The Biography of Coke (Boston: Little Brown, 1957), 4–7.
36 Bowen, The Lion and the Thrown: The Biography of Coke, 8.
38 Ibid.
strict literal interpretation and it was argued that the function of the judges was merely
to determine the intention of the Parliament behind the legal enactment and to apply it
to the case at hand. 40 Generally, there was a complete lack of contact between the
practitioners and the academic lawyers. The academic jurists of law were not in better
position to express their opinions freely and were not given importance by the judges
in their jurisdictional functions. They were oppressed by the expectations of those
who provided their remunerations. In most cases, the judges looked almost
exclusively to the opinions of their brethren. The judges did not pay great respect to
the opinions of the jurists and the commentators. The academic condition of the
English law was so poor that the teaching of the English law almost in the universities
was left behind. 41

Moreover, legal philosophers ignored the linguistic philosophy of the
interpretation. Majority of them was not agreed to consider the science of the
interpretation more than an art to be sensed rather to be understood. They believed
that the rules of interpretation were to be implemented by feel rather than according to
the established principles. Interpretive rules were not considered as legal rules but just
as a piece of the advice and suggestion to guide an interpreter. 42 For example, J. C.
Gray and Kelsen 43 declaered that “the subject statutry interpretation had nothing to do
with law and that it deals just with the choice of a judge who adopt any meaning

40 Ibid.
41 Bowen, The Lion and the Thrown, 112; Bennion, Statutory Interpretation,18.
42 See, Bertran Russel, Human Knowledge,251-53; Nichal & Karl, The Contemporary European
Philosophy, 433; Laski, Political Thought in England, 2:235; Dias, Jurisprudence , 225; Crawford, The
Construction of Statutes, 248; R. Weisberg, “The Calabrasian Judicial Artist: Statute and New Legal
43 Hans Kelsen was a great western philosopher of the 20th century. He was born in 1881 and died in
1973 at California. He studied law at the University of Vienna and did his Ph.D in 1906.He presented
an independent theory of law. He participated in the drafting of the constitution of Austria. In his
writings are “Main problems in the Theory of Public Law (1911), and “General Theory of State in
among many meanings of the text.\textsuperscript{44} Such type of thinking led to establish the critical legal studies movement to criticize the existing interpretive theories and their approaches. Consequently, non-interpretive views were flourished among the legal philosophers and it was argued that the interpretive principles could not lead the interpreter to a single outcome which might make the issue subject to contradiction and assign the judges power to establish their own rules of justification not governed by any system.\textsuperscript{45} Moreover, the common law precedential theory played a vital role in frustrating the development of the general theory of interpretation. For example, cases regarding contracts were started to be dealt by the English courts in the light of the objectives of the legislation rather than the subjective provisions of the contract.\textsuperscript{46} On the same issue, the Continental court adopted subjective approach while the American courts adopted both subjective and objective interpretation.\textsuperscript{47}

In Europe however, the Roman law was practiced and their opinions were honoured (\textit{responsa prudentium}) and the central body of the law was prepared in the light of the writings of its jurists and for this purpose the jurists of the Augustan age were declared as the real builders of the great fabric of the Roman law. The juristic interpretation was considered primary source of law along with scripts and edicts.\textsuperscript{48} During the last century, the American jurists contributed in the development of the statutory interpretation and established deductive and inductive

modes of legal reasoning while some of them declared the then prevailing deductive mode as unscientific and proposed a new scientific study of the law grounded in the pragmatism. They focused on the study of the action of the judges rather than the disembodied legal rules. Others not only argued for a more pragmatic study of the law but also denied the objective existence of any legal rule.49

The confusion about the nature of the law and its language swept the juristic schools of English-common law and the American legal systems. The legal philosophers of the western world were confused to define law in its true perspective rather to design rules of interpretation. Even by the 1950s there was no concept regarding framing of any comprehensive and generally accepted theory of the interpretation. The nature of the interpretive rules was vague. The students of law and even courts were in the dark about the way in which the English rules of interpretation should be formulated. The approaches of the courts were varying according to the judges’ perception of their Constitutional role at any given period. 50

After the World War II, the role of the constitution increased in the development of the law and human society by inserting fundamentals human rights. People started to take interest to know the meaning and scope of their rights and to know the boundaries by which the judges could be bound in their decisions. Since that time, the interpretation of the constitution has become an important subject to understand law properly and to standardize private law in general and contract law in particular.51 Further, the European Community Law and the victory of globalization

49 Ibid.
51 See, Passmore, A Hundred Years of Philosophy, 127; Feigl & Sellars, Reading in Philosophical Analysis, 444; Lock, Human Understanding, 2:455;Stuckey, Procedure in Juristic System,288.
played an important role in the standardisation of interpretive laws for the sake of the public interests. It further led the judges to rely upon writings of the modern jurists and the legal theories during the process of interpretation. Contrary to this, the tradition legal theory was that no author or jurist could be cited as an authority during his own lifetime, so that they might change their minds or they might become a party to litigation dealt by them in their writings. This notion however, has been declared obsolete and outdated and now it is considered that the more recent work is the more persuasive.

With the development of the law and legal theory, the courts became clearer regarding their interpretive authority but the burning issue was to decide which of many meanings might be the true intent of the legislature. Over the last few decades, the English legal philosophers and the judges realized seriously, the unavoidable role of the interpretive theories in the development of the law. The credit for the growth of the science of interpretation goes to the contemporary legal philosophers and the jurists who introduced different techniques and modes of the interpretation. For example, Roscoe Pound founded the “Mechanical Sociological Jurisprudence and declared the then prevailing modes of interpretation as empty swords yield nothing but arbitrary result. He suggested that the judges should hold the issues by way of

54 Ibid.
57 Roscoe Pound was an American jurist and legal philosopher was born in 1870 and died in 1964. He was declared as the founder of American jurisprudence. He was appointed as dean of Harvard Law School. He was influenced by common law theory and he emphasized on administrative law. See for detail, http://PoundRoscoe.stanford.edu.
reasoning and the general will of the superior authority. According to him the best approach to decide a case is sociological interpretation which should be preferred over the judge-made rules if they lead to a narrow and strict interpretation. 59 Another eminent legal philosopher of the 20th century was H. L. A. Hart. 60 He presented the theory of the “Model of Rules” and suggested that there must be some pre-existing legal rules to guide the judges and which should clearly require, forbid, and permit certain conduct and cover the case relating to this conducts. He divided the cases brought before the court of law into two types such as easy and hard cases. Easy cases are those cases which are expressly within the scope of the legal rules while hard cases are those which cannot be covered clearly by the apparent scope of the legal rules and require further investigation into the hidden meanings of the pre-existing rules. 61

The other philosopher Ronald Dworkin 62 argued that the law is nothing but a result of the interpretation. 63 He was in view that the questions that what is law and what should be the law on a given situation are dealt substantially by the same and

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60 H.L.A Hart was born in 1907 and died in 1992. He studied at Oxford College and delivered certain lectures on law (1952) which formed a new concept of law. He also lectured on the concept of right and duties. In his writings are Law Liberty and Morality (1963), and The Morality of Criminal Law (1965). See for detail, www. Oxford University Press; Brain Leiter, Objectivity in Law and Morals, 16.


63 This theory of interpretation was presented by Dworkin in his articles on the “Interpretive Nature of the Legal Theory” and published in 60 Texas law Review (1981), See for detail, Andrei Marmor, Interpretation and Legal Theory (New York: Oxford University Press, 1994), 35-45; Leiter, Objectivity in Law and Morals, 18-20.
one principle of interpretation. In this way, his theory of law created a strong relationship between the theoretical and practical aspects of the law.64

Some other contemporary theories are “Legal Process Theory” and the “Theory of the Originalists”. Legal Process Theory declared that the interpretation was neither the re-construction of an author’s intent nor the interpreter’s acts of social engineering but rather a process by which the interpreter and the text reach to a common understanding. According to it, law is purposive and regulates the conducts of the human beings with one another, hence statutory interpretation is the process by which various legal actors work together to apply legislative directives to carry out their purposes under constantly changing circumstances. Unlike Post-modern theory of interpretation which refuses to privilege the author and re-construct the text and the textual authority, the legal process theory tries to create harmony between the two.65

The Originalist’s theory of the statutory interpretation declares that the interpretation in concrete cases can be analytically connected with the decisions that have been made by the majority-based coalition in the legislature. In absence of such a theory the statutory interpretation cannot keep pace with the democratic legitimate legislature. 66 In this way, discussion on this topic is a recent phenomenon in western legal system. Before the current century, this subject was declared as a dead and obsolete subject by the Anglo-American legal thinkers. It was believed that interpretive discussion had been completed and no more discussion was required for this subject and that what little had already been said about the statutory interpretation

65 Karl Marx, Early writings, 222; Passmore, A Hundred Years of Philosophy, 177; Feigl & Sellars, Reading in Philosophical Analysis, 449; Stuckey, Procedure in Juristic System,288.
66 Ibid.
was enough and that this subject had no worth of scientific discussion. At present, the European legal system is based on the purposive approach of interpretation while the English-common law is following two contrasting approaches which are the restrictive literal interpretation and the permissive or purposive interpretation.

However, by joining the European Community, the contemporary English courts and the Supreme Court of the United Nations tend to adopt purposive approach of interpretation. For example, in Pepper v. Hart (1972), the Lord Griffith declared that “the day have long passed when the courts adopted a constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts must adopt a purposive approach which seeks to give effect to the true purpose of legislation.” The judges have started to consult committee reports and other materials to inquire into the legislative history and the objective of an enactment. But many issues are still unresolved and demands detail discussion such as the issues that if the wording of the statute is plain and bears only one meaning, the court has authority to resort to extrinsic aids in determining the legislative intent. In such a case, many of the courts are in favor of the plain meaning rule.

Another issue is related to the authority and the power of each organ of the state in England which is still ambiguous and the English legal system cannot control conflicts of interests. The other issue needs to be solved to decide what should be a neutral decision making process? Contrary to it, in other constitutional systems such as civil law system as in France or common law as in the United States, there are clear

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68 David Hume, Contemporary European Philosophy, 567; Slapper and Kelly, The English Legal System, 193.
concepts regarding separation of power between judiciary, executive and the legislature and Constitutional Court to deal with such issues. Interpretation is not simply a political activity as suggested by some scholars of the critical legal studies that the interpreter’s act remains unguided by the interpretive rules and based on the political whims of the interpreter. It is rather a legal process and a matter of law.

1.3 Sources and Classification of Interpretation

In constitutional law system, the primary source of the interpretation is the constitution of the state. Generally constitutions do not contain interpretive rules rather the legislative work contains interpretive laws. Most of the civil codes contain instructions how to interpret the statutes, will and the contracts. In countries governed by Anglo-Saxon law, legislation commonly includes Interpretive Acts that define terms without determining the general principles governing the meaning of the terms. These statutes are concerned not with the laws of the interpretation rather with the results of the interpretation. In western legal systems whether European-civil law system or common law system, case law is the primary source of the interpretation. Among the secondary sources are the constitutions, statutes, precedents, customs and the autonomy of the private Bills etc.

The western legal philosophers have divided the process of interpretation into many types but only two major types are being mentioned here which are interpretation based on the meaning of the text which further subdivided into

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grammatical and logical interpretation and second is the interpretation based on the role of the interpreter. The Grammatical interpretation means to apply the linguistic rules of English language to derive a legal meaning of the text. In this case, the language of the text bears only one possible meaning and thus, the interpreter applies only literal meaning to it and does not go beyond the rules of the syntax. Logical interpretation means to assign a rational meaning to the text in the light of the object and the circumstances of the statute concerned. In case where the wording of the text is of ambiguous meaning or has more than one meaning, the interpreter utilized his personal reasoning to assign to the word any of its all possible meanings in the light of the context and objectives of the text.

Interpretation may also be divided into genuine and spurious interpretation on the basis of the role of the judges during the process of interpretation. Genuine interpretation leads to the discovery of the true intention of the law-giver with which the statute was passed. This type of interpretation is purely judicial in character. Spurious interpretation has been referred to judicial law-making process and the interpreter does not discover the intention rather he has to resort his effort in making or remaking the rule for which the legislature had to intend through legislation. In this case the intent of the legislature is not discovered through genuine interpretation and the interpreter has to adopt some different methodology to draw the intention of the legislature. However, the scope of each is dependent upon the conception of the interpretative process. Analytical theory of interpretation contends that the process of interpretation is purely logical and scientific and the scope of genuine interpretation is

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76 Ibid.
78 Ibid.
closely confined. Contrary to it, equitable interpretation leads that the legislative enactment merely lays down a general guide and leaves the court wide leeway to deal with the individual cases as the justice of the case demands both the reason and the moral sense generally. 

1.4 Characteristics and Validity of the Interpretive Rules

Interpretive policy of all the legal systems of the world is based on some certain broader and general principles which provide guidance for further development of the detailed rules. Each of them has its own identity and does not become void if contradicted with other interpretive rule. These rules not only distinguish one legal community from the other but also provide a guideline to the interpreters of that particular community.

The interpretive policy of each legal system guarantees security, stability, and certainty and determines the discretion of the judges during the process of interpretation by prescribing certain limits. Interpretive rules enable an interpreter to rationalize his discretion in the light of the objectives of the text. Moreover, interpretive principles and theories also guide the legal practitioners and lawyers in the preparation of their arguments.

In case of ambiguous legal texts, the interpretive rules resolve the disputes and legalize the judicial decisions even if based on the discretion of the judges and enable the courts to review their decisions with logic and reference. Interpretive principles help out a judge to give a legal norm created in the past, the breadth and the content


80 Ibid.


which it needs to respond to the contemporary issues to narrow the gap between law and society. Interpretive rules confirm the stability of the law in a society and reconcile the conflicting issues of the society by creating new laws by way of logical interpretation.

Interpretive rules expressed in the language of a particular society and hence become a source to develop that language. Interpretive rules are matter of law not facts and part of substantive law. Interpretive rules are based on the principle of *stare decisis*. It is this reason that lower courts are bound by Supreme Court’s decisions on matter of interpretation. Interpretive principles help to make a meaningless provision as meaningful. For example, if a contract contains a provision that it shall be construed according to the intent of one party alone must not be constructed according to this provision but will be construed according to the general principle of contract that it must be constructed according to the intention of both parties.

The validity of the interpretive rules is based on the assumption that interpretive rules are themselves general rules and have their origin in the constitutional law of the land and are as binding as other constitutional provisions. They are declared as the laws of the laws and are set out in the light of constitutional considerations like democracy, separation of powers, and rule of law. These rules provide base for the development of a general structure of a legal system and for detailed rules of interpretation which may vary from nation to nation and society to society and reflect the culture and social set up of a particular society. Therefore it is

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necessary that the jurists must consider these factors to ensure the means of interpretation because the system of interpretation is not a matter of feeling but of law.

Section Two

Development of Law and Legislation

2.1 Definition and Development of Law

In English-common law system, the term “law” is an ambiguous term and is used into two meanings, the concrete and the abstract. In the concrete sense, it is said “a law” or lex, loi. Lex means a statute is a source of law. The word “a law” includes thus statute, ordinance, decree or any act of the ruler. In its abstract sense the word “law” is declared as “the law” or jus, droit, recht which means that the parliament is a source of law by way of legislation (jus, droit, and recht). In its abstract sense the term “the law” denotes the entire body of the legal principles enacted by the parliament and prevailing in a particular system, e.g., the law of England, the civil law, and the criminal law etc. 85 Salmond defines law as “the body of the principles recognized and applied by the state in the administration of justice. The law is not right alone or might alone but a perfect combination between the two.”86 The institution of law has its origin and in the Greek philosophy. In primitive Greek society, the law was

86 Ibid.
assumed to be revealed from the gods and known to man. People believed that Zeus gave law to mankind as his greatest present on the earth. The Greek philosophers adopted different views regarding law and justice in a society. For example, Socrates and Plato were deeply convinced of the natural inequality of men which they considered a justification for the establishment of the class system in the commonwealth. Contrary to this idea, Aristotle viewed that a state based on the law is only practicable means of achieving the good life and it should be the chief goal of every political organization. He held that the rule of law should be preferable over the interest of a single citizen.

Another philosopher Zeno observed that the whole universe consisted of one substance of reason. Man in following the dictates of reason was conducting his life in accordance with the laws of his own nature. On the whole, until the 5th century the

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87 Zeus was considered as the Chief of the Olympian gods of the sky, the weather and the fate. He was depicted as a regal man, mature with sturdy figure and Dark beard. His usual attributes were a lightning bolt, royal scepter and eagle. See, www.iep.utm.edu/phi;philosophy, visited on Dec.12,2011.
89 Socrates was a great legal philosopher of 5th century. He was born in 348 B.C and died in429 B.C. He established a substantive system of ethics based on an objectively verified theory of values. He developed his ideas solely in oral disputations and never reduced his teachings in written form. His philosophical ideas reached to us exclusively through the dialogue of his great pupil Plato. See, Earner Barker, Greek Political Theory: Plato and his Predecessors (London: 1951), 86-88.
90 Plato was an Athenian philosopher and was born in 328 BC and died at the age of 80 years. He was the student of Socrates and the teacher of Aristotle. He was under great influence of his teacher and started to write about tragedies He was famous for his style of dialogue, characterization, and dramatic context. He founded a new philosophy of law and wrote “Republic”. He blended ethics, politics, philosophy, epistemology, and metaphysics in to a systematic way. He presented the theory of Forms according to which the world we know through the senses is only an imitation of the pure, eternal, and unchanging world of the Forms. See for detail, Barker, Greek Political Theory, 78; www.iep.utm.edu/philosophy.
91 Allen, Studies in Plato’s Metaphisics,225; Gomperz, Greek Thinkers,2:314; Green, Karl Lowth from Hegel to Nietzsch,3:323;Bodenheimer, Jurisprudence: The Philosophy and Method of the Law, 7.
93 Zeno was born in 490B.C. He presented the method of proof or reduc to ad absurdum that is the concept to reduce to the absurd. He produced not less than forty arguments revealing contradictions and has been lost but only nine are known. See, G.S.Kirk &J.E.Raven, The Presocrates Philosophy (Cambridge University Press,1957),3:455.
Greeks considered law as revealed and immutable which had no room for change.\textsuperscript{95} Prior to the Norman Conquest of England during the 11\textsuperscript{th} century (1066 A.D), England was governed by the King through customs and usages of English and Danish people. The greater part of the law was unwritten. There was not any judicial machinery to decide the matters and to produce law. The Normans founded the system of law and government in England but through racial discriminations between French and English.\textsuperscript{96} The concept of the common law system was seeded in the 12\textsuperscript{th} century and started to grow with the expansion of legal institutions founded by the Normans.\textsuperscript{97}

The systematic development of the law of England was encountered during the 19\textsuperscript{th} century. English Jurisprudence was developed as formal science by Hobbes\textsuperscript{98}, Austin\textsuperscript{99}, and Bentham.\textsuperscript{100} Hobbes presented “Imperative Theory” of law and declared that law was brought into the world nothing else but to limit the natural liberty of particular men.\textsuperscript{101} John Austin defined law as the command of supreme Law-making

\textsuperscript{95} Ibid; Jones, Law and Legal Theory of the Greeks, 138-139. 
\textsuperscript{97} See for detail, R. K. Wilson, History of Modern English Law (n. p., 1890), 9; Pollock & Maitland, History of English Law, 1:98; Baker, An Introduction to English Legal History, 10-19; Slapper and Kelly, The English Legal System, 36-39; 
\textsuperscript{98} Hobbes was born in 1588 and died in 1667. He got education at the Westport church and then at Oxford college. He founded the theory of “Social Contract” and gave the idea of an absolute and undivided sovereign power or divine theory of law of nature. He contended that the true doctrine of the law of nature is true moral philosophy. See, Stumpf, Philosophy, 3:678. 
\textsuperscript{99} John Austin was born in 1790 and died in 1859. He first joined British army but later he devoted himself to the study of law and became professor of jurisprudence at University of London during 1826-32. His writings have a profound influence on English Jurisprudence. In his writings are “The Province of Jurisprudence Determined 1832, and “Lectures on Jurisprudence. See, Wilfred E. Rumble, The Thought of John Austin: Jurisprudence, Colonial Reform and the British Constitution London (n. p: Athlone Press, 1985), 1-5. 
\textsuperscript{100} Jeremy Bentham was born in 1748 and died in 1832. He was a social reformer and presented the theory of Utilitarianism which was based on the attainment of pleasure and absence of pain. He sketched a happiness making Calculus to measure the intensity, duration, likelihood, extent, etc of pleasures and pains. In his writings are “Introduction to the Principles of Morals and Legislation, and “Handbook of Political Fallacies 1824 in which he described logic and rhetoric of political debate. See, http://www.blupet.com/phil/Library. Lawbooks 
power in the state which does not need divine sanction. For him every piece of positive law is a creature of the Sovereign or State and has an element of physical force of the state for its sanction. 102 Jeremy Bentham (1748-1832) founded the English Analytical School and based his theory on the principle of utility according to which the ultimate end of the law should be the greatest happiness for the greatest number of the people by keeping balance between pain and pleasure. He based his theory of expediency on setting pleasures against pains. 103 However, the traditional or formal theory of law was concerned to frame the specific rules of substantive and procedural laws and was restricted to pure legal phenomenon with out reference to the social activity to which the legal rules are applied. 104

During the 20th century, many philosophers of the jurisprudence presented different legal theories and many of them are established in the light of the public and social interest. 105 Ludwig Gumplowicz 106 introduced “Sociological Theory” of the law and described that the law is essentially an exercise of the state powers. According to him law is a form of the social life arising from the conflict of different social groups of unequal power. 107 Another important theory of the law was presented by an American legal philosopher Lon Fuller 108 who defined legal system as a body to enlighten rules which were created purposefully and intended to control and to guide

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102 Austin, Lectures on Jurisprudence, 1:88-89; Rumble, The Thought of John Austin, 278.
105 Ibid.
106 Ludwig Gumplowicz was an Austrian sociologist. He was born in 1838 and died in 1909. He presented sociological theory of law. He decared law as a social phenomenon arising from the conflict of different social groups of unequal power. He wrote “The Out Lines of Society”. See, http://www.blupet.com/phil/1ibrary. Lawbooks
108 Lon Luvois Fuller was born in 1902 and died in 1978 and was an eminent legal philosopher of America. He founded his theory of law on the basis of morality. He was Prof. of law at Harvard University. In his writings are “The Morality of Law and “Law of Contract. See, www.icp.utm.edu/phi/philosophy, last visited Dec.13, 2011.
human behaviour. He then pointed out certain deficits in the contemporary legal system of the law. For instance, failure to make known to the people, failure to present a clear and in obscure legislation, retroactive legislation, failure to relax people from undue pressure and demands of law, failure to frame a stable and sound system of legislation by every day amendments and lastly, failure to solve the disagreement and differences of opinion among judges, government and legislation. The presence of these deficits leads to the failure of legal system. To avoid such deficiencies some corresponding principles should be formed. These corresponding principles are based on the internal morality of the law and conformity of them leads to just laws and away from the evils.\textsuperscript{109} He observed that there must be some general rules formed to guide particular actions.\textsuperscript{110}

2.1.1 Sources, Objectives and Codification of Law

The main sources of the common law are the case law, statute law, international conventions and treaties, custom and academic writings.\textsuperscript{111} The sources of the European Community law are four fold: Firstly, internal treaties to govern the member States of EU (European Union), and any thing contained therein supersedes domestic legal provisions. The primary treaty is the Treaty of Rome which amended by the legislation of 1986. The others are the Maastricht Treaty on European Union and the Amsterdam Treaty. Secondly, international treaties include treaties with other nations by the EC (European Community) on behalf of the Union as a whole and are binding on the individual members of the EU. Thirdly, secondary legislation which is

of three types provided by Art 249 of the Treaty of Rome. These are regulations which are applicable generally to the member states. The last source of the Community law is the judgments of the European Court of Justice (ECJ). The primary objective of the law is to control human actions in such manners as not to infringe the fundamental rights of the others. On the one hand, it controls law and order and maintains justice in normal days and on the other, it arranges to control the situation in emergencies. It also helps to resolve the issues between the people and the state. Aristotle has described the objectives and the purposes of law in beautiful manners that “every practical pursuit seems to have an end and that the good of man must be the end of political science. He observed that to secure the good of one person only is better than nothing but to secure the good of a nation or a state is a nobler one”.

The idea behind the codification of the English law was based on the Roman law code. Codification is in fact a systematic arrangement of present laws and rules into a code. In the history, the Anglo-Saxons were the first who introduced the concept of the written law in the beginning of the 8th century and compiled certain rules of law. But that compilation was consisted of fixed rules to decide the matter which was previously held by the discretion of the King, e. g., and fixation of the blood-money in lieu of feuding. The King Alfred of Wessex (d. 899 A. D.) was the first one who tried to codify a uniform system of law. The first written document in the history of the English law was “The Laws of the William the Conqueror”.

112 Ibid.
His ‘Charter to the City of London (1066-75)’ was the first document which was written in old English not in the Latin or in French language.\(^{117}\) In the late 16\(^{th}\) century, Francis Bacon spent over 21 years over a scheme for reducing the volume of the “Statutes of the Parliament 1593”. He called for the digests of the common and statute laws and to keep them up to date. Unfortunately, he could not succeed in his attempt to produce a code because his contemporary scholars and judges were against his project on the presumption that common law was unwritten law.\(^{118}\) The first general text book on the English law was written by Sir William Blackstone under the title “Commentaries on the law of England” and published during 1765-1769.\(^{119}\)

The Criminal Law Consolidation Act 1961 was the first codification in that perspective and then began a long series of codification of statutes.\(^{120}\) The major portion of the common law however, is still unwritten which is considered a great blessing for the English people as it is flexible and capable for flexible interpretation.\(^{121}\) Thus, this unwritten aspect of the English common law controls legislation and maintains justice in the society and on the other hand, it arranges to control the situation in emergencies. It also helps to resolve the issues between the people and the state.\(^{122}\) Aristotle has described the objectives and the purposes of law in beautiful manners that “every practical pursuit seems to have an end and that the good of man must be the end of political science. He observed that to secure the good

\(^{117}\) J. Spedding, Life and Letter of Bacon (n. p., 1872), 6; Pollock & Maitland, History of English Law, 1:78.
\(^{118}\) Spedding, Life and Letter of Bacon, 6:67; Baker, An Introduction to English Legal History, 188.
\(^{120}\) R. K. Wilson, History of Modern English Law (n. p., 1890), 184; L. Fuller, Law without Precedent (Chicago: Chicago University Press 1969), 134.
\(^{122}\) V. Aubert, In Search of Law (Oxford: Mariton Robertson, 1981), 12.
of one person only is better than nothing but to secure the good of a nation or a state is a nobler one".  

2.1.2 Classification of Law

English-common law is divided into different categories which have further subdivisions such as classification of the law based on its nature, classification of the law based on its mode of expression and the classification of the law based on its operation. On the basis of its nature law may be divided into six types such as public general laws and private laws, common law & equity, civil law and criminal law, natural law and statute law etc. On the basis of its mode of expression, law may be divided in to different types such as mandatory or imperative law, obligatory and permissive law, directory or recommendatory law, and negative mode of expression. On the basis of its scope, law may be divided into different types such as declaratory and procedural laws, penal and civil laws, law of property and succession, fiscal law and law of limitation etc.

2.2 Development of Statutory Legislation and Legal Text

The enactment procedure of English legal system is three fold. It requires the consent of the Lords (judges), the House of the Commons and the assent of the King. When a legislative Bill passed by the Parliament through these three fold consents, gains the force of an Act of Parliament. Such Act of the Parliament furnishes the paradigm text

126 Ibid.
for interpretation. The old English legal system had no clear concept of the legislation and enactment procedure to make a law. Until the 14th century there was no distinction between legislation and any other action of the government. Any order of the government had to constitute a law. There was no settled procedure for an enactment to be followed. There were however some private drafting which contained very loose and general language and the words but there was no official record of the old statute until the 19th century.

In contemporary legal theory, the law-giver may be defined as an executive body consisted of specific individuals to whom a specialized function has been temporarily assigned. The concept of an independent legislature in English-common law system is not much older. The concept of absolute authority of the Parliament is a consequence of the struggle between the Parliament and the Stuart monarchy during the 17th century. In its conflict with the Crown, the Parliament claimed the power of making law as its sole right. By the recognition of EC (European Community), European Community Law has become primary source of the legislation in English-European legal system.

In the history of the English-common law, the first written statute passed by the Parliament of England was the Statute of Merton 1235 A.D. and Magna Carta. Magna Carta was first signed by King John in 1215 and confirmed thirty eight times.

127 Wilson, History of Modern English Law, 178; Bennion, Statutory Interpretation, 82.
131 Adler & Charles, Great Treasury of Western Thought, 695; Bennion, Statutory Interpretation, 81.
before the close of the middle Ages. The drafting was prepared by the judges and the clerks after the assent of royal King. The statutory drafting after its legislation were started to be declared as an Act of the Parliament and many Acts were passed by the Parliament in the second half of the 19th century which were ambiguous and complexed in their scope. For example, the Criminal Law of the English statutes was declared the most complicated and unintelligible which exhibited an exaggerated structure of all the characteristics defects of the English Statute law.

To remove the complexity and to reform the statutory enactment certain attempts were made and written guides were started to be prepared for the drafting of the English statute. In 1868, the Statute Law Committees and in 1875 a Select Committee was appointed to search manners which might be adopted to remove the defects of the language and to improve legislation.

Generally, the Parliament of UK is considered as a source of the legislation and has power to enact, revoke or alter any piece of the legislation if it considers necessary. Among the other sources are delegated legislation, precedents, customs, law reforms, consultative Green Papers used by the government and books of authority etc. When a court is unable to locate a precise or analogous precedent, it may refer to legal text books for guidance. Such books are sub-divided depending upon when they were written. The most important of these works are those by Glanville from the 21st century, Bracton from the 13th century, Coke from the 17th century and Blackstone from the 18th century. Legal work produced after Blackstone’s Commentaries of 1765 are considered to be of recent origin, and they

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133 Nicholl & Karl, Contemporary European Philosophy, 267; Bennion, Statutory Interpretation, 82-84; Van Caengem, Judges, Legislators and Professors: Chapters in European Legal History, 67.
135 Ibid.
can not be treated as authoritative sources. The courts however, will look at the most eminent works by accepted experts in particular fields in order to help determine what the law is or should be.\textsuperscript{136}

In spite of the best endeavors of the legal drafters to draft legislation more precise and communicating the meaning of what they produce, legislation suffers many general problems such as the fluidity of language used. Majority of the words of common use possess more than one meaning and the determination of a true and correct meaning is a difficult task. Further, legislation involves an inescapable measure of uncertainty and generality which creates hurdle in determining the true meaning and the scope of the text that can only be made certain through judicial interpretation. Then incorporation of ECHR (European Community Human Rights) into UK law has created friction between the judiciary and the executive. In many cases legislation has contradictory nature of the various purposes which it tries to achieve.

Problem of amendment is also an issue to resolve. Amendments in the Acts alter existing laws which make it difficult to determine the scope of an existing or amending law. The plenty of delegated legislation has been resulted in speedy implementation of the law and suffered from lack of scrutiny of proposals, lack of accountability of those who make such laws and the sheer amount of delegate legislation. The other problem is the existence of the doctrine of stare decisis or binding precedent. The precedents lead to uncertainty, fixity, and constitutionality. Along with these problems the core problem of the English-common law is that it is

consisted of uncodified and unwritten constitutional law, statutory legislation is not in dominant position and it is assumed that only common law has wider scope.  

2.2.1 Definition of Statute

In common law system, statutes form a comparatively small part of the law as a whole. A legal drafting passed by the parliament recognized and published by the state is called a statute. A statute law means a set of rules made and passed by the parliament. It may be defined as body of rules of all kinds of action whether animate or inanimate, rational or irrational. Literally, the word statute means a formal written document passed by the law-making body. Technically, it has been defined in different ways by the different legal jurists but all of them lead that all the statutes are made up and passed by the legislature. For example, Maxwell defined a statute law as the will of the legislature. Crawford defines statute in the same way that it is an act of the legislature declaring, commanding or prohibiting something.

It is inevitable that a statute must be made in the words of a specific language well known and recognized by the people of the state. Statutes must be in writing and in the language having meaning of everyday life. For example, to pass a statute for Pakistani people, it is necessary for Pakistani Parliament to make it in its official language as declared by the constitution of Pakistan, either in English or in Urdu. Article 251 of the Constitution of Pakistan 1973 states that the national language of Pakistan is either English or Urdu.
Pakistan is Urdu and official language is English while provincial languages may be promoted by laws. A statute made in Latin can not be a statute for Pakistani people. The prime concern of a statutory enactment is to declare something by making some action permissible, compulsory or prohibited. The other purpose behind a statutory enactment is to control a particular situation whether desirable or undesirable. The way through which a statute or legal text is explained and interpreted is called interpretation. In this sense, the statute law is consisted of the work of the legislature which are enacted for the purpose to declare some action as permissible, obligatory and prohibited to manage the advantageous and unwanted situations in a society.

2.2.2 Parts of a Statute

A statute may be divided into different parts. Some important and common parts of the statutes are as under:

2.2.2.1 Title of a Statute

The early statutes of the common law did not contain title. It was during the regime of Henry VIII in 1495 when it became known to put a title to each chapter of a statute but it was not considered an important part of the statute. In the modern times, every statute bears a title which describes its scope and subject by which the statute is generally known and is considered an important part of the Act. The title of a modern statute can be divided into two types which are the long and the short titles: The long title describes the scope of the Act and is amended with the amendment of the Bill and the short title means a title given to the Act for reference only. A title is not conclusive of the intent of the legislature but constitutes only one of the numerous sources from which assistance may be obtained in the ascertainment of that intent in

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cases of doubt, use of general language or word of ambiguous meaning, the court may consider the title of the statute to ascertain the legislative intent. The statute further is divided into chapters and each chapter bears its own title. The title of the chapter is an identifier and indicates not only the general nature of the statute but explains the nature and subject-matter of the chapter. For example, chapter one of the Constitution of Pakistan 1973 is given a title as “Fundamental Rights” which identifies the subject-matter of the chapter that is regarding fundamental rights of the citizens of Pakistan and indicates the democratic and parliamentary structure of the government. Chapters then have sections and sub-sections.

2.2.2.2 Preamble of Statute

Preamble is that part of the statute which describes the objectives of the statutory enactment. Almost all legal systems recognize the importance of the preamble during the process of interpretation. In the sold statutes preamble was to be considered a key to open the understanding of the statute. In modern statutes however a preamble is not considered as a part of the statute rather it may be consulted in case of ambiguity. In a case, State v. Zia ur-Rehman, justice Hamood-ur-Rehman observed that “the preamble if is not incorporated in the Constitution or does not form a part thereof it can not control the constitution. The court in any way has no power to declare any provision as being in violation of such document.” It is this reason that the preamble of the Constitution of Pakistan 1956 and 1962, and 1973 now has been inserted in Article 2-A by P. O.14 of 1985 by the revival of the Constitution 1973.

147 P L D., 1973, at 49 SC.
people of Pakistan within the limits prescribed by Him as sacred trust.”149 The role of
the preamble is that the preamble sheds on the purposes of the statute to which a
statute intends to reach but if a text is itself clear and bear only one meaning, the
preamble is not helpful to control the case and cannot qualify or cut down the
meaning and scope of the text. The preamble only helps to explain the objectives of
statute.150 In a case, Mirza Shafiq Baig and Others v The State, (NAB) (2004), it was
held by the Supreme Court of Pakistan that it is well accepted rule of the
interpretation that for ascertaining the attention of the legislature the courts can look
in to the preamble of a statute.”151

2.2.2.3 Legislative Definitions and Interpretive Clauses

Interpretive clauses and legislative definitions are inserted by the parliament while
enacting a statute.152 For example, the Constitution of Pakistan 1973 consisted of a
chapter contains definitions of different words and phrases commonly used in the
constitution. In a case Huzoor Bux v. State (2008), it was held by the High court of
Pakistan that terrorism is determined from the criminal act designed to create a sense
of fear and security in the minds of general public disturbing even tempo of life and
tranquility of the society. The other criminal acts are not to be dealt under the Anti
Terrorism Act 1997 as defined in section 6 of the Act.”153 Legislative and interpretive
clauses are usually binding upon the courts and form parts of the statute.154 In a
case, Greenleaf & Crosely Co., v Coleman, the word “itinerant merchant” of a
statutory definition was in question. The provision was relevant to impose a tax on

150 Ibid.
English Legal System, 201; Craw Ford, The Construction of Statutes,356.
Statutes, 363.
those who followed this occupation. The definition was used to control as against all other definitions and it was held that the expression as used in the statute relative to public printing, even though the definition was not the usual one.”  

2.2.2.4 Sections, Headings and Schedules

In the history, the practice to insert headings over a group of sections was initiated in 1845 by the enactment of the “Lands Clauses Consolidation Act 1845”. Similarly subheading was first inserted in the Merchant Shipping Act 1854. The headings in old statutes were used to explain the following clause and the purpose of the enactment. Headings in modern statutes are just inserted to make an allusion. Sometimes section headings are inserted by the Parliament itself and are taken as to provide aid in the construction of statute. For instance, section one of “The Interpretation Act of 1978” states that every section of an act takes effect as substantive enactment without introductory words. A schedule may be used to set out the provisions of an earlier act as amended. The characteristics of schedule are that a schedule is attached at the end of the Act of Parliament, it is an operative part of the Act, its provisions are as important as section’s, it contains provisions of transitional nature, and it contains a number of amendments which are better dealt with in the schedule than in the main body of the Act. The general principle regarding the status of section’s heading is that it must not be given effect if the wording of the text is clear in its meaning and scope. In Battle v Shivers, it was held that due to the probability of inaccuracy of the

155 Ibid.
156 Russel, Human Knowledge, 278; Marcuse, Reason and Revolution, 121; Edgar, Craies on Statute Law, 213-217; Crabbe, Understanding of Statutes, 21-24.
157 Ibid.
159 Ibid.
headings very little reliance should be placed upon them in order to control the statute’s construction.”

2.2.2.5 Punctuation and Marginal Notes

A statute consists of many punctuations and marginal notes. Insertion of punctuations in the statutory enactment is a recent development of the modern legislation. The old statutes had no idea regarding the insertion of punctuation in a statute. The insertion of the punctuations is done by the draftsmen according to the grammatical rules of linguistics. The judges have to care for the punctuation during the process of interpretation. In absence of the punctuations, the statutory drafting leads to the ridiculousness of the meaning and application of the statute and the judges feel difficulty to assign a particular meaning to the words in a particular situation.

The marginal notes indicate towards the contents of section. The legality of marginal notes is dependant upon the presumption that marginal notes if inserted by the parliament, the court of law is bound to take into consideration while constructing a statute otherwise not. Punctuation and the marginal notes play a significant role in the interpretation of statutes if they constitute a part of original statute. Sometimes marginal notes are inserted in the section only to provide expediency to the interpreter or reader and in this case they are not important to consider.

2.2.2.6 The Text and the Context of a Statute

The term context means the background policy, the reason, the objectives and the changed circumstances should be taken into consideration during the process of interpretation. The court considers the context of the statute only in case of doubt. The context of the statute consists of the wording, phrases, provisos, saving clauses,

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161 Ibid.

162 Ibid.
and other parts of the statute. In O’Neil v Seglin, it was held that every part of the statute must be considered together and considered as an integral part of the whole, and kept subservient to the general intent of the whole enactment.\textsuperscript{163}

\textbf{2.2.2.7 Individual Words of a Statute}

A text of a statute consists of different types of words. The words of a text may have a definite or indefinite, general or specific, and express or implied meaning. Sometimes, a statute consists of an ambiguous, difficult, and homonym words. Generally, it is considered that a word is a unit of meaning, a distinct unit in the pattern of the language. The words of a single text perform their communicative function jointly and enjoy a measure of independence in the dictionary.\textsuperscript{164} Aristotle defined a word as the smallest significant unit of a speech.\textsuperscript{165} Words are a special class of symbols and the most important in ordinary thinking and communication. The object causes a thought in the mind of speaker and that person used a word to express thought.\textsuperscript{166}

There are two types of words perfect words and imperfect words. Perfect words are those words which are clear in their meaning. The words have express meaning are the example of perfect words. The express meaning includes the meaning that is attached by usage to a particular phrase even when that meaning is not revealed by the individual words that comprise the phrase. For example, the phrase, ‘Eau de Cologne’ has the express meaning of diluted perfume, even though the word ‘eau’ and ‘Cologne’ are taken separately and carry an aggregate express meaning that is significantly different\textsuperscript{167}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{164}] Ibid.
\item[\textsuperscript{165}] Aristotle, \textit{The Nicomachean Ethics},31.
\item[\textsuperscript{166}] Ibid.
\end{itemize}
\end{footnotesize}
Imperfect words are the most imperfect means of communication. Amongst their imperfections are vagueness, ambiguity, and instability. The main difference between the two is that for express meaning the underlying usage attach to identifiable words, phrases and syntactical relationships whereas for implied meaning they attach to kinds of contexts, which are not so really identified. Imperfect words are further divided into three types such as vague words, ambiguous words, and adjectives and adverb. Vague words are those words which are not clearly expressed and have no settled meaning or perceived meaning. For example, the word ‘vehicle’ is a vague word and is not clear whether the meaning of this word may be extended to every ‘vehicle’ including a toy-motor-car, a sledge, or a bicycle etc in its general term, though it is used exclusively for a ‘motor car’. Ambiguous words are those words which have more than one possible meaning. The words of a text have considerable relations with the adjectives and adverbs used in the text. The adjective and adverb work as modifier to modify the meaning of a word.

Conclusion

Interpretation is a process and a mental activity by which a judge constructs from the wording of the statutes, a meaning which he either believes to be that of the legislature or which he proposes to attribute to it. The interpretive activity of the courts may be divided into three types such as to lay down general principles, to apply

168 Ibid.
171 Burke, Jawitt’s Dictionary of English Law, 1:56; Blackstone’s Law Dictionary, 123; Cowie, Oxford Advance Dictionary, 34.
172 Russel, Human Knowledge,71-78; Lock, Human Understanding,3:122; George Dillon, An Introduction to Contemporary Linguistics (1977), 56-67;
the established rules to a particular case and lastly, to decide whether an accepted construction includes or excludes a particular set of the facts or not?

It is also revealed that the contemporary interpretive system of the English-common law is following two contrasting approaches, the literal interpretation and the purposive approach. In fact, the subject of statutory interpretation is a recent development in western legal systems and until the 2nd half of the 20th century this subject was not touched upon by the contemporary western jurists and the judges. The medieval development was the revival of the public interest in Roman law which provided a foundation for the modern legal science of the interpretation. The Heydon’s Case (1584) was the first case which authorized the judges to add force and to put life to law to cure and to provide remedy according to the true intent of the makers of the Act. Majority of the legal systems of the world such as Islāmic, civil or common law, the sources of the interpretation are two folds that are primary and secondary sources. In modern context interpretation is considered a skilful mental and legal activity of the courts and the jurists and as a matter of law.

The prime concern of any legal system is the study of the law as a legal and social phenomenon to maintain peace and order in a society. It has its origin in the history, legislation, juristic opinion and the decisions of the courts. The law is declared as a set of rules designed to guide human behaviour and to secure the rights of the people in a society. Common law and the civil law however, are related to two distinct legal systems. The English legal system is based on the unwritten common law while the European legal system is based on the civil law. The term statute law is a new advent in English legal system and until the 19th century no clear concept of the statute was there. Modern statute law can be defined as an enactment passed by the legislature to declare some action as permissible, obligatory, and prohibited. A text of
a statute consists of different types of words which may have different meanings. The enactment procedure of the modern English law is three fold such as it requires the consent of the Lords, the House of the Commons and the assent of the King. Overall, the English-common law has a complex nature and its mystery is beyond the capacity of one to understand. As a system of legal thought, the common law is inherently incomplete, vague and fluid. It is this reason that Jeremy Bentham, the great legal reformer declared common law no more than “mock law, sham law and quasi law” and that the development of the law through judicial decisions can be illustrated just as exercise of the arbitrary power.

Roscoe Pound (an American jurist) attributes common law just as a mode of treating legal problems rather than rules. At present the common law of England suffering many problems regarding contemporary statutory legislation and its interpretation such as the existence of the fluidity in the language of the statutes, problem of liberal interpretation arising due to incorporation of the ECHR (European Community Human Rights Law) into UK law, ambiguous wording of the statutory legislation and the generality of its application etc. Further, it appears that the theory of law presented by Fuller which based on certain objectives and each of them forms a corresponding principle to consider during the process of contemporary legislation, is similar to the process of legislation of Islamic law which will be discussed in the next chapter.

CHAPTER 2

DEVELOPMENT OF IJTIHĀD IN ISLĀMIC LEGAL SYSTEM

Section One

Understanding of Ijtihād in Historical Perspective

The process of statutory interpretation in Islamic legal system has its origin in the Qur’ān and the Sunnah of the prophet (pbuh) and has been considered as one of the most important subjects of the Qur’ānic sciences since the time of revelation. In Islāmic legal system, the task (ijtihād) to find out solutions for the contemporary issues of any age through interpretation of the Qur’ānic texts and the Sunnah of the prophet (PBUH) has been assigned to the people of knowledge, the jurists and the judges.

The process of interpretation is based on the presumption that only those texts can be subject-matter of ijtihād which are relevant to the worldly affairs of the people while the issues related to the beliefs and Arkan-e-islam (Ibadah) are excluded from the scope of the interpretation/ijtihād. On the basis of this presumption, the Muslim jurists have divided the legal texts of the Qur’ān and the Sunnah (PBUH) into different categories according to the definitive and probative meanings and evidences of the texts and declared some of them prohibited for ijtihād while others as permissible.174

The legal texts of Qur’ān and Sunnah which are permissible for interpretation/ ijtihād are divided in to four kinds: Text probable regarding its meaning and transmission; text probable regarding its transmission but definitive in its meaning; text probable in

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its meanings but definitive in its transmission; and the contemporary issues for which no ruling existed. 175

The primary function of ijtihad is to find out the true meaning of the wording of the Qur’ān. Along with this paramount object, interpretation in Islāmic legal system aims to modify the existing laws to ensure objectives of Sharī‘ah, to encourage contextual and purposive interpretation rather than the literal interpretation of the legal texts, to reinterpret the legal texts of the Qur’ān in the light of the public interest to decide the contemporary issues of Ummah, to examine and to evaluate foreign laws prevailing in the Muslim states and to modify them in the light of the objectives of Sharī‘ah to recognize them as Islamic laws, to set up an interpretive body at each Muslim state to solve the contemporary issues in the light of objectives of Sharī‘ah and public interest.176

1.1 Concept and Definition of Ijtihād

The word *ijtihād* has been derived from the Arabic word *Jahd* which means to strive, pain, trouble and to spend effort in search of anything. Literally, it means to strive, pain, trouble and to spend effort in search of anything.177 Allah Almighty declares: “Then judge (think, consider) O you with eyes.”178 Another corresponding Arabic word is “*juhd*” which means capacity and capability.179 Hence, this word is attributed to both meanings to spend effort and striving hard and to the capability of oneself. During the time of the prophet (pbuh) and the companions, the term *ijtihād* was used technically, in the meaning to exercise personal opinion (rā‘y) to resolve a


176 Ibid.


contemporary issue in the absence of any clear provision of the Qur`ān or the Sunnah (pbuh), not necessarily based upon any evidence. Along with the Qur`ān and the Sunnah of the prophet (pbuh), it is considered as a third source of the legislation to fulfill the needs of the people in the light of the changed context. Like the western process of interpretation the process of *ijtihad* is consisted of different modes to explain a given legal text such as *bayān*, *tafsīr*, and *tā’wil* which are used in the meanings of explanation, interpretation and construction respectively. Hence, these terms can be defined in contemporary legal language as:

**1.1.1 Concept of Bayān (Explanation)**

The Arabic word *bayān* is used in many meanings. It is used in the meaning of elaboration, explanation, plain statement and appearance etc.\(^{180}\) Technically, it is defined as an explanation of the plain meaning of the text to whom it addresses or self-determining of what is stated.\(^{181}\) For example the verse: “This (the Qur`ān) is a plain statement for mankind, a guidance and instruction to those who are pious (*al-muttaqīn)*.”\(^{182}\) Similarly the ḥadīth: “Verily! In plain statement there is a possibility of majication.”\(^{183}\) Technically, it has been defined as a self-determination or explanation of a word by another word or text. The majority of the jurists defined it as an explanation of one legal text by another text either from the Qur`ān or from the Sunnah (pbuh).\(^{184}\) For instance, it is stated in the Qur`ān: “And perform *al-ṣalāt* and pay *al-zakāt*.”\(^{185}\) This text is clear in its statement that is to say *ṣalāt* and to pay *zakāt* but it needs explanation regarding the performance of *ṣalāt* and payment of *zakāt*. The

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\(^{182}\) The Qur`ān: 3:138.


\(^{185}\) The Qur`ān: 2:43.
text then explained and elaborated by the prophet (pbuh) by his action and saying when he performed ṣalāt according to the instruction of the angel Gibrā’il and said: “Perform your prayer as you see me to perform.” Here, the word bayān is used corresponding to the words explanation of the English language.

1.1.2 Concept of Tafsīr (Interpretation)

The word “tafsīr” in Islāmic interpretive system is used corresponding to the word interpretation which literally means to explain which is not understood easily and to expose its meaning. For example, the verse: “I revealed to you the truth and the better tafsīr.” In this text the word “tafsīr” means explanation of something. Technically, the word tafsīr is used to understand the meaning of the Qur’ānic text (nass) to derive legal rule and to explain it properly according to the demand of its language. The science by which the Qur’ān is understood, its meaning is explained, and its wisdom and point of law is derived is known as tafsīr al-nusus. Likewise, the term interpretation in English-common law system means to discover the meaning of the language used in a text. Interpretation by way of tafsīr demands understanding of the language of the Qur’ān in its ordinary meaning not beyond its textual boundaries. This interpretation is provided by the use of the content and the linguistic composition of the text.

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188 The Qur’ān: 25:33.
192 Sutherland, Statutes and Statutory Interpretation, 22.
1.1.3 Concept of \( tā\text{‘}wīl \) (Construction)

The Arabic word “\( tā\text{‘}wīl \)” is used corresponding to the word construction and declared as allegorical interpretation of the ambiguous legal texts of the Qur’an or the Sunnah (pbuh). The word “\( tā\text{‘}wīl \)” has been used by the Qur’an and the Sunnah (pbuh) in different meanings and in different ways. It has been used by the Qur’an and the Sunnah (pbuh) in the meaning of construction by way of logical reasoning. For instance, the verse: “It is He Who has sent down to you the Book. There are verses in it that are entirely clear, they are the foundations of the Book and other are not entirely clear (obscure). So as for those in whose hearts there is a deviation (from truth) they follow what is not clear seeking for polytheism and trials and seeking for its \( tā\text{‘}wīl \).”\(^{194}\) Similarly the Holy Prophet used the term \( tā\text{‘}wīl \) in the meaning of construction. It is reported that once the Holy Prophet (pbuh) hugged ῎Abd Allāh bin ῎Abbūs\(^{195}\) and prayed for him in the wording as: “Allāh may bestow him deep understanding of the religion and make him skilled in \( tā\text{‘}wīl \) (construction).”\(^{196}\)

In some cases, this word is used in the context of a command and is meant “execution or implementation of something. For instance, once Haḍrat ῎Āishah stated that Allāh’s Messenger (pbuh) “\( yata’awwal al-Qur’ān \)” by saying (Glory be to You, O Allāh, our Lord and praised are You. O Allāh forgive me) in bowing (\textit{rukū῾} ) and in prostration (\textit{sujūd} ) during prayer.”\(^{197}\) In this report Haḍrat ῎Āishah used the word “\( yata’awwal al-Qur’ān \)” in the meaning of the implementation of the God’s command by way of logical interpretation. Sometimes, this word is used in the meaning of some

\(^{194}\) The Qur’ān: 3:7.
\(^{195}\) ῎Abd Allāh bin ῎Abbūs bin Abd al-Muṭṭalib Hāshimī was born in 3Q.H and died in 68A.H. He was considered the greatest interpreter among the companions. He was an expert of translation of Qur’ān and hadith, attended battle of Ṣuﬀayn and Jamal with ῎Ali, See, Khayr al- Dīn , al-Zarkaﬁ, \textit{Al-AĪm} (Beirut: Maktabt al-Hayat, 1389 A.H), 4:246; Tūj al-Dīn, al-Subkī, \textit{Ṭa῾baqāt al-Shaf῾iyyah al-Kubrā} (MISR: Dūr Ihyāʾ al-Kutub al-Arīb yyah, n. d.), 5:129-130.
\(^{197}\) Ibid.
event, incident, occurrence or information as declared by God: “Verily I have brought them a book of knowledge and explained it in detail; a guide and mercy for the believers. Are they only waiting for the ṭā‘wīl (occurrence)?”¹⁹⁸ In this text, the word ṭā‘wīl is used in the meaning of an event or information for those who did not accept the revelation and asked again and again in foolish manners about the occurrence of the Day of the Judgment. ¹⁹⁹ It is also used in the meaning of turning something to its origin or relying upon a precedent that if a rule applied to its precedent (naẓā‘īr) shall be applied to the matters under consideration.²⁰⁰

Technically, it has been defined as to depart from the literal meaning of a given text in case where it leads to some absurdity or injustice and to assign it an appropriate meaning in the light of its object and intent of the Law-giver. If the given text is ambiguous or general in its scope, then the interpreter is allowed to use the method of the allegorical interpretation to derive law and to apply it to the current situation.²⁰¹ Similarly, the term construction in English-European interpretive system denotes an understanding of the text beyond its language to make the given text applicable to the situation at hand.²⁰² The Muslim jurists also divided taw’wil into different types and discussed about the scope of each type.²⁰³ The companions and the traditional Muslim jurists however, did not make any difference between them and used them interchangeably to explore and to construct the legal texts of the Qurʾān

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¹⁹⁸ The Qurʾān: 7:52-53.
²⁰⁰ Ibid.
²⁰² Sutherland, Statutes and Statutory Interpretation,23.
and the Sunnah (pbuh) to apply them to the contemporary issues.\textsuperscript{204} The word \textit{tafsīr} is also referred in the meaning of the construction of \textit{mujmal} and \textit{mushtarak} words.\textsuperscript{205} Similarly, the earlier Qur’ānic elucidation used both terms interchangeably. At that time, the Qur’ānic \textit{tafsīr} was meant to explain the meaning of the Qur’ānic texts by way of self-explanation, by way of \textit{ahadīth}, juristic opinions and by consultation of the customs and the mores of the Arab society along with the past stories of the Jews and the Christ etc.\textsuperscript{206} Among the traditional Muslim jurists, Ibn Jarīr al-Tabarī,\textsuperscript{207} founded the scientific mode of the Qur’ānic interpretation and wrote “\textit{Tafsīral-Qur’ān}” in the systematic manners and used both terms interchangeably. His mode of interpretation was to introduce first a legal text with its phrase and its grammatical meaning and then to interpret and to construct it with reference to different \textit{ahadīth}, juristic opinions and past stories. In the last, he had to prefer and adopt the strongest opinion of the jurists.\textsuperscript{208} Until the present day his \textit{tafsīr} is a great source to establish a large variety of the methodologies for Qur’ānic interpretation.\textsuperscript{209}

1.2 Development and Growth of \textit{Ijtihād}

The history of Islāmic legal philosophy witnessed that the statutory interpretation was started to be developed during the period of the revelation under the guidance of the the Prophet (pbuh) in the light of the changed context and public interest. The development and growth of Islamic system of interpretation may be discussed as:


\textsuperscript{205} Al-Sarakhsī, \textit{Uṣūl al-Sarakhsī}, 1:31.

\textsuperscript{206} Muhammad Husayn Al-Thālībī, \textit{Al-Tafsīr wa al-Mufassirūn} (Cairo: Maktebah Wahāb, 1995), 1:24; Abū Ṣabūh, \textit{Lamḥāt fī ‘Uṣūl al-Qur’ān}, 120.

\textsuperscript{207} Muhammad b. Jarīr bin Yazid bin Kathīr, al-Ṭabarī was born in 224 A.H (839 A.D) and died in 310 A.H (923 A.D). He was well versed in Hadīth, history, philosophy and was an independent jurist. See for detail, Hussayn al-Thālībī, \textit{Al-Tafsīr wa al-Mufassirūn}, 1: 244; Al-Zarkalī, \textit{Al-A‘īm}, 3:374.


\textsuperscript{209} Abū Ṣabūh, \textit{Lamḥāt fī ‘Uṣūl al-Qur’ān}, 122-126; Manna‘ al-Qaṭṭān, \textit{Mabūhbīth fī Ulūm}, 326;
1.2.1 Growth of *Ijtihād* by the Prophet (PBUH)

As an interpreter/mujtahid, the Apostle of Allāh adopted different interpretive measures to solve the contemporary problems according to the demand of the time and situation of the case. He did not stick to any particular rule and did not establish any hard and fast policy for the interpretation of the Qur’ānic texts. Primarily, the Holy Prophet focused on taking guidance from the divine revelation to decide a case brought before him for judgment and adopted the explanatory mode of interpretation. Moreover, the Apostle of Allāh interpreted the legal texts of the Qur’ān with the help of the general principles of the Qur’ān such as equity, justice and humanity etc.

The reason behind this flexible policy was that he was fully aware of the realities of the life and knew the fact that in the administration of justice, different situations and problems would occur which could not be solved by strict legal rules and might cause hardship for the people, so, he left the task to be decided by the jurists of each generation according to the needs and the circumstances of different societies.

In majority of the cases related to the affairs of the people, the Holy Prophet decided the cases as what he saw appropriate in the light of the facts of the case. In such cases, he gave his verdict like a judge or a jurist and declared himself as an ordinary human being in these words: “When I decide a matter on my own then I am only an ordinary individual (distinguished from being an apostle of Allāh).”\(^{210}\) In addition to this, to act upon the verse of the Qur’ān: “And consult with them”,\(^{211}\) the prophet had to consult his companions in majority of the cases related to the worldly affairs and affairs of the state. The Holy prophet encouraged his companions to do

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\(^{211}\) The Qur’ān: 3:159.
to search the appropriate solution of the contemporary problems. For instance, one day two persons came to the Holy Prophet. One of them charged the other that his cow had killed his donkey. The Holy Prophet ordered Abū Bakr\textsuperscript{212} to decide the case. He decided that animals could not be charged the liability for their acts. Then Holy Prophet ordered `Umar\textsuperscript{213} to decide the matter. He also gave the same verdict. Then he ordered Hadrat `Ali\textsuperscript{214} to decide the matter. `Ali first maintained the cross examination of both parties and after knowing the fact that the donkey was tied and the cow was free, `Ali decided that the owner of the cow was liable for the damages and the prophet (PBUH) acknowledge that decision.\textsuperscript{215}

Once, the Prophet (PBUH) remarked: “If something belongs to the domain of your affairs, then you know all about it. (You are the best judge thereof and have the right and capacity to deal with it according to the Sharīʻah)” \textsuperscript{216} The Holy Prophet (pbuh) had to resolve the contemporary issues by his own logical reasoning as God declares: “And God revealed to you the book and the wisdom and taught you what you did not know.”\textsuperscript{217} In this verse the word “wisdom” means the logic adopted by the Holy Prophet and became Sunnah.\textsuperscript{218} For instance, on the occasion of Khyber, all

\textsuperscript{212} Abdullah bin `Uthmān, Abū Bakr, al-Ṣiddīq was born in 569 A.D and died in 634 A.D. He was one of the four Caliphs of Muslim Ummah. He was the first one who pronounced his belief on the Oneness of God and the prophet hood of Muhammad. He never ever left Muhammad alone after his prophet hood and remained with him everywhere. He led as Imām during the prayers by the order of Holy prophet. He was father of the wife of the prophet and one of the greatest Muslim jurists and decided many cases by way of public interest. See for detail, Al-Zarkalī, Al-ʿAlīm, 3:340.

\textsuperscript{213} `Umar bin Kaṭṭāb bin Nufyl was born before the birth of prophet and died in 23A.H. He was declared as “al-Fārūq” by the prophet. He was 3\textsuperscript{rd} Muslim Caliph and a great jurist. He solved many contemporary issues by way of public interest and was a great social reformer. He founded an advanced welfare Muslim state which further provided base for modern developed states of the world. See for detail, Al-Zarkalī, Al-ʿAlīm, 5:204; `Allīmah Shībī Nūʿmānī, Al-Fārūq: A Biography of `Umar (Lahore: Maktāb Remaniah, 1998), 6.

\textsuperscript{214} `Alī bin Abī Ṭālib was born in 23Q.H and died in 40A.H. He was 4\textsuperscript{th} Muslim Caliph. He was married with the daughter of the prophet and was the first among the children who pronounced his believe. He was a great jurist and exercised his logical reasoning in deci Dīn g many cases by the order of the prophet. See for detail, Al-Zarkalī, Al-ʿAlīm, 5:108.


\textsuperscript{216}See, Imām Hāfīz al-Qazwīnī, Ibn Mūjah, Sunan ibn-Mūjah (Beirut: Dār al-Ma rifah, 1997), 2:34.

\textsuperscript{217} The Qurʾān: 4:113.

\textsuperscript{218}Al-Shāfiʿī, Al-Risālah,78; Ibn Taymiyyah, Majmuʿ al-Fatāwā (Cairo: n. p., 329A.H), 19:175.
conquered lands were declared to be belonged to the divine dominion and the Holy Prophet distributed the land at his own discretion.\textsuperscript{219} Similarly, when the Muslims conquered Makkah, the Holy Prophet (PBUH) declared it as sacred and prohibited all types of fighting and hunting in it.\textsuperscript{220} This was the personal judgment of the Holy Prophet (PBUH).\textsuperscript{221} In fact, whatever, he decided by way of logical reasoning was recognized by God through revelation and got the same validity as decided by the Qur’\textsuperscript{ā}nic provisions and considered as a part of revelation. This great honour given to him by a clear provision of the Qur’\textsuperscript{ā}: “And he does not speak with his own desire, it is nothing except revelation which revealed to him.”\textsuperscript{222}

In some cases, the prophet (PBUH) interpreted the text in the light of its context. For instance, it is stated in the Qur’\textsuperscript{ā}: “Surely wine, gambling and the statutes and the divining arrows are an abomination of Satan’s work: Avoid them that ye may prosper.”\textsuperscript{223} But no punishment was prescribed by the Law-giver for these acts. The Holy Prophet (PBUH) used to punish the drunken man with twenty or forty lashes according to the context of the case and some time excused the convict without any punishment.\textsuperscript{224}

One day a person came to him while he was guilty of drinking wine. He confessed his sin and demanded for the punishment. The Prophet (pbuh) asked: “Have you not offered prayers with us? He replied: “yes I have so prayed”. The Prophet (pbuh) then declared that “Allāḥ has forgiven your sin.”\textsuperscript{225} Here, the prophet excused him in the light of the context of the case influenced by the sense of good of the

\textsuperscript{219} Abū Dūwūd, Sunan abī Dūwūd, Kitāb al-Siyar, Būb, al-Amwūl, 1:69.
\textsuperscript{220} Ibid., 1:189.
\textsuperscript{221} Al-Āmīdī, Al-Āhkām fī Uṣū al-Āhkām, 3:141.
\textsuperscript{222} The Qur’ān:53: 3-4.
\textsuperscript{223} The Qur’ān: 5:92.
\textsuperscript{224} Ibn Qayyim, I lām al-Mawaqqī’īn, 3:122; Al-Tabrizī, Mishkāt al-Masābī h, 3:57.
\textsuperscript{225} Al-Tabrizī, Mishkāt al-Masābī h, 3:56.
Moreover, the prophet introduced the interpretive principle of analogy and decided many new cases on the basis of analogy. For example, once a woman came to him and asked about performance of Hajj on behalf of her mother who had determined to perform Hajj but died before she could fulfill her commitment. The Holy Prophet instead of answering her, asked: “If she was under debt would you pay it back on her behalf? She said: “Of course”. The Holy Prophet (pbuh) then replied: “Pay the debt of Allāh for it has the highest priority.”

In this case, the prophet adopted analogical mode of interpretation by estimating the issue of the performance of Hajj obligation on behalf of a deceased person over the case of a debt upon a deceased and thus, applied the ḥukm of debt over that. Some contemporary issues solved by the companions by their own logical reasonings and came to different conclusions. However, when they met the prophet (pbuh) they had to describe the case before the prophet. The prophet would either approve a particular judgment or correct it or kept silent over it and the decision thus, became the part of the Sunnah of the Prophet (pbuh).

For example, on the day of the battle of Ahzab, the Holy Prophet asked the companions not to pray 'Āṣr until they reach the village of Banī Qurayzah while still on their way, the time of 'aṣr prayer came and the companions differed over the issue of the performance of prayer. Some of them contended that they would not perform the ṣalāt until they get the place following the order of the Holy Prophet (pbuh) while others declared that they would pray and the prophet did not prevent them from saying pray and thus they performed their pary. The matter was brought before the

227 Imām Bukhārī, Ṣahīh al-Bukhārī, Kitāb al-Qarḍ, 2:256.
prophet (pbuh) but the Prophet kept silence and did not disagree with either group. The cause behind the difference of opinion was that one group of the companions adopted literal rule of interpretation and took the order of the Prophet in its literal meaning while the other understood the order in its contextual meaning in the light of the prevailing situation and performed ṣalāt. But the prophet’s silence over both interpretations leads that both modes of the interpretation are valid and a jurist has authority to decide the case either by way of literal interpretation or by the context in the light of the circumstances and the situation of each case. In this way the Holy Prophet introduced certain interpretive rules and carried out the functions of an interpreter and legislator in the most successful manners and thus provided an interpretive guideline for the future generations.

1.2.2 Growth of Ijtihād by the Companions

The period of the Holy prophet became ended with his death in 632 A.D., and the era of the caliphate started which ended in 662 A.D. The companions had acquired adequate knowledge of interpretive modes by the prophet and became expertise in the science of interpretation. They were fully aware of the fact that an interpreter must perform dual role: To explain and to construct existing laws and to legislate new laws to meet the needs of the people and the society. On the basis of this presumption, the companions particularly the Khulafā‘e al-Rashdīn adopted flexible policy of the interpretation and modified many existing rules to apply them to the changed circumstances. They established many rules of interpretation based on the general principles of Sharī‘ah and in the absence of a clear ruling of Qur’ān and Sunnah, the

229 Imam Bukhārī, Šahīh al-Bukhārī, Kitāb al-Ṣalāt,1:382; Abū Dāwūd, Sunan Abī Dāwūd, Kitāb al-Ṣalāt, no.334.
companions had to recourse, logical reasoning, contextual rule, customary rule, analogy and the rule of public interest. For instance, the appointment of Abū Bakr as Caliph of the Muslim state was based on the analogy because the Holy prophet asked him to be imām of the people in the prayers during the days of his sickness, so the people took it as an indication from the prophet (PBUH) that Abū Bakr should be their head.

Haḍrat Abū Bakr took a large number of independent decisions to organize the affairs of the state in the light of the general principles of the Qur’ān and the Sunnah. He formed a legislative council to interpret and to legislate which was consisted of some of the leading companions like Ḥaḍrat ’Umar, ῾Uthmān, Alī and others. The issues regarding the administrative affairs of the state were within the exclusive jurisdiction of the council and no other person had the right to interfere in such issues that exclusively fell within the jurisdiction of the state.

They categories Islāmic law into different types and declared some laws as mandatory to abide by, others as prohibited not to do and rest of the laws were declared as permissible. To declare something permissible or prohibited, it was not necessary that there must be some evidence from the Qur’ān or the Sunnah (PBUH) rather the principle of the public interest was considered a sufficient proof to declare something permissible or prohibited. In the absence of a collective decision, the caliph


234 Ibid.

235 ‘Uthman bin ‘Affān Qureshī Umawī was born in 47Q.H and was murdered in 35A.H. while he was reciting Qur’ān. He was son in-law of the prophet and was the 3rd Muslim Caliph. See, Al-Zarkalī, Al-Ālām, 4:371.

236 Abū ’Abd Allāh Muḥammad bin Sa’d, Ibn Qayyim, I’lām al-Mawaqqūtīn, 1:256.

had to resort his own logic to decide a controversy.\textsuperscript{238} For example, in case of repudiators of Zakat, (the residents of Yemen) Abū Bakr resorted to use his own interpretive effort and announced fighting with them by declaring that prayer and zakāt had same status and could not be treated differently although, Ḥaḍrat ʿUmar had raised objection against the proposed war on the ground that they were after all the Muslims. Likewise, on the suggestion of Ḥaḍrat ʿUmar, Abū Bakr formed a committee for the compilation of the whole Qurʿān.\textsuperscript{239}

The most significant achievement of Ḥaḍrat Abū Bakr was to lay down certain rules for interpretation which all the later day jurists followed strictly in their interpretive process.\textsuperscript{240} In majority of the cases, the companions decided the issues in the light of the public interest (maslahah) by adopting contextual and purposive interpretation rather than literal meaning. It is this reason that Ḥaḍrat ʿUmar reinterpreted many legal texts of the Qurʾān and the Sunnah (PBUH) in the light of the changed context and made some landmark decisions regarding the worldly affairs of the people different from the rulings of the Prophet (PBUH). For instance, keeping in view the objective of Sharīʿah regarding public interest, he fixed maintenance allowances for all the citizens and their children which was neither pronounced by the Qurʿān nor by the prophet (PBUH). Moreover, He prohibited Muslims from hoarding wealth, tilling the soil either themselves or by employing others and to have landed properties in the light of the objectives of Sharīʿah.\textsuperscript{241}

The companions also re-interpreted many of the earlier decided cases by the prophet (PBUH) in the light of the changed circumstances to suppress the mischief and to advance the remedy. For instance, the Holy prophet had to administer the

\textsuperscript{238} Ibid.
\textsuperscript{239} Ibid.
\textsuperscript{240} Ibid.
\textsuperscript{241} Abū Yūsuf, Kitāb al-Kharāj, 89; Ibn Qayyim, Iʾlām al-Mawaqqiʿīn, 1:23.
conquered lands in two ways either he distributed the conquered land amongst the
members of the army or he left the land in the possession of the original holders.
Haḍrat Umar however, reinterpreted the established Sunnah of the prophet on the
occasion of distribution of the conquered lands of Iraq and Spain and gave a quite
different verdict by saying: “How it is possible to distribute lands amongst you and to
leave the others who would come after you in a situation where they will have no
share in these lands?”. Then he argued with the Qur’ānic verses which lay down rules
for the distribution of the property acquired by way of Faiy and said that the wealth
acquired from enemies is not only for the benefits of the soldiers but others (public)
have an equal share in that and thus refused to distribute lands and retain them at the
sole discretion of the government.242

This was unprecedented ruling and contradictory to the practice of the
Prophet. It also shows wide legislative powers of the state to legislate in the
administration of justice. Some old laws were changed as they became out-moded and
old-fashioned. For example, the quantum of the blood money was fixed by the Holy
Prophet (PBUH) with reference to the camel. During the period of Haḍrat ʿUmar it
was felt that all the people had no camel and could pay the same in either gold or
silver, so, he prescribed two thousand dinars or twelve thousand dirham instead of the
camel as the case may be.243 The wealth was made under the direct control of the state
and agricultural and other activities were prohibited for people. Registration of citizen
started to maintain the record of the people and each of them was granted a fixed
amount of money for maintenance. The salaries were fixed for the scholars, judges,
teachers, imām and Muadhins (who announce Adhan) for the first time and the

242  Imām Bukhārī, ʿSahīh al-Bukhārī , Kitāb al-Amwāl, 2:283; See for detail, Abū Yūṣuf, ʿKitāb al-
Kharāj, 20-26; Ahmad binʿAlī al-Rāzī, Abū Bakr, al-Jassāṣ, ʿAkhkān al-Qurʿān (Egypt: Matbah al-
children were also entitled to receive the living allowances.\textsuperscript{244} To avoid unreasonable consequences the companion restricted the scope of some texts departing not only from the literal and ordinary meaning of the texts but also from the grammatical rules of the interpretation. For instance ’Umar laid down the rule that in case where a person pronounced three or more divorces at one and the same time, it will be treated as an irrevocable divorce and the condition of *hlālah* (marriage of divorced wife with a person other than her former husband) would be applicable in case where remarriage was desired by the ex-husband. This decision was contrary to the verdict of Holy Prophet who considered such divorce single and revocable.\textsuperscript{245}

Similarly, he prohibited the Muslims to eat the meat of the animals slaughtered by the Jews and the Christians and ordered to remove their slaughter houses. Contrary to it, the Qur’ān permits Muslims to eat the meat of an animal slaughtered by Jews.\textsuperscript{246} It is stated in the Qur’ān: “This day are (all) things good and pure made lawful unto you. The food of the people of the book is lawful unto you and yours is lawful unto them.”\textsuperscript{247} Here, he restricted the scope of the Qur’ānic provisions by way of strict interpretation for the sake of the Ummah and to avoid unreasonable consequences. In many cases, the companions adopted beneficial construction and extended the scope of the law whether civil or criminal in the light of the public interest. For example, zakāt could be given to those who embrace Islām. It is stated in the Qur’ān: “Zakat may be given to those who won over.”\textsuperscript{248} But ’Umar rejected the literal interpretation in favour of the beneficial construction and stopped this prescribed use of zakāt by saying: “The apostle of Allāh used to give you zakāt when

\textsuperscript{247} The Qur’ān:5:6.
\textsuperscript{248} The Qur’ān: 9:7.
Islām was weak and the number of the Muslims was very small but now Islām has adequate strength and you may go and do whatever you could do to oppose it.”

In the same manners the companions adopted the mode of exceptional construction in cases where ordinary meaning and grammatical interpretation led to some mischief or contradictory to the purpose of the text. For instance, Ḥadrat Umar assigned some unusual meanings to some particular texts of the Qurʿān and the Sunnah (PBUH). For example, he suspended the punishment of cutting hand for theft during the urgency arising out of starvation and hunger while no such exception has been mentioned in the Holy Qurʿān. Likewise, he announced that the prescribed punishment of cutting hand would not be implemented if some one steals from the public treasury and thus suspended in the favour of a person who stole from the public treasury. Later on he changed his ruling and ordered in the same case to recover the double price of the stolen things from the public treasury.

In this way, the companions not only developed interpretive rules introduced by the prophet but also established some additional interpretive principles to resolve the contemporary issues of that time. They disagreed frequently with each other and issued different rulings on the same issue. Some of the companions like ‘Abd Allāh bin Ṭālimah Ḥadrat Ṭumām and Zayd bin Thābit strongly adhered to the precedents (past decisions) and interpreted contemporary issues in the light of those judgments while

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249 Imām Mālik, Al-Muwātfā, 2:322.
250 The Qurʿān: 5:4.
252 ‘Abd Allāh bin Ṭumām bin Ḥadrat Ṭumām was born in 10A.H and died in 73 A.H. He was a great muḥadīth and relied upon aḥadīth during his process of interpretation. He was the last of the companions who died at Makkah. See for detail, Al-Zarkalī, Al-Aʾlūm, 4:246.
253 Zayd bin Thābit was one of the best reciters of the Qurʿān and memorized the whole Qurʿān during the life time of Holy prophet and was present when the prophet recited the whole of the Qurʿān during his last Ramaḍān. He was appointed by the prophet to write down Qurʿān during his life. See, Al-Zarkalī, Al-Aʾlūm, 11:470.
others like 'Umar bin Kahtāb and 'Abd Allāh bin Mas’ūd frequently relied upon their own logical reasoning during the process of interpretation.

1.2.3 Development of *Ijtihād* by the Traditional Muslim Jurists

The period of the righteous Caliphs became ended with the death of Ḥaḍrat ‘Alī in 662 A.D. (11-40 A.H) and Umayyad dynasty started and remained in power for approximately one century and became down in 750 A.D (41-132 A.H). This era is significant regarding the scientific study of the sciences of jurisprudence and Islamic law. The Umayyad caliphs enacted in almost all the fields of life such as fiscal laws, laws of war, marriage, divorce, succession, pre-emption and blood money, etc. The issue of the appointment of the *Qādīs* and the judges was declared at the domain of the central government and on the basis of evidences, official documents and on the record of the courts. In the same manners, the ‘Abbāsids showed great respect towards the Muslim jurists.

The traditional Muslim jurists divided the legal texts of the Qur’an and the Sunnah (pbuh) into different categories in the light of their meanings and scope and defined the subject-matter of *ijtihād* by declaring permissible and non-permissible texts of *ijtihād*. The students of the jurisprudence frequently differed from their teachers and shifting from one *madhhab* to the other was common among them. In this way, during the 1st century of Hijrah, almost 13 legal theories appeared on the

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scene. It led the development of the subject of *uṣūl al-fiqh*. They introduced many interpretive approaches and established many interpretive rules which were never adopted by the companions of the prophet (p.b.u.h) rather it was marked as flexibility with stability. The interpretive activities of the traditional Muslim jurists were based on the two different theories of interpretation such as theory of textual implication and Sunnah and the theory of the contextual implications and reasoning.

The majority of the jurists living at Madinah adopted textual theory of the interpretation in the light of their literal and ordinary meanings. In case where no rule found in Qur’ān or the Sunnah (PBUH), they decided the case in the light of the practices of the companions. They hardly used their own interpretive logical reasoning and were afraid of any transgression in the structure of the law. Further, they disliked to exercise *ijtihād* regarding hypothetical issues and were reluctant to say about a thing which was not existed then. The contextual theory was practiced by the jurists of Kūfah and was based on the teachings of Ḥadrat ʿUmar and ʿAbd Allāh bin Masʿūd. By his judicial performance Ibn Masʿūd founded rationale theory of the interpretation in Kūfah (Irāq). His methodology of interpretation had influenced over the philosophical theories of the jurists of Kūfah. Due to rapid cultural expansion, multiple conquests, development of education and learning, the Muslim jurists of Kūfah developed their interpretive skill in more progressive and

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259 Ibid.

260 Ibid.


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scientific style. To meet the challenges of the time and needs of the people, the Muslim jurists of Kūfah adopted a very liberal and contextual approach in the light of the logical reasoning.  

In that particular context, Mālik bin Anas 264 adopted textual theory and in his process of interpretation, he heavily relied upon the traditions of the Prophet (pbuh) and the precedents set by the companions. At the same time, he evaluated his juristic opinions in the light of the practices of the people of Madinah and declared the common practices of the Madinetes as a part of the authentic Sunnah (PBUH) and introduced the principle of “Ijmā‘ ahl al-Madinah”.265 He also presented the theory of maslaḥah mursalah based on the principle of public interest presented by the companions. He was strongly in opinion that no single madhhab should be declared as binding for all the Muslims rather declared the differences of the opinion as a blessing of Allah Almighty for the Ummah.266

Ibn ʿĀbidin 267 introduced a different mode of interpretation to make the existing law flexible to meet the challenges of the time by way of amalgamation of the the fatawa of different jurists. He opined that if a substance is not positively

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266 Imām Mālik, Al-Muwāṭṭā, 1: 14; Al-Mudawwānāh

267 Zayd bin ʿĀbidīn was grandson of Ḥadrat Ḥusyn and was a great jurist. He was the founder of Zaydī sect. He rebelled against the Umayyad. He was arrested and executed in 120 A.H. see for detail, Al-Zarkalī, Al-A‘lām, 11: 67.

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harmful then it is not to be prohibited even if it is useless.\textsuperscript{268} Likewise, Muhammad Bāqir\textsuperscript{269} was a great Muslim jurist of Shi‘ite madhhab of taht time and discussed many interpretive rules in his writings.\textsuperscript{270}

Imām Abū Ḥanīfah\textsuperscript{271} adopted inductive mode and introduced a new approach of interpretation named as \textit{Istihsān/} juristic preference.\textsuperscript{272} Another significant role of Abū Ḥanīfah was that he based his legislative activity on the principle of prior legislation (hypothetical issues) for a future expected problem before its occurrence and issued up to 500,000 \textit{fatāwās.}\textsuperscript{273} Abū Yūsuf\textsuperscript{274} collected \textit{fatāwā} of his imām and wrote a book “\textit{Kitāb al-Uṣūl}” in which he discussed the process of \textit{ijtihād} and some principles of interpretation.\textsuperscript{275} Muḥammad bin Ḥasan Shaybānī\textsuperscript{276} was a disciple of Abū Yusuf, and Imām Mūlik and devoted him to the \textit{madhhab} of Abū Ḥanīfah. He wrote many books about the basic principles of \textit{fiqh} and derived Islamic laws in the light of his own logical reasoning and in this way he modified many earlier rulings of

\begin{footnotes}
\item[268] Ib\textsuperscript{n} ‘Ābidīn, \textit{Radd al-Mukhātār}, 8:33.
\item[269] Muḥammad Bāqir bin ‘Alī bin Zayn al-‘Ābidīn was one of the greatest Muslim jurists. He belonged to Shi‘ite al-Imāmīyah sect. See for detail, Asad Hayder, \textit{Al-Imām al-Ṣādiq wa al-Madhabīb al-Arba‘ah} (Najaf: Matha‘b Najaf, 1957), 2:284-286.
\item[274] Ya‘qūb bin Ibrāhīm al-Anṣārī, Abū Yūsuf was one of the most nearest disciples of Abū Ḥanīfah who studied by him and got dictations. He was born in 113 A.H., and died in 183 A.H. H compiled juristic opinions of his teacher and tried to reconcile between methodologies of Abū Ḥanīfah and Imām Mūlik. For this he was titled as Aḥl-Hadīth and Aḥl al-Sunnah. He also wrote “Kītūb al-Kharāj”. See for detail, Al-Zarkalī, \textit{Al-A’lām}, 5:67; Abū al-Wafū, Jawaahir al-Ma‘dū‘ah, 2:56; Ib\textsuperscript{n} Naḍīm, \textit{Al-Fahrist} (MISR: Dūr al-Iṣtiqām, n.d), 258.
\item[276] Muḥammad bin Ḥasan al-Shaybānī was born in 122 A.H at Kūfah. He learned from Mūlik and Abū Yūsuf and discussed many issues with Imām Shafi‘ī. He was expertise of the Qur‘ānic sciences, Arabic language and mathematics. He died in 198 A.H at Ray. He wrote 990 books on the knowledge of Shafi‘ī in the light of the Hanafi Maslak. See, Al-Zarkalī, \textit{Al-A’lām}, 3:37; Abū al-Wafū, Jawaahir al-Ma‘dū‘ah, 2:16; Ib\textsuperscript{n} Naḍīm, \textit{Al-Fahrist}, 2:58.
\end{footnotes}
his teacher in the light of the changed context. His procedure was that he just referred a *ḥadīth* to proof the correctness of his *fatwā*. The student of Abū Ḥanīfah also discussed hypothetical issues and presented their solutions by issuing *fatwā*. For instance, Imām Abū Ḥanīfah interpreted the word *Khamr* in the meaning of a particular wine made up of grapes and held that the Islamic prohibition of *Khamr* covered only the products of the fermented grape juice not other intoxicants which led that the intoxicating drinks made up of other sources are permissible. Abū Yusuf and Muḥammad b. Ḥasan however, when found the other reliable *ahādīth* clearly indicating that all intoxicants were to be included in the meaning of *Khamr*, they changed the ruling of their teacher and issued fatwa of prohibition of all types of intoxicant.

By departing the prevailing theories, Imām Shāfῑʿī established a harmonized theory of interpretation by amalgamating the Mālikī and the Ḥanafī theories of interpretation and tried to strike a balance between the up-holders of the literal interpretation and the traditions (*fiqh al-Hijaz*) and the up-holders of the logical interpretation and Rāy (*fiqh al-Iraq*). He declared both the Qurʿān and the Sunnah (PBUH) of the same status as it is impossible to look into the Qurʿān without looking into Sunnah (PBUH). Imām Shāfῑʿī held that for every issue either there is a binding text (Nass) or there is a guidance that may indicate the way to the solution. If

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279 Ibid.
280 Muhammad bin Idrīs ibn al-ʿAbbas al-Hāshmī al-Muṭṭalib was born in Syriya at Ghazah in 150 A.H and died in Egypt in 204 A.H. Imām Shāfῑʿī was an independent jurist and expertise in hadīth, language and sciences of jurisprudence. In response to the letter of his disciple ʿAbd al-Rahmān bin Mahdī who asked him to guide about the methods and modes of interpretation, he wrote certain rules and modes of interpretation which later declared as “al-Risālah” means to sent something to some one. In his writings are, *Al-Umm*, *Al-Risālah*, and *Ahkām al-Qurʿān* etc. See for detail, Ahmad bin ʿAlī al-Khattīb al-Baghdādī, *Tārikh al-Baghdādī* (Beirut: Dār al-Kutāb al-ʿArabī, 1932), 2:56; Al-Subkī, *Tabaqāt al-Shafʿīyāh al-Kubrā*, 2:324.
there is a text, then the Muslims have to follow it. If there is no express provision then
the Muslims have to seek guidance to the truth by *ijtihād*. 283 He condemned the free
use of personal reasoning and took the term in its narrow meaning only to the logic
existing behind a legal text. He permitted reasoning only through analogy and rejected
the principle of juristic preference presented by Imām Abū Ḥanīfah and *maṣlaḥah mursalah* by Imām Malik. 284

His period of learning can be divided into two phases. During his stay at Iraq,
he dictated a book named as *al-Hujjah* to his students and declared it as *madhhab al-
Qadīm*. The second phase started when he reached in Egypt and studied the fiqh of
Imām Layth bin Sa`d and thus, founded a new school of thought (*madhhab al-jadīd*).
On the basis of this new approach, he compiled a book titled as *al-Umm* in which he
reviewed many of his legal decisions which he had held while he was in Iraq. He also
worked for the renaissance of *Khabr al-wāhid* and titled as the father of ḥadīth. 285

With the help of this exposure, he showed his command over the sciences of
the jurisprudence. He took only the factual realities as a subject for interpretation and
he did not issued fatāwā regarding hypothetical issues. 286 He has been declared as a
founder of the modern sciences of jurisprudence. 287 Imām Ahmad bin Ḥanbal 288 was
an independent jurist of his time but his greatest concern was the collection and the
interpretation of the *aḥadīth* (pbuh). He compiled *al-Musnad* which contained over
30,000 *ahādīth* and āthār of the companions. In his process of interpretation, he had

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284 Ibid.
286 Ibid.
288 Abū ʿAbd Allah Ahmad bin Ḥanbal was born in Baghdād in 164 A.H. (780 A.D.) and died in 241 A.H. He attended the lectures of Shāfīʿī but founded his own School of law and his reputation as traditionalist is greater than as a jurist. In his writings are, *Al-Musnad*, *Al-Masāʾil*, and Faḍūʾil al-Ṣahābah. See for detail, Al-Zarkalī, *Al-ʿAṭāʾ*, 1:192.
to apply the relevant hadīth or precedent to the problems. He resorted to his own logical reasoning in case where he failed to find a suitable hadīth but he did not acknowledge the human reasoning as an independent source to derive law.\textsuperscript{289}

Dā’ud al-Zāhīr\textsuperscript{290} introduced the literal rule of the interpretation and rejected the use of logical reasoning, juristic preference and analogy as interpretive techniques. He validated only the ījmā’ of the companions and rejected the ījmā’ of the later jurists. This theory, however, was rejected by the contemporary jurists due its extreme and illogical standpoint.\textsuperscript{291}

Wūṣil bin ‘Aṭā\textsuperscript{292} founded the school of I’tizāl by his departure from the prevailing schools of the jurisprudence especially from his teacher. He also declared Qur’ān as a creature of God rather than His kalām. He validated four basic sources of the interpretation such as the Qur’ān, the hadīth mutawātar, ījmā’ and lastly, the logical reasoning. He established some rules of interpretation regarding specification of general text by a specific text and viz a viz, subject-matter of abrogation, and interpretation based on the logical reasoning. He described that if a general text can be specified by a specific text then it is quite possible that a specific text may have a

\begin{footnotesize}
\begin{enumerate}
\item[289] ‘Abd al-Qādir, Ahmad bin Badrān, Al-Madkhal Ilā Madhhab Imām Ahmad (Miṣr: Idārah Ṭaba’al-Munīriyyah, 1959), 34.
\item[290] Dū’ud bin ‘Alī bin Khalf, Abū Sulaymān, al-Zāhīrī, was died in 884 A.D (270 A.H.). He was the first jurist who claimed for strict literal interpretation and rejected all other methods and sources except Qur’ān and Sunnah. He wrote “Kitāb al-Uṣūl” and “Kitāb Mufassar wa Mujmal”. See, Al-Zarkalī, Al’A’lām, 3:8; Ibn Naḍīm, Al-Fahrist, 319.
\item[292] Wūṣil bin ‘Aṭā was born at Madīnah and grown up at Baṣrāh. He founded his own methodology of interpretation and was titled as bi “Al-Mu’tazilah” because he left the company of Ḥasan al-Baṣrī. He was well-known for his spiritual vision. See, Al Zarkalī, Al-A’lām, 9:121.
\end{enumerate}
\end{footnotesize}
general application. \(^293\) Awzā῾ī\(^294\) was an independent jurist of Syria and established his own moed of interpretation to derive laws to cover the situations at hand.\(^295\)

On the whole and with the passage of the time many of the interpretive theories disappeared from the scene and two most appropriate and compatibly interpretive theories remained in practice among the later Muslim jurists such as the interpretive theory of the Ḥanafī jurists (madhhab al-Ḥanafīyah) and interpretive theory of the Shafi῾ī jurists.\(^296\)

The differences between both theories were based on their differences of the divisions of the wording of the Qur’anic legal texts, sources of Islamic law, subject-matter of *ijtihād*, use of logical reasoning, status of *Khābr al-wāḥid* with respect to logic, inductive (*istiqrāyī*) and deductive (*istihrājī*) approaches etc.\(^297\) Lastly, unlike Ḥanafī jurists who differentiated between the principle of analogy and the process of *ijtihād*, Imām Shafi῾ī considered both interchangeable and corresponding to each other. He decreed that *ijtihād* does not operate independently. It occurs in the mind of a *mujtahid* in the light of the logic of a text.\(^298\)

1.2.4 Development of *Ijtihād* by the Muslim Jurists of the 4th-7th Centuries of Hijrah

With the expansion of the traditoional legal theories, the desciples and the followers of the traditoional Muslim jurists became prejudiced regarding the views of their

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\(^{294}\) Abū al-Rahmān bin ῾Umar, al-Awzā῾ī was born in 88 A.H and died in157 A.H (774 AD). He was an independent jurist of Syria and founded his own methodology of interpretation. See, Al-Zarkalī, *Al-A῾lam*, 6:234.


\(^{298}\) See, Imam Shūfi῾ī, *Al-Risālah*, 76.
Āimmah and started undue favor of their particular schools. At that time, the most of the discussions and writings of Muslim scholars was based on the preaching of their teachers’ methodologies and on the condemnations of the others. It gave birth to the principle of *taqlīd* which means to put something in to the neck of someone.$^{299}$

Technically, it denotes to follow the opinions of a particular jurist in every issue without demanding arguments for his opinion.$^{300}$ In their attempts to prove them obedience to their Āimmah, they neglected the fundamental difference between the foundational principles of the Qur’ān and the Sunnah (pbuh) and the juristic opinions of their Āimmah. $^{301}$ Moreover, political decay of the Muslims, lack of ascientific knowledge, misunderstanding of the schools of Islamic jurisprudence and above all colonization of the Muslim states left the Muslims farbehind to compete the challenges of the modern development. Incompetent and unqualified people started to issue fatawa in the light of their own reasoning. To protect Islamic law from the intrusion of the foreign law, the Muslim scholars started to avoid issueing new *fatawā* and made them confined to the reference of the fatawa of their teachers which gradually led them to the condemnation of issuing new fatawa and finally, until the 4th century of Hijrah majority of the scholars declared for closing of the door of *ijtihād*.$^{302}$

Closing the door of *ijtihād* was meant that there was no possibility for the establishment of a new school of law or to give a verdict different from the traditional Muslim jurists. The argument behind such declaration was that in this way the din of


Allāh could be protected and kept pure from innovation and personal inclinations and desires.\(^{303}\) This trend caused to make Islamic law static and consequently, the Muslim jurists failed to provide flexible solution of the problems of their age. Further, in an attempt of preaching their madhāhib, the Ḥanafī and the Shafi’ī scholars started to condemn each other and this and similar attempts gave rise serious controversies between them.\(^{304}\) Some of the contemporary Muslim jurists however, tried to reconcile the situation by introducing combined legal theory to study Islamic jurisprudence and to interpret Islamic law. The founder of this theory was Ibn al-Sū‘ātī\(^{305}\) who was the first jurist who combined Ḥanafī and Shafi’ī methods of interpretation and utilized both general interpretive principles of the Shafi’ī madhhab and detailed rules of the Ḥanafī madhhab and derived many combined legal rules of interpretation.\(^{306}\)

In his treaty “Bādī’ al-Nizām al-Jāmī’ bayna Uṣūl al-Bazdawī wa al-Aḥkām”, he analyzed critically principles of interpretation described by al-Bazdawī a Ḥanafī scholar in his book “Uṣūl al-Bazdawī” and the principles contained in “al-Aḥkām fi Uṣūl al-Aḥkām” written by Al-Āmīdī based on the Shafi’ī madhhab. He first summarized interpretive principles of both madhāhib and then derived many other secondary rules. This method of the study of jurisprudence contributed a great to reconcile between Ḥanafī and Shafi’ī jurists and to bring them together. This provided a base for further development of the subject of jurisprudence and its sciences. The Muslim scholars of the next generation founded their discussion on this style. For

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\(^{303}\) Ibid.

\(^{304}\) Ibid.

\(^{305}\) Muẓaffar al-Dīn Ahmad bin Sū‘ātī was a Ḥanafī jurist of 7th century of Hijrah. He was born in 613 A.H. and died in 694 A.H. He was expertise of uṣul, tafsīr and fiqh. Among all the most significant attribute of” Sū‘ātī was that he founded combined legal theory of interpretation and wrote “Bādī’ al-Nizām al-Jāmī’ bayna Uṣūl al-Bazdawī wa al-Aḥkām”. See, Ibn Khalkān, Wa$fāyāt al-A‘yān, 3:411; Khaṭīb al-Baghdādī, Ṭārīkh al-Baghdādī, 3:110.

\(^{306}\) Ibn Khaldūn, Muqaddimah fi Tārīkh (Egypt: Muṣtafā Muḥammadī, 1989), 1:145.
instance, Ṣadr al-Sharī‘ah wrote first “al-Tanqīh” and then “al-Tawḍīḥ” in the same manners. 307 Abū al-Ḥusayn al-白斑 al-Mu’tazili 308 was a great Muslim jurist and wrote about the primary sources of Islāmic law and principles of interpretation. 309 The disciples of the traditional Muslim jurists though were reluctant in exercising independent ḵiṭḥād yet they developed the subject of jurisprudence and system of interpretation through their devotion and discussion on every issue relating to these sciences. For instance, in the light of their logical reasonings, they differed over the scope of ḵiṭḥād. 310

Some of them like Imām al-Rāzī 311 defined ḵiṭḥād in general and broader meaning as to spend utmost effort to seek out a solution of a problem speculative or certain in an irreprehensible manner. 312 Some of them like Ibn Qadāmah 313, al-Bazdawī 314, Ibn al-Hammām 315, al-Bayda’ī 316 and Imām Ghazālī 317 confined the

307 Dr. Maḥmūd Ahmad Ghāzῑ, Ḫl Uṣūl al-Fi ḡ: Ayk Ta’āruf (Islamabad: Sharī‘ah Academy, 2002), 1:60-61.
309 ῾Alῑ bin Ta’yib, al-白斑, Al-Mu’tazili was a great jurist and Imām of his time and died in 482A.H. He was born in 1147 and died in 1223. He learned recitations of Qur’an and wrote about the primary sources of Islᾱm, philosophy, interpretation and jurisprudence. He was a Hanafῑ jurist and wrote in Uṣūl and interpretation. Among his writings are, al-Tawqīh, al-Rawāh, al-Inba’h al-Bakrī, al-Nihāyat al-Sul, 1:234; Al-Insawī, Nihāyat al-Sul, 3:169.
310 Ibid.
311 His name was Muhammad bin ῾Umar bin ῾Abū Ḥasan al-Sulaymᾱn, Fakhr al-Dīn, Al-Tarafaq al-Bu’d, 3:401; Khatῑb al-Uṣūl, 3:532; Al-Zarkalῑ, Al-A’lᾱm, 7:203; Ibn Sa’d, Ḫtᾱbqᾱt al-Kubrᾱ, 8:18.
313 ῾Abd Allῑh bin Ahmad Muḥammad, Ibn Qadᾱmah, al-Ḥanbalῑ, his title was al-Muwaqqaf al-Dīn. He was born in 1147 and died in 1223. He learned recitations of Qur’an and hadith and started writings on Fiqh. He was a great scholar and preacher of his Maslak. In his writings, al-Mughῑnī, Al-Kᾱfῑ, al-Umdat, and wrote in Uṣūl al-Rawdah’. See, Qudῑ Abī al-Hussayn Muḥammad bin Abī Ya’lᾱ, Ḫtᾱbqᾱt al-Hanᾱbilᾱh (n.p: Matba’ā al-Sunnah al-Muhammidiyah, 1371 A.H), 3:532; Al-Zarkalῑ, Al-A’lᾱm, 2:546.
315 Muḥammad bin Abī al-Wῑhῑd, Kamῑl al-Dīn al-Hammᾱm was born in 790 A.H. and died in 861A.H. He was a Hanafi jurist and expertize in Uṣūl, philosophy, interpretation and jurisprudence.
process of *ijtihād* to the seeking of the knowledge of *Sharʿī aḥkhām*. Among the third type of the jurists who recognized *ijtihād* only in speculative issues were Ibn al-Ḥājib, Al-Fatūḥī, and Al-Āʾmidī etc. Further, they defined elements/arkān of *ijtihād* such as *ijtihād* itself, interpreter, legal texts and the issue which required to be solved by the interpreter. The later Muslim jurists divided *ijtihād* into two types such as *ijtihād tam* or independent juristic opinion and *ijtihād nāqīṣ* or expertise in any madhhab.

### 1.2.5 Development of *Ijtihād* during the 7th-14th Centuries of Hijrah

The static attitude of the scholars of the 4th-7th centuries of Hijrah affected badly the growth and the development of Islamic law in scientific manners. The attempt to protect the dīn of Allāh resulted in the stagnated Islamic law which failed to fulfill the needs of the changed context. However, during the 7th century of Hijrah, the Muslim scholars started to follow the principle of amalgamation by way of selection (*takhyīr*) by opting any of the juristic opinion and suggested not following any madhhab. This

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317 Muhammad bin Muḥammad Abū Ḥūmid, al-Ghaẓālī was born in 450 A.H and died in 505A.H. He was a Shafiʿī jurist and expertise in principles of jurisprudence, logic and tawāwuf. He traveled to many countries such as Baghdād, Hijāz, Syria, Egypt and Ṭūs etc. In his writings are, Al-Mustaṣfū, Ḫiyū ῖlm al-Dīn, Al-Ḍaiʿat, Al-Wajīz. See, Al-Subkī, *Ṭabaqāt al-Shaftī* ‘iyah al-Kubrā, 5:59, Raḍū Kaḥḍūlah, *Mūjam al-Muʾalāfīn* n, 6:97.

318 Al-Muḥaddissīn, Al-Muṣṭaṣfū, 2:350-351.


method was established to reconcile among different madhahib and to counter taqlid and thus, the people were given liberty to adopt any traditional juristic opinion to resolve their problems. Some of the Muslim scholars introduced the principle of exemption/Rukhsah in an innovative sense by authorizing the people to adopt more lenient juristic opinion over an issue and thus, tried to create flexibility in the structure of Islāmic law. Others established the principle of reconciliation (talfiq) by way of amalgamation of different jurist opinions and in this way an attempt was made to reconstruct the existing structure of Islamic law to cope with the changed scenario and to fill in the gap between law and social needs.

For instance, İbû Śūd İfendi contributed in the reformation of the existing structure of Islāmic law by way of selection (takhyīr) and reconciliation (talfiq). Further, the muslim scholars started to decide the contemporary issues of the people by adopting the opinion of a weak madhab, by moving away from their own madhab to another, by following the opinions of the companions rather than their Āimmah and by following the opinions of an obsolete madhahib such as madhhab al-Awzā‘ī, madhhab Sufyan al-Thawrī, and madhhab Dawūd al-Ẓāhirī etc.

In due course of time, it became clear that there is no concept in Sharī‘ah for closing the process of ijtihād and that the assumption of closer is a mistake and a false

326 Ebu Suud al-Efendi was appointed as Seyhul al- Islām of the Ottoman state between 1545-1574 and also performed along service in the lower echelons of the Ottoman religious institution. He had an enormous influence over the politics of the state. He gave detailed fatwas consisted more than few words. See for detail, M.E. Duzdag, Seyhulism Ebusuud Efendi Fatualari (İstanbul: Enderun Kitāb evi, 1972),23.
327 ‘Abd Allāh Efendi, Becet ul-Fatawa (İstanbul: Dār al-Tab’a al-‘Amira, 1266Ah),640; Duzdag, Seyhulism Ebusuud Efendi Fatualari,194.
impression. The intellectuals of Muslim world then realized the immense need for the renaissance of *ijtihād* and started condemnation of blind imitation of the traditional juristic opinion and consequently, the academic research of the Muslim scholars was expanded in its scope to study the foundational principles of Sharī‘ah and different Islāmic legal theories. For this purpose, the Muslim universities started to teach comparative fiqh on a particular issue by presenting various legal views of different jurists about a single problem along with the description of each view, discussing their evidences, comparing them and then preferring the one which based on stronger evidence and public utility.

The inspiration to study law in comparative perspective was taken from the book “al-Umm” written by Imām Shafi‘ī in which he presented views of the opponents and discussed them critically. Ibn Taymiyyah was the foremost among the reformers of this period and declared dire need for the renaissance of *ijtihād* to solve the contemporary issues of Ummah. He studied fiqh according to the Ḥanbalī madhhab but he did not restrict himself to it. He rejected the absolute authority of any madhhab and refused to follow any *fiqhī madhhab* and founded his process of issuing *fatawa* directly on the foundational principles of the Qur’an and the Sunnah without taking help from any of the old methodologies. Ibn Taymiyyah rejected the authority of analogy (*qiyyās*) and consensus of legal opinion (*Ijmā‘*). In his treaty “Al-Muqaddimah fi Uṣūl al-Tafsīr” he discussed many rules and methods of interpretation of the Qur’ānic legal texts.

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330 Ibid.
Shāh Walī Allāh334 was a great jurist of the South Asian Sub-Continent and led opposition to taqlīd here. His objective was to re-fashion and revival of ijtihād rather than rejection or refutation of others. On the one hand, he raised his voice against the innovations and pagan practices in order to protect the true spirit of Sharī‘ah and on the other he suggested that the task of ijtihād should be performed by a collective body of the jurists not by the individuals. He pointed out that the solution of the confrontation among different maslak (madhūhib) could be put to an end only if the Muslim jurists and therscholars start to refer to the original sources (Qur’ān and Sunnah (PBUH)) of Islamic law.335

Muhammad bin Ali al-Shawkānī336 was an outstanding scholar of Zaydī madhhab during the 18th century who started to exercise independent ijtihād. He declared the prohibition of taqlīd and wrote “al-Qawl al-Mufīd fī ḥukm al-Taqlīd” and number of other books on the topic.337 Similarly, Jalāl al-Dīn al-Suyūṭī338 was a great jurist and became an independent mujtahid at his time. He contributed in the development of Islāmic law by his juristic opinions based on the logical reasoning.339

Likewise, ‘Abd al-Wahhāb Najadī340 declared blind imitation of any maslak (taqlīd)

336 Muhammad bin Ali bin Mūḥammad al-Shawkānī was born in 1757 and died in 1835A.D. He was one of the greatest jurists of Yemen and was appointed as chief justice over there. In his writings are “Nayl al-Awtār Sharah Muntaqal Akhbār, “Fath al-Qadīr, and “Irshād al-Fuḥūl. See, Raḍā Ḧaḥṭāl, Muʿjam al-Muʾallīfī n.1:225.
338 He was an independent jurist, a Muḥadith and Mufassir and Historian. He wrote more than five hundred books. He founded an independent school, See, Al-Zarkalī, Al-Aʾlām, 7:34.
340 Muhammad b. Abd Wāḥhāb Najadī, (d.1792) was a Hanbāli Faqīḥ. He started movement against bidʿah. He called the jurists of his time to turn back towards original sources of Sharī‘ah which was the basic aim of his movement. See, ‘Ādil Nuwyḥḍ, Muʿjam al-Mufassirīn,2: 143.
prohibited for the Muslim jurists and started movement against innovations in Islāmic law. He played an important role in the renaissance of *ijtihād* by his writings.³⁴¹

During the 19th century, Jamāl al-Dīn afghānī³⁴² was that great jurist of the Muslim world who inspired a far-reaching approach to infuse many reforms in the political, social and economic fields of Islāmic law. He presented a reformed concept of *ijmāʿ* by suggesting that regional centers of the jurists should be set up in different countries of the world where *ijtihād* could be exercised for the guidance of the common man. These regional centers should be connected with global center which may be established in any of the holy places. The representative of the various centers may get together to exercise *ijtihād* for the whole of the Ummah.³⁴³

Muḥammad ʿAbduh³⁴⁴ was the disciple of Jamāl al-Dīn afghānī, following the footstep of his teacher he suggested that the Ummah should go back to the spiritual and logical legacy of Shariʿah and called for re-opening the closed door of *ijtihād*. Among the reformers of the 20th century was Rashīd Rida³⁴⁵ who inspired by ʿAbduh’s theory of interpretation. He published a voluminous biography of ʿAbduh and completed the commentary of the Qurʿān *al-Manār* started by ʿAbduh in 1927.

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³⁴² Jamāl al-Dīn al-Afghānī was born in 1839 and died in 1897. He was Persian and issued fatwas as an independent mujtahid by not following any maslak and called for the renaissance of *ijtihād*. He gave the concept of institutional *ijtihād*. See, ʿĀdil Nuwyhḍ, *Muʾjam al-Mufassirīn*, 3: 143.
³⁴⁴ Muḥammad ʿAbduh was born a short time before 1850 in the Egyptian countryside and died in 1905. For his involvement, in the Urabi Revote in 1882, he was condemned to exile. In 1888 he was pardoned, returned to Egypt, and was appointed judge when in 1892 ʿAbbas Hilmi became Khedive. Abduh suggested to him reforms of the Azhar University, which were partly carried out. In 1899 Abduh was appointed Mufti of Egypt. Also he became appointed member of the Legislative Council. In his writings are “Al- maqṣad al-Haqiq ʿal-ʾIḥtiḥād” and “Al-Tafsīr… ʾĪbārat an al-ʾĪlām ʿal-ʾUlamāʾ fī Kutub at-Tafsīr. See, Al-Zarkalī, *Al-Aʾlām*, 6:252.
³⁴⁵ Muḥammad Rashīd bin ʿAlī Riḍā bin Muḥammad Shams al-Dīn was born in 1865 at al-Qalāmūr and died in 1935. He was one of the most prominent reformers of Islāmic law during the first half of the 20th century. He started to issue fatwās and published a journal al-Manār at Cairo (1898). He wrote “Tafsīr al-Manār”, “Tafsīr al-Mukhtaṣar al-Mußī”, and Tūrīkh al-Ustūz al-ʾImām al-Shaykh Muḥammad ʿAbduh. See, Al-Zarkalī, *Al-Aʾlām*, 3:52.
He issued many *fatawa* to cope with the changed political and social issues of Ummah. During his process of interpretation, he consulted the provisions of the Qur’ān and ḥadīth and then logical reasoning. Like his teacher, he resorted to the Qur’an, the Sunnah of the Prophet and the consensus of the companions and set a side all legal doctrines established by the traditional jurists, insisted to reform the religious institutions and educational system and resorted to the rationale approaches of interpretation.346

‘Allama Iqbal was the great scholar of the 20th century who insisted on the independent *ijtihād* and re-construction of the legal texts of the Qur’an. In 1924, ‘Allāmah Iqbāl delivered some lectures on the necessity for re-construction of Islāmic legal thought and emphasized to attach the principle of *ijtihād* with Ijmā‘ so that *ijtihād* may be developed into form of an institution and that it should not be confined to the individual *fatāwā* only. 347 He declared that “if we ponder the present life conditions we find a need for a new theology to support the principles of religion and for this we require independent jurists to reinterpret Islāmic law in the light of the changed context. This jurist must possess rational and imaginative faculties to such a vast extent that he may be capable not only to organize but to derive law according to the needs of time and changed circumstances of the people.”348 He declared that the assumption for closing the door of *ijtihād* is pure fiction and modern Islām is not bound by this voluntary surrender of intellectual independence and not this absurd and biased assumption of closing the door of *ijtihād*.349

348 Ibid., 42.
349 Ibid., 178-179.
On the whole, until the 20th century, the jurists of Muslim world were strictly adhered to their own fiqhi sects (madhāhib) and indulged into preaching the fatwās issued by their Āimnah though they might not meet the needs of the Muslim societies. Such a stagnated attitude of the scholars put the Ummah into grave and serious political decay, particularly in the colonial states where there was complete lack of contact between the theologians and the prevailing legal system. The academic condition of Islāmic law was so poor that teaching of Islāmic jurisprudence was abolished almost in all the institutions. 350

1.2.6 Ijtihād in Contemporary Scenario

The contemporary legal writers and judges of the Muslim world are under the great influence of the theories and teaching of Ibn-e-Taymiyyah, Jamūl al-Dīn afghānī, Shūh Walī Allāh and ʿAllāmah Iqbūl. They invite their contemporaries for re-interpretation and re-construction of the legal texts of Qurʾān and Sunnah in the light of the contemporary problems of the Ummah. The contemporary law students tend to analyze the legal theories of the companions and the traditional jurists in the light of their context and objectives. At present, it is suggested that the contemporary Muslim jurists should re-interpret the legal texts of the Qurʾān and the Sunnah in the light of liberal and rationale approaches. This advancement does not mean to transgress the limits and to deviate from the true spirit of Islām and its fundamental sources. The modern time requires applying the broad general principles of Sharīʿah through ijtihād to accommodate the current needs of the society and to refute the challenges of the Orientalists who claim that Sharīʿah consists of rigid immutable system, embodying norms of an absolute and eternal validity which are not susceptible to modification by any legislation. Islāmic law is not competent to fulfill the needs of

350 Amūʿ Allī, Fatwāwā ʿĀlamgīrī, 4:66.
the people of different nations living in a society. Law on the other hand is the product of human reason based on the local circumstances and the particular needs of a given community.\footnote{Zagday, Modern Trends in Islamic Law in Current Legal Problems, 1:212.}

The modern legal theory is based on the presumption that the Qur’ān is a compilation of divine revelations and preserved by Almighty Allah and is as much the property of the later generations as that of the earlier or even the earliest generations. Each generation has equal right to understand and to interpret the Qur’ān in the light of prevailing context.\footnote{Muhammad Shaḥrūr, Al-Kitāb wal-Qur’ān: Qirā’a a Muʻṣirah (Cairo: Sīnā lil Nashr, 1992), 44.} The founder of this theory was Muḥammad Shaḥrūr\footnote{Muḥammad Shahrūr presented a new dimension of interpretation of legal text in perspective of natural sciences, particularly mathematical and Physics. He was an engineer and re-constructed Qur’ānic legal texts in his book “Al-Kitāb wal-Qur’ān” in 1992. His work is then a unique contribution to the interpretation of Qur’ān and Sunnah in particular and to law as a comprehensive system in general. See, Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge: Cambridge University Press, 1997), 249.} who claimed that modern Muslim scholars are more qualified to understand the Qur’ān for their own purposes and exigencies than earlier generations were and that the traditional interpretation of Qur’ān must not be taken as binding upon the modern Muslim societies.\footnote{Hallaq, A History of Islamic Legal Theories, 246; Shaḥrūr, Al-Kitāb wal-Qur’ān, 246.} Another Egyptian jurist Muḥammad Saʿīd Ashmāwī\footnote{Muḥammad Saʿīd Ashmāwī was a legal practitioner. He served as a counselor of the Court of Appeal and a member of State Commission for legislation. He served as the Chief Justice of the Criminal Court and was a professor of Islāmic and comparative law in the University of Cairo. He wrote Uṣūl al-Sharīʿa. See, Hallaq, A History of Islamic Legal Theories, 231.} presented a moderate theory of interpretation. He described that the Holy Book is consisted of divine instructions and provides a guideline to solve the problems and issues of human conduct of all ages in actual reality instead of abstract formulations.\footnote{Yūsūf ʿAbd Allāh al-Qardāwī was born in 1926 at Turūb Miṣr and an eminent jurist of Egypt. He is famous for his lectures under the title of “Al-Sharīʿah wa al-Ḥayūr”. He also issued many fatāwā. He founded a website “Islām online and is an author of 120 books on Islāmic law and jurisprudence. He was a trustee of Center of Islāmic Studies at Oxford University in 2004. In his writings are “The
language and needs of the age. He did not claim for independent *ijtihād* rather focused on *ijtihād Juz‘ī* (specific) and issued many *fatawa* on the issues which were new and found no solution in the traditional ruling and precedents. Al-Qarḍāwī by his process of re-interpretation tried to create a harmony between liberal theory of the modern time and the traditional legal thought. Like Ibn al-Qayyim, he identified his own interpretive process based on the descriptive and applied *ijtihād*.358

Talking about the contemporary situation of issuing fatwaw in Pakistan, there are many many religious institutions of each sect and muftis of these institutions have authority to issue fatawa or to convey the fatawa of their Āimmah in pure traditional style. Constitutionally, the authority to interpret law has been assigned to the High Courts and the Supreme Court of Pakistan. It is the task of the judges to interpret laws and to derive legal rules in the light of the provisions of the Qur’ān and the Sunnah.359 The *fatwā* issued by a *muftī* has no legal validity until adopted and acknowledged by the court through legal decision.360

In this context, it is appropriate to discuss some of the hot issues of Pakistani society which demand flexible interpretation in the light of their objectives and public interest. Among them are the issues of *Ru’yat al-Hilāl* on ’Īd occasion, issue of the validity of the capitalist banking interest, lack of scientific knowledge, issue of unlimited population, illiteracy, issue of the social status of female, issue to reform procedural laws in court proceedings in the light of the objectives of Shariah particularly regarding distribution of inherited property and laws of evidence in

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criminal cases etc. Some of these problems are given here which caused to disrupt the whole structure of the Pakistani society.

The issue of lack of scientific and comparative knowledge of Islamic legal theories is top of the list. Majority of the scholars do not get updated education and knowledge of Islamic jurisprudence in scientific manners in the light of the changed context. It is this reason that they are not agreed to find out any liberal and flexible solution of an issue like the companions and the traditional jurist. Majority of the scholar clamis to follow the juristic views of Imam Abū Ḥanīfah but none of them seems agree to make an honest research of his methodologies and fatawa who ever focused on the public interest and introduced principle of juristic preference to make existing law flexible and accommodative to the changed context. They address only family issues in quite traditional manners and show less concern with pure social and legal issues. Social groups and NGOs however are crying for re-interpretation of the stagnant fataws. For instance, in November 2004, a detailed discussion was arranged by a newspaper “Daily Jang” on the topic of *ijtihād*, its need and capacity of the mujtahid etc. Unfortunately, majority of the participants were not agreed to reopen the closed door of *ijtihād* as practiced by the companions and the traditional jurists.361

Another hot issue is the problem of Capitalist Banking Interest and profit on savings which made the people of Pakistan confused regarding the validity of their earning and savings.362 However, this issue demands flexible interpretation in the light of the changed context and objectives of Shariah. At present the economic system found in the Muslim countries is based on the capitalism and overall economic

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362 This issue however has been held by the Federal Shariat Court by declaring it unlawful and prohibited. See, PLD 1991FSC. In an appeal against the judgement of the Shariat Court, the Shar’iat Appellate Bench of the Superem Court of Pakistan held on 23Dec.1999 and validated the of the Federal Shariat Court.
policy is consisted of interest base transactions which have created a serious anxiety among the people regarding Shar‘ī ḥukm of the interest. Whether Banking interest is equal in status to that of ribā existed and practiced during the lifetime of the prophet (PBUH) or not? The question arose two centuries ago but the Muslims did not realize its seriousness till the present time. Without re-interpreting the text regarding ribā in the context of the past ribā and the modern capitalist interest which is a type of gharar transaction and without any sound analogical deduction the Qurʾānic ḥukm of ribā has been imposed upon the interest of the modern Banking system by the contemporary Muslim scholars.

The issue however, cannot be solved blindly and all necessary parameters of ijtihād must be taken into consideration before arriving at any conclusion. The issue of ribā itself was taken by the companions as an ambiguous issue and they never took the provision in its general meaning that might be “interest” rather the companions had extensive doubts concerning the meaning and the application of the term “riba” and thus, avoided to apply the provision to the all type of the commercial transaction involved interest and gharar.363

While discussing the issue, Ibn Qayyim held that Sharī‘ah demands only a just distribution of wealth or resources and that the private interest must yield to public interest. Any rule which goes from justice to injustice, grace to trouble, and ḥaṣlah to mischief and from prudence to futility can never be a part of Sharī‘ah even though it is included therein by argumentation. Where a just and well ordered society is established, wherein economic justice finds a proper place and expression then notwithstanding the nature of the working process, it will be treated as part of

Sharī‘ah and faith, and it shall be pleasure of Sharī‘ah and authority”. The contemporary jurists such as ʿAbduh, Shahrūr and Ashmawī have held the permissibility of the modern Banking interest.

The other problem is of illiteracy which has become a severe issue for the whole of the country. Pakistan consists of many divided and different sects having its own method and mode of the education. There are narrow minded people who condemn and are against worldly and as well as scientific education and try to confine the young to the study of madāris and are insisting to create a class ignorant of updated and modern knowledge. The credit goes to the wrong interpretation of the ḥadīth that “Getting of knowledge is obligatory for every Muslim”. In this hadith, the word knowledge is a general word and includes all types of knowledge religious and secular but it is being interpreted as a specific text and the term knowledge is used only in the meaning of religious knowledge and is confined to the traditional literal translation of Qurʾān and some fiqh books of later traditional scholars and has no concern to study Islamic legal theories in the light of modern context. The traditional theory of knowledge however, ignored the first and primary text regarding the importance and obligation of knowledge revealed to the prophet (pbuh) which states: “Read in the name of Allāh Who created you . . . Who taught with pen. He taught human being what he did not know before.”

The importance of education can be judged in the prospect of the decision of the prophet regarding the educated prisoners of battle of Badr that each of them was asked by the prophet to teach ten Muslims as ransom for their release.

364 Ibn Qayyim, ʿIḥām al-Mawaqqiʿīn 3:27, 543.
365 See for detail, Rashid Rida, ʿIḥām al-Manar, 2:124; Fazlur Rahman, Riba and Interest, 30; Shahrūr, Al-Kitāb wal-Qurʾān, 466.
366 The Qurʾān: 96: 1-5.
The problem of illiteracy in Pakistan is one of the most burning issues which requires a serious intention of religious scholars because illiteracy itself is against the spirit and objectives of Sharī‘ah. In Pakistan Muslims are 95% so education ratio should be at least 95% in order to abide by the Qur‘ān and the Sunnah (pbuh). ‘Ilm in fact is one of the objectives of Sharī‘ah. For instance, the object behind prohibition of drinking wine is the preservation of intellect if we see in perspective of criminal law but if the same object is studied in perspective of intellectual capacity, it reveals that getting education is necessary to enhance and to develop one’s mental capacity and to preserve it from negative thinking and evils on the one hand; and enables him to live, to earn in more respectable way as if compare with the prevailing circumstances in the developed countries on the other. Hence, it is necessary that both religious and worldly knowledge should be taught in the same institutions. The purpose of education should be to produce people who are imbued with Islamic learning and character. The education should make the people capable of meeting all the economic, social, political, technological, physical, intellectual needs of society.

It is evident that the educated people are more concerned regarding progress of their country and welfare of the people than uneducated persons who in themselves become problem for the development of country. Likewise, special intention should be given to the education of girls. For, Islam did not differentiate between male and female regarding education. Awareness program regarding education should be started from grass root level at the mosques.

Likewise issue of ru‘yat al-Hilāl has become one of the most unsolvable issues for Pakistani people. The religious scholars of Pakistan do not have consensus of opinion regarding this minor issue and consequently, on every ‘Īd occasion people suffer from anxiety and disparity due to stagnated attitude of these scholars.
Irrespective of the fact that Sharī‘ah insisted on unity of Ummah, the scholars of Pakistani society cannot maintain unity among themselves. On every ‘Īd occasion, there are more than two celebrations of ‘Īd in Pakistan and people cannot enjoy this great religious celebration. The issue is still unsolvable by the parliamentary legislation and by the Muslim scholars of Pakistan. This issue should be solved by way of legislation and in scientific manners.

Similarly, the explosive growth of the human population is one of the most significant issues of the present day societies. Three and one half billion people now inhabit the earth, and every year this number increases by seventy million.\(^{368}\) It is a matter of deep concerned that the contemporary society of Pakistan is passing through a period of grave crisis of over-population threatening the whole structure of the society. The population of Pakistan in 2011 was over 187,342,721 at 1.573% growth rate.\(^{369}\)

Due to explosive growth and low resources of earning about 43% of the population lives below the international poverty line of US$ 1.25 a day.\(^{370}\) The reason is that unlike past, today we lack the resources that are needed to maintain high level of culture and honorable living. We are unable to utilize fully and righteously the vast resources we have come to acquire. Lack of scientific knowledge, technology, over population and economic control made us unable to accomplish organized society, to maintain justice, to establish strong moral good consciousness based structure of society. Since the children are the prime focus of family life and of society, the sociologists, psychologists and economists show deep concern for their welfare. The rocketing expansion of the population in recent years has threatened not only the


\(^{369}\) Pakistan, An Official Hand Book (Islamabad: Directorate General Publications), 269.

government but the sociologists and economists of all over the country. It is resulting in poverty, which is creating day by day. The alarming situation of poverty has invited the intention of those who work for the betterment of the family and the society. Sociologists suggest “planned family system” to solve this problem and introduced method of birth control during the 19th century. It is considered now to be an indispensable aspect of modern welfare system. It does not mean to reduce the growth rate of a country to zero, but it aims only a reduction in absolute population size of a country.

So far as concerned concept of birth control policy in Islām, it was existed even before the dawn of Islām and ‘Arab had to use contraceptive methods to prevent unwanted child. Then we find strong and authentic a ḥadīth on the permissibility of birth control policy. Then majority of the traditional jurists declared birth control is permissible in case where a person has too many children and has no capacity to maintain and train them or wife is weak etc. In these and similar cases birth control is permissible. Not only is this but some of the Ulama viewed that in such cases birth control is recommendable. Contrary to this, the majority of contemporary Pakistani mufti is against birth control policy. For instance, Council of Islāmic Ideology of Pakistan held in 1984 that birth control policy should be cancelled by the government because it is against the spirit of Islām. Some of the contemporary Pakistani Scholars however, are in favor of declaring family planning as an issue of Ijtihād.

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The problem of over population can be solved by way of contextual approach in the light of modern context where 43% of Pakistani is living below the poverty line. To overcome this destructive problem, three departments the government, the social welfare institutes and the religious institutions can play constructive role. Under the prevailing ratio of poverty and hunger, it is duty of the Pakistani muftis to review their policy and to solve the issue in the light of the objectives of Shariah which focus on the manintenance and training of the children.

**1.3 Validity of the Process of Ijtihād**

*Ijtihād* or interpretation is a fundamental principle of *Sharī‘ah* and all the Muslim jurists are agreed over the justification of *ijtihād* as an important and third source to derive Islāmic law to govern the affairs of the people and the Muslim state. Though there is no direct Qurānic text regarding the use of logical reasoning in the process of interpretation, yet there are number of Qurānic verses which may be taken as evidence by way of indications and inferences that motivate the believers to use their wisdom to understand a thing logically. These texts are used by the Muslim jurists to justify the legality of *ijtihād*. Among these the verse: “And whomsoever thou come forth (prayer, O Muhammad), turn the face towards the inviolable place of worship. Lo! It is the truth from the Lord. Allāh is not unaware of what you do.” In this verse the believers are directed to turn towards the sacred Mosques when it is not visible. The effective cause of this instruction is probability and calculation. It indicates that when probability and approximation is definitely reliable in case of prayers then it is beyond doubt that it would be unquestionably reliable in case of injunctions relating to the human affairs. Another verse is: “So learn a lesson, O ye 378

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377 The Qur‘ān: 2:149.
who have eyes.” 379 Looking at the Sunnah we find clear and express provisions regarding the justification of *ijtihād* not only by saying but by the practice of the prophet and his companions rather the bulk of Islāmic law is derived through *ijtihād*. For example, once an issue rose before the Holy prophet and a companion ʿAmar bin ʿĀṣ was present there. The Holy Prophet asked him to decide the matter. He said: “I do *ijtihād* in your presence.” The Holy Prophet replied: “Yes, if you resolve the issue rightly, you will get reward twice and if you tried but made a mistake then you will get one reward.” 380

On another occasion when the Holy Prophet appointed Muʿāz bin Jabal as a governor and judge of the province Yemen, the prophet asked him about his methodology of interpretation to decide the issues in case of absence of any direct and express provision of law in the Qurʿān and Sunnah. He replied that he will decide the matter according to his own logical reasoning (*Ajtahidu wala ālū*) and will not feel hesitate to act accordingly. The Holy prophet (PBUH) appreciated him and thanked God who bestowed him with such companions who used their wisdom and logic. 381

Moreover, the Muslim jurists have consensus over the validity of *ijtihād* by their practice. 382

Finally, *ijtihād* by virtue of its nature and function cannot guarantee correct result and the rules derived by means of *ijtihād* are subject to differ, modification and cancellation in the light of changed context. Hence, these rules should not be binding forever. For example, in case of turning the face towards the Kaʿba, the Qurʿānic provision is: “From what so ever place thou come forth, turn the face towards the

379 The Qurʾān: 59:2.
sacred mosque, and whosesoever you may be turn your faces towards it when you pray."383 In this text God has only mentioned the sacred mosque and prescribed that every Muslims should turn his face towards it in prayers. So far as the exactitude is concerned the issue is left to the Muslims to get such exactitude. And if the Muslims exert their minds and means of knowledge, then they have done their duty. It is only this exertion that God has charged on them not the certainty of the exactitude, which they may not be reached. It is this reason that no one has right to say “since the exactitude is unattainable, then let us turn our face any way we like.”384 The traditional Muslim jurists expressly declared that if a case is solved through personal reasoning in the absence of a binding text relevant to that issue, then each of the Muslims is bound only by what he personally considers to be the right and none of them may abandon to follow him blindly.”385

Section Two

Development of Islāmic Law and Legal Text

The revelation of the Qurʾān completed in twenty 23 years to establish a legal system and to enable it to fulfill the needs of the changed scenario. Haḍrat ’Aaisha386 narrates: “Initially those surahs were revealed which explained the matters relating to the Day of the Judgment, Hell and Paradise to induce an acceptance of the basic

383 The Qurʾān: 2:150.
386 Haḍrat ʿĀishah was the daughter of Abū Bakr and wife of the prophet. She was born in 9 Q.H and died in 58A.H. She was a jurist and Adeebah and the companions had to consult her regarding aḥādeeth and her opinion. See, Ibn Ḥajar, Al-I Ṣabāḥ fī Tamyīz al-Ṣḥābah, 4:348.
postulates. When people accepted Islām, then the precepts relating to lawful and unlawful acts were revealed. For example, the prohibition of the consumption of wine was revealed at different stages, if this order was revealed at an early stage, the people might have denied it. Likewise, if the prohibition of fornication had been laid down in the beginning then the people might have rejected it.”

2.1 Definition and Development of Islāmic Law

The political system of Islām does not accept any ruler, king, or authority other than Almighty Allāh. The principle of sovereignty has been established and declared by Allāh Himself: “And to Allāh belong the east and the west, so wherever you turn (your faces), there is the face of Allāh.” The term Shari‘a ḥukm denotes Islāmic law as a body of legal rules deals with the conduct of the people to regulate in the administration of justice. The traditional Muslim jurists defined Islāmic law in comprehensive manners as a communication from Allāh Almighty related to the acts of the people through a demand, option or declaration. Islāmic law is derived from revealed texts through interpretation with the help of the logical reasoning.

According to Islāmic legal system, God is alone supreme having absolute and independent authority over the whole universe. It is stated in Qur’ān: “The Lord of the heavens and the earth, and whatsoever is in between them.” In this sense, Qur’ān and Sunnah are the sources of primary legislation and have been declared fountain head of all other sources through which Islāmic law is to be derived. The most important source of the secondary legislation is ijtihād which keeps Islāmic law compatible and flexible to meet the challenges of the changed circumstances. All other secondary sources such as Ijmā’, analogy, juristic preference, istidlāl, istiṣḥāb,

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388 The Qur’ān: 2:115
389 Al-Sarakhsī, Uṣul al-Sarakhsī, 1:21; Ṣadr al-Sharī‘ah, Al-Talwīḥ ’alā al-Tawdīḥ, 1:29.
custom, *maslahah*, rationale and contextual approaches are based on the principle of *ijtihād*. The bulk of the Islāmic law owes its development to the juristic opinion of the companions and the traditional jurists.\textsuperscript{391}

The whole structure of Islāmic law and a Muslim society in its early period passed through four stages of social evolution. At the first stage the purpose of the divine legislation was to reform the existing laws of the people not to confuse the people with new things with which they were not familiar. The second stage started when they improved their social conditions and learned more civilized techniques of living and began to form a civil society. The third stage evolved when the people founded a new state of Madinah, conflicts appeared and the people needed for authority to administer peace and justice and to settle their disputes. The fourth stage started when disputes rose among different groups and nations of the state and the people realized a need for a supreme ruler to regulate the affairs among different cities of the state.\textsuperscript{392}

### 2.1.1 Function, Purpose and Codification of Islāmic law

The primary task of Islāmic law is to control human actions and to provide justice to all on equal basis. Law works within the parameter of the constitution of any nation. Islāmic law performs its task in the same manners according to the divine Constitution of Ummah. It is duty of Islāmic law in a Muslim state to arrange to preserve Dīn of Muslims, to ensure security of the lives of people, to secure their wealth, to secure the intellect of Muslims and to secure the self-respect of its citizen.

The objectives of Islāmic law are not different from law of any other legal system rather Islāmic law is the pioneer and presented legal theory of fundamental


\textsuperscript{392} Shāh Wali Allāh, *Hujjah Allāh Balighah*, 1:82
rights and thus founded international law in the history of the legal knowledge and emphasized on their surety and security. Like common law system Islāmic law is based on the presumption of the public interest and that the interest of the majority will prevail over the interest of the individual in case of contradiction between the two. As declared by Aristotle that good is the same for the individual and for the state, nevertheless, the good of the state is manifestly is greater and more perfect good, both to attain and to preserve. To secure the good of one person only is better than nothing; but to secure the good of a nation or a state is a nobler one.\(^{393}\)

Likewise, Imām Shatibi observed that the purpose of legislation and Islāmic law is to provide benefits for people in this world and in the world hereafter. The whole social structure of this world is moving around the interests of the people. *Sharī‘ah* aims to secure these interests and has prescribed certain rules in case of contradiction between these interests.\(^{394}\) The end of law in every legal system is to promote the interest of men as an individual and as a society. So is Islāmic law which is based on the principle of public utility. The codification and the compilation of the Constitution of Muslim Ummah (Qur‘ān) was started with the start of the revelation when the prophet ordered his companions to write down various verses and chapters of the Qur‘ān in order to preserve it. The companions started to write provisions of the Qur‘ān under the guidance of the prophet which he was told by Jibra’il. The whole of the Qur‘ān however, was not written down in the presence of the prophet rather major portion of it was preserved in the heart of the companions who memorized it.\(^{395}\) Similarly, the companions started to compile Sunnah of the prophet during his life time but he did not encourage his followers for


\(^{394}\) Al-Shāṭibī, *Al-Muwāfaqāt*, 1:34.

this with the fear that it might not mixed with the Qurʾān. There are however, some writings and letters of different companions to one another mentioning ahādīth of the prophet. For instance, Ḥaḍrat Abū Bakr wrote to Anas bin Mālik and mentioned ahādīth of the prophet regarding duty of Ṣadaqah.\footnote{396 Al-Bahūṣī, Sunan al-Kuḥrā, 4:84; Abū Dāwūd, Sunan abī Dāwūd, no.1567,546.}

The systematic compilation of the Qurʾān took place during the period of first Caliph with the advice of ʿUmar. Abū Bakr constituted a committee headed by Zayd bin Thābit\footnote{397 Zayd bin Thābit al-Anṣārī was a great companion and writer of the Holy Qurʾān. He started to write with the order of the prophet. He was the first who wrote on the subject of distribution of the deceased property, See, Al-Sheristānī, Al-Mīlāl wa al-Nāhī, 1: 236; Ibn Ḥajar, Al-Iṣbaḥ fi Tamyīz al-Ṣaḥābah, 5:324.} to collect and to compile Qurʾān. In this way the first compilation of Qurʾān was prepared in 631 A.D (11 AH) approximately. The second compilation was prepared by the order of 3\textsuperscript{rd} Caliph ʿUthmān during the year 646 A.D. It was written down according to the Qurayshī dialect and was kept in the prophet’s mosque.\footnote{398 Abū Ṣabāḥ, Lamḥāt fi ʿUlūm al-Qurʾān,13-138; Al-Qaṭṭān, Ṣabāḥīth fi ʿUlūm al-Qurʾān, 2-6.} In the later period it was written down according to the standard rules of Arabic language to make it easy to understand for an ordinary man and to protect the Qurʾān from falling in to errors of recitation by the ignorant people. In this way, the later compilations were slightly different from ʿUthmānī Maṣḥaf.\footnote{399 Ibn Khaldūn, Muqaddimah fi Tārīkh (Egypt: Maṭbaʿa Muṣtafā Muḥammadī,1989), 145.}

The calligraphy of the Qurʾān started during the period of 3\textsuperscript{rd} century of Hijrah (9\textsuperscript{th} A.D) and the Qurʾānic parts (juz or pārah) were further subdivided under the titles of rūkūʿ (one fourth), nīṣf (half), and thalāṭah (one third) of the pārah etc. Each sūrah was started with different signs. Starting point and ending point of each verse was introduced as well as a variety of punctuation marks and dots and dashes were added to the texts during this period.\footnote{400 Al-Suyūṭī, Al-Itqān, 4:160-165; Abū Ṣabāḥ, Lamḥāt fi ʿUlūm al-Qurʾān, 133-138.} After the period of the Caliphs, the scholars of Hijūz collected the various fatāwā of ʿAbd Allāh bin ʿAbbās, Abd Allāh bin
῾Umar, and ῾Āishah bint Abī Bakr. The scholars of Iraq collected the rulings of ῾Abd Allāh bin Mas῾ūd and ῾Alī bin Abī-Ṭālib. In this way, during the first and second century of Hijrah, two types of compilation of legislative material were found from two radically different sources: The first one was the Arabian associated with the pre-Islāmic laws and customs that were practiced or approved by the prophet and the second one was a systematic compilation incorporated into the body of Islāmic law derived from the Sunnah of the prophet (PBUH).

The Muslim jurists of that period like Imām Mūlik, Abū Ḥanīfah and Shafi῾ī started the compilation of pure legal and operative rules of Islāmic law. The question of one and same codification under the supervision of the government did not rise rather Muslim jurists were not agreed to do so. The Muslim rulers of the later period started to codify Islāmic laws and the caliph Abū Ja῾far Ma῾ṣūr (d.158 A.H) was the first who attempted for the codification of Islāmic law.

The scholars of the Sub-Continent though did not evolve in ijtihād yet they collected and compiled fatāwā by the order of the emperors. This was the last historical moment when the traditional Islāmic legal system may be said to have been still undiluted by the Western cultural penetration.

During the colonial period, the first attempt was made by the Ottoman state to codify Islāmic law. This work was resulted under the title “Majalla al-Ahkām al-‘Adaliyyah” prepared by the commission of scholars and jurists which took them

401 ῾Abd Allāh bin ῾Umar bin Khattab was one of the gretest companions of the prophet. He was born in 10 A.H. and died in 73 A.H at Makkah. See Al-Zarkalῑ, Al-ATEGORY, 4:246; Ibn Ḥajar, Al-ISTRY, 2:338.
402 Shāh Walῑ Allāh, ῾Ḥiyyah Allāh al-Bālibghah, 329.
404 Ibid.
405 Haim Gerber, Islāmic Law and Culture,1.
seven years of hard labour to complete from 1869 to 1876. In 1931, Egypt had to resort to the doctrine of Siyāsah in order to restrain the practice of child-marriage.\textsuperscript{406}

The modern codification of Islāmic law however, is not based on any particular school of law rather is based on the principle of takhyīr, rukhsah and amalgamation of foreign laws which are not against the spirit of Sharī‘ah to fulfill the needs of modern times. It, perhaps, started in 1953 when the law of Personal Status was passed in Syria, followed by similar laws in other Muslim countries. The Qur‘ānic verses were re-interpreted and many of them that were treated by the classical jurists as ‘moral obligations’ were interpreted as ‘legal duties’ and the law amended accordingly.\textsuperscript{407}

2.1.2 Classification of Islāmic Law

The divine Constitution of Muslim Ummah consists of almost 228-500 legal texts which deal with different categories of law. The different legal texts have different modes of expression and contain different laws which may be classified into different categories according to their subject and scope. Hence, like positive law, Islāmic law may be divided into different categories based on its nature, mode of expression, scope, and function etc. On the basis of its nature, Islāmic law may be divided into three types like general provisions, specific provisions, and provisions of combined nature. On the basis of its mode of expression Islāmic law may be divided into two types, positive mode and negative mode of expression. On the basis of its scope and extent and regarding its definitive or probative values, Islamic law is divided into five types by Jamhūr al-‘Ulamā while Imām Abū Ḥanīfah divided Islāmic law into seven types. Islāmic law on the basis of its functions may be divided into many kinds such as

\textsuperscript{406} Tyser, and Haqqi, \textit{The Mejelle}, 109.
\textsuperscript{407} Coulson, \textit{A History of Islāmic Jurisprudence}, 202-217.
as the constitutional law, international law, public law, private law, fiscal law, law of inheritance and property etc.

2.1.3 The Characteristics and the Problems of Islāmic Law

Islām has laid down fundamental frame work to be secured on permanent basis to maintain balance and stability in society and within that man has been authorized to undertake detailed legislation as and when required. This is what is called in Islāmic reconciliation of the stability with the change. In western legal system, law is considered as a set of the commands by a supreme authority and as a source to achieve administration of justice in the society. The rules of law administered by the courts and customs form a part of the law when recognized and acted upon by the courts in their decisions.

Islāmic law is considered as a command of Almighty Allāh and sovereign of an Islāmic state exercises delegated power to legislate and to command in the administration of justice. It is stated in Qurʾān: “Say: Who has forbidden the adornment of God which He hath brought forth for His bondmen, and the good things of His providing.” This provision is an answer to those who dare to prohibit what God has not prohibited. Islāmic law is based on definite and certain principles and is applicable to all without any distinction. Further, Islāmic law is a mixture of rigidity and flexibility. It is rigid in the sense that it has its origin in the divine instruction which cannot be changed or abrogated but it is flexible and can be modified and changed through the process of ijtihād.

The legislative portion of Islāmic law through ijtihād is subject to amend, to alter, and to change to accommodate new circumstances and to secure national

409 Friedmann, Legal Theory, 274-278; Salmond, Jurisprudence,58.
410 The Qurʾān: 7:32.
interest. For example, Ribā and corruption are prohibited but no punishment prescribed on charging Ribā or on taking money through unfair means. It is for the state to legislate and to prescribe a punishment for them which shows the flexibility of Islamic law.\(^{412}\) Islamic law developed through a continuous process like law of other nations. History shows that the Muslims were made gradually to accept and to abide by the changed revealed laws. The best example of this is the texts of prohibition of wine, which were revealed in three steps. Firstly, it was revealed: In both there is great sin and benefits for people, but the sin of are greater than their benefits.\(^{413}\)

Then, the second verse was revealed regarding the prohibition of wine only before or at the time of prayer. It was revealed: “O you who believe! Approach not al-ṣalāt when you are in a drunken state until you know of what you utter.”\(^{414}\) Finally, the last text revealed and it was clearly announced that the intoxicants, games of chance and some other things are impure things and declared as acts of Devil. It was revealed: “O you who believe! Intoxicants and gambling . . . are of abomination of Shaitan’s handiwork. So avoid that in order that you may be successful.”\(^{415}\)

Islamic law has realistic nature and the texts of the Qurʾān and the Sunnah (PBUH) deal with the factual realities of the life. Pre-supposition is basically excluded from its philosophy of legislation. It is reported that the Holy Prophet said: “God has enjoined certain enjoyments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy and deliberateness, as He never forgets, so does not ask me about them.”\(^{416}\) This method is declared as method of realism. Lastly, Islamic law is unique law in the sense that it

\(^{412}\) Haim Gerber, *Islamīc Law and Culture*, 141.

\(^{413}\) The Qurʾān: 2:219.

\(^{414}\) The Qurʾān: 4: 43.

\(^{415}\) The Qurʾān: 5:90.

is consisted of both revealed and manmade rules of conduct. A great portion of Islamic law consisted of manmade laws through juristic opinions derived from legal texts of Qur’an and Sunnah. At present however, Islamic law has been facing many problems due to closing the door of ijtihad. The most serious issue of Islamic law is that it is misinterpreted not by the foreigners but by its holders. The majority of the Muslim scholars is the follower to a particular sect or madhhab and stick to believe that the juristic work done by their Āimmah constituted the final authority and must be applied to the current issues faced by the Muslim in this quite different scenario of 21st century. This is the sole reason which has led to the stagnation of Islamic law and caused to create misconception among the philosophers of the developed world regarding Islamic who regarded Islamic law as a private law which can control only family and religious issues has no concern with the scientific realities of the modern world.\(^{417}\)

Another problem of Islamic law is undue taqlid of the traditional fatwas and disassociation of the contemporary Muslim muftis and scholars from the contemporary problems of the Ummah. Extreme religious thinking and lack of scientific understanding of Islamic law caused to create chaos among the people. In majority of Muslim countries, states are working under the influence of English-European democratic system. State legislation is based on the modern concept of legislation by the parliament which is often condemned by the religious scholars. It is claimed that the work of fiqhahā is full of reproachful judgments on conditions of the present day. What the people adhere to as usage and custom is abuse and evil in the eyes of God.\(^{418}\) Further, the majority of the Muslims mixed up Islamic law with the Sharī‘ah and treats both on equal level. For them there is no difference between the

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provisions of the Holy Qurʾān, the Sunnah which constituent Sharīʿah and the juristic opinions of the traditional jurists. Another problem is the notion that Islāmic law is a sacred law and cannot be changed or modified in the light of the changed context. It is this reason that the term “Islāmic law” came to be expressed as an irrevocable Will of God. 419 This so called notion has confined Islāmic law to the religious duties of Ummah and made the Western-European scholars capable to claim that Islāmic law is just as a set of religious duties pure and simple.420

Moreover, the existing structure of Islāmic law has no compatibility with the current socio, economic and political scenario of the modern world. The so called cleavage between Islāmic law and the positive law has created many serious problems among the citizens of the modern states. Along with these problems, Islāmic law is being criticized by the Western-European countries and the role of the traditional Muslim jurists and qādis is being misinterpreted by them. For example, the view of the Western-European scholars concerning the powers of a Muslim judge is that the Qādi or the Muslim judge had great and unguided discretion and he depended simply on his own whims and wish for the equities or he acted on his own prejudicial opinions of the matters. 421 Not only is this but the Muslim jurists are being criticized for their style and way of judgments. 422 Justice Felix Frankfurter once remarked that the United States Supreme court “is not a tribunal unbounded by rules. We do not sit like a Kadi under a tree dispensing justice according to the consideration of individual expediency.”423

419 Gibb, Mohammedanism, 67.
420 Coulson, Islāmic Law and Legal Theory, 56; Gibb, Mohammedanism, 67-68.
421 Ibid.
422 Haim Gerber, Islāmic Law and Culture, 10.
2.2 Development of Islamic Legislation and Legal Text

The divine revelation of the Qur‘ān is divided into phases like Makkah revelation (before migration) and Medinite revelation. The Makkah legislation of the Qur‘ān was consisted of the unity of God, stories of the past nations, and the matters of reward in form of paradise and hell. No legal enactment was made during that period and the only legal order which issued was about the obligation of prayer.424 During the Medinese period, legislation was primarily concerned with the organization of the Muslim state and majority of the social, economic and legal orders were revealed during this period. The last three pillars of Islam were revealed. The consumption of Pork, intoxicants, dead animals and blood were declared prohibited. The punishments for adultery, fornication, murder, theft, robbery were fixed. Several legislations were made in order to tackle the political, economical alliances with Christians and Jews.425

Legislation in Islamic legal system is normally initiated in the form of an opinion by a mujtahid who is to endeavor hard to comprehend the object and the intention of the Law-Giver.426 The criterion of Islamic legislation is that every believer is not competent to legislate. This right belongs to a class of specialists of Islamic jurisprudence, called mujtahid. Similarly, the process of legislation in an Islamic state is bound by certain conditions such as that the legislation must be in accordance with the legal texts of Qur‘ān or Sunnah, the fresh legislative enactment must not against the spirit of general principles of Shari‘ah and that the legislation through judicial process should be in the light of the objectives of Qur‘ānic legal texts and public interest.”427 Like English legal system, the legislative work of Shari‘ah can be divided into different categories such as legislation to make new laws, legislation

426 Al-Shātibī, Al-Muwāfaqāt, 4:106.
427 Ibid., 1:78.
to reform existing laws and legislation to identify the nature of the law. In Islāmic legal system, Qur’ān is the primary source of all legislative work of Islām. Similarly Sunnah forms part of Qur’ānic legislation. Moreover, to make new laws system of interpretation or ijtihād is existed in Islāmic legal system.

In this way, Islāmic concept of legal text is richer and older than the concept of legal text in any other system of the modern world. History shows that the modern concept of English-European statute law or legal text was seeded during the 13th century and some written legal texts were mentioned in the Statute of Merton 1235 and Magna Carta 1215 and repeated again and again and confirmed thirty eight times before the close of the Middle Ages. Then the term legal text was not clear in the early statutes of English law and included every command of monarch, judicial decree and the work of the Parliament. It was in later period when it became clear that legal text includes only legislative work of the Parliament. Contrary to this, Islāmic concept of legal text was very much clear since its birth and the Muslim jurists did not mix-up legal texts of the Qur’ān and authentic Sunnah with the juristic opinion and judicial decisions of the courts. The traditional Muslim jurists established general rules for the study of the legal texts of the Qur’ān and Sunnah and drawn many secondary rules to interpret these texts in the light of the changed circumstances and needs of the people. The development of Islamic statutory law and legal text may be discussed as:

2.3 Qur’ān as an Immutable Statute

The Qur’ān is comprised of speeches of Allāh and was revealed to the last Prophet. The word “waḥī” in Arabic is used in the meaning of revelation and means a secret transfer of information.\(^{428}\) Literally, the word Qur’ān is verbal noun and has derived from the Arabic word “Qirū’t or qara’a” which means to read or to recite

something. The title “al-Qur’ān” to the revealed Book of Allāh to His last prophet has set by Almighty Allāh Himself. It is stated in the Qur’ān: “Verily, this Qur’ān guides (human beings) to that which is most just.” In technical sense, it is defined as Book of Allāh revealed to His Apostle, Muḥammad (pbuh), written in maṣāḥif, in Arabic language and transmitted to us through an authentic and continuous narration without any doubt. The subject matter of the Qur’ān is human being to invite him to the obedience of God, to encourage him to be righteous in his conducts not only to God but to himself and to his fellow beings, and to train him to administer peace and justice on the earth. Then all the contents of Qur’ān were arranged manually by the prophet under the guidance of the angel Jibra’īl. The arrangement of Qur’ān is neither chronological nor thematic.

The phenomenon of the Qur’ān however, is unique in literature and cannot be understood in the light of the standard norms prescribed to understand man made legislation. It is stated in the Qur’ān: “And this Qur’ān is not such as could ever be produced by other than Allāh.” The Qur’ān has its own narrative pattern where stories have been narrated in rambling. Likewise, the language of the Qur’ān can not be compared with linguistic rules or rules of the rhymed poetry. The Qur’ān however, never claimed to be a literary book or a book of poetry. For, it is clearly stated in the Qur’ān: “Nay, they say these (Qur’ānic verses) are mixed up false dreams! Nay, he (Muḥammad) has invented it! Nay he is a poet. Let him then bring us

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431 Al-Suyūṭī, Al-Itqān fi ’Ulūm al-Qur’ān, 1: 32.
432 Ibid.
434 The Qur’ān: 10:37.
a verse like the one that were sent before.”

The uniqueness of Qur’ān is located in both its message and language. Not only is this, it challenges all the creations of the universe to bring a book of the stature of the Qur’ān. It has been declared by God: “Say: If all mankind and the Jinn would come together to produce the like of this Qur’ān, they could not produce its like even though they exerted all their strength in aiding one another.” In this text God has made a challenge for all those who did not believe in the divine revelation to bring a book or even a single piece like Qur’ān.

2.3.1 Parts of the Qur’ānic Statutes

Qur’ān is not like other books written for legal purposes or for social reforms. The traditional view regarding the statutes of the Qur’ān was that the Qur’ān is basically a Book of religious guidance and is not easy reference for legal studies and that legal provisions are comparatively limited and few in number. It was argued that the Qur’ān consisted of a code of divine exhortations and moral principles. Further, legal bearing of some injunctions is disputable, whereas in some others it is simultaneously applies to more than one sphere of law. The modern juristic view is different from the traditional view in the sense that it contends that the Qur’ānic precepts should be studied as legal norms rather than to take it as a Book of moral exhortation.

The parts of the Qur’ānic statutes may be discussed as:

2.3.1.1 Preamble of the Divine Constitution

The preamble of the divine Constitution of Muslim Ummah describes the purpose and the objective of the Qur’ānic statutes and has been considered as an opening key for

436 The Qur’ān: 21:5.
437 The Qur’ān: 17:88.
the whole of the Qurʾān. Like preambles of the constitutions of other nations, preamble of Islāmic constitution sheds on the purposes of the statute to which a statute intend. The title of the preamble is al-Fūtihah which literally means to open or to introduce some thing.\textsuperscript{442} The preamble of the Muslim Constitution started with the praise of Almighty Allāh. It pronounces Islāmic monotheism (tawḥīd) that only Allāh Almighty is Rabb or Lord of all creatures of the universe and He is alone Who deserves to all types of worship and obedience. He has the sole authority of the Day of Resurrection.\textsuperscript{443}

In this way, the preamble of the divine Constitution has established a fundamental and basic principle of interpretation that all methods and techniques of interpretation must have their origin in the guiding principles of the Qurʾān prescribed by Allāh Almighty. Unlike modern theory regarding the status of the preamble that it does not form an important part of a statute and that where the language of the statute is clear, the preamble must be overlooked by the courts, Islāmic legal theory considers preamble of the Qurʾān as a necessary part of the Qurʾānic statutes which cannot be ignored in any case and is declared as a key to open the discussion regarding law and to explain the whole policy of Islāmic legal system. During his process of interpretation a Muslim jurist or judge cannot ignore the content and spirit of the Qurʾānic preamble and he must keep in mind that what he derives through interpretation must not be against the spirit of the divine preamble.

\textbf{2.3.1.2 Juz of the Qurʾān (part)}

The Muslim jurists tried to facilitate the readers of the Qurʾān by its division into thirty parts. Each of them named as juz which means a part. These ajzā are further sub-divided into four sections and each of them comprising a quarter of juz and has

\textsuperscript{442} Ibn Fāris, \textit{Maqa`yis al-Lughah},3:25; Rohi, al-Ba`alBaki, \textit{Al-Mawrid}, 55.

\textsuperscript{443} The Qurʾān: 1:1-7.
been declared as *ḥizb* (section). Each *juz* may or may not have one or more than one surahs.\(^{444}\)

### 2.3.1.3 Sūrahs of the Qurʿān

Primarily, the Qurʿān consists of 114 chapters called as sūrahs. The word “sūrah” literally means a chapter or an enclosure of something.\(^{445}\) The word sūrah has been revealed nine times in the meaning of a unit, chapter and section. It is stated in the Qurʿān: “A sūrah which I have sent down and which I have enjoined (ordained its law).”\(^{446}\) In this text the word sūrah denotes a chapter of the Qurʿān. Except sūrah al-Fātehah, all other surahs are arranged in descending order. Starting from the largest surah of 286 verses al-Baqarah (the cow) the Qurʿān concludes with the sūrah al-Nās (human being) which consisted of six short verses. Except sūrah al-Tawbah (repentance), all sūrahs are started with the name of Allāh, the Most Gracious, and the Most Merciful. Each sūrah comprises of number of verses named *āyah*. Each sūrah of the Qurʿān contains certain legal texts of general and specific nature, title, introductory letters, and words etc. The content of a sūrah or chapter of the Qurʿān can be divided into four types such as title, introductory letters, verses and wording.\(^{447}\)

Each chapter of the Qurʿān has its own particular name or title which was set by the prophet himself. Many companions compiled some pieces of revelation with the name of sūrah and placed a particular verse accordingly. For example, the compilations of Ḥadrat ʿAlī, Ibn Masʿūd contained sūrahs along with their particular names such as al-Baqarah, al-ʿAalq, Āl ʿImrān etc and their respective orders according to the time of their revelation.\(^{448}\) The title of sūrah sometimes indicates towards the subject matter of that sūrah. For example, the title of 1st sūrah of the


\(^{446}\) The Qurʿān: 24:1.

\(^{447}\) Al-Zarkashī, *Al-Burḥān fī Ḥilm al-Qurʿān*, 1:244.

Qur’ān is “al-Fātihah” which literally means to open or to introduce some thing. As “al- Fātihah” is the first sūrah or the beginner of the Qur’ān so it was named as al-Fātihah. Sometimes, the title or name of the sūrah was taken from any event, or from mentioning of something in that particular sūrah. For instance, the title of the 2nd sūrah of the Qur’ān is “Al-Baqarah” which means a cow and indicates that this sūrah has some mentioning of a cow.449

Most of the sūrah has been named with the words mentioned in the starting texts or verse. For example, sūrah al-Nisā’ (the women) was named because the word Nisā’ has been mentioned in its early text. Similarly sūrah al-Muḥammad, the title of the sūrah has been derived from the 2nd verse of the sūrah. Sometimes, the title or the name of the sūrah was taken from any mentioning in that particular sūrah. For example, the 3rd sūrah of Qur’ān is named as “Āl Imrān” which has been taken from the mentioning of the term “Āl Imrān”. Some sūrahs have been assigned names by the disjointed letters (ḫurūf muqattāt) of Arabic alphabet with which those sūrahs are started. For example, sūrah al-Yāsīn is named because of the letter Yāsīn has mentioned in the beginning of the sūrah.450

Likewise, many sūrahs of the Qur’ān started with particular introductory letters of the alphabet which are sometimes clear in their meaning and sometime ambiguous and unclear and have no obvious meaning in themselves. Most of the sūrahs are started with a coherent and meaningful text. There are however, 29 sūrahs which are started with the letters of Arabic alphabet. These introductory letters of sūrahs are sometime intelligible and are able to be understood and have an accurate and precise relationship with the subject-matter and occurrence of the sūrah. In some cases, the introductory letters are unintelligible seem meaningless and difficult to

explain. The presence of these letters is mysterious for Muslim jurists. The Muslim jurists have different opinion over the issue. A group of the jurists contend that presence of such word is just to draw the intention of the prophet to the impending revelation. Some of them hold that these letters are abbreviation of actual words relating to God and His attributes and can be understood only by those who have deep fellowship with God. Others believe that these letters are intended to show the mysterious, inimitable nature of the Qurʾān. It is reported from Abū Bakr that in every divine Book there is some element of mystery and the mystery of the Qurʾān is the opening of the sūrahs.451

The Muslim commentators (Mufassirūn) believed that there is a mathematical relationship between the introductory letters and their occurrences in their respective sūrahs, as well as in the other sūrahs of the Qurʾān. For example, sūrah Qāf begins with the letter “Qāf” as stated: Qāf, by the glorious Qurʾān”452 In this sūrah the Arabic letter “Qāf” repeated frequently in this sūrah than any other letter of the Arabic alphabet and the ratio of the letter “Qāf” to the total number of letters in this surah is higher than any other letter used in any other sūrah among one hundred and 113 sūrahs of the Qurʾān. However, the intended meaning of the letter “Qāf” is unknown. Neither the Holy prophet explained the meaning of this letter nor the grammatical context indicated to its meaning and hence it remained obscure to define. The commentators have different opinions regarding the meaning of this letter. Some of them declared that the letter “Qāf” is an abbreviation of the word Qurʾān, while other contended that it represents the phrase “qādiyāh al-ʾamr” which means that the matters has been destined.453

452 The Qurʾān:50:1.
The Muslim jurists have different opinions regarding the arrangement of the surahs at their particular places. The majority of the Muslim jurists however, opined that the surahs are set out in the Qur’ān by the divine revelation. The location of each surah reflects its origin in the divine wisdom which can be proved by certain ways such as the surahs starting with the letters ḥā-mīm all following with each other and the ending content of one surah is in complete harmony with the beginning content of the subsequent surah. Each surah has a principal theme and all the verses revolve around that. No verse or group of verses stand alone rather they have a strong relation with their principal theme.\[454\]

The traditional Muslim jurists made seven groups of the total surahs and each group contains some Makkah and some Medīnan surahs. Each group logically leads to the next and in harmony with the others. The first group contains five surahs started from surah al-Fātiḥah and ended at surah al-Māʾīdah (no.5); the second group consists of four surahs and ended at surah al-Tawbah (no. 9); the third group started from surah Yūnus and ended at surah al-Ňūr (no. 24); the fourth group consists of nine surahs and ended at surah al-Ahzāb (no. 33); the fifth group started from surah al-Šabā and ended at surah al-Hujrāt (no. 49); the sixth group consists of fifteen surahs and ended at surah al-Taḥrīm (no. 66); the last and seventh group started from surah al-Mulk (no. 67) and ended at surah al-Nāṣ (no. 114).\[455\]

On the basis of their verses, the surahs of the Qur’ān have been divided into four categories such as category of ṭawīl (long) surahs which contain ten surahs starting from al-Baqarah (no. 2) to surah Tawbah (no. 9), maʿīn surahs which means surah consists of one hundred or more than hundred verses starting from surah Yūnus

\[454\] Al-Suyūṭī, Al-Itqān fi 'Ulūm al-Qur'ān, 2: 376.
(no10) and ended in sūrah Ṣabā (no.34), sūrah mathānī are those sūrahs which consist of less than one hundred verses such as sūrah Qāf (no.50) which contains only 45 verses and sūrah al-Najm which consists of 62 verses and lastly, the shorter or mufassal suraḥs like sūrah al-Ṭīn (no.95), al-Sharāh (no. 94) and al-Nās (no.114) etc. This division is based on a hadith of the prophet that he has been given seven long sūraḥs in place of Tawrāh, the maʿān in the place of Gospel (Injīl), the mathānī in the place of Psalms (Zabūr), and that he has been distinguished with the mufasṣal. Generally, the Qurʿānic sūraḥs consist of different types of subject-matters. Hence, it is difficult to locate a particular legal text relevant to an issue. For this the interpreter must have a comprehensive study of all the sūraḥs of the Qurʿān to take guidance in his process of interpretation.

2.3.1.4 Legal Text (Naṣṣ) of the Qurʿān

Each of the Qurʿānic sūraḥ contains different texts or verses. The order of the texts or verses in each sūraḥ was set by the prophet himself. It is reported from ʿUthmān bin al-ʿĀṣ that once he was sitting with Allāh’s prophet, he rolled his eyes upwards in a star, and then after a while he lowered them and said: “Jibraʿīl came to me and ordered me to place this āyah in this place in this sūraḥ.” Then there are number of ahādīth which maintained that the prophet had recited verses with their orders during prayer and in many times made references with the number of the order of verses in a suraḥ. A single verse (āyah) of the Qurʿān literally, means a sign or symbol by which a person or thing is known. The formal concept of the legal text or “naṣṣ” consists of the wording of the Qurʿān and Sunnah only and it does not include any

456 Al-Zarkashī, Al-Burhān fī ʿUlūm al-Qurʿān, 1:244.
457 Aḥmad bin Ḥanbal, Al-Musnad, no 376, 436.
458 Imām Muslim, Ṣaḥīḥ al-Muslim, no.1766, 2:387; Abū Dāwūd, Sunan abī Dāwūd, no. 4309, 3:1203.
459 Ibn Fāris, Maqāyīṣ al-Lughah, 1:259; Rohi al-BaalBaki, Al-Mawrid,212.
other piece of legislation.\textsuperscript{460} In contemporary legal language, the word legal text has the same meaning as the term “statute law or legal text” used in English-European legal system for every enactment made and passed by the Parliament. It includes legal provisions of the Qur’ān and Sunnah and the legislative enactments through ijtihād. To arrive at just and fair result the interpreter understands not only the relevant text but tries to understand the surrounding texts in the light of their contexts because it is quite possible that a particular \textit{hukm} may be found into pieces scattered in different texts and sūrahs. Here, the task of the interpreter is to collect all the relevant texts from the whole of the Qur’ān and then try to derive a law by way of reconciliation.

\textbf{2.3.1.5 Words of a Legal Text}

A single text or verse is composed of different words of different characters. The expression \textit{laff} means utterance and in this sense, a word is comprised of letters pronounced by a person.\textsuperscript{461} It is synonymous to the expression “word” of English language and is used in the meaning to throw something from the mouth.\textsuperscript{462} This meaning is based on the text of Qur’ān: “Not a word does he (she) throw but there is a watcher by Him (ready to record).”\textsuperscript{463} It is stated that the \textit{laff bil kalām} has been borrowed from throwing something from mouth.\textsuperscript{464} Technically, the expression \textit{laff} has been defined as reliable voice consisted of the letters of alphabet.\textsuperscript{465} A single text consists of different types of words, so it is necessary for an interpreter to have knowledge of all types of words in the light of Arabic lexicon and rules of grammar. The Qur’ānic legal texts consist of words of one clear meaning while some of them

\textsuperscript{460}Al-Shāfi‘ī, \textit{Al-Risālah}, 60; Al-Baṣrī, \textit{Al-Mu’tamad fī Uṣūl al-Fiqh}, 1:6.
\textsuperscript{462}Ibn Fāris, \textit{Maqāyīs al-Lughah}, 5:259.
\textsuperscript{463}The Qur’ān: 50:18.
have vague meanings. Similarly, some Qur’ānic texts contain words of foreign language which entered in Arabic language due to number of factors such as usage of foreign words by Arab, adaptation of certain foreign words due to commercial transaction and contacts of Arab with other nations.\textsuperscript{466}

2.3.1.6 Context of a Text

The context of each text made up of two components that are the surrounding words and the related texts and secondly, the circumstances (\textit{asbāb al-nuzūl}) which refer to the legislative history, circumstances, the time, and place etc. As majority of the Qur’ānic provisions are in the manners of speech and are not like legal provisions contained in any constitution of the positive law, so they can be understood properly in the light of their contexts. The \textit{asbāb al-nuzūl} is important source to understand the Qur’ān.\textsuperscript{467}

Conclusion

The above discussion reveals that Islāmic law has its origin in the divine instructions while English-European law has its origin in the positive legislation. This prime difference causes further differences between the two which are discussed here.\textsuperscript{468}

One of the most critical differences is the difference in the concept of sovereignty. In Islāmic legal system the concept of sovereignty is different from the western world. Sovereignty in an Islāmic state belongs only to Almighty Allāh alone. It is declared in the Qur’ān: “The command is for none but Allāh. He has commanded that you


\textsuperscript{467} Al-Jaṣṣāṣ, \textit{Aḥkām al-Qurʾān}, 1: 37; Ibn al-'Arabī, \textit{Aḥkām al-Qurʾān}, 1: 56.

\textsuperscript{468} Concluding remarks regarding development of statutory interpretation have been discussed in the last chapter to avoid repetition.
worship none but him; that is the true (straight) religion, but most men knew not.”

The head of the state and other machinery of the government administer justice just as vicegerent of Allāh on this earth. It is declared in the Qurʾān: “Behold, the Lord said to the angels: ‘Verily I am going to make a vicegerent on the earth.’” Unlike western constitutions which are subject to amend and repeal, the Constitution of Islam is contained irrevocable provisions which cannot be altered or amended by any means of legislation. For example, the fundamental principle of governance has been declared explicitly in the Qurʾān: “O ye believe! Obey God, His Apostle, and those set in command among you.” Contrary to secular legal system which deals with the worldly affairs of the people, Islamic legal system places equal value to the sensational issues and the issues of transcendent nature and controls the beliefs, ideas and the actions of human being regarding this world and the world hereafter. Unlike English-common law, Islāmic law is written law. The common-law and the civil law have their source in the Roman law and the Catholic Canon law. On the other hand, Islāmic law has its origin in the Qurʾān and Sunnah. The concept of legislature is different in both systems. Islamic legal system considers legislative body or Parliament as subordinate authority to God exercising delegated power while in English-European legal system; the Parliament is supreme authority having unrestricted power to make law. The term “law” in western legal system has been derived from the Latin term of Roman law “jus” which means right while Islamic law termed as “Fiqh” means to know and to understand something. Islāmic law is defined as the command of the God, revealed in the Book and the Sunnah of the prophet and interpreted by the Prophet and the Muslim jurists while English-European law is described as the command of a supreme political sovereign enforceable by a political

469 The Qurʾān:12: 40.
470 The Qurʾān:12: 40.
471 The Qurʾān: 4:59.
force and has its origin in the custom, precedent and juristic opinions. Islāmic law is based on the Will of the God while in English-European legal system, the will of the people constituent the fundamental base for every law. In case of law of England precedents are strictly followed and it is considered that apart from judicial decision there is no law in England at all. Judicial precedents on the other hand form a considerable part of Islāmic law but has no binding force do not form the whole structure of law. The English- European law is based on the temporal objectives of the government having a particular political agenda. The priorities of one government may differ from another one while Islāmic law is based on the eternal objectives of Sharī‘ah and changing in the government can not disturb them. In the early English-common law system women were considered as private property of men and had no right of inheritance or to own any type of property. Islāmic law on the other hand, declares women equal in status to the men and has made a systematic arrangement to protect and to secure the interest of women by way of inheritance and Nikāh. The English-European legal system differentiates between religion, morality and law, while Islāmic legal system is based on the religion and considers morality as a part of it. Not only is this but it declares certain rules of morality as obligatory and enforceable by law. Islāmic system of governance is based on the idea of two-nation theory, Muslim and non-Muslim. On the one hand, it declares the whole Ummah as one nation and on the other it binds a Muslim state to respect and to protect its each and every citizen whether Muslim or non-Muslim. Contrary to it, the idea of a cosmopolitan state presented by the Western scholars is based on the assumption that the individuals of the world should be free to co-ordinate with one another to share a homogeneous culture and should be governed by a single, unified, indivisible
souvereign. But it seems impossible that all the people of the world may agree to come to share a homogeneous culture, a single federal structure for the governance of all nations, a common universe of discourses and a single form of global citizenship.

There are however, some common elements between both legal systems such as like all the modern constitutions of the world Islāmic constitution contains both universal immutable principles and as well as detailed specific rules which are constituted to apply the general principles. Then law either Islāmic or English and European is a product of long historical development, based on the juristic opinion and fabricated by well-educated and people of well-known fame. For example, Roman law was promulgated and codified by the Roman jurists and similarly Islāmic law was developed by the people who had deep understanding of the precepts of the Qur’ān and Sunnah and their contexts. Both laws aim to regulate and govern the conduct of people in the light of the interests of society to establish a welfare state and to provide justice to all and to secure its citizen from all internal and external aggression.

Like European civil law, Islāmic law is derived and designed from the legislative work or the legal texts through logical reasoning in the light of the public interest. The judicial work is enforced by the element of sanction moral and physical. Both systems do differentiate between the law and ethics and if a person breaks moral values is not subject to punish. For example, in English and European legal system if a person engaged in void transaction does not commit any offence and is not regarded as subject to punish. The same practice is found in Islāmic law. For instance, if husband leaves his wife without maintenance is not punishable by law for the act

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while it is clearly mentioned in the Qur’an that husband is bound to maintain his wife.
The only difference between morality in positive law and morality under Islāmic law
is that the break of moral values has been declared by Sharī‘ah as punishable in the
world hereafter and the parliament is authorized to restrict it by way of ta‘zīr
punishment while no such provision is found in English-common law. Like English
legal system, Islāmic law some time creates artificial logic behind an enactment. For
example, the fatwā given by Abū Ḥanīfah and Abū Yūsuf reveals that the sever
prohibition of usury is not treated as total and absolute prohibition, but merely as a
legal injunctions, so there is no harm in using a sale as a cover for interest.474

Like European-civil law, Islāmic law is derived through logical interpretation
of the received texts or legislative work. Its growth and development is dependent
upon the juristic interpretation and the judicial decisions. In Islāmic legal system, the
word “Naṣṣ” has the same meaning as the term “statute law or legal text” in English-
European legal system and consists of the provisions of the Qurʾān and Sunnah and
the legislative work of Muslim government if not against the spirit of Sharī‘ah.
Islāmic law though has its origin in the divine instructions of Qurʾān and Sunnah yet
does not oppose the formal concept of the modern law in English-European language.
Like any piece of the positive law, Islāmic law which is result of interpretation of the
legal texts of the Qur’an and the Sunnah of the Prophet (PBUH) can be modified
(except definitive ahkām and the ahkām which can not be rationalized) to meet the
challenges of the changed time and hence, possesses all that qualities and the
characteristics which can be part of modern concept of law in any legal system of the
world today.

474 Ibn ʿĀbidīn, Al-ʿUqūd, 2:223-224.
CHAPTER 3

INTERPRETIVE SYSTEM OF ENGLISH-COMMON LAW

Section One

The Process of Interpretation

In a Parliamentary form of government, both Parliament and judiciary have different roles to play. It is duty of the Parliament to enact and to legislate in the possible clearest way to express its intention and the constitutional role of the judiciary is simply to explain, to interpret and to apply these enactments to the cases brought before it. In Akhtar Ali v. Judges Special Court (Offences in Banks), 2003, it was held by the Lahore High Court of Pakistan that the Constitution of Islāmic Republic of Pakistan 1973 is based on the principle of trichotomy of powers i.e. legislature legislates, the executive administers and the judiciary interprets the law.\textsuperscript{475} The prerequisite of the process of interpretation is the presence of a written legal text or statute not a verbal statute. The process of interpretation exists with the existence of a statute, where there is no statute the question of interpretation does not arise. In fact, the whole process of interpretation is dependent upon the existence of an issue brought before the court to decide. The function of the court is to analyze and to examine that

\textsuperscript{475} P L D., Lahore (2004), LVI at 182,196.
issue through interpretation and to decide which provision of a particular statute is applicable to that issue. 476

While performing the function of the interpretation, judges adopt different approaches to derive legal meaning of a legal text which is not necessarily its grammatical meaning. These approaches of statutory interpretation are not framed by the legislature and the law-makers rather they are evolved by the judges during the process of interpretation. A mode or technique once adopted by the judges becomes a rule of statutory interpretation. These rules of statutory interpretation further provide aid to solve new and contemporary cases brought before the courts of law. The interpretive rules framed and established by the judges if failed to compete the challenges of changed circumstances must be changed in the light of changed context.

It is this reason that in different times and periods, the legal jurists and the judges have different views regarding the status and importance of these rules. For example, the traditional legal positivist thinks that the law is distinguished from other social norms by virtue of their historical perspective. Hence, it is necessary for an interpreter to look into the previous interpretation of the case and adopt an interpretation fit between a particular decision in the present case, external legal standards and the previous interpretation of those standards. 477

By the contrast, the natural lawyer stress that valid laws are based on the moral principles which indentify the law with the demands of political morality, hence interpreter must look into the forward-looking aspects of interpretation which stress the moral acceptability of following one principle, rather than another, in

476 Rutner, Intelligence in the Modern World, John Dewy’s Philosophy, 33; John Lock, Human Understanding, 34; Crawford, Construction of Statutes, 62.
477 Marcuse, Reason and Revolution, 56; Hart, Positivism and Separation of Law and Morals, 34.
related controversies. The contemporary approach of interpretation however, is based on the theory of constructive interpretation which considers both dimensions important and necessary. It argues that if no weight is given to the forward-looking dimension of acceptability, then it is tough to understand the law in a favourable mode to justify its assignment of rights and duties. And if no weight is given to the background looking dimension then it will be difficult to distinguish between interpretation of the law and the legislative work. For the best interpretation of legal provisions, even if ambiguous and wicked legal provisions, a meaningful interpretation is necessary through the most attractive principles to rationalize those provisions.

The role of the judges to create new laws however, is a matter of debate since time memorial. For instance, Aristotle opined that the court should have no discretion to create new laws. To him the task of the judicial office was only to fit each case to the legal bed, if necessary by a surgical operation. The judges of the European-common law courts have enough discretionary power to create new laws while interpreting law of the Parliament that comes before them. Similarly, in the United-States of America, the interpretive role of the Supreme Court has a great value in the development of general public law. The whole structure of the case law of England is based on the judicial decision and apart from it there is no law in England at all. Soviet law on the other hand, is based on the notion that the Soviet jurists and the

479 Ibid.
judges are bound to interpret law according to the intent of the legislators. Here, the discretion of the judge is tied to the policy of the state.481

1.1 The Basic Criterion of Interpretation

The interpretive criterion of all legal systems of the world is almost same and the whole structure of interpretation is based on the same general principles framed and established in the light of the provisions of the constitution based on the cultural, ethical and religious background of that system. The difference of constitutional objectives, culture and religion however causes differences of descriptive rules and values among different legal systems. The fundamental principle behind every legislative enactment is that parliament must have an intention in everything it does. Likewise, the basic and paramount criterion of interpretation of a legal text is that the interpreter must interpret a text with the intention to find out the true intent of the lawgiver behind that enactment.482

In a case, Khawaja Hassan v. Govt of Punjab and others (May 2004), it was held by the Supreme Court of Pakistan that the primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction only then it would not be opened to the court to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statutes must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect of the policy and the object of the Act

481 Gutwie, A History of Greek Philosophy 1:267; David and Brierley, Major Legal Systems in the World Today, 399; Stuckey, Procedure in the Juristic System; 234; Slapper and Kelly, The English Legal System, 192, 316; Dickerson, The Interpretation and Application of Statute, 66.
482 Ibid.
The word intent literally means an objective or concentration on anything. It is a state of mind to have full interest in something good or bad. Technically, an act is said to be intentional if it exists in idea before it exists in fact. The word intent neither denotes the ultimate aim and object nor is used as synonym for motive. The word intent refers usually to the actual intent of some human beings respecting what they intended to say. This word is also used in the sense of the intent objectively manifested by the language used.

In this sense there are two types of intention, the actual intent to enact and the manifest intent which is objective of that enactment. But both of these intents may be declared as actual objective intent. In Consul Confizon v. H. M. Prosecutor General, it was held by the Lahore High Court that intention means the expectation of the consequence in question. It is a universal principle that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the act. The intention cannot be proved by direct evidence which is rarely available and therefore it has to be inferred from surrounding circumstances.

1.1.1 Views of the Jurists regarding Legislative Intent

The fundamental principle of interpretation is that the court is bound to interpret law according to the legislative intent. The contemporary legal philosophers however, have different opinions regarding the existence of a legislative-intent. The majority of the jurists considered legislative intent as a cardinal principle of interpretation and
declared that the court is bound to trace and to find out the true intention of legislature while contradictory view opined that no such an item existed as a legislative-intent. This adverse view is based on some arguments such as it is unrealistic to talk about legislative intent because the notion of the law-maker is fictional and there is no such person. Intention can be known only by the external expression and the behaviour of the people. The task of the legislature is to make statute not to impose its respective will and even if unanimous legislative intent is known, it would be impossible to bind the courts.  

The third view tries to create a balance opinion and declare that although to find out a collective intention upon specific statutory provision is difficult task yet a general legislative intent in statutes of general public concern is discoverable. For this purpose, debates, committee reports and other similar unconnected matters can provide aid to derive a general legislative intent. In Field v Clark, it was held that to deny the existence of legislative intent would seem to imply upon the part of our legislators, a neglect of legislative duties and responsibilities. Such a denial would also seem to conflict with the many presumptions which operate to make our legal system practical that common words are presumed to carry their ordinary meanings and technical words to carry their technical meanings and that the law-makers are presumed to know the previous state of the law.**489

Finding out legislative intent however, is a complex and an intricate job and the court has to take certain steps to make the process successful such as the court has to suppose a general legislative intent behind every enactment, the court seeks the plain meaning of the words of a text and in case of ambiguous texts, the court

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489 Ibid.
considers the other parts of the same provision of the statute to seek the true intent of the legislature; the court considers the intention of those who voted for the Bills, the court makes a throughout study of the statute and lastly, the court also take help from the debates, committee reports and other similar unconnected matters and thus derive a collective or general legislative intent.\(^{490}\) Unfortunately the object to find out legislative intent cannot be achieved easily because legislative body is not always successful in communicating its views and thoughts.\(^{491}\)

### 1.1.2 Types of Legislative Intent

To find out the true legislative intent an interpreter has to decide four things: What an intention is? Whether any such things (intention) can properly be said to exist? Whether intentions have prima facie role to play in the theory of interpretation and if so, what that role vis-à-vis ordinary meanings? Lastly, which type of intention is the appropriate one to use, realist or conventionalist conception of interpretation?\(^{492}\)

On the basis of this theory, Prof. Hart divides legislative intent into three types such as general intention, specific intention and semantic intention. To explain different types of legislative intent, Hart presents a hypothetical case where an accident has to be happened between a blue-Ford 1973 and a jogger in the town park.

In response to it, the town mayor enacts an ordinance forbidding “vehicles” in the park. In this ordinance two distinguishable intentions of the mayor could be derived easily: One was the general intention and the second was the specific intention to accomplish certain effects by enacting this ordinance. The third type of intention could be drawn from the word “vehicle” used in the ordinance called as semantic intention and was the actual intention with which the mayor passed the ordinance to


\(^{491}\) Ibid.

\(^{492}\) Ibid.
promote safety for the pedestrians in the park.\textsuperscript{493} In interpreting this ordinance, the first type of intention will not aid in construing the ordinance. For aid in interpreting the ordinance, a court must look to either the specific intention with which it was passed or the semantic intention with regard to the language used in framing the ordinance.\textsuperscript{494}

\subsection*{1.1.3 Problems Arising from the Notion of Legislative Intent}

The notion of the legislative intent however, causes to create certain problems both for legislators and interpreters. The fundamental problem arises from the democratic concept of legislature which makes it difficult to look for legislative intent in the mind of many persons. Moreover, the notion of legislative intent is an ambiguous term and cannot be defined in one single definition. Its wider concept and different types lead to some problems which are frequently faced by the interpreters.\textsuperscript{495}

Among the secondary problems are that the actual intent of the legislature is normally affected by the sponsors of the Bill, the discretionary power of the courts makes it difficult to arrive at true intent, the judges cannot be made bound to interpret to ascertain the legislative intent because the function of the legislature is not to impose their will but to pass statutes, in case of new and unprecedented cases, the notion of legislative intent ceases to affect and cannot relate to a specific factual situation which was not existed at the time when the intention was formed and lastly, the interpreter has to deal with the whole legislative body each of its member may have different intentions.\textsuperscript{496}


\textsuperscript{494} Ibid.

\textsuperscript{495} Dickerson, \textit{The Interpretation and Application of Statute}, 78.

\textsuperscript{496} See, Karl Marx, \textit{Early Writings}, 566; Broud, \textit{The Philosophy of Francis Bacon}, 344; Dickerson, \textit{The Interpretation and Application of Statute}, 78-80; Radin, \textit{Statutory Interpretation}, 871; Ingman, \textit{The Statutory Interpretation}, 78-80.
1.1.4 Harmonized Concept of Legislative Intent

To remove such anomalies arising from the pure concept of legislative intent, a harmony can be created by way of reconciliation in the light of the changed circumstances by considering the word “legislative intent” into two senses: First as the meaning of legislation and second as the purpose of the legislation.\textsuperscript{497} Thus, in a case, Thinker v Modern Brotherhood of America it was held that the legislative purpose is the reason for the enactment passed by the legislature . . . The court should seek to carry out this purpose rather than to defeat it.”\textsuperscript{498}

The difference between legislative intent and the legislative purpose is that the legislative intent constitute law while the legislative purpose could not constitute law, it is merely reason for the enactment of the law. Another difference is that the legislative intent and the meaning of the statute are synonymous while the legislative purpose is instrumental in determining what the statute’s construction shall be by indicating the meaning of its language.\textsuperscript{499}

1.2 Fundamental Steps of Interpretation

For the correct interpretation it is necessary that the law must be taken as a whole, the reason behind a statute and the effect of that particular interpretation should be considered.\textsuperscript{500} The legal writers have been divided the whole process of interpretation into three major steps which should be followed by the interpreter:


\textsuperscript{497} Ibid.


1.2.1 Finding out the Relevant Text

The primary duty of a court is to locate the statute related to the issue at hand. Once the relevant statute is confirmed, it becomes easy for the interpreter to find out a particular provision related to the current case. The court has to examine the whole statute to find out the relevant provision applicable to the situation. This first step involves further three steps such as the court has to find out a problem of the conflict of the laws then finds out the corpse of the law relevant to that particular case and lastly, the court has to determine what section, paragraph, phrases or words may be applicable directly to the case at hand.501 In Azra Riffat Rana v. Secretary, Ministry of Housing, it was held by the Lahore High Court of Pakistan that the administrative instruction could not have replaced the Accommodation Allocation Rules 2002, it may be pointed out here that though an office memorandum being inconsistent with any statutory rule on the point, cannot be given effect to as it does not stand on a higher footing than the statutory rules."502

1.2.2 Analysis of the Relevant Text

The court after finding out the relevant statute, its section and subsection, its phrases or words has to inquire into the legislative intent behind the text. At this stage, it is necessary for the court to understand that text in the light of its linguistic meaning and the legislative intent.503 The interpreter has to apply the plain meaning rule first and in failure of this attempt, he has to inquire in to the grammatical meaning of the particular words of the text. The legislative intent can be found in the meaning of the

502 P L D., Lahore 1959, LVII at 499.
503 Karl Marx, Early Writings,566; Broud, The Philosophy of Francis Bacon,344; Dickerson, The Interpretation and Application of Statute,78-80; Radin, Statutory Interpretation, 871; Ingman, The English Legal Process, 300; Landis, Note on Statutory Interpretation,886-893; Bennion, Statutory Interpretation,15.
words of a text. In a case, Lake County v Rollins, it was held by the court that if a word conveys a definite meaning which involves no absurdity, nor any contradiction of the other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted, and neither the courts nor the legislature have the right to add to it or taken from it.  

1.2.3 Application of the Text Concerned

The last stage in the process of interpretation is the application of the law concerned to the situation at hand. When the court finds out the legislative intent or constructs a text according to the interpretive rules, it becomes easy to apply the text to the case presented before the court for solution. At this stage the court may assume certain attitude towards certain statutes through grammatical, strict, liberal, logical, legal, doctrinal and sociological interpretation. By virtue of these, the court may include or exclude a case from the operation of the statute before it for application. In this case, the function of the court is *jus dicer* to interpret law and not *just dare* to make law. Here, the court must regard that system of law is the best which abandons as little as possible the discretion of the judges and that judge is the best that relies as little as possible to his own opinion or discretion.

In some cases, a legal text consists of ambiguous or homonym words or the literal interpretation leads to some absurd result and against the intent of the legislature and the court cannot discover the true intention of the legislature by plain meaning. Here, the duty of the judge will be shifted from *jus dicer* or interpretation to

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504 Lake County v Rollins (1987), W.L.R. at 1469
506 Ibid.
the *jus dare* or construction of the text. In such cases, his function is to create new law and is constructive not one of mere interpretive.\textsuperscript{507}

### 1.3 Sources to Provide Aid to Interpreter

An interpreter takes help from different sources which are consisted of intrinsic and extrinsic material.\textsuperscript{508} The term intrinsic source literally means the source exists naturally in the statute and provides aid to the interpreter.\textsuperscript{509} The intrinsic sources include the title, the words, and the context of the statute.\textsuperscript{510} Extrinsic sources are used as corroborative in ascertaining the legislative intent and the meaning of the statute.\textsuperscript{511} Among the extrinsic sources is the history of the statute, public policy, committee reports, contemporaneous construction, construction by bar, judicial and legislative construction etc.\textsuperscript{512}

In case of ambiguity, the court may consider the historical background of a statute to discover the intent of the legislature. In People v Odienno, where the question was regarding the validity of the action of a married person who had to live in a furnished room with an eighteen years old girl who was not his wife. That person was indicted under the Compulsory Prostitution Statute. The question was whether the person came within the scope of the law or not? It was held by the court after considering the public reports and historical background of the statute that the

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\textsuperscript{507} Dickerson, *Legislation Class & Materials*, 432-433.


\textsuperscript{510} See for detail chapter 2, pages, 55-60.

\textsuperscript{511} Edgar, *Craies on statute Law*, 175; Crawford, *The Construction of Statutes*, 354.

prostitution among the ancients and in the middle Ages has been exploited for the purpose of public revenue not intended to deal with isolated or individual acts of prostitution. Consequently, the indictment against the person was dismissed.”

Public policy means a general tendency of judgments made by the courts towards a particular legal result whether at common law or statutes. This policy is acceptable where the statute under consideration is implied not explicit. Unlike legislative debates, committee reports play an important role in the interpretation of statutes. In Commonwealth v West Philadelphia Mannerchor, it was held that the reports of the Committees of House or Senate may be regarded as an exposition to the meaning where the meaning of the statute is obscure.”

Contemporaneous construction means to construct a law according to the meanings of the text bearing at the time when passed by the legislature. The traditional view regarding the consideration of contemporaneous Construction was that ancient Acts and grants must be construed in the light of the contemporaneous construction. The modern courts however, have different opinions regarding the validity of contemporaneous construction. Some of them give it wattage while others deny its validity. In a case Hyde v. Hyde, it was held by the court that the word “marriage” in English statute means only monogamous marriage, a contract between a man and woman enter in this country whether Christians or not, and does not include polygamy or any other type of marriage as considered in past.” Debates and constructions of legal terms done by the Bar may be considered in case of ambiguity.

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513 See, People v. Odienno (1963), 1, W.L.R., 1247.
516 Edgar, Craies on statute Law, 80.
517 Russel, Human Knowledge, 251;Blacksoten, Commentary on the Law of England,667; Gutwie, A History of Greek Philosphy, 2:678;Feigl & Sellars, Reading in Philosophical Analysis, 478.
Similarly, the construction done by the Attorney General of a state is also regarded as a valuable source of assistance. In Central Pacific Railway Co. v. Tax Commission, it was held that the contention of the attorney general respecting the construction of a state statute is at least persuasive.”\(^{518}\)

Judicial construction means interpretation of the legal terms by the courts which is valid and will be used unless contrary intent appears. In Barras v. Aberdeen Steam Travelling and Fishing Co. (1933), it was held that it has long been a well-established principle to be applied in the consideration of Acts of parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or a same phrase in similar context must be construed according to the meaning that has previously ascribed to it.”\(^{519}\) Legislative construction means construction by the legislature of an ambiguous statute. Such construction however, is not binding on the court.\(^{520}\)

### 1.4 Presumptions to Follow before Interpretation

The general policy of statutory interpretation is not regulated by the Parliament, but established by the judges to utilize during the process of interpretation. However, the Interpretation Act 1978 seems to provide a guideline to judges by defining and explaining certain terms and provisions used commonly in the statutes. Moreover, internal and external parts of statutes and commentary of legal experts also help judges to arrive at the true intention of the legislature.\(^{521}\) In all common law jurisdictions where there is a written constitution, it is the duty of the courts to carry out and interpret the intention of parliament as envisaged in the statute or Act of

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\(^{519}\) Barras v. Aberdeen Steam Travelling and Fishing Co. (1933), 1 W.L.R.1234.

\(^{520}\) Crawford, The Construction of Statutes, 404-405.

parliament unless the same is ultra virus to the Constitution itself.”522 Under such legal systems, presumptions are those legal assumptions which are considered as true and accurate principles to provide directions for the court in the process of interpretation.

The use of these presumptions however, is dependent upon the discretion and circumstances of the case. Presumptions have general application unless excluded by the express wording of legislative enactment. For instance, the presumption of natural justice; presumption of abusing discretion of the court; presumption of criminal liability; presumption that no one can gain advantage from his own wrong; presumption that every word of a statute is strictly and correctly used not incorrectly and loosely; presumption against retrospective effect; and presumption that not to import into statutes words which are not to be found there. The other type of presumptions may be applied only in doubtful cases and include presumption against changes in the Common law; presumption that if a statute is capable of two interpretations and one involving an alteration in common law it will be left over in favour of other which does not bring change in common law; presumption against ousting the jurisdiction of the court; presumption against interference with vested rights; presumption of strict construction of penal laws in favour of citizen; presumption against retrospective operation; presumption that statutes do not affect the Crown; presumption that Parliament does not intend to violate international law; and the presumption that a statute does not apply to acts committed abroad etc.523

Section Two

Categories of the Interpretive Rules

Interpretive rules are those principles which are based on different legal theories to provide assistance to the courts and the judges in their process of interpretation. The rules laid down for the interpretation of the statutes are general in nature which shows plainly how much is left to the opinion and judgment of the court. The rules and the approaches followed by the courts during the process of interpretation may be divided into four major categories for the purpose of their clear understanding: Linguistic rules of interpretation, fundamental rules, traditional rules, and contemporary legal theories of interpretation.

2.1 Linguistic Rules of Interpretation

Linguistic rules of interpretation reflect the nature and the usage of language. Linguistic rules are not dependent on the legislative character and the quality of an enactment as a legal pronouncement rather they are based on the rules of logic, grammar, syntax and punctuation etc. The linguistic meaning of a text is based on its dictionary meaning. It deals with the totality of the meanings attached to the language of the text. A meaning of a word if drawn with the help of linguistic rules is declared as a legal meaning which may be different from its ordinary and dictionary meaning. The difference between dictionary meaning and a legal meaning is based on

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the difference between a perfect word of one clear and explicit meaning and the
imperfect word of more than one meaning. According to the linguistic rules of
interpretation, an interpreter cannot assign a meaning to a word which is not assigned
to it by the linguists or which is beyond its possible meanings.® Linguistic rules of
interpretation deals with two types of words: Interpretation of individual words and
interpretation of legal maxims.

2.1.1 Interpretation of the Individual Words

Contrary to the traditional theory of linguistic meanings, the modern theory does not
consider a dictionary inclusive in all of the meanings which words in fact have. It is
simply considered as an historical record which determines what meaning may be
given to the text on semantic ground and it does not determine the legal meaning
given to the text. The dictionary is considered as linguistic instrument which just
guides the interpreter to derive legal meaning and it is presumed that the dictionary in
fact cannot be a criterion for understanding the legal meaning of the text. The position
of dictionary is vital only to observe but it never determine the actual meaning of a
word in its context.® The detail of the interpretation of individual words is as under:

2.1.1.1 Interpretation of General Words

Interpretation of general word is based on the presumption that a general word must
be given a general meaning and applicable to everything covering by it unless
something in the Act proves contrary that the general word should be construed in
such manners as to restrict its scope. The court is bound to apply the general word to

527 Ibid.
528 Lock, Human Understanding, 3:245; Bennion, Statutory Interpretation, 814; D. Mellinoff, “The
its own subjects exclusively not to any foreign subject even within British territory.\textsuperscript{529}

The general word of a legal text is given a general meaning not the literal meaning where the scheme of the language requires doing so. For example, Article 9 of the Constitution of Pakistan describes that “no person shall be deprived of life or liberty save in accordance with law”.\textsuperscript{530} Here the word “person” has been used in its general meaning and includes everything understood in the meaning of a person such as an individual male, female and child, a politician, and a corporate body or company etc.

A general word may be restricted by applying the rule of \textit{ejusdem generis} and the rule of \textit{noscitur a sociis} when used in association with other words.\textsuperscript{531}

\section*{2.1.1.2 Interpretation of Specific Word}

A specific word is a word which has a precise meaning and is clear in its scope or which can apply only to one particular thing.\textsuperscript{532} The general rule regarding the interpretation of specific word is that a specific word must be given its original meaning whether it is limited or wider in its scope. For example, the number “four horses” is a specific word and must be given its original meaning and applied to four particular horses. In some cases however, the specific words may be expanded in their meaning as well as limited or restricted, provided the purpose of statute is general, if such expansion will make the intent of legislature effective.”\textsuperscript{533}

\begin{thebibliography}{9}
\bibitem{529} Edgar, \textit{Craies on statute Law}, 176-177; Bennion, \textit{Statutory Interpretation}, 824
\bibitem{530} The Constitution of Islāmic Republic of Pakistan 1973, Article, 9.
\bibitem{532} Ibid..
\end{thebibliography}
2.1.1.3 Specification of General word by *Ejusdem Generis*

In some cases, a specific word follows by the general words and affects the meaning of that general word. In this case, the interpretive rule is that the meaning of the general word is to be understood with reference to that specific word. The words of a general character take their colour from the preceding words. The general terms may also be restricted by the specific words. The scope and the conditions for the application of *ejusdem generis* rule have been well explained by the High Court of Pakistan in a case Muhammad Rafiq v. Muhammad Ismail, where it was held by the court that the words in a statute were to be interpreted by the association in which they were found. The rule was applied as aid in ascertaining the intent of the legislature. . . . the said rule would apply when conditions would exist viz that the statute contains as enumeration by specific words, that the members of enumeration constitute a class or category, that the class is not exhausted by the enumeration, that a general term followed the enumeration, that there was a distinct genus which comprised more than one species and that there was not clearly manifested an intent that the general term be given a broader meaning than the doctrine required.\footnote{PL D., 2008 Karachi, LX at 261.}

2.1.1.4 Specification of General word by *Noscitur a Sociis*

In case where a general word is used in association with other words, the scope of the general words may be restricted by the interpretive rule of *noscitur a sociis* which means that a general world should be interpreted in the light of its context. This rule leads that a statutory general term is recognized by its associated words.\footnote{Ibid.}


\footnote{P L D., 2008 Karachi, LX at 261.}

of this rule is broader than that of *ejusdem generis* in the sense that the meaning of a doubtful word can be ascertained by reference to the meaning of its associate words while in case of *ejusdem generis* the existence of a recognized category is necessary.\(^{538}\) In case, where the general and specific words of the same text are in contradiction, the rule is that they should be harmonized if possible, but if such contradiction is irreconcilable, the specific provision will control the general word unless the statute indicates a contrary intention upon the part of legislature. In this case the interpretive rule *generalia specialibus non derogant* will help the interpreter to remove contradiction and to reconcile both.\(^{539}\)

### 2.1.1.5 Interpretation of Qualifying Words

The general rule regarding the interpretation of qualifying words (which, said, and such etc) is that such words may be applied to the words, phrase, or next preceding clause unless a contrary intention appears. If there is something in the statute indicating that the relative word or qualifying provision is intended to apply other than to the next preceding antecedent, they must be disregarded. Some indication is necessary in order to extend the scope of the relative terms.\(^{540}\)

### 2.1.1.6 Interpretation of Homonym Words

A homonym word is that which has more than one meaning. It is a type of imperfect word. Interpretation of a homonym word is based on the presumption that where the legislators use a homonym word in an Act, it is intended to have same meaning in each place. For example, the word ‘rent’ is a homonym word and bears two different meanings.

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\(^{538}\) Ibid.


meanings the rent charged upon a land and the rent reserved under a lease. A word may be declared as homonym in many cases such as meaningless words, different words of same meaning, word of both literal and technical meaning, and word of opposite meaning. In some cases different words are used in a provision but all of them have similar or same meanings. In this regard, the general rule of interpretation is that if they carrying similar meaning then they must be given a similar meaning. In some cases a word has two opposite meanings, a wide and a narrow meaning. In this case, the word may be given a narrow meaning and strict application. In some cases, a word or term used in the provision has both a literal and as well as a technical meaning at the same time.

The general rule regarding the interpretation of a technical term is that if a word or phrase has a technical legal meaning in a certain branch of law and used in that context, it should be given that technical legal meaning unless the contrary intention appears. The general meaning of these terms may be given by statute or at common law, military terms, and words of arts. For example the word “terrorism” under sec. 1 (2) provided by the Anti-Terrorism Act 1997 of Pakistan and has been defined technically in the Act itself which means the use or threat of action where the action involves the doing of anything that cause death, grievous violence or injury, damage to the property, endangers a person’s life; involves kidnapping for ransom, hostage-taking or hijacking, infringe on religious congregations, mosques, imām bargahs, churches, temples, and all other places of worship, creation a serious risk to

541 Bennion, Statutory Interpretation, 815.
542 Ibid.,
544 Ibid.
545 Bennion, Statutory Interpretation, 816.
the safety of public, burning of vehicles, extortion of money, disrupt a communication system and the violence against police force, armed forces etc.”

2.1.1.7 Interpretation of Abrogated Words

The general rule regarding the abrogated words is that if a particular provision has been omitted by the legislation from the statute, the court can not include the omitted provision while construing the statute by supplying the omission, even though such a omission is within the obvious purpose of the statute and the omission has been appeared due to accident or due to the failure of the legislature to anticipate the missing provision. However in case of grave necessity the general rule may be overruled to meet the needs and demands of the case and to arrive at a just and fair result. The rule of *casus omissus* is based on the presumption that to supply the omitted words of a statute by *casus omission*, is considerably danger and encroaches the legislative power to make, to amend or repeal any part or provision of the law.

The operation of this rule is limited by its scope because it is not easy to say that the legislature has intended to include the case which it has omitted. The omitted case or words might be included only where it appears that the legislature intended to include it but actually failed to use language which might cover the omitted case.

2.1.1.8 Interpretation of Archaic Words

Sometimes a word is inserted in an Act even though it is known to be outdated. In such cases the duty of the court is to give this term its intended meaning with regard to changes since it was current. In Re American Greeting Corp’s Application (1983),

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547 P L D., 2008 Karachi, LX at 266; Anti Terrorism Act, 1997, iv-x.
549 Ibid.
550 Ibid.
the word ‘trafficking’ of section 28(6) of the Trade Marks Act 1938, was subject to construction. It was held that the word ‘trafficking’ had no statutory definition and it is used with usury in the Middle ages, though it is known to be deadly sin, it has become less and less clear, as economic circumstances have developed, what the sin actually comprehend.”

2.1.1.9 Interpretation of Conjunctive Words, May and Shall

Interpretation of statutes not only involves construction of the words and the phrases but also disjunctive and conjunctive words are subject to interpretation. These words some times are used interchangeably and sometimes are used corresponding to each other. In a case, Shakeel Ahmad v. Additional District Judge, the question was regarding the jurisdiction of family court. It was held that the provisions of statutes and rules made there under are to be read in conjunction and the matter is referred to the jurisdiction of the family court.” The words may and shall are permissive in nature and imports a discretion to the court to construe them according to the condition and the circumstances of a case. The words “shall have power” indicate that something may be done which prior to it could not be done. The word “shall be” however in many case is to be interpreted as imperative, on the other hand, the word “may” is often used in the permissive meaning. Sometimes the word “may” also be used in the sense of “shall” or “must”.

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552 Ibid.
553 P L D., 2008 Lahore, LX at 414.
2.1.2 Interpretation of Legal Maxims

Legal maxims belong to the field of the language and provide aid in determining the semantic meaning of a legal text but not the legal meaning. The task of these maxims is just to verify the dictionary meaning of the text and lead that a particular meaning is linguistically permissible to assign to that particular word.\(^{555}\) For instance, the maxim, “\textit{Actus non facit reum, nisi mens sit rea}” means that the act itself does not constitute a crime unless done with a guilty intention.\(^ {556}\) The criminal law of English legal system is based on this rule that the act of a guilty person must be construed according to his intention and if the wrongdoer has no intention to commit a crime, he will be considered innocent.\(^{557}\)

Another well known maxim is “\textit{Expressum faci cessare tacitum}” which leads that implied provisions should be interpreted accurately in the light of the inferences of the text. The court has to adopt one of the best possible conclusions arises from the implications of the text.\(^ {558}\) Likewise, the maxim, “\textit{Generalia specialibus non derogant}” leads that where the words of specific meanings are followed by general words, the general words will be construed as being limited to the persons or things of the same general kind or class as those considered by the specific words. The other maxim is “\textit{Reddendo singula singles}” which means that disorganized words may be interpreted according to their own subjects and should be assigned to each its relevant object. In case where a multifarious provision has more than one subject and more than one object, it may be construed according to the rule of \textit{Reddendo singula}

\(^{555}\) Ibid.
\(^{557}\) Ibid.
\(^{558}\) Feigl & Sellars, \textit{Reading in Philosophical Analysis},322; Crawford, \textit{The Construction of Statutes}, 267
Statutes in *pari materia* are the Acts relating to one subject or a class of thing or person and are to be considered as to form one system or code of legislation. Both are to be taken together as forming one system. In this case, all the statutes related to the same subject matter are enacted in accord with the same general legislative policy to constitute a harmonious system of law. Modern jurists however, treat them neither legal nor unique to law rather these canons reflect semantic rules and are considered the rules of general applicability.

### 2.1.3 Interpretation of the Doctrines of Judicial Precedent

There are some other doctrines under the doctrine of judicial precedent such as the doctrine of *stare decisis* which refers to stand by the past decisions that alike cases should be decided alike. Under this doctrine if a rule of law settled by a series of decisions is binding upon the courts and must be followed in similar cases. This rule is based on the public policy and expediency. Another doctrine is *ratio decidendi* which is formulated by a court in a judicial decision. In this case, the actual decision does not lay down the precedent rather it constituent a set of facts on which the decision is based. The *ratio* however, can be re-interpreted or altered in later cases. The other doctrine is *Obiter dictum* which is an expression of an opinion on

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561 Ibid.
562 Salmond, *Jurisprudence*, 180-182
a point and a statement said by the way. It does not form part of binding precedent and in later cases its consideration is dependent upon the discretion of the judges.565

2.2 Fundamental Rules of Interpretation

Fundamentally, the interpretive system of English-common law is based on three types of interpretive rules such as plain meaning rule, rule of literal or grammatical interpretation and construction against absurdity while interpretive system of European-civil law is based on the contextual and objective approach of interpretation. To elaborate combined legal system declared as English-European legal system, it is appropriate to discuss interpretive rules of both systems such as:

2.2.1 Plain Meaning Rule of Interpretation

The most popular rule of interpretation is plain meaning rule which leads that the words of a text should be construed in its ordinary and natural meaning. Where the meaning is plain and admit only one meaning, it must be followed. According to this rule words of the English text should be given the meaning which the ordinary speaker of the English language understand in their context at the time when they were used. In such cases, the court will give the words their ordinary meaning because the words in themselves alone best judge to declare the intent of legislature.566

Where the wording of a legal text is clear and plain in its ordinary meaning, the question for the application of any principles of interpretation does not arise and the court is bound to give the word its actual plain meaning. If there is more than one ordinary meaning, the most common and well-established will be preferred over the

565 Ibid.
566 Blacksoten, Commentary on the Law of England,567; Stuckey, Procedure In Juristic System, 344; Bennion, Statutory Interpretation, 264; Cross, Statutory Interpretation,1.
other. In Southern Ry. Co. v Machinists Local Union, it was held that if the language is unambiguous and the statute’s meaning is clear, the statute must be accorded the expressed meaning without deviation, since any departure would constitute an invasion on the province of the legislature by the judiciary. Interpretation through plain meaning rule however, results in creating many problems which cause difficulty for the court to arrive at the true intent of the legislature. The contemporary legal jurists declared it as incomplete theory of interpretation for certain reasons such as the central problem to approach this theory is the presence of unclear and ambiguous term of “legislative intent”. In many cases, it is difficult to distinguish the true meaning from the actual meaning. Whereas actual meaning is the meaning carried by the language when it is read in a particular context, and true meaning is the meaning carried by the language when it is read in the light of its proper context. In some cases, the concept of the actual meaning, the literal meaning and the true meaning lead to have same meaning. However, the proper context of the language may be different from any other context which creates differences in the meaning and the actual meaning may diverge from true meaning.

2.2.2 Literal or Grammatical Interpretation

Literal construction means to assign the words its grammatical and dictionary meaning unaffected by the consideration of a particular context. This rule is based on the presumption that the word of a legal text should be construed in accordance with the accepted linguistic rules such as usage of grammar, syntax, punctuation

567 Ibid.
568 Crawford, The Construction of Statutes, 249.
569 See for detail, Blackstonen, Commentary on the Law of England, 567; Stuckey, Procedure In Juristic System, 344; Eskridge, Dynamic Statutory Interpretation, 14-17; Dickerson, The Interpretation and Application of Statutes, 38-39.
570 Ibid.
etc.\textsuperscript{571} Literal rule of interpretation has its origin in the legal theory of the second half of the 19\textsuperscript{th} century when the rule of equity was terminated in favour of literal interpretation and the courts started to see the words in their strict linguistic meanings.\textsuperscript{572} Literal rule of interpretation requires the judge to consider what the legislation actually says rather than considering what it might mean. The application of this rule leads to establish some important legal maxims and presumptions. For example, that no statute may be treated as null and void, that a statute must be construed in such manners as the intention of legislature may not be treated as vain or left to operate in the air (\textit{ut res magis valeat quam pereat}), that a statute may not be extended to cover a case which does not come clearly and undoubtedly under a provision of statute (\textit{Casus omissus} not to be created or supplied), that the courts will not relief against express statutory provisions.\textsuperscript{573}

\textbf{2.2.2.1Circumstance to apply Literal Interpretation}

An enactment may be assigned its grammatical or literal meaning under the following circumstances even if it leads to some absurd result: Where the enactment is clear, bears only one grammatical meaning, in case where the enactment have more than two grammatical meaning, where the enactment is semantically obscure without any grammatical meaning, where the correct version is grammatically capable of two or more meanings, where the wording of an enactment is disorganized, garbled or otherwise semantically obscure etc. In all these cases, it is first necessary to determine what the intended grammatical meaning was and the function of the court is to define the correct version behind the enactment.

\textsuperscript{571} Bennion, \textit{Statutory Interpretation}, 200; Dickerson,\textit{The Interpretation and Application of Statute}, 37.
\textsuperscript{572} Ibid.
2.2.2.2 Problems arising from Literal Interpretation

The literal construction sometimes faced genuine problems in ascertaining the correct meaning of a text. In a case, Waugh v Middleton (1853) it was held that grammatical and literal approach to understand the words in their common sense is as obscure as to lead so many doubts and contentions in any question of law.” 574 Some of the problems of literal interpretation are summarized as:

(i) The words of a legal text sometimes intend to have quite different meaning from its context. In this case a contradiction appears when the context yields a meaning significantly different from its literal meaning and the contextual meaning of the word is actual meaning rather than its literal meaning.575

(ii) In many cases the dictionary itself gives many alternative meanings of a single word, hence the question arises which of the meanings may be given preference over the others and which of them may be used? This happened in a case, R v. Maginnis (1987); the question was of the literal interpretation of the word ‘supply’ of the Misuse of the Drugs Act 1971. The defendant had been charged under the Act, having drugs in his possession and with intent to supply them. The defendant claimed that as he had intended to return the drugs to a friend who had left them in his car, he could not be guilt of ‘supplying’ as charged. In this case, the judge for the first time (through the court of Appeal to the House of Lords) disagreed as to the literal meaning of the common word ‘supply’ and held the case in favour of the defendant.”576

(iii) The literal rule may not helpful where the court is in resolving a doubt regarding the applicability of a broader term. For example, the wording of a statute was ‘it is an

574 Laski, Political thought in England,349; Robertson, The Philosophical Work of Francis Bacon, 322.
575 Dickerson, The Interpretation and Application of Statutes, 38.
576 Russell, Human Knowledge,189; Smith and Bailey, The Modern English Legal system, 242.
offence for a person who unlawfully or maliciously to stab, cut or wound any other
person.’ In R. v. Harris (1836), where the defendant bit off the end of the victim nose,
it was held that the offence was not to come within the ambit of the said provision,
because the words of the statutory provision indicated that for an offence to be
committed some form of instrument must be used.577

(iv) Sometimes a general word bears several shades of its meaning and the literal
interpretation leads to some absurdity or injustice.

(v) The problem to draw a distinction between a literal and a legal meaning lies at the
heart of the problems of statutory interpretation because in modern times, the need is
felt to consider the relevant matters drawn from the context while determining the
grammatical meaning of a word;

(vi) The judges have to use different terms while explaining this rule. The epithets
“natural,” “ordinary,” “literal,” “grammatical,” and “popular,” are frequently used
interchangeably and this indiscriminate use leads to some confusion regarding the
application of a specific rule.578

(vii) The interpretation in English-common law is based on the judicial precedent and
on the argumentations of the adverse parties. The words of legal text can be taken and
understood in different meanings and each party can claim that the word has and can
be interpreted only in the particular literal meaning suggested by him which often
creates difficulty for the court to decide which of both literal meanings should be
taken as actual ordinary meaning of the word.579

2.2.2.3 Validity of the Literal Rule
The validity of literal rule is still in debate in modern legal systems and under
discussion of the modern legal jurists. Some of them give a valuable wattage to this

577 Ibid.
578 Lock, Human Understanding, 3:178; Edgar, Craies on Statute Law, 65.
579 Dworkin, Law’s Empire, 267.
rule and considered it as the least problematic method of interpretation because this rule restricts the discretionary power of the judges and binds them to remain with the parameter prescribed by the Parliament through legislation. Contrary to it, others consider it a problematic rule especially in modern context. 580

2.2.3 Construction against Absurdity

Construction against absurdity or strained construction is allowed where two or more words of a provision contradict each other or where literal interpretation leads so undesirable result that the Parliament could not have intended. It is also allowed where some error or doubt existed in the text which plainly contradicts the Parliamentary intention. 581 There are number of factors under which doubts arise in the meaning of the language used. 582 For instance:

(i) Sometimes, the draftsman leaves some words unexpressed by using implied words.

(ii) In some cases, the draftsman uses broader term of wide meaning and leaves it to the user to judge what situation fall within it. For example, the word ‘vehicle’ which covers expressly, the motor, the bus, and motor cycle, and covers a donkey-cart, child’s tricycle and a pair of roller-stakes impliedly. 583

(iii) In many cases ambiguous words are used deliberately due to political uncertainty. 584


581 Ibid.


583 Lock, Essay Concerning Human Understanding, 2:398; Cross, Statutory Interpretation, 68; Smith and Bailey, The Modern English Legal system, 236.

(iv) In majority of the cases, the draftsman uses the language capable of extension, though he does not intend to cover unforeseeable developments.585

(v) In many cases, inadequate words are inserted in the legislative drafts due to drafting or printing error. For example, use of homonym words, or use of words having two or more distinct meanings.

(vi) In some cases the draftsman mistakenly dealt the law as being altered or amended.

(vii) Sometimes the provisions of a statute fail to meet the object of legislation or may be narrower or wider than its object.586 On the basis of these grounds, the court has to adopt some other rules to interpret a law and to remove absurdity and inconveniency arising from the literal or grammatical interpretation of statutory provisions such as the golden rule and the mischief rule.

2.2.3.1 The golden Rule

This rule is generally considered as an extension of the literal interpretation. Golden rule means to modify or to alter the language of the text where the application of the literal rule leads to obviously absurd result. The meaning of the provisions of an Act in this case may be modified so as to avoid absurdity and inconsistency.587 This rule was first stated by the Lord Blackburn in Caledonian Ry. v. North British and then repeated by the Lord Wensleydale in Gray v. Pearson (1857), that where the literal meaning of statutory provision produced an inconsistent and absurd result and the court was convinced that the intention of legislature could not had been to use the words in their ordinary meaning, the court justified to put them on some other

585 Ibid.
586 Ibid.
587 Russell, Human Knowledge, 189-213; Lock, Human Understanding, 3:123-45; Edgar, Craies on Statute Law, 84; Slapper and Kelly, The English Legal System, 196; Smith and Bailey, The Modern English Legal system, 244.
signification, which though less proper was one which the court thought the words will bear.”

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The scope of the golden rule may be discussed into two opposite versions: The narrow scope and the wider scope of the golden rule. The narrow meaning of the golden rule is applied in cases where a word used in a provision of an enactment has more than one or two conflicting meanings without any indication to the preferred meaning. In such a situation the golden rule operates to ensure that preference is given to the meaning that does not result in the provision being an absurdity. 589 The wider scope of golden rule is resorted to a situation where there is only one possible meaning to a provision of legislative statute. In such situation the court is of opinion that to adopt a literal construction will result in inconsistency, absurdity or inconveniency. Hence, golden rule may be applied. For example, in Re Sigsworth (1935), where legislative provisions were silent on the matter to prevent the estate of a murderer from benefiting the property of the party he had murdered. The court introduced a fresh common law rule and prevented the murderer from benefiting the property of the party he had murdered just as it was contrary to the public policy to allow a murderer to benefit directly from the proceeds of his offence”. 590

2.2.3.1.1 Circumstance to apply the Golden Rule

There are two fundamental requirements for the application of golden rule. These pre-requisites are expressed by Jessel M. R. in North v. Tamplin (1881) that anyone who contends that a section of an Act of parliament is not to be read literally must be able to show one of two things---either that there is some other section which cut down its meaning, or else that the section itself if read literally is repugnant to the general

588 Gray v. Pearson (1857), 1W.L.R. at 4321
589 Russell, Human Knowledge,189-213; Lock, Human Understanding, 3:123-45; Edgar, Craies on Statute Law, 84; Smith and Bailey, The Modern English Legal system, 244.
590 Re Sigsworth (1935), 1 W.L.R. at 345.
purview of the Act.”\textsuperscript{591} There is however some other circumstances under which golden rule may be applied by the court such as:

(i) In construing all written documents, statutes, and will etc where the literal meaning is in contradiction with the other parts of the provision of an Act.

(ii) Where the court reasonably satisfied to put the words on some implications other than literal meaning.

(iii) Sometimes golden rule is applied due to the paucity and deficiency in the language adopted by the draftsman.

(iv) Where lack of legislative clarity leads to the interpretive complexity and creates confusion in the meaning of the words.

(vi) Where it seems that a word bears two conflicting meanings, the court has to adopt one of them by the applying golden rule.

(vii) In case where a legislative provision is clearly ambiguous in its consequences. In such a situation, the golden rule is organized to make sure the meaning of the provision in the purview of the Act and the court has enough power to modify the language of the statute to arrive at true intent of the legislature.

2.2.3.1.2 Circumstances where the Golden Rule may not apply

The golden rule however, is not applicable in all cases of absurdity such as:

(i) Where it seems that the application of golden rule may lead to more inconvenient and absurd result than its literal interpretation.

(ii) Where it appears that the meaning derived through golden rule does not meet the express intent of the legislature.

(iii) Where it seems that the golden rule makes the text itself repugnant to the general purview of the Act.

\textsuperscript{591} See, Jessel M. R. in North v. Tamplin (1881) 1W.L.R. at 4011.
(iv) Where it is clear that golden rule cannot overcome the absurdity arising from the literal interpretation of the text.

(v) Where it is apparent that modification of the language of text by golden rule may result against the interest of a party concerned which might not otherwise.\textsuperscript{592}

**2.2.3.1.3 Validity of the Golden Rule**

Golden rule is an important rule of English-common law to remove rigidity of the literal interpretation. To meet the criterion of the golden rule however, is a difficult task and it is not easy to prove that the text itself is repugnant to the general purview of the Act. There is no hard and fast rule to follow for the implementation of the golden rule. To some extent the application of the golden rule is dependent upon the discretion of the court. The court however is not at liberty to use the golden rule to ignore, or replace legislative provisions simply on the basis that it does not agree with them; it must find genuine difficulties before it to decline the literal rule in favour of the golden rule. The determination of genuine difficulty is a matter of discretion and dispute. Lord Blackburn once observed that the use of this rule actually involves the judges in finding what they consider the statute should have said and provided, rather than what is actually did state or provide. The validity of this judicial activity is based on that extremely wide unstructured legal concept and public policy.\textsuperscript{593}

**2.2.3.2 The Mischief Rule**

The mischief rule is the most flexible and trustworthy rule of interpretation in English legal system. Literally the word “mischief” bears a different and contradictory meaning from its technical meaning. It is defined as harms or trouble cause by


\textsuperscript{593} Ibid.
The logic behind this rule is legislative presumption that there must be some reason behind every enactment of the parliament. The application of this rule is based on the presumption that the Parliament does not need to change the existing law if it is not defective. The defect is the “mischief” to which the Act is directed.\(^{595}\)

The development of this rule lies in the conflicted and the dual nature of the common law. During the Norman Conquest the statutes had to express the will of the king and the most of the statutes had to deal with the relations between the king and the baron, the statutes concerned with the ordinary regulation of the society were full of defects. The king’s bailiff and the officials had unlimited powers to oppress the ordinary people. For example, they could snatch the cattle of citizens for ploughing and whenever they wanted had to demolish and pulling down the houses and towns within the king’s realm.\(^{596}\) Under these circumstances, the mischief rule was founded by the Barons of the Exchequer in Heydon’s Case (1584). It was held by the Court that for the sure and the true interpretation of the statutes in general, is they penal, or beneficial, restrictive or enlarging the common law, four things must be considered by the judges: What was the common law before passing of the statute? What was the mischief and defect in the law which the common law did not adequately deal with? What remedy for that mischief had Parliament intended to provide? What was the reason for Parliament adopting that remedy? It was held that the function of the judges in such cases is always to suppress the mischief and to advance the remedy, to suppress subtle invention and evasions for the continuance of the mischief for private benefits (pro privato commodo) and to add force, life and remedy according to the

\(^{594}\) The Blackstone’s Dictionary of Law, 678; Cowie, Oxford Advance Dictionary, 912.


\(^{596}\) Ibid., 632.
true intent of the makers of the Act for the public good (pro bono publico)." The resolution of Heydon’s case played a considerable role in the development of statutory interpretation and continuously is being cited till today. The term mischief is divided into three types such as social mischief, legal mischief and party political mischief. However, what type of the mischief, the important thing is to determine the precise scope or ambit of the mischief parliament intended to remedy for settling the point at issue. In Ingham v Hie Lie (1912), under the Victorian Act, the hours of the work of the Chinese in factories, laundries were made limited to protect other industries. The defendant was the Chinese laundry man and had been found ironing his own shirt. He was charged with an offence for violation of law under the Act. It was held by the court that the purpose of the mischief found in the Act did not cover the said act of Chinese as he was ironing his own cloth not of the customers. Hence, he did not commit any offence under the Act.

2.2.3.2.1 Circumstance where Mischief Rule may be applied

(i) Where draftsmen intentionally use implied words in the enactment and leave them unexpressed which cause a mischief.

(ii) Where wording of the enactment consisted of a narrow and a wider meaning which cause a mischief.

(iii) The mischief rule may be applied by way of alteration or modification of a statute only to avoid some manifest absurdity or strangeness of the result.

(iv) Where a legal mischief exists in the statute.

597 Heydon’s Case (1584) 2 W. L. R. at 1656; see also Rumble, The Thought of John Austin, 378; Feigl & Sellars, Reading in Philosophical Analysis, 564; Slapper and Kelly, The English Legal System, 199.
598 Russell, Human Knowledge, 189-213; Lock, Human Understanding, 3:123-45; Bennion, Statutory Interpretation, 635.
599 Ibid.
600 Ibid.
(iv) Where existing law cannot not provide full treatment for a social mischief arising from the changed circumstances of social and economic conditions of the people.

(v) To add force and life to cure the law according to the public good.

2.2.3.2.2 Circumstances where Mischief Rule may not apply

(i) Mischief rule is not applicable where a provision is clear in its scope and extent.

(ii) Where the application of mischief rule leads to contradictory interpretation to what was intended by the legislature.

(iii) Where the deficiency from the law cannot be removed and new cases cannot be covered by the mischief rule.

(iv) Where the legal mischief leads to some confused meaning contradictory to the objectives of the Act. 601

2.2.3.2.3 Validity of the Mischief Rule

Mischief rule is currently well recognized rule of interpretation of modern legal systems of the modern world. For instance, in a case, Nazeem Khan v. Inspector General of Prisons (2004), it was held by the High Court of Pakistan that the court must give and pay due regard to a clear intent of the law-maker. Ambiguity in a statute would entitle the court to make efforts by interpreting same in a manner which was in consonance with the settled principles of justice and to advance the cause of the statute, its purpose and to suppress the mischief.”602

2.2.4 Hierarchy of the Fundamental Rules

The above mentioned rules of interpretation form a hierarchical order. The first rule is the plain meaning rule. Second is the literal interpretation which is followed by the golden rule in particular circumstances where ambiguity arises from the application of

601 Edgar, Craies on Statute Law, 96; Bennion, Statutory Interpretation, 634.
the literal rule. The third rule is the mischief rule which is brought in to use where there is a perceived failure of the other two rules to deliver an appropriate construction.\textsuperscript{603} However, there is no way in which outsider can determine in advance which of them the courts will make use to decide the meaning of a particular statute.\textsuperscript{604}

2.3 Traditional Rules of Interpretation

Traditional rules are the rules which a court has to apply normally during the process of interpretation in case where plain meaning rule fails to justify the demands of justice or where some absurdity found in the statutory enactments. This type of rules includes:

2.3.1 Rule of Textual Implication

Textual rule of interpretation is based on the determination of semantic content. The promoter of this rule is Justice Scalia\textsuperscript{605} who contends that the rule of law within a constitutional democracy requires that interpretation should be constrained by the original meaning of the legal texts rather than by extra textual source such as the intentions of the framers of the past or the present and the moral or the political ideals. Thus only textual approach of interpretation will ensure the rule of law, rather than a rule by individuals.\textsuperscript{606} Rule of textual implication requires a text to be understood by the language of the statute and contends that the court is bound to give that meaning to the text which is most suitable and based on its textual implication.


\textsuperscript{604} Ibid.

\textsuperscript{605} Antonin Scalia was a justice of Supreme Court of America in 1986. He was born in 1936 in Trento, New Jersey and was one of the most controversial justices. He shows extreme views during argumentation and adopted critical view in his writings. See, \texttt{www.biography.com},visited on Dec.12,2011.

2.3.1.1 Cases where Textual Rule may be Applied

The rule of textual implication has limited scope and applies only to the provision which is clear and manifest in its text. In case where a legal text is manifest in its meaning and scope, the task of textual rule can fulfill the demands of a case clearly including each and every thing permissible or prohibited.  

2.3.1.2 Problems arising from the Textual Interpretation

Many problems however, arise due to textual rule of interpretation. Some of them are as under:

(i) Interpretation through textual rule leads to create difficulty in the way of flexible interpretation.

(ii) Textual rule of interpretation requires everything within the text whether anomalous and unusual and hence causes confusion and contradiction. For example, if municipal order of a city prohibits “entering vehicles in the park”, the textual application of the text prohibits police vans from entering the park in pursuits of danger criminals.

(iii) In many cases textualism creates anomalies in the application of law. For example, if a law is made by the parliament to prohibit speech at public places”, the application of textual rule may include both permissible speech and non-permissible speech.

(iv) Textual rule of interpretation does not necessarily leads to a just and fair result without taking help from extra textual sources.

(v) Textualism does not admit social and political changed needs and demands of the people hence cannot meet the demand of justice.

607 Ibid.
2.3.2 Rule of Strict Construction

Strict construction of a statute means to interpret law in its exact and technical meaning in such manners as to restrict its scope to the subject concerned. This rule is based on the presumption that nothing should be included which does not come clearly within the meaning of the language used in the law. In a case, Warner v. Connecticut, it was held by the court that the language of the statute must be given its exact and technical meaning with no extension on account of implications or equitable considerations”.

2.3.2.1 Application of Strict Rule

There are however, certain statutes which bear strict construction such as penal and criminal statutes, statutes in derogation of common rights and common law, statutory grants, statutes authorizing summary proceedings and most of the tax laws etc.

(i) The rule of strict construction however, cannot be applied where it leads to some absurdity or where strict interpretation defeats the object of the statute or where it contradicts to the legislative intent as expressed in the statute.

2.3.2.2 Validity of the Strict Rule

The scope of restrictive construction has a narrow application in recent times and a tendency is seemed towards its abrogation. The application of this rule is restricted only to the language which is uncertain and ambiguous but if the language of a statute is clear and unambiguous, there is no need to restrict the scope of the statute and the interpreter is bound to construct the statute to include everything come within its scope. In number of the modern states, the rule of restrictive construction has been expressly abrogated by a clear provision inserted in the penal codes. In this sense the

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old common law rule has been destructed and the modern penal statutes are required to be liberally construed according to the express meaning of the terms with the view of promoting justice and achieving the purpose of the enactment. However, the application of restrictive construction depends upon the discretion of the court to some extent as it is the court who determines regarding the exclusion or inclusion of a situation from the provisions of the statute.

2.3.3 Rule of Liberal Construction

Liberal construction means to extend the scope of the meaning of the statute to the cases which come within the spirit of the law. In a case Karam Dad and Another, v. The State and Another, it was held by Lahore High Court that section 354-A, P. P. C. was added in the year 1984 after commission of offence of outraging the modesty of women by exposing them to public view after stripping off their clothes. . . As the said offence can be punished with death, therefore one should be very careful to indict the accused under the said section.

2.3.3.1 Application of Liberal Rule

The rule of liberal construction can be applied in cases where there is any doubt regarding the express meaning of the text, or where a text relating to the fundamental rights of individual, the text will be constructed liberally. For example any law pertaining to promotion and the protection of human rights is entitled to a liberal construction. If a case brought before the court of law and is between the individual and the government, the relevant text will be interpreted in favour of the individual.

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611 Ibid.
612 P L D., 2008, Lahore, LX at 312.
613 Ibid., 499.
There some cases where liberal rule has no application such as where an Act creates a new offence it will not take liberal interpretation rather it be construed strictly or where a statute increased penalty on second conviction of an offence, a conviction before the commencement of the statute cannot be taken into account or where the wording of the statute is clear and admits only one meaning. 614

2.3.3.3 Validity of Liberal Rule

The fact is that both strict and liberal approaches are taken into consideration in case of doubt only, otherwise they have no value. 615 The liberal rule of interpretation is different from the strict rule in the sense that it applies to the remedial texts while strict construction applies to penal statutes. 616

2.3.4 Interpretation through Legislative History

Historical rule of interpretation provide aid in the construction where the letters of the Act are not plain in their meaning or seems to against the spirit of law. The origin of this theory of interpretation is found in the mischief rule laid down in Heydon’s case in 1584. A clear provision of the judgment was that for authentic and true interpretation of all statutes pre-legislative history of the common law must be taken into consideration. 617 The history of an enactment may be divided in to two types like pre-legislative history which is the history of the time and extraneous circumstances existed at the time of legislation and the legislative history which indicates towards the cause of the development of law. Those who adhere to the historical school expound the law by an inquiry in to the pre-existing law. 618 Likewise in America it is

614 Bennion, Statutory Interpretation, 633; Crawford, The Construction of Statutes, 455.
615 Ibid.
616 Russell, Human Knowledge, 298; Edgar, Craies on Statute Law, 531.
617 Ibid.
618 Pound, Enforcement of Law (20 Green Bag, , n. d), 404; Bennion, Statutory Interpretation, 633.
also controversial and an issue of debate that to what extent the legislative history should be considered as criterion for interpretation.619

2.3.4.1 Circumstances to apply Historical Interpretation

The rule of legislative history can be applied under the following circumstances:

(i) Legislative history may be used to understand the objective role of a statute.

(ii) Where no clear picture emerges from the plain meaning of the text.

(iii) Through this rule, an interpreter can take information regarding the overall policy of legislators at the time of legislation.

(v) Legislative history helps the interpreter to know the social background of an enactment.

(vi) In case of ambiguous text, the judge may seek help from legislative history to arrive at the true intent.

2.3.4.2 Problems arising from Historical Interpretation

The consultation of legislative history causes some problems such as:

(i) The question of the wattage of the legislative history is still in debate.

(ii) Sometimes legislative history is apparently different from the intended object of the legislature. It becomes difficult to decide which of the two should be preferred over the other.

(iii) Legislative history is often has no connection with the intent of the modern legislature and hence cannot be relied upon.

(iv) Legislative history does not provide any aid to interpretation to define the true intent of legislature in changed context.

(v) In contemporary period a tension is found between two extreme theories of interpretation regarding the status of legislative history in the process of

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interpretation. The traditional jurists are in favour of the use of legislative history while the jurists of modern times favour the contextual approach.620

2.3.4.3 Validity and Scope of Legislative History

Legislative history in modern era is considered as an important source to find out the true intention of legislature in English law. The scope of legislative history has been increased in the sense that it includes not only pre-legislative history of the common law but the history of the modern legislation, legislative debates, legislative committee’s recommendations, and public committee reports form part the legislative history for the courts to consider in the understanding and interpretation of statutes. Moreover, no appropriate theory of interpretation can be formed without consideration of legislative history. It is only the legislative history which helps the interpreter to find out the true intention and the purpose of legislation. A statute without history is like a tree without roots. It helps an interpreter to determine subjective and objective purposes of the legislation.621

2.3.5 Equitable Construction

Construction through equity was started to be used to extend a remedial statute. The cause of equitable construction was the existence of the implied terms in a statute where the parliament failed to use express words. The logic behind this rule was that the general principles of law cannot meet the challenges of the changed time. The actions of human beings are too diverse and indefinite that it is impossible to cover and to treat them by the general principles of law.622 This rule is based on the presumption that common law nationally immutable and that the construction based

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620 Ibid.
621 Barak, Purposive Interpretation in Law, 355; Edgar, Craies on Statute Law, 129.
622 Aristotle, The Nicomachean Ethics, 98; Baker, An Introduction to English Legal History, 90.
on equity adopted by the court not by changing the law but by avoiding its inconvenient and unjust result in a particular case. In this case, the court constructs a law out of the letters of a statute to suppress the mischief and to advance the remedy. Aristotle was the founder of the doctrine of equity who defined equity as a correction of law where the law is defective due to its universality. It has been derived from Latin expression ‘Aequitas’ which means equalization. Equity can be defined in many ways and in different sense. The most appropriate meaning is natural justice and equality. Equitable construction was grown up in England from the deficiencies of the law where the remedies provided by the common law failed to give relief to the party concerned and the Court of Chancery started to provide equity.

2.3.5.1 Circumstance to apply Equitable Construction

The rule of equitable construction can be applied under the following circumstances:

(i) In case where strict interpretation of the letters of the law causes injustice.

(ii) Where the wording of the statute does not reveal express legislative enactment and merely provides general guide to the interpreter.

(ii) Where literal interpretation of the text leads to some unreasonable result.

(iii) Equitable rule of interpretation helps the judge to decide a matter relevant to the remedial statute by interpretation the statutes on the basis of equity.

(ii) Where letters of the law lead a result against the spirit of and the object of law.

(iii) Where implied terms in a statute are not express in their meaning and scope

(iv) Equitable construction is also needed where a legal text is capable of two interpretations: restrictive and the liberal.

623 Ibid.
624 Karl Marx, Early Writings, 679; Adler & Charles, Great Treasury of Western Thought, 874; Kirk & Raven, The Presocratic Philosophy, 690; Stumpf, Philosophy, 237; Salmond, Jurisprudence, 215.
(v) Equitable construction helps the court to remove absurdity created by the immutability of common law.

(vii) Where common law seems to be inflexible and immutable to deal with the changed circumstances and changed needs of people.

2.3.5.2 Problems arising from Equitable Construction

(i) Equitable construction sometimes leads construction out of the spirit and the intent of the legislature.

(ii) Equitable construction can be applied only to the remedial statutes and penal statutes are exempted from such construction.

(iii) Ignorance of plain meaning rule of interpretation in favour of equitable construction is against the fundamental principle of interpretation that every word of the text must be given its ordinary and natural meaning.

(iv) There is no criterion to examine the scope of equitable construction by disregarding the plain meaning of the text.

(v) Frequent use of equitable construction may cause to destruct the supreme legislative authority of the legislature.

2.3.5.3 Validity and Scope of Equitable Construction

Equitable construction during the earlier period of the statutory interpretation was a regular and known rule of English law and under this rule the jurisdiction of the court could not be called in question about legal changes or making law. The regular practice of this rule caused to the overall changes of the content of English law and the certain decisions of the court by way of equitable construction now have become a part of common law. For example, the development of equitable remedies of specific performance, injunction, declaration, cancellation and rectification in English law is due to equitable rule of construction. Among later issues were the issue of ‘copy
right’, trade mark, and the legality of joint-stock companies with limited liabilities were solved through equitable construction and then recognized by the Parliament through legislation.626 In contemporary scenario however, this mode of construction has been declared as out-moded by the English Courts of law. This rule now has lost its importance by Law Reform Limitation Act 1954 which repealed Public Authorities Protection Act 1893 in many proceedings to which the Act applied and notice of action was to be given. In Edwards v. Edwards, it was held that the courts of equity have given relief on equitable grounds from provisions in Acts of parliament, but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal principles. At present time much more weight is given to the natural meaning of the words than was done in the time of Elizabeth.”627 Equitable rule is still in operation in English courts although in a different way as it is obvious that the rule of justice demands something to cover not expressly provided by the Act of parliament.

2.3.6 Hierarchy of the Traditional Rules

The contemporary legal philosophers and the interpreters have different views regarding the hierarchy of these rules. Some of them prefer only the literal rule as the safest means to determine the legislative intent while others are in favour of the equitable interpretation. Others rely heavily upon extrinsic evidences found in the legislative history of prior enactments.628 The Court of Justice of the European Communities has a different approach from the English Courts of common law to some extent. The techniques of interpretation adopted by the Community Court tend

626 Ibid.
627 Edwards v. Edwards (1956) 1 W.L.R. at 1190; See also, Russel, Human Understanding, 788; Edgar, Craies on Statute Law, 102-103.
628 Sutherland, Statutes and Statutory Construction, 315.
to be employed cumulatively rather than as alternative. The process of interpretation must obviously commence with an analysis of the text. The literal interpretation of a word is not favoured by the Community Court. The Court has shown little interest to hold a word in its plain and ordinary meaning rather it considers a word in its contextual and purposive construction.629

2.4 Contemporary Approaches of Interpretation

In this ever changing scenario, the trend of the courts regarding interpretation of statute has been shifted from traditional rules to the modern approaches of interpretation. The contemporary courts of all the nations of the world have started to give an accommodative and flexible meaning to a legal text to make it applicable to the situation at hand rather than to restrict its scope through strict literal or traditional rules of interpretation. It has been acknowledged now by the judges and the jurists that interpretation is a rationale activity and inquires in to the text of a particular Act through rational and logic behind that text. It deals with the word and determines its meaning and scope in the light of the purpose of legislation and public interest. Moreover, the effect of the EC law seems to authorize the judiciary of UK with extra powers of interpretation much wider than those afforded to them by the traditional rules of interpretation. For example, section 3 of HRA 1998 (Human Rights Act) declares that it is the duty of the court to strive to find a possible interpretation compatible with Convention on Human Rights. In case where ordinary methods of interpretation lead to some absurd consequences, the court may depart from the language of the statute to avoid absurd consequences and must look for a contextual

629 Smith & Bailey, The Modern English Legal System, 270-271; Cross, Statutory Interpretation, 43; Bennion, Statutory Interpretation, 829.
and purposive interpretation. It is more radical in its effect.\textsuperscript{630} The practical situation however, is that where the HRA is not involved, the English courts still have to interpret legislative provisions according to the well-known literal and traditional rules of interpretation. Perhaps it would be better if the 1969 recommendations of the Law Commission were given effect and the judges were expressly permitted to adopt a purposive approach to statutory interpretation.\textsuperscript{631} Anyhow, among the contemporary approaches of statutory interpretation of English-European legal systems are the contextual interpretation, harmonious construction, sociological interpretation, rules of logical reasoning and lastly, purposive interpretation.

\textbf{2.4.1 Contextual Interpretation}

The contextual approach of interpretation is based on the presumption that the word of a legal text must be read in its context not in isolation. This rule leads that a text cannot be understood without its context whose boundaries are not limited in advance. The text should be read as a whole and it is the duty of interpreter to create a link between the background of the past and the present and the circumstances of the text. The interpreter has no concerned with the letters of individual word and literal meaning of the text, rather he has to apply the enactment to the case brought before him in the changed scenario.\textsuperscript{632} The word context literally means the circumstances that form the setting for an event. It also denotes to parts that immediately precede and follow a word or passage and clarify its meaning.\textsuperscript{633} Technically, it may be defined as to consist of other provisions of the same act, legislative history, and the

\textsuperscript{630} See for detail, European Community Human Rights Act, 1998 section, 3.
provisions of the other acts in *pari materia*, and all facts constituting the subject matter of the act. Context not only includes linguistic context but the subject matter, scope, purpose and background of the Act also be taken into consideration.

The court adopts a contextual meaning which is based on the cultural environment of a society. Culture is defined as collective human intellectual achievement and a refined understanding of a society and consisted of the ideas, customs and social behaviour of a particular nation or society. The origin of this theory is found in the wording of Sir Thomas More that words cannot be construed effectively without reference to their context. Their meaning is to be ascertained by reference to the whole of the Act, including the preamble if necessary and even full title. A statute must be read as a whole; therefore the language of one section may affect the construction of another. This theory of interpretation was repeated in 1976 by Sir Rupert Cross who suggested that to overcome the problem of conflict between different rules the judge must give effect and consider the context of the general words if appropriate. The word of a statute should be read in its context. In a case where judge feels that the grammatical meaning may result contrary to the purpose of the statute, the secondary meaning of the word should be taken. A word changes its meaning like a chameleon changes its colour in a particular environment. In this context, every word has two meanings: Its dictionary meaning and its

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637 Sir Thomas More was an English Lawyer and served as counselor to Henry viii in the early of 15th century. He coined the term Utopia in reference to political system in which policies are governed by reason. See, www.biography.com
connotation which means that the words obtain its meaning by its association with other words.  

In fact the language has open texture that imparts discretion to the interpreters. The shortcoming of a language and of author makes it possible for a text to mean the same thing in every circumstance. Those shortcomings compel the interpreter to look beyond the text for criteria by which to understand it. They necessitate consideration of a text environment. Contextual interpretation demands that a general word of a text may not be read in isolation. It should be read in the context of related words. Every piece of legislative work requires interpretation and that interpreter requires consideration both internal and external context of the legislation. In Ayaz Hussain v. Province of Sind, it was declared by the High Court of Pakistan that every section of statute is substantive enactment in itself and its true meaning and effect depends upon its language context and setting. Every section must be considered as a whole.

2.4.1.1 Circumstances to apply Contextual Approach

(i) Where the general words of legal text are to be treated in isolation and lead some absurd result. In this case the wording of the statute should be read in the context of the statute.

(ii) Sometimes an enactment includes a word which in itself is neutral or colourless, and then the context provides colours to it. By such colouring the neutral word becomes colourful and meaningful.

(iii) Where a word in its primary meaning produces an inconvenient result which cannot reasonably be supposed to have been the intention of the legislature.

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640 Sarathi, Interpretation of Statutes, 11.
641 Ibid.
642 P L D., 2005 Karachi, LVII at 391.
643 Russell, Human Knowledge, 2:180; Lock, Human Understanding, 2:223; Bennion, Statutory Interpretation, 824.
644 Ibid.
645 Ibid.
(iv) Where some unusual meaning of a text under specific circumstances requires a less usual meaning through contextual rule of interpretation.646

(v) Sometimes, the texts relevant to a particular industry, profession or of some overseas country reveal that the words should be treated in a special way through context.647

(vi) Sometimes, a literal or usual meaning of a word leads to a broader meaning but it is inconsistent to the legislative intent and thus restricted by the context.

(vii) In case where a string of words is followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last but applies to all in the light of its context.648

(viii) Contextual approach may be applied to cover the problems in statutory interpretation arising from the changes of the constitutional status, joining of the UK the EC and the advent of the Human Rights Act in the common law.

2.4.1.2 Problems arising from Contextual Interpretation

(i) Contextual approach may lead to the consequences against the intent of legislature and the meaning of wording of an enactment.

(ii) Sometimes the scope of the text is widened through contextual interpretation which necessitates undue favour against the legislative intent.

(iii) Contextual approach widened the scope of the discretionary power of a judge in making law and cause to threat the legislative supremacy and to reduce the importance of legislature.

(iv) Contextual interpretation in some cases leads to sabotage legislation by ignoring the literal meaning of the word.

645 Cross, Statutory Interpretation, 44; Smith & Bailey, The Modern English Legal system, 245.
646 Bacon, New Organon,677; Bennion, Statutory Interpretation, 826.
648 Bennion, Statutory Interpretation, 827.
By applying the secondary meaning through contextual approach, the judge may apply the words in different meaning rather to meet the intention of legislature.

The conflict between traditional rule (literal) and the contextual approach cause a tension inherent in legal reasoning of English legal system.

2.4.1.4 Validity and Scope of Contextual Interpretation

In the current phenomenon, the contextual approach of interpretation has gained much importance and played an important role to find out the true intention of the legislature. The Court of Justice of the European Communities has paid close intention to this method of interpretation. This special concern is reflected from its Report on the Judicial and Academic Conference, Sep.1976. In many cases, the decisions of the Court have consistently shown the influence by the contextual and purposive approaches of interpretation. The Court has to interpret the legislative provisions by the context than its exact wording or the subjective intention of those who promulgated the legislation.649

2.4.2 Harmonious Construction

The principle of harmonious construction is based on the presumption that the legislature never intends to make two provisions of a same statute contradictory to each other. The basic rule regarding the interpretation of two conflicting provisions is that the court has to interpret both provisions in such manners as to avoid contradiction and to harmonize them to arrive at the true intent of the law-makers. If some repugnancy appears between the two provisions of a statute, the duty of the court is not to construe them as they were rather than to construe both provisions in

649 Stumpf, Philosophy,224; Laski, Political Thought in England,654; Smith & Bailey, The Modern English Legal System, 270-271; Cross, Statutory Interpretation, 43; Bennion, Statutory Interpretation, 829.
such manners as to remove contradiction and to create harmony between them. For this, the court reads the statute as a whole and tries to give effect to both provisions by harmonizing them. In such cases, the court has to adopt two methods to reconcile: Either it considers both contradictory provisions as dealing with separate issues or it holds that that one provision is an exception to the general rule provided by the statute. In fact the harmonious construction does not aim to destroy the effect of any statutory provision rather it aims to reconcile them by giving effect to both contradictory provisions. The object of this rule is that the provisions of the act should be construed to promote the objectives and spirit of the Act so that the plain meaning of the provisions may not be violated.650 If harmonious construction leads to or give effect to one provision as a dead letter while focusing on the other provision, the construction will be void. In Shahid Nabi Malik v. Chief Election Commissioner, it was held by the Supreme Court of Pakistan that if the words of an instrument are ambiguous in the sense that they can bear more than one meaning, where the words are semantically ambiguous or literal interpretation of a provision incompatible with the other provisions of that instrument, the Court would be justified in construing the words in a manner which will make the particular provisions purposeful according to the rule of harmonious construction.”651

In case where two provisions of the same Act are irreconcilable, the one which expresses the intent of lawgiver should control the other. In such case, the provision last in order of position will prevail, since it is the latest expression of the legislative will. Where the conflict is between two statutes, more may be said in favour of the rule’s application, largely because of the principle of implied repeal.652 In a case, Zafar Ali Khan v. Government of N.W.F.P (2004), it was held by the court that the

650 Singh, Introduction to Interpretation of Statutes, 50.
651 P.L.D., 1997, LV at 32 SC.
652 Guinprez, Greek Thinkers, 655; Crawford, The Construction of Statutes, 263-264.
courts are required to harmonize the provisions of a statute in such a way that every
part thereof becomes effective.” In Johnes v York County, it was held that the court
should seek to avoid any conflict in the provisions of the statute by endeavoring to
harmonize and reconcile every part so that each shall be effective.

2.4.2.1 Circumstances to apply Harmonious Construction

The harmonious construction may be applied under certain circumstances such as:

(i) Where two or more provisions of a same statute are repugnant to each other.

(ii) If it appears that a provision of the statute is meaningless.

(iii) In case of inconsistency between two sections of the same act.

(iv) In case where a text consisted of homonym words and each of them carries
different meaning and literal interpretation of the provision made it incompatible with
the other provisions of that instrument.

(v) In case where literal interpretation leads to the omission of any word of the statute,
the court is required to harmonize the provisions of a statute in such a way that every
part thereof becomes effective.

2.4.2.2 Problems arising from Harmonious Construction

(i) There is no hard and fast rule to determine the category and scope of each
provision.

(ii) It is very difficult to decide whether separate provisions of the same statute are
overlapping or mutually exclusive.

(ii) Harmonious construction sometimes leads to a conflict between two sub-sections
of the same section.

iii) In case where it is impossible to reconcile between two contradictory provisions of the same section, one provision may be used to defeat the other by way of harmonious construction.

The rule of harmonious construction has much importance in the case of two conflicting provisions. It helps the interpreter to reconcile between them in such manners as to avoid confliction and to harmonize them to arrive at the true intent of legislature. For the legislature does not intend to enact two repugnant provisions in the same statute.

2.4.3 Sociological Approach of Interpretation

The term sociological approach of interpretation was introduced in English-European legal system during the 20th century. The approach of sociological interpretation is based on the principle that the judicial approach should be dynamic and elastic rather than rigid and static. That the judges should look not only to the wording of the statutes but to give much intention to the social needs and demands of the people. The court cannot be indifferent from the burning issues of the society rather it must interpret law in the light of the social and the political context of a society. This theory is based on the presumption that legislature does not ignore the social needs and social context while making law rather the sole object of legislation is to solve the contemporary social issues of the people through legislation, so the interpreter must abide by this presumption. The theory of sociological-positivistic interpretation of law is based on the doctrine of Austrian sociologist Ludwig Gumplowicz. He

Gumplowicz was born in 1838 and died in 1909. He was an Austrian sociologist, political thinker and jurist. In 1882 he became an associate professor of law at Graz and a full professor in 1893. In 1909 he committed suicide along with his wife by taking poison. He was the chief representator of the minorities and focused on their problems. He presented the theory of sociological approach of positive law. In his writings are, The Out Lines of Society, Der Rassenkampf 1909 (Struggle for the race), and numbers of other books on administrative and constitutional law of Austria. See, William M Johnston,
established a sociological foundation for the positivistic theory that law is essentially an exercise of the state power. He observed that the chief moving force in the history was the struggle of different races for supremacy and power. The stronger overcame the weaker and formulated rules of conduct for other members of the society. Individuals and the state had no positive relations between them. The individual was permanently exposed to the arbitrary rule of the state. In modern times, however, both legislature and the courts cannot ignore the benefits of minorities. Hence, the prime concern of law should be to solve the social needs of people. Similarly, the court should interpret law to respond to ever changing conditions prevailing in a society.655

In Pakistan the first case held according to the sociological approach was Arbab Ali v. Ghulam Muhammad where it was held that the law is interpreted to respond to ever changing conditions prevailing in the society. The apex Court has since long recognized ground of delay as a valid ground for bail."656

2.4.3.1 Circumstances to apply Social Construction

(i) In case where law directly deals with the social issues of the people.

(ii) Where court thinks it appropriate to assign a broader meaning to a word.

(iii) In case of doubt, the court may adopt sociological interpretation to give benefit of doubt to the party concerned.

(iv) In case where plain meaning of a related text restricts the scope of the law and fails to cover contemporary issue at hand.

(v) Where changed social needs demand changing in the law and existing legislation does not cover the case.

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656 P L D., 2005, Karachi, LVII at 261; P L D., 1968, at 353 SC.
2.4.3.2 Cases where Social Construction may not apply

(i) The rule of sociological interpretation is not applicable in case where such construction seems contradictory to the apparent purpose of the legislature.

(ii) Where issue is concerned with an outmoded practice of people, the court can not assign a social meaning to that issue.

(iii) Where sociological interpretation leads to unjust and unfair result.

(iv) Where sociological interpretation causes to disrupt the legislative power of the Parliament and disturb the well established meaning of an enactment.

(v) In case of sociological approach, a possibility always existed that a group of persons may get undue benefits in the guise of sociological interpretation.

Sociological interpretation however, can be a useful and appropriate rule of interpretation, especially in cases where plain meaning rule fails to fulfill the demand of changed needs of society. The modern law aims to promote the interests of the people and to administer justice equally among all the members of the society. So to achieve this goal and to do proper justice, the interpreter must have concerned with the social issues of the society and ever changing demands of the people.

2.4.4. Interpretation through Logical Reasoning

Logical reasoning may be defined literally as an action or event in accordance with the logical argument or reasonableness. Technically, the term logical reasoning may be defined as the legal meaning of an enactment in its application to a particular factual situation ascertainable by the process of reasoning. Rule of logical reasoning is based on the presumption that for every valuable and worthy process argumentation is necessary to justify that process. All manners relating to legal,

\[657\] Bennion, Statutory Interpretation, 789.

\[658\] Ibid.
political, economic and social behaviour and acts of the people are based on the logical reasoning to prove legal justification for what they do. While performing judicial activity, a judge is required to show legal justification of his decision which he selected among numbers of similar decisions and applied it to a particular situation at hand. The specific task of logic as a branch of knowledge is to study the forms of valid argument is existed at least since the time of Aristotle.\textsuperscript{659} In contemporary period, the first attempt to undertake a systematic and logical classification of some fundamental concepts of legal science was made by American jurist Wesley N. Hohfeld\textsuperscript{660} during the 20\textsuperscript{th} century. He observed that since judges are required to give only such decisions as are justified according to the law, they must apply thought to the question which of the decisions sought from them by the parties to case in court is so justified. Since they are required to state the reasons for their decisions, they must not merely reason out, they must publicly state and expound, the justifying reasons for their decisions –hence their eminent accessibility to study.\textsuperscript{661}

Logical interpretation contends that statutory interpretation is not like other branches of the common law, as a body of doctrines to be gathered from particular precedents and judicial interpretation and apply to a particular situation, it rather consisted of logical reasoning which is existed behind every piece of legislation. Legal reasoning in fact consists of a particular method and style which is quite different from the method and logic of scientific explanation as well as from moral, economic and political writings. It is logical reason that works behind the wide discretionary powers of the judges in the process of interpretation. In the present context, the people are concerned not with the demonstration of logical truths but with

\textsuperscript{660} Hohfeld was a professor of law at Yale University; he was born in 1879 and died in 1917 at the premature age of 38. See for detail, Jules Stone, \textit{Legal System and Lawyer’s Reasoning} (Stanford: n. p., 1965), 137-139; Roscoe Pound, “Fifty Years of Prudence,” 50 \textit{Harv. L. Rev.} 557 at 573-576.
\textsuperscript{661} Jules Stone, \textit{Legal System and Lawyer’s Reasoning},138.
the application of logically valid forms of argument in legal contexts.\textsuperscript{662} Rule of logical reasoning may be divided into different types such as:

**2.4.4.1 Rule of Deductive Reasoning**

Deductive reasoning literally means taken away a part of something.\textsuperscript{663} Technically, it may be defined as reasoning from the whole to the part; from the general to the specific.\textsuperscript{664} It is that method of logical reason which derives a particular law from the general principles of the constitution or code law. The rule of deductive reasoning is based on the presumption that since it is the nature of the law to be universal so it is applied to the facts by way of a conclusion or inference drawn or deduced from two statements relevant to a matter of law. In deciding between opposing construction of an enactment, deductive reasoning is applied to each construction in turn. Deductive inference proceeds from a universal premise to a particular premise.\textsuperscript{665} The rule of deductive reasoning may be explained in its simplest and yet most powerful expression by way of Aristotelian syllogism that “all men are mortal” and that “Socrates is a man”. Therefore, it is concluded that Socrates is mortal.”\textsuperscript{666} A deductive argument is an argument which maintains that the conclusion of the argument is implied by some other proposition of the argument.\textsuperscript{667} Unlike common law, civil law is based on deductive reasoning as it proceeds from a comprehensive code of provisions in accordance with which all subsequent experiences must be judged and evaluated. The European lawyers favour for a more convenient and

\textsuperscript{662} Bodenheimer, Jurisprudence, 385; Jules Stone, Legal System and Lawyer’s Reasoning, 139.
\textsuperscript{663} The Blackstone’s Dictionary of Law, 54; Cowie, Oxford Advance Dictionary, 310.
\textsuperscript{664} Ewing, A Short Commentary on Kant’s Critique of Pure Philosophy, 241; McCormick, Legal Reasoning & Legal Theory, 378; Slapper and Kelly, The English Legal System, 187.
\textsuperscript{665} Bennion, Statutory Interpretation, 789.
\textsuperscript{666} Aristotle, The Nicomachean Ethics, 10:13; Bodenheimer, Jurisprudence: The Philosophy & Method of Law, 385.
\textsuperscript{667} Morrison, Geary, and Malleson, Common Law Reasoning and Institutions, 41.
flexible body of law than a code of rigid and fixed laws and prefer flexibility over
certainty. They stress that law should be easily understandable and is approachable to
all and. Here precedents are not dispensed with but its hold is looser than in English
legal system. Thus on the basis of logical reasoning a legal decision is always
justified by means of a purely deductive argument. In a case, Daniels and Mrs.
Daniels v. R. White sons and Tarbard (1938), the judgment was based on the logical
deductive justification by granting the meaning of the phrase “of merchantable
quality” in the context of s.14 (2) of the Sale of Goods Act 1893.”

2.4.4.2 Rule of Inductive Reasoning

Inductive reasoning may be defined literally as to initiate something or to induce it. Technically, it may be defined as arguing from the part to the whole; from the
particular to the general. In common law history, Francis Bacon founded the
inductive mode of interpretation and prescribed certain rules for this purpose. His
theory constituted breaking through in the field of legal sciences and statutory
interpretation. It is a method of logical reasoning to discover general laws from the
particular facts of the cases. Inductive reasoning is gathered from the mass of the
decisions and certain tendencies seeking to determine whether some of these
tendencies are strong enough to impose themselves upon courts by reason of inherent
fitness and necessity. In case of inductive reasoning, the individual hypothetical

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668 Ibid.
University Press, 1931), 234; Friedman, Legal Theory, 533.
207-208.
673 Francis Bacon was born in 1561 and died in 1626. He was the Lord Chancellor of England. He
founded inductive theory of interpretation and theory that “knowledge is power”. See, Robertson, The
Philosophical Work of Francis Bacon, 1-8; Broude, The Philosophy of Francis Bacon, 2-5.
674 Bacon, New Organon, 12-23; Advancement Learning and New Atlantic, 34-45.
675 Lock, Essay Concerning Human Understanding, 2:453; Freund E., “Interpretation of Statutes”, 65
cases are solved by way of logical reasoning behind any relevant enactment and the general principles ascertain themselves gradually from the individual decisions of the particular cases, and the system of law ascertain general principles from the decisions of particular individual facts of the cases. A case law system, on the other hand develops tentatively, and truly casually; the principles crystallizes slowly from decisions in particular cases, and the method of law finding proceeds inductively from the particular to the general. Common law is inductive and empirical in nature and laid down its rules on the basis of case-by-case and infers a general principle through a plenty of precedents and confines that principle to the actual experience.

### 2.4.4.3 Rule of Analogical Reasoning

Reasoning by analogy is a form of deductive reasoning and involves reasoning from part to part. An example of this type of reasoning would be that wood floats on water. Plastic is like wood. Therefore, plastic floats on water. The truth of the conclusion depends completely on the accuracy of the analogy. The connection between two subjects that are being compared depends upon weighing up and assessing their similarities and their differences. On similar attributes, the question is to solve whether the similarities are more important than differences between the two objects. If the analogy is valid then the conclusion may equally be valid.

### 2.4.4.4 Rule of Combined Reasoning

In some cases, a law may consist of both methods of reasoning, deductive and inductive at the same time. The example of this type of case is the precedents under common law system. Originally the precedents form the model of the deductive reasoning because in case of precedents, the judges merely apply the legal principle

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677 Ibid.
established in the precedent to the facts in hand to determine the outcome of the case. To this extent the precedents form deductive reasoning but as the judges have to consider many other factors while deciding a case. In the presence of bulk of similar cases, the major difficulty faced by the judges is to ensure the validity of analogy made, if conclusion drawn is to be valid. The binding element in any precedent is the ratio decidendi of the decision. In delivering his decision, the judge does not separate the ratio of the case from other obiter comments. It is for judges in subsequent cases to determine the ratio of any authority. This method of determination of the ratio may be seen as a process of inductive reasoning. For the judge in the present case derives the general principle of the ratio from the particular facts of the previous case. This move from the particular to the general is by its nature is inductive. However the use of inductive reasoning cannot claim the certainty inherent in the use of deductive reasoning.679

Unlike deductive reasoning, inductive reasoning draws a conclusion which is not simply a re-statement of what is already contained in the basic principles. Inductive reasoning is less certain in its conclusion than deductive reasoning.680 The clear and a distinct demarcation line however, cannot be drawn between inductive and deductive legal reasoning. The logical reasoning behind a judgment is neither purely inductive nor deductive rather it is just asserted as a matter of logic. The legal reasoning as exercised by the judiciary is a mixture of both reasoning and consisted of partly deductive and partly inductive, and partly reasoning by analogy along with the element of personal discretion of the judge.681

679 Ibid.
680 Ibid.
681 Ibid., 191.
2.4.5 Purposive Interpretation

Purposive approach of interpretation is based on the presumption that in this democratic regime, no need to wait for some ambiguity and absurdity in the text of a statute and that the wordings of the statute should be constructed according to the spirit and the purpose of the Act. The logic behind this approach is that the law in any legal system is framed and designed to enhance the scope of justice not to frustrate it. The prime concern of statutory interpretation should be to arrive at the purpose and objectives of legislation in any way and the concept of literal interpretation is no more important to day. It is the language of statuary text which set and restricts the limits of the text and then the text of a statute restricts the scope and limits of the interpretation.

Literally, the word purpose denotes a reason for which some thing is existed.\textsuperscript{682} Technically, it is defined as a process which aims to promote the remedy intended by the Parliament to cure a mischief existed in the text.\textsuperscript{683} The purposive approach aims to express the will of legislature.\textsuperscript{684} Construction by way of purposive rule takes account not only of the words of the text according to its ordinary meaning but also the context. In fact every piece of legislation is designed to enhance the object of justice not to frustrate it on mere technicalities. Though the function of the court is to expound the law not to legislate, but in any situation, the legislature cannot be asked to sit to resolve the difficulties found in the text in the implementation of its intention and the spirit of the law. In such circumstances it is the duty of the court to mould or creatively interpret the legislation by liberal construction to meet the end of justice. The statute must be interpreted to advance the cause of statute not to defeat it.

\textsuperscript{682} Cowie, Oxford Advance Dictionary, 167. \\
\textsuperscript{683} Feigle 7 Sellar, Reading in Philosophical analysis, 233;Bennion, Statutory Interpretation, 657. \\
\textsuperscript{684} Eskridge, Dynamic Statutory Interpretation, 41; W. Twining and D. Meirs, How to do Things with Rules: A Primer of Interpretation (n. p: 1999), 186; Cross, Statutory Interpretations, 3.
In such cases the court will not care for the certain grounds for inferring that the legislature intended to exclude the jurisdiction of the court.\textsuperscript{685}

2.4.5.1 Development of Purposive Interpretation

The historical source of purposive interpretation is found in the mischief rule established in Heydon’s case. The fact is that the phrase of “purposive interpretation” is a modern version of the mischief rule set up in Heydon’s case. The reference of ‘purposive interpretation’ has been made to the ‘rule of effectiveness’ (\textit{regle de l’effet utile}), a concept borrowed from international law. According to this rule preference should be given to the construction which gives the rule full effect and maximum practical value.\textsuperscript{686} The earlier concept of purposive interpretation was that the courts should look at the general intention of the legislature and where the words of a text clear in their ordinary meaning, the courts would not go further to inquire in to the purpose of a legislative enactment. The concept was that the purposive approach needed only where the intention was not clear or there was a doubt that the courts resorted to their interpretation of the words used.\textsuperscript{687}

The need for wider meaning of purposive interpretation felt seriously during the mid of the 20\textsuperscript{th} century when many serious problems occurred due to the application of strict traditional rules of interpretation. It was the times when judges had to follow the traditional rules strictly which were later became incapable to meet the challenges of the changed scenario.

The legal philosophers and the judges of the modern era rejected not only the static rules of intentionalism but also the traditional rules for purpose of statutory interpretation to solve contemporary issues of developed nations. This changed trend

\textsuperscript{685} Russell, \textit{Human Knowledge}, 134; Singh, \textit{Introduction to Interpretation of Statutes}, 54.
\textsuperscript{686} Bennion, \textit{Statutory Interpretation}, 657; Smith & Bailey, \textit{The Modern English Legal System}, 274.
is based on the argument that the purpose of legislation can be drawn easily by considering the generality of legal text and not by a specific mode of intentionalism. Consequently, the trend of interpretation started to shift from traditional interpretation to the modern approaches when Denning LJ in his judgment of a case, Seaford Court Estates Ltd v. Asher (1950), clearly argued that the better way to find out the intention of Ministers and Parliament is by filling gaps and by making sense of enactment but it was strictly criticized by his contemporaries and his approach was declared as a naked usurpation of legislative function under the guise of interpretation. It was at the end of 1960s and at the beginning of 1980s that this approach appeared simultaneously in American, English, Canadian, Australian and Newzealand common law and developed primarily in the context of statutory interpretation. The modern thinking is that the purpose of legal interpretation is to achieve the purpose of a legal text.\footnote{Seaford Court Estates Ltd v. Asher (1950) 1, W.L.R. at 1089; See also, Blackstone, The Commentaries on the Law of England, 767; A Haron Barak, Purposive Interpretation in Law, 89.}

This approach was re-used in 1980s by the Lord Scarman in a lecture in which he declared that no one was dare to choose the literal meaning rather than a purposive construction of statute. In a case, Mandla v. Dowell Lee, the court was sharply divided on the application of statute. The question was regarding the interpretation of word ‘ethnic’ in the context of Sikhs Britain. In this case, the House of Lord and the Court of Appeal adopted different interpretation not only of the word but about their attitude to the legislation and to the activities of the Commission for Racial Equality.”\footnote{For detail study see, Nichal & Karl, The Contemporary European Philosophy,456; Bennion, Statutory Interpretation, 657-668; Smith & Bailey, The Modern English Legal System, 271-291; Morrison, Geary & Malleson, Common Law Reasoning and Institutions, 171-176.} The phrase of purposive interpretation was used openly in a case, United Steel Workers v. Weber (1974) where it was held by the court that construction through legislative intent might brought about an end completely at variance with the purpose of the statute. The statute must be constructed according to the objective and
the purpose of a statute as whole”.690 In this way, Weber case provided a base for a new methodology of interpretation by way of purposivism.691 The general rule is that if the provisions of an enactment are express, clear, and unambiguous cannot be curtailed or extended on the basis of purposive interpretation but if the object or meaning of certain provisions is not clear then it is perfectly legitimate to recourse to purposive interpretation and the Court can take aid by preamble to ascertain the objects of the statute. Although it is new fashion to talk of the purposive construction of a statute, the need for such a construction has been recognized since 17th century.692 A statement of purpose may be found either in the act itself or in the judgment of the court devising the statement as an aid to construction. It may be found in the form of long title, or in purpose clause or recital.693

Purposive interpretation may be divided in to three types: Purposive and literal construction; purposive and-strained construction and non purposive and literal construction etc.694 Purposive and literal construction means to follow the literal meaning of the enactment where the meaning is in accordance with the legislative purpose. Purposive and strained construction is applied to the text where the literal meaning is not in accordance with the legislative purpose.695 Non-purposive construction means literal construction which is adopted in cases where the meaning of the words is clear and unambiguous.696

691 Eskridge, Dynamic Statutory Interpretation,15.
692 Lock, Human Understanding, 786; Bennion, Statutory Interpretation, 658- 673; Cross, Statutory Interpretation,33.
693 Ibid.
694 Ibid.
695 Ibid.
2.4.5.2 Causes for the Development of Purposive Interpretation

In contemporary period European Community Court gives much importance to the purposive interpretation due to several reasons. The policy is to go back to the spirit, general scheme and the objectives of the treaty during the process of interpretation.\(^{697}\)

The reasons behind the purposive interpretation are as:

(i) Many of the key provisions of the EC and EURATOM treaties are drafted in general terms, and with no definition sections.

(ii) The text of EEC and EURATOM Treaties and other secondary legislation are published in different languages and cause to create doubt, so in cases of doubt, the words may be considered in the light of their context and purposes.

(iii) The role of the European Parliament is merely consultative and the Court is expressly empowered to review the legality of the acts of the Council and Commission.

(vi) The freedom of the Court to adopt contextual and purposive approach is facilitated by the express statement of Community’s Treaty.

(v) The EC has to refer frequently to the purposes of the Community in the process of statutory interpretation. This reference is based on the general scheme of the Treaty. Exceptions to general Community rules and derogation to Treaty obligations are restrictively interpreted. For example, the principle of the free movement of workers is subject to limitations justified on ground of public policy, public security or public health. These limitations are strictly construed.\(^{698}\)

\(^{697}\) Ibid.

\(^{698}\) PerryGeneral theory of Value, 654; Russell, Human Knowledge, 658; Smith & Bailey, The Modern English Legal System, 275.
2.4.5.3 Modern theory of Purposes Interpretation

The comparatively advance theory of purposive interpretation leads that purposive interpretation is based on three components the language or semantic component; the purpose; and the discretion. Semantic component means the language of the text which shapes the range of semantic possibilities whether express or implied. The task of semantic component is to set the limits of interpretation by restricting the interpreter to a legal meaning of the text can. 699 The second is that element of purpose which forms the ratio juris at the core of the text. This purpose may be described as the values, goals, interests, policies, and aims for which the text is designed to actualize. It is a normative concept and works like a legal construction such as concept of ownership, right, and duty. 700

The third component of purposive interpretation is the discretion of the judge. Discretion means the choice of a judge to adopt any possible interpretation among few legal interpretive possibilities. With the help of his discretion the judge determines the ultimate purpose of the text. For example, the interpreter determines the limits of language of the text and sometimes evaluates the reliability of sources of information about the author’s intent by exercising his discretion. 701 The discretionary power of the judges may be restricted in democratic way by the principles of democracy and legislative supremacy according to which the constitutional laws have supreme authority and are binding on every one including judges who cannot void them because they do not like them. 702

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700 Ibid.
701 Ibid.,
702 Ibid.
2.4.5.4 Circumstances to apply Purposive Approach

The purposive construction can be applied under different circumstances:

(i) Where a literal construction leads to some inconvenience or unjust result,

(ii) Where the objects of the statute or act is not clear.

(iii) Where the traditional interpretation frustrates and abuses the purpose of legislation as a whole rather than to expound it.

(iv) In case where two constructions of a provision are possible.

(v) Purposive construction may be applied to penal statutes to avoid a lacuna.

Under these and similar circumstances the court goes beyond the literal interpretation of the text and tries to find out the true intention of the legislature through the purpose behind an enactment. In this effort, the court may derive the legislative purposes through two possible ways: The broader and the narrow way. In its broadest way, the legislative purpose may be find out from all the Acts dealing with the issue in question, while in its narrowest way, it can be the purpose of a particular enactment relevant to a specific issue.  

2.4.5.5 Characteristics of Purposive Interpretation

Purposive interpretation has a wider scope to interpret and construct existing laws to remove the rigidity and complexity of law and to make it flexible such as:

(i) Purposive interpretation helps the interpreter to construct law according to needs of time and people.

(ii) Through purposive interpretation, the subjective and the objective intent reflect the author’s intent and the intent of the legal system.

(iii) In case of contradiction, purposive interpretation replaces the rigid interpretive rules with the flexible interpretive presumptions.

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(iv) Purposive interpretation helps to remove doubt from the language of the text.

(v) Purposive interpretation considers the previous state of the law, the general scope of the statute, the mischief to cure and lastly, statutes in pari materia.

(vi) Purposive approach is an active alternative to intentionalism.

(vii) The generality of purposive interpretation is a blessing for modern legal system as different legal systems may adopt different ways of interpretation.

(viii) Purposive interpretation takes an account both the legislature’s intent and the intent of the legal system.

(ix) Purposive interpretation focuses on the true intent of the text’s author, and not just his or her expressed intention.

(x) To specify the general language of the text, purposive interpretation not only satisfies the requirement of semantic ground but also the context of a legal system.

(xi) Purposive interpretation is unique for its holistic, universal approach. In interpreting a single statute, a judge interprets all statutes.

(xii) Purposive interpretation seeks to fashion to create harmony between the meaning given to a text and the legal system surrounding it.

(xiii) In presence of numerous interpretive rules purposive approach is decisive and ensures the spirit and end of legislation.704

2.4.5.6 Problem arising from Purposive Interpretation

The contemporary approach of purposive interpretation is based on the assumption that a legislature is consisted of reasonable persons pursing reasonably and purposes reasonably.705 This notion often seems false and impractical.706
(i) In hard cases, purposive approach cannot maintain a connection with the actual object of the legislature. The fundamental problem in purposive interpretation is the relationship between text and context, form and substance.\(^{707}\)

(ii) The methodology of purposive approach is not satisfactory to meet the ends of legislation. It neither accounts for the way in which agencies and courts do interpretation, nor does its methodology rests on a sufficient account of what enacting body wants.

(iii) Purposive approach assigns an absolute freedom to an interpreter to construct a statute according to his own whim.\(^{708}\)

### 2.4.5.7 Validity and Scope of Purposive Interpretation

The rule of purposive interpretation is still under discussion in English legal system. Legal writers and judges are in confusion to design the scope and parameters of this rule. Before this current century the English courts in most cases stuck to the golden rule by which statutes were interpreted according to the grammatical and ordinary sense of the words, even if this gave rise to unjust result to which Parliament never intended.\(^{709}\) However the ‘1969 recommendations of the Law Commission’ are focused to adopt purposive approach of interpretation and contemporary writers advocate the flexible and more convenient construction of a statute. It is argued that 1969 recommendations of the Law Commission should be given effect and judges should expressly be permitted to adopt a purposive approach to statutory

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\(^{709}\) Eskridge, *Dynamic Statutory Interpretation*, 25.
interpretation.\textsuperscript{710} The modern thinking is that the purpose of legal interpretation is to achieve the purpose of a legal text.\textsuperscript{711}

The modern version of English courts is to consider the purposive approach on the same principle as considered by the European Courts. In Bulmer v. Bollinger (1974), it was held by the court that beyond doubt the English court must follow the same principles as the European court. Otherwise there would be difference between the countries of the nine. . . . It is enjoined on the English courts by section 3 of the European Community Act 1972.\textsuperscript{712}

The influence of purposive interpretation in English legal system may also be found in the provisions of the human rights and the fundamental rights of European Convention by becoming a party to the European Convention. However, the British system of purposive construction is less liberal than the continental. The British concept of purposive construction is far more literalist than the European variety and permits the strained construction only in rare cases. The British courts do not permit a wholesale jettison of the grammatical meaning. Since the purpose is mainly to be gathered from the language used, it must by definition broadly conform to that language.\textsuperscript{713} In this way, the European version of purposive interpretation is different from British concept. According to which the judges do not need to interpret a text according to its literal or grammatical meaning. They should interpret a law according to its design or purpose behind it.

\textsuperscript{710} Lock, \textit{Human Understanding}, 3:332; Passmore, \textit{A Hundred Years of Philosophy}, 378; Slapper and Kelly, \textit{The English Legal System}, 200.


\textsuperscript{713} Eskridge, \textit{Dynamic Statutory Interpretation}, 45; Passmore, \textit{A Hundred Years of Philosophy}, 378; Slapper and Kelly, \textit{The English Legal System}, 200; Smith & Bailey, \textit{The Modern English Legal System}, 277.
Conclusion

This chapter concludes that the paramount objective of interpretation is to derive true intent of the law-giver. It is this reason that the contemporary legal philosophers discussed the notion of legislative-intent in detail and introduced different approaches to find it out. The contemporary western philosophers and judges showed great concern to the study of the science of interpretation and succeeded to develop a liberal approach in very short period during last few decades only by declaring traditional rules as obsolete and out-dated. Further, they discussed in detail all necessary measures that may be taken into consideration before entering into the process of interpretation for the guidance of an interpreter. Moreover, the contemporary academicians and jurists have considered this subject as the most technical subject of legal studies.
CHAPTER 4

INTERPRETIVE SYSTEM OF ISLAMIC LAW

Section One

The Course of Ijtihād

Different legal systems have to adopt different interpretive rules based on their culture and constitutional general principles. For instance, in English-Common law, the process to find out legislative intent is based on the literal rule while interpretive system of European law is based on the contextual approach of interpretation. Likewise, the process of interpretation in Islāmic legal system is based on the contextual and purposive approaches which though may not in accordance with the literal meaning of the text.

1.1 Steps Necessary for the Course of Ijtihād

The fundamental criterion of interpretation in Islāmic legal system is not different from any other interpretive system of the world that it must be in accordance with the intention of the Law-giver and must have its validity in the legislative and interpretive measures of the Constitution (Qur’ān and Sunnah). Throughout the history of the science of the statutory interpretation, the prime concern of the interpreter or mujtahid was to discover the most appropriate meaning of the text in the light of the object and
intent of Law-giver. The primary duty of the jurist or a court is to strive hard to find out the particular text related to the issue at hand. For this a thorough study of all legal texts, traditions, and judicial interpretation is necessary. Once the relevant text is located and confirmed, the process of *ijtihād* becomes easy for interpreter. After finding out the relevant text and its location whether in the Qurʾān or in Sunnah, the task of *mujtahid* is to understand deeply wording of the text, its scope, and grammatical construction and more important is to study its contextual and purposive scheme to find out the proper solution of the case. If a word of a text is plain and bears only one meaning the interpreter must give the word that particular meaning and must not depart from the ordinary meaning of the word.

In case where ordinary meaning of the text does not cover the case at hand or there is some doubt in the actual meaning of the text, the interpreter goes beyond the literal meaning and find out the hidden meanings of the text by use of logical reasoning through *ijtihād*. If jurist is succeeded to derive the hidden meanings of the text, he has to inquire into that meaning in the light of the prevailing customs and usages of the society. For this a Muslim jurist has to take help from earlier, traditional and the modern approaches of interpretation to arrive at proper solution of the contemporary case. The last step is the application of the relevant text to the issue. For this, the interpreter has to apply the plain meaning rule along with contextual approach first and in failure of this attempt he has to adopt any other mode of interpretation based on logical reasoning. In case of ambiguous text or if no direct evidence found in the Qurʾān or Sunnah, the interpreter has to derive law by way of inferences and implications of the text in the light of their objectives and public interest.
1.2 Sources to Provide Aid to Interpreter

During the process of interpretation, an interpreter takes help not only from the textual parts of the Qurʾān but from the context, the Sunnah, history, and judicial interpretation etc. In this sense and like English-common law system of interpretation, the sources of Islāmic interpretation can be divided into two different categories and can be discussed in the light of modern legal terminologies such as intrinsic sources and extrinsic sources. As Qurʾān is considered a divine Constitution of the Muslim Ummah, the term intrinsic source is applied to the different parts of the Qurʾān such as the preamble, surah and Qur’anic texts etc. The external links of a text are divided into six types such as Sunnah of the prophet (pbuh), context of the text, judicial precedents and dinterpretrive techniques of the past.

The most important source to understand the legal texts of Qurʾān is the Sunnah of the prophet. The term Sunnah literally means habitual or customary practice whether good or bad. Technically, the term Sunnah applies to the saying, acts and tacit approval of the last prophet of Allāh. It is reported from Rāfiʿ bin khudayj that Allāh’s Messenger came to Madinah and found the people grafting their date palm trees. He asked them what they were doing. They informed Him, that they were artificially pollinating the trees. He then said: “Perhaps it would be better if you do not do that.” They abandoned the practice; the yield of the date palm became less. So they informed Him, He said: “I am a human being. So when I tell you to do something pertaining to the religion accept it, but when I tell you something from my personal opinion, keep in mind that I am a human being. Then he added: “You have

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714 See for detail, Chapter 2, pages, 126-128.
716 Al-Shāṭibī, Al-Muwāfaqāt, 4: 56.
better knowledge in the affairs of this world.” It is necessary for an interpreter to have knowledge that the cases related to the affairs of the people, the Holy Prophet decided them as what he saw appropriate in the light of the prevailing customs. A Muslim interpreter is not allowed to interpret and to construct any legal text without taking help from Sunnah. In this sense, Sunnah forms a necessary part of the Qur’an.

The prophet, his companions and the traditional Muslim jurists adopted different techniques such as analogy, logical reasoning, juristic preference, istidlīl, consensus of opinion and maṣlaḥah mursalah etc. A modern jurist can take help from these sources to solve the contemporary issues of Ummah. Public policy in Islāmic legal system is defined as maṣlaḥah mursalah that is utilized by the Muslim judges and the jurists since the birth of Islamic legal system. Like English-European system, public policy in Islāmic legal system is acceptable only in cases where the statute under consideration is ambiguous not clear and it may be assumed to be the policy of the law in respect of that result.

1.3 Interpretive Presumptions of the Qur’ān

Among many unique characteristics of the divine Book, one important and significant character is that the Qur’ān itself contains many interpretive presumptions. These presumptions on the one hand, provide aid in the interpretation of the legal texts of the Qur’ān and Sunnah and on the other, outline a base to develop an organized system of interpretation. The task of Muslim judges is to utilize these guiding principles and to frame general legal theory of interpretation in the light of these principles. The Qur’ān contains many provisions which lead that a jurist or a judge must decide the case by exercising his own logical reasoning according to the demand and circumstances of the parties concerned and that his judgment must be beneficial for

717 Imām Muslim, Ṣaḥīḥ al-Muslim, no. 5831, 4:1259.
both parties. For example, the text regarding the judgment of David and Solomon, when they gave judgment in the matter of the field into which the sheep of certain people had stayed by night.\textsuperscript{718} In this event both of them decided the case according to their own independent logical reasoning. Then both decisions were correct but the second decision was more beneficial to both parties, hence it was preferred over the other and the Law-giver appreciated it.\textsuperscript{719} From this Qur’ānic provision, certain presumptions of interpretation may be derived. For instance, a proper and deep understanding of the facts of the case is necessary to find out the true intent of Law-giver and to arrive at correct decision; if two decisions or juristic opinions upon a matter or issue are contradictory with each other, the more beneficial for the parties concerned will be adopted and preferred over the other; interpretation must lead to a more convenient result; and lastly, every judgment must base on public interest.

Among the important presumptions of the Qur’ānic interpretation the presumption that “an interpreter must be a qualified person” and must have sound knowledge of the Arabic language and other requisites of interpretation. It denies those who claim that every person has right to interpret Qur’ān or Sunnah. Another important presumption is that “change in the condition justifies change in the law” and it has its origin in the abrogated rulings of the Qur’an and the actions of the prophet and his companions who amended and changed the then existing body of the law by way of amendment and reconciliation. That one legal text can be interpreted by another one. This presumption is based on the Qur’ān provisions which are interpreted and elaborated by another legal text of the Qur’ān (same statute). For example, the text: “What will make you understand what al-Ṭāriq is?”\textsuperscript{720} In this text

\textsuperscript{718} The Qur’ān: 21:78-79.
\textsuperscript{720} The Qur’ān: 86:2.
God talked about “al-Ṭāriq” but did not made it clear what the “al-Ṭāriq was? And then in later text interpreted the unclear word “al-Ṭāriq” by saying that: “It is the piercing star.”\(^{721}\) That a text should be interpreted in the light of its context because many of the legal provisions of the Qur’ān revealed in perspective of some incident or based on some events and thus form a general presumption that an interpreter must consider the surrounding words, relevant texts and the context of the revelation etc.

It is also presumed that a legal text should be interpreted in the light of its object as behind every enactment there is an objective intended by the Law-giver and the task of the interpreter is to discover that intent. This presumption has its source in the text: “Surely assumption can by no means take the place of the truth.”\(^{722}\) That an existing law can be abrogated by new law and this modern and updated presumption has been declared by Allāh Almighty in these words: “Whatever a verse does I abrogate or cause to be forgotten, I bring a better one or similar to it. Know you not that Allāh are able to do all things?”\(^{723}\) That interpretation must base on the public interest and it has its origin in the Qur’ānic provisions as declared: “Allāh intends for you ease and he does not want to make things difficult for you.”\(^{724}\)

That the interpretation must not deviate from well-accepted and popular meaning of the text and according to this presumption the interpretation of a legal text must not depart from its popular and recognized meaning and application. The interpretation must not base on the perceptions and ideas of any particular sect or group of persons. For example, the šūfīs movement of 4th century of Hijrah (10th A.D) tried to interpret certain provisions of the Qur’ān to represent its own cause and

\(^{721}\) The Qur’ān: 86:3.
\(^{722}\) The Qur’ān: 10:36.
\(^{723}\) The Qur’ān: 2:106.
\(^{724}\) The Qur’ān: 2:185.
preaching. Thus the verse: “Throw down your stick”,725 was interpreted by them as it means to throw aside the material world and only depend on Allāh.726 Similarly, the verse: “Muḥammad is not the father of any man among you, but he is Allāh’s messenger and the seal (Khātām) of the prophets.”727 In this text the word “Khātām” has been interpreted in its most well-accepted meaning and according to its context that Muḥammad is the last prophet of God in this universe, but Qādīyānī sect appeared in the later part of 19th century in India interpreted this verse that the word “khātām” does not means a seal rather it means a ring which beautifies the finger, the prophet Muḥammad was the beautification of the prophet hood. Therefore the meaning of the verse is that the prophet Muḥammad is the most superior of the prophets but not the last.728 That every word of the text must be given effect and this presumption leads that if a word has some meaning it must be given and not be regarded without effect. The similar rule found in common law is ‘Ut res magis valeat quam pereat. If the words of a text cannot be given its true meaning, it takes effect in metaphorical meaning.729

Section Two

Categories of Islamic Interpretive Rules

Islāmic interpretive methodologies and techniques have their origin in the interpretative principles of the Qurʾān and in the interpretive modes of the prophet and his companions which were developed and expanded by the traditional jurists of

725 The Qurʾān: 27:10.
726 Abū Ameenah, ʿUsūl at-Tafsīr, 42-45; Al-Qāṭṭān, Mabūḥīth fi ʿUlūm al-Qurʾān, 355-359.
727 The Qurʾān: 33:40.
728 Abū Ameenah, ʿUsūl at-Tafsīr, 42-45; Al-Qāṭṭān, Mabūḥīth fi ʿUlūm al-Qurʾān, 355-359.
the Muslim world. The principal theme behind the development and expansion of interpretive system was that the law must be in accordance with the time and needs of the people of a particular era. It is this reason that different jurists of same era had adopted different modes and techniques to interpret a legal text of Qurʾān or Sunnah. The jurists of Madinah focused on the textual rule of interpretation while jurists of Kūfah based their interpretive activity on more advance techniques of contextual and purposive interpretation as they were living in more advance and developed cities, the culture and lifestyle of which was quite different the cultural environment of Madinah. The rules followed by the courts and the Muslim jurists of different era are divided in to four major categories such as:

### 2.1 Linguistic Rules of Interpretation

Interpretive system of Islām is based on both textual and contextual implications. To arrive at a just and fair decision, the Muslim jurists not only take in to consideration the literal or grammatical meaning of the word but give a proper and comprehensive attention to its surrounding words and relevant statutes. The Qurʾān has been revealed in the language of Arab people to whom it was revealed and has a variety of words, phrases and grammatical construction. Some words are perfect in their meaning and scope while others are imperfect regarding their understanding and extent. This type of words needs extra-ordinary exertion to understand their meaning and to construct them in the light of their objectives. It has been declared in the Qurʾān: “It is He who sent down to you the Book (Qurʾān). In it there are verses that are entirely clear, they are the foundations of the Book and others are not entirely clear.”\(^{730}\) This text clearly indicates that there are two types of wording in the Qurʾān: The perfect words clear in

\(^{730}\) The Qurʾān: 2:5.
their meaning and scope and formulate the foundational principles of Sharī‘ah and the imperfect words which are not clear and contain some ambiguity, vagueness and uncertainty in their meaning and scope. Then Qur’ānic provisions contain laws of different nature having different modes and forms. The language of these laws is different accordingly to distinguish obligation from permission and permission from prohibition. To understand the perfect and imperfect wordings of the texts of Qur‘ān, the ‘Ulamā‘ of Uṣūl have described each word in the light of the textual and contextual surroundings of a legal text for the purpose of ascertaining the meaning of the text according to the intent of the Law-Giver. This division is based on the Arabic syntax in which Qur’ānic provisions have been revealed. The objective behind this division is to help the interpreter to understand a text properly to derive a legal rule from a legal text. The Muslim jurists have two legal theories regarding the textual division and division of each word. The detail of this division and rules of interpretation is as under:

2.1.1 Interpretation of the Word based on its Mode of Expression

A legal text contains different words in different modes. The term mode of expression leads to the manners in which a word expresses its view or order and demand for something to do or prohibit from something. A word on the basis of its mode of expression is divided into two types such as commanding mode of the words (Amr) and prohibiting mode of the words (Nahī). A commanding word of the Qur’ānic legal text is called Amr. Amr literally used in the meaning of a command or an order from a

superior and higher authority.  

Technically, a command is defined as an order of a superior authority to its subordinate to do some act or to perform certain duty. A positive order means a demand by Allāh Almighty to do something. The word “amr” itself is considered a homonym word and used in different senses such as command, desire, permission and direction.  

The general rule regarding the interpretation of an imperative word is that the word amr implies literally in the meaning of a command or obligation unless there is some indication, condition or circumstances which leads that amr may be used other than its literal meaning. In some cases, literal interpretation of an order leads to an obligation while contextual interpretation suggests that it intends just a recommendation or permission. For example the text: “O you believe when you contract a debt for fixed periods write it down (faktubūh).” In this text the word “faktubūh” is used in the mode of an order and creates an obligation but the contextual interpretation of the text leads that it intends only to create a recommendation not an obligation. Thus the following text: “Then if one of you entrusts the other let the one who is entrusted discharge his trust.” In this text the word “āmina or trust” leads that the creditor can trust the debtor even without any writing. On this issue the Muslim jurists have different onion. The majority of the Muslim jurists adopted contextual interpretation and are in opinion that the in such cases the rule is that writing down a contract or debt is mere a recommendation not an obligation while the jurists of ahl al-Zāhir adopted literal rule of interpretation and

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735 The Qurʾān: 282.  
736 The Qurʾān: 2:283.
held that writing down of contract or debt or any payment is an obligation and pre-
requisites of a contract. In some cases a commanding order by its manifest meaning
and by implication leads both obligation and recommendation respectively. In this
case the interpretation of manifest meaning of the text and the meaning by its
implication lead two different results. For example, the text: “There is no sin on you if
ye divorce women before consummation or the fixation of bridal money (given by
husband at the time of marriage) dower. But bestow on them (a suitable gift or
mattiʿūhunna), the rich according to his means and the poor according to his means. A
gift of a reasonable amount is due from those who wish to do the right things (Haqqan
ʿala al-Muḥsinīn).” The manifest meaning of this text leads that the commanding
order “mattiʿūhunna” creates an obligation and similarly the word “Haqqan” also
leads to an obligation. At the same time, the word “al-Muḥsinīn” leads by its
implication that the text creates just a recommendation not obligation.

On this issue the Muslim jurists have different opinion and majority of the
jurists (Imām Abū Ḥanīfah, Imām Shafi’, and Imām Ahmad b. Hanbal) contended
that the text leads more than a recommendation. They argue that the word “al-
Muḥsinīn” though associated the meaning who desire to do right things but has used
in conjunction with the word “Haqqan” and leaves no doubt about the obligatory
nature of the command. According to this view the word “Haqqan” has used to
signify both recommendatory act and the act binding in action. Contrary to this, Imām
Mālik considers the command as merely recommendatory in nature not obligatory. As
the word “Muḥsinīn” means liberality for those who desire to do right things and leads
only preferred course of action for the Muslims. Hence, this text does not lead to a

737 Ibn Hazam, Al-Aḥkhām fī Uṣūl al-Aḥkām, 1: 24-51; Abū Zahra, Uṣūl al-Fiqh, 73; Taqi Amini,
Fundamentals of Ijtehad, 110.
738 The Qurʾān : 2:236
mandatory act. According to *ahl al-Zāhir* a command is always leads for making something obligatory and a meaning by implication is not recognized as a reliable indicator of the meaning of the text or of its nature. Thus this text has an obligatory nature and creates an obligation. The text however, should consider as creating an obligation in the light of the prevailing circumstances and public policy. The question whether a commanding text always requires immediate performance or not? The Muslim Jurists are differed on this issue. According to Ḥanafī jurists a commandment neither requires immediate performance nor inclines to it. Imām Shafī’ held that a commandment sometimes requires immediate performance and others do not. The third opinion is that a commandment does not require immediate performance. The issue however can be solved by the context or surrounding words as well as by the implications and inferences of the text.

Prohibitive words are those words which are used to forbid something. A prohibitive order may be defined as an order of a sovereign or superior authority to the inferiors to avoid from some act. Once a prohibited order issued it requires prompt implication and remains intact forever. Like *amr* the word *nahī* is also a homonym word and have more than one meaning. An order of prohibition in its literal and original meaning is used in the meaning of *ḥarām* and always issued in future tense followed by the letter “lā” or by clear prohibited word while in metaphorical meaning it is used in the past tense by way of information in negative mode. The fundamental principle regarding the interpretation of a prohibitive order or a text is that such text leads to prohibition (*ḥarām*) unless associated with some indication

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741 Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1: 55.
742 Ibid.
leads to otherwise. The traditional Muslim jurists established certain rules of guidance in this respect. For example, use of the words forbid, to avoid, do not do etc., lead to a definite prohibition in majority of the cases and in some cases, they lead to disapproval only. The text: “O you who believe! Avoid much suspicion; indeed some suspicions are sin. And spy not neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it.” In this text the word avoid according to the majority of the jurists leads to prohibition of spying on others and backbiting while others maintain that it leads only to the disapproval of the acts. The third opinion is that this text is a type of a mujmal or vague text and needs an explanation to determine the prohibition or disapproval of the act. In some cases the mode of an order seems to condemn some act through negative subject-matter although the wording of text is not prohibitive. An example is the text: “Those who devour ribā will not stand except as stands one whom the Satan by his touch hath driven to madness.” The mode of the text is not negative but the subject matter is negative which condemns those who exploit the needs of others by lending money on interest will not be able to stand firmly on their foot rather they will be seemed like a mad man whom Satan touched upon and made them mad and insensible.

2.1.2 Interpretation of the Word based on its Substance

A word according to its substance and structure is divided in to two types like restricted words (muqayyad) and unrestricted words (Muṭlaq). The unrestricted word means a word used and applied to all of its substance. It is also declared as an absolute or muṭlaq word as it is not restricted to some part of its substance rather it applies to

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744 Al-Āmidī, Al-Abhkhām fi Uṣūl al-Abhkhām, 4:200; Al-Sarakhsī, Uṣūl al-Sarakhsī, 1:55.
745 The Qur’ān:49:12.
746 Al-Sarakhsī, Uṣūl al-Sarakhsī, 1: 65.
747 The Qur’ān: 2:75.
the whole of its substance. The Muslim jurists have different opinion regarding the question whether a *muṭlaq* word is considered as a genus of a general word or not? Some of them like Āmidī and Ibn al-Hājib declare that a *muṭlaq* word is a genus of general words. Al-Bayḍōwī considers a *muṭlaq* word different from a general word and defined it as a word applies to a person or thing in its original meaning without any limitation of restriction. For example, the word “human being” when used in its original and literal meaning leads to a speaking animal (*haywān al-nāṭiq*) because human being is attributed to as animal but with a distinct feature of “speaking” which makes it distinguish from the original meaning of the word “animal”.

Restricted or *Muqayyad* word literally means a word limited in its scope and application. Technically, the word *muqayyad* is defined as a word attached with some additional or extra characteristics needed to define the word and applies to some of the species of its substance. The general rule regarding the interpretation of an unrestricted and restricted word is that both are taken in their respective meaning and will be applicable in their respective spheres. But in case where a single word used in different texts in the meaning of unrestricted word and at other place in the meaning of restricted word then five different situations may arise and different rules of interpretation may be applied to each situation:

(i) Where a word is mentioned as an unrestricted word in absolute terms at one place and as restricted or qualified at another place but dealing with the same subject-matter, having same rule of law and same cause, the unrestricted word will be taken in the meaning of restricted word. For example, the Qurʾān sates: “He only prohibited

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for you dead meat (carrion) and blood and the flesh of swine. And that on which another name hath been invoked other than that of God.” 754 In this text the word “blood” has used in an unrestricted form and includes all types of blood whether the blood pouring forth or otherwise and no condition attached to it. At another place it is stated: “Say! I do not find anything forbidden to eat in all that has been revealed to me, if one wants to eat of it, unless it is carrion or blood poured forth or the flesh of swine.” 755 In this verse the word ‘blood’ is restricted by the word “poured forth” and leads that only the blood pouring forth is prohibited the consumption of which is harmful for the health of a person and excludes the clotted blood like liver of a slaughtered animal and the blood that steeps from meat while it is being cooked;

(ii) Where a word is used in an unrestricted meaning at one place and as restricted and qualified at another place but deal with different subject-matter and different effective causes, then both will be applied to their respective subjects and in such a situation the unrestricted word will not be taken in the meaning of a qualified word. For instance the text regarding punishment of thief male or female is cut off their hands.” 756 In this text the word “hand” is used as an unrestricted meaning and includes the whole hand and the effective cause is theft. In another text the same word is used as: “O you believe! When you get up to say prayer, wash your faces and your hands up to the elbow.” 757 Here the word hand is dealing with a different subject-matter that is ablution and different effective cause and at the same time is also restricted by an associated word “up to the elbow”. In this case the word hand used in the first text will not be taken in the meaning of hand used in the second text because both are dealing with different subject-matters and different effective causes;

754 The Qurʾān: 2:173.
756 The Qurʾān: 5:41.
757 The Qurʾān: 5:6.
(iii) In some cases a word used in one text both in the meaning of an unrestricted word and in the meaning of restricted word. In such case the subject-matter and effective causes remain same but have different rules or ḥukm. For example, the text regarding ablation deals with two issues at the same time the matter of ablution; and the issue of tayammum but both have same effective cause that is purification for prayer and have different rules or laws. Hence, the restricted use of word will not be applicable to the unrestricted use of the word and both will be applied to their relevant matters. 758

(iv) Where a word is absolute in one context and the same word is qualified in another context, the effective causes are also different but this is not in the application of the rule of conduct, in such a case, the Muslim jurists have different opinions. The Jamhūr al-ʿUlamāʾ declared that the absolute will be treated as qualified. On the other hand, the Ḥanafī jurists contended that the absolute will not be treated as qualified. For example, a tradition relates to Ṣadaqah al-fiṭr giving on the occasions of two ʿIdāyin states: “Slave, free, men, women, elder or minor who are Muslims are under a duty to give compulsory charity on the occasions of two ʿIdāyin.”759 In this ḥadīth, this obligation is made only for Muslims. While, another ḥadīth is: “Every slave, free, men, women, elder or minor is under a duty to give compulsory charity on the occasions of two ʿIdāyin.”760 In this case the Jamhūr al-ʿUlamāʾ treated the absolute as qualified, while according to Ḥanafī jurists the absolute will not be treated as qualified and both will separately operate within their respective areas.


760 Ibid.
2.1.3 Interpretation of the Word based on its Grammatical Construction

The words of a text are divided into three classes in the light of its scope and grammatical construction such as:

2.1.3.1 Interpretation of a Word based on its Scope of Meaning

A word used in a text may have a general scope to all the things and as well as a specific scope applied only to a particular thing or person. Sometimes, a word has more than one meaning and has different applications. In some cases, the word cannot be applied in its clear meaning or its scope cannot be determined by its apparent meaning and leads to some absurd sense. In all these cases, the word of a legal text requires both interpretation and construction. This type of word is sub-divided into four kinds such as general (ʿĀm), specific (Khāṣ), homonym (Mushtarak) and al-Muʿawwal. General word literally means a wide-ranging word comprising the whole subject which it covers. Technically, a general word may be defined as a word which is applied to the things or a class of things comes under the scope of that word. It is an expression to denote itself to all of its content without excluding any one of them. It is used by a single application to many things not limited in numbers and includes everything to which it is applicable. For example, the text: “O Mankind! We have created you from a male and a female, and made you into nations and tribes.” This text is a general provision and includes the whole creation of human being, male or female. The word khāṣṣ in Arabic has been derived from the word “Khusūṣ” which means something isolated or independent. Literally, the word Khāṣṣ

764 Al-Shāfiʿī, Al-Risālah,57.
leads to an isolated meaning applied to a particular and a specific thing or person.\textsuperscript{765} Technically, the word \textit{Khᾱṣş} is defined as word has a single meaning and a single application to a limited number of a thing or person.\textsuperscript{766} For instance, the text: “Then I gave Mūsᾱ the Book (Twrᾱh or Torah).”\textsuperscript{767} In this text the word “Mūsᾱ” is used in the meaning of a name of a particular prophet “Mūsᾱ” and the word Book is used for a particular revealed Book Twrᾱh. A homonym or \textit{mushtarar} word is that which have more than one meaning or which may be applied by several applications to many things. The word \textit{mushtarar} has derived from the word \textit{shirk}. It is said \textit{Ashraka yushriku} which denotes a thing in joint ownership between two or more persons.\textsuperscript{768} Technically, a homonym word is defined as a word carries more than one meaning and for every meaning it is coined separately.\textsuperscript{769}

In some cases, a homonym word has two opposite meanings such as the word \textit{qur’}. The word \textit{qur’} has two opposite meanings purity and impurity (menstruation) at a time. Sometimes a word is common in three meanings such as the word “\textit{al-Baynūnah}”. This word is used in the meanings of explanation, declaration, and apperance of something.\textsuperscript{770} The example of \textit{ishtirᾱk} in the letters of alphabet is “\lᾱm”. This letter is used in several forms like \lᾱm bil jar, \lᾱm bil jazm and \lᾱm zᾱ’idah etc. Then \lᾱm bil jar itself is used in 22 different meanings some of them are advice, who, should, and cause etc. Sometimes an \textit{ishtirᾱk} is happened in the order and arrangement of words in a text.\textsuperscript{771} A homonym word becomes homonym due to certain causes and reasons behind its formation and contains various meanings and

\textsuperscript{767} The Qur’an: 6:154.
\textsuperscript{768} Muhammad Murtaḍᾱ Zubaydῑ, \textit{Jawᾱhir al-Qᾱmūs}, (Beirut: Maktaba’ al-Ḥayᾱt, n.d.), 7:149.
various applications. Some of the causes and reasons are that sometimes a word started to be used in different meanings by different tribes and nations. Later on it becomes a common word of both meanings and declared as homonym word. For example the word ‘hand’ is used in the meaning of palm, the hand, the hand with elbow and the hand with shoulder by different peoples. A word was used in a particular dictionary meaning but used in a quiet different meaning by way of Qur’ānic legislation. For example, the word ṣalāt and zakāt have particular dictionary meanings but are used and known in technical meanings used by Qur’ānic legislation.772 Mu‘awwal means construction of a homonym word by way of personal reasoning and ijtihād. The term mu‘awwal has been derived from the word ta’wīl which means construction of a statute by way of logical reasoning. It is said Āla Ya‘īlu in the meaning to revert to or to attribute to something.

In case of mu‘awwal a far off meaning is attributed or assigned to a homonym word in the light of its inferences or implications and is preferred it over all other meanings and then declared it as mu‘awwal or a word given preferred meaning by way of implication or inferences. In this way, the interpreter tries to find out the true and proper meaning of the word through construction or ijtihaād rather than to adopt any of its manifest meanings.773 A general word of Qur’ānic legal text is subject to interpretation and specification. The primary rule of interpretation regarding a general word or text is that it must be given a general meaning and applied to all which it intended unless some indication leads otherwise. However each general word used in a text may not be applied generally. For the purpose of interpretation of a general term, the Muslim jurists divided a general word into three

773 Ibid.
types: The general word of absolute nature and have unlimited scope applied to all of its possible applications and may not be specified. For example the text: “And Allāh knows all things.”\textsuperscript{774} In this text the word “all” is a general word but cannot be restricted or specified and include knowledge of everything. The second type leads the metaphorical usage of a general word which does not intend to be used in its literal meaning rather has a limited scope. For instance the text: “Those to whom the people said, ‘the people have gathered against you.”\textsuperscript{775} In this text the first general word “the people” was revealed only to the reference of a person Nu’man bin Mas’ūd and the same word used second time with reference to the person Abū Ṣufyān a leader of Qurysh and for his army. Hence, the word “people” though a general word yet cannot be used in a general scope and limited to particular persons individually as intended by the Law-Giver and explained by the prophet himself.\textsuperscript{776}

The third type of general word accepts restriction and specification by a specific term followed by it. The fourth type of general word is that which is not clear in its intention whether it needs restriction or not? Muslim jurists have different opinions in the case. The majority of the jurists opined that each general world has a possibility of specification and generality of word leads its probability and hence a general word may be specified by analogy and \textit{khabr al-wāhid} because both are equal regarding their reasoning. Contrary to this view Imām Abū Ḥanīfah opined that the reasoning of a general word is definitive and in such a case there is no possibility of specification by analogy and \textit{khabr al-Wāhid}.\textsuperscript{777}

The general rule regarding the interpretation of a specific word is that it must be interpreted in such manners as to have only one meaning and a single application.

\textsuperscript{774} The Qur’an: 4:175.
\textsuperscript{775} The Qur’an: 3:173.
A specific word always bears a clear and definite meaning and is binding because it
does not need any explanation or interpretation.\footnote{Al-Bazdawī, \textit{Uṣūl al-Bazdawī}, 1:31; Al-Āmidī, \textit{Al-Aḥkām fī Uṣūl al-Aḥkām}, 2:58.} The Muslim jurists however,
differed over the issue whether such word needs further explanation or not? Imām
Abū Ḥanīfah states that a specific expression is self-explanatory and it does not admit
further explanation. If such explanation is admitted, its value will not be of an
explanation but of repeal which will over-ride the implementation of Qur’ānic verses.
In such a case, the repealing text must be of a higher or at least of an equal rank as
compared to the repealed text. Thus, the Ḥanafī jurists do not accept \textit{khabral-wāḥid}
for explanation or abrogation of a specific term while Jamhūr al-ʿUlāmā contended
that a specific word may be explained by \textit{khabr al-wāḥid} as it has possibility of an
explanation like a \textit{mujmal} word.\footnote{Ibn Malik, \textit{Sharah al-Manār fī al-Uṣūl}, 1:61; Al-Shawkānī, \textit{Irshād al-Fuḥūl}, 146;
Al-Taftūzānī, \textit{Ḥāshiyyah `alā Sharah al-ʿUṣūl}, 2:157.} For example, the text: “And bow down your heads
with those who bow down.”\footnote{The Qurʾān: 2:43.} Here the word “bow down” is a specific word. The
question is whether bow down is a part of prayer or not?

Jamhur al-ʿUlāmā contended that bow down is a part of prayer and its
omission amounts to no prayer. In this case the specific of a Qurʾān admits
explanation and has been explained by a single narration that the Holy Prophet asked
an ‘Arab to repeat his prayer when he did not bow down properly with patience. On
the other hand, Ḥanafī did not consider bowing down with patience prescribed for the
proper rendering of a prayer and held that a single narration has only probable value
and cannot explain the specific text.\footnote{Al-Āmidī, \textit{Al-Aḥkām fī Uṣūl al-Aḥkām}, 2: 259; Al-Bayḍāwī, \textit{Sharah al-Insāwī}, 2:57.}

In case of contradiction between two specific texts, the primary duty of an
interpreter is to remove this contradiction by way of reconciliation if it is possible
because performance of both is preferable than to leave any one of them that each of
them intends to be performed.\textsuperscript{782} For example the tradition that Holy prophet had to wash his feet while performing ablution” seems in contradiction with another tradition that Holy prophet made ablution and rub his feet with water while he worn socks.\textsuperscript{783} Apparently both traditions are contradictory each other and this contradiction may be removed by way of reconciliation that by taken the first tradition as to washing of the feet when the ablution is made first time and the tradition of rubbing of feet to renew ablution when made it again and fro next time. Some of the jurists opined that the first ḥadīth may be taken as ablution ḥaqīqī and the second one in the meaning of cleanness.\textsuperscript{784} In case where reconciliation is not possible between them then the later in revelation will abrogate the earlier one whether from Qur‘ān or from Sunnah. If both are unknown regarding the period and date of their revelation in this situation the interpreter has to wait until some evidence is found to prefer one over the other.\textsuperscript{785}

Specification means to specify or qualify the scope of the general word used in a text. When the scope of a general word is restricted by any specific or a more limited general word it is called specification of general word.\textsuperscript{786} In case where a word of a text is general and another is specific and specific applies to some of the species of general but ḥukm of specific is against the ḥukm of general, the general word will be specified by specific word to that extent. The Muslim jurists are differed on the issue of specification of general word by probable evidence such as analogy and khabr al-wāḥid.\textsuperscript{787} The Ḥanafī jurists opined that a general word of a definitive text is always definitive in its scope hence it can be specified only by definitive evidence of Qur‘ān or by Sunnah mutawātirah. The probable evidence such as

\textsuperscript{782} Al-Isnawī, \textit{Al-Tamhīd}, 155; Al-Shawkānī, \textit{Irshād al-Fuhūl}, 157.
\textsuperscript{783} Imam Muslim, \textit{Ṣaḥīḥ al-Muslim}, Kitāb al-Ṭahārah, 1:128-129.
\textsuperscript{784} Al-Shawkānī, \textit{Irshād al- Fuhūl}, 158; Al-Āmidī, \textit{Al-Ahkām fī Usūl al-Ahkām}, 2:258.
\textsuperscript{785} Ibid.
\textsuperscript{787} Ibid.
analogy and single narration cannot specify a general word. However, in case where it has already been specified in its reasoning, it become probable and the question of preference will not arise. Now its specification is permissible by probable evidence. 788

Contrary to it, Imām Shāfi‘ī and Imām Aḥmad bin Ḥanbal opined that the reasoning of a general word in a text is probable. Therefore, specification of probable evidence by other probable evidence is permissible. 789

Interpretation of homonym word is based on the contextual approach of interpretation and the interpreter has to prefer one of the many meanings by way of rational reasoning. In some cases a homonym word carries both technical legal meaning and literal meanings together, here the technical legal meaning will be preferred over its literal meaning. For example, the words prayer, divorce, zakat, etc are used in dictionary in different meanings and have different technical legal meaning so their legal meaning will be preferred over their dictionary meanings. In some cases a homonym word has two opposite dictionary meanings and the interpreter has to adopt any one of them by way of preference with the help of logical reasoning and the implications of the text. For example the word qur‘ was used in to different meanings in Arabic in the meaning of purity and at the same time in the meaning of menstruation or impurity. In its ordinary and customary sense the word qur‘ was well known for purity and not for menstruation. On the basis of these arguments the Jamhur al- ‘Ulamā, Shafi‘ī, Mālik and Aḥmad contended that the word qur‘ leads to purity. Contrary to it the Ḥanafī jurists were in opinion that the word qur‘ led to menstruation not purity and argued that the word in the text leads to menstruation because menstruation causes limitation of waiting period and causes is

788 Ibid.
always preferred over *ḥukm*. This difference of opinion leads further differences in detailed cases regarding the time limit of waiting period, matters of inheritance, and permission for second marriage etc.\textsuperscript{790} The difference between a homonym and general word is that in case of general word it is one which originally designed to convey a number of meanings while in case of homonym word it is used for different meanings and is designed to mean a particular thing in particular context. A general word applies more than one meaning at one and the same time while a homonym word ordinarily leads only a particular meaning at one time.\textsuperscript{791}

The general rule regarding the interpretation of a *muʿawwal* word is that if it has been assigned a particular meaning becomes binding to take it into that meaning only because a muawwal word originally a homonym word which has to be interpreted by way of different techniques and measures of interpretation. In case where the word is not clear in any of its prescribed manifest meanings then interpreter construct the word in a different mode by adopting its remote and far-off meaning or possible implication through his own logical reasoning and prefers it over others.\textsuperscript{792} An interpreter has to prefer one of the many meanings and this preference is based upon the many factors. For example, relevant traditions, mode of expression, occasion and context in which the word is used are utilized to reach the preferred meaning. Lastly the interpreter decides the matter by his own personal reasoning. Originally a *muʿawwal* word leads to have probative value as it is decided by way of logical reasoning yet there are other factors which guide an interpreter to prefer one of several meanings of a homonym word. It is therefore once a homonym word assumes the status of a *muʿawwal* it becomes binding in action because of its high probative

\textsuperscript{791} Ibid.
value which it so acquires by way of contextual interpretation based on the logical reasoning.\textsuperscript{793} The Ḣanafī jurists are in opinion that a *mu‘awwal* word is not binding as it is based on the logical reasoning which has possibility of an error and in case of contradiction between a *mu‘awwal* and *khabr al-wāḥid*, the latter will prevail over the former.\textsuperscript{794}

2.1.3.2 Interpretation of Word based on its Clarity and Ambiguity

A word of a legal text some times is clear in its meaning and application and requires no explanation and declared as clear or perfect word. Some words are not clear in their meaning and scope and need construction through logical reasoning and declared as imperfect word. Amongst their imperfections are vagueness, ambiguity, and instability etc. From this angle of the word, the ‘Ulamā of Uṣūl divided a word in to two types like perfect or clear word and imperfect or unclear word. A clear word means a word which is clear in its meaning and scope and needs not any foreign factor for its explanation or interpretation. The clear words then have different ranking regarding the degree and scope of their clarity. Some of them are as obvious in their meaning and scope as declared unequivocal and indisputable regarding their subject-matter and application, while others are lesser in degree of clarity and lucidity that cannot reach the degree of unequivocal words. On the basis of this argument the Ḣanafī jurists divided a clear word in to four types such as word of manifest meaning (*Ẓāhir*); word of explicit meaning (*Naṣṣ*); word of unequivocal meaning (*Mufassar*); lastly, word of unalterable meaning (*Muhkam*).\textsuperscript{795} Unclear words are those words which are ambiguous in their meanings or scope and require interpretation and

\textsuperscript{793} Al-Bannūnī, *Ḥāshiyyah al-Bannūnī ’alā Sharah Jām’ al-Jawām’,* 2:52.
\textsuperscript{794} Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1:163.
construction by way of logical reasoning in the light of their contexts and public interest. Ḥanafi jurists divided imperfect words into four types like word of obscure meaning (*Khafī*); word of difficult meaning (*Mushkil*); word of vague meaning (*Majmal*); and word of mysterious meaning (*Mutashābḥ*). 796

To interpret a clear word, the Muslim jurists have prescribed certain rules of interpretation to help out an interpreter in his process of interpretation such as rules of interpretation of manifest (*zāhir*) word, rules of interpretation of explicit (*nasṣ*) word, interpretation of unequivocal (mufassar) word, and interpretation of *muḥkam* word.

The general rule regarding the interpretation of a manifest word is that the apparent meaning of the word must be taken as its original intended meaning unless there is some indication which leads otherwise. A Manifest expression is one where the order is quite plain but its application to certain referents is implied. It is also clear in its *ḥukm* but at the same time it has an open texture to be modified and applied to a contemporary case by way of *tāʾwil* or by way of contextual interpretation. 797 For example, the text of the Qurʾān: “And God permitted trade and prohibited usury” 798

This text leads a clear and manifest *ḥukm* that Allāh has made trade permissible and riba prohibited. This rule is quite manifest but it can be interpreted by way of implications of the text and some secondary rules may be drawn. It shows the distinction between the trade and usury. It prescribed a rule of commerce that it must base on the means of trade and business not of usury. It has made trade bound by restrictions that it must not involve the element of fraud or cheating. It indicates only a particular type of interest which results in the exploitation of debtor and the poor (debtor) becomes poorer. Here, the Muslim jurists have different opinion regarding

798 The Qurʾān: 2:275.
the characteristics of *ribā* mentioned in the text and the prevailing form of Banking interest of modern times. It also leads that the object of the text may be different from its manifest meaning.\(^{799}\) The general rule regarding the interpretation of an express word is that an interpreter has to interpret the text in such manners as to ensure the plain and explicit meaning of the text. In case of an explicit word, some indications or inferences connected to it and leads that the word must be taken in the context of that inference or indication which may be interpreted by way of logical reasoning in the light of the context of a text. The explicit word is more obvious in its meaning and scope than a manifest word because it’s literal meaning and as well as its contextual meaning both lead to a harmonized interpretation. For example the distinction between usury and trade is definite and one cannot resemble the other because it has been declared by the explicit text of the Qurʾān.\(^{800}\)

The rule regarding the interpretation of a *muffāsir* word is that it must be taken in isolation according to its ordinary meaning which cannot be modified by way of logical reasoning. For instance, the text: “The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes.”\(^{801}\) In this text the word “hundred” is self explained word and has indisputable meaning which cannot be changed or modified by any means of interpretation. This type of text is binding in action and there is no possibility of attributing some other meaning than what is obvious.\(^{802}\)

A *muḥkam* is the most obvious word in its wording and meaning and need not interpretation by way of logical reasoning. Unlike manifest and explicit word it accepts no specification, substitution or change. This type of words includes all the

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800 Ibid.

801 The Qurʾān: 24:2.

fundamental universal principles of religion and law, such as those relating to faith, prayer, and marriage etc. It also includes all those orders where it is clearly declared that they shall be applicable always. The difference between a *mufassar* and *muḥkam* is that in case of *mufassar* the possibility of repeal exists while in case of *muḥkam* no such chance exists. However, the possibility of repeal of *mufassar* was confined to the time of revelation and now after termination of that period, the *mufassar* has acquired the status of *muḥkam*. It is this reason that now the Muslim jurists divided *muḥkam* into two types, unalterable *ab anitio* or *muḥkam bi al-dḥdhāt* and secondary *muḥkam* or *muḥkam li ghayrihī*. The effect of *muḥkam* is that it is binding in nature and the question of argumentation and abrogation does not arise. 803

The general rule of interpretation regarding the unclear or *ghayr wādiḥ* words is that such words may be interpreted and constructed by way of logical reasoning with the help of the inferences and the implications of the text based on its context. Like clear words, unclear words have certain rules to be applied for their interpretation. The general rule related to the interpretation of a *khafī* word is that its meaning and scope both are determined in the light of its context. It is duty of an interpreter to understand not only the apparent meaning of the word but to search out its concealed meaning indicated by the word and to define its scope according to the intended meaning of the Law-giver. For instance, the word *al-sāriq* or thief is a *khafī* word which can be removed by applying the word to its apparent meaning and by excluding implied meaning from its scope. The difficult word is interpreted by way of logical reasoning with the help of inferences of the text based on the contextual approach of interpretation. It is the opposite of explicit word. Unlike obscure word the difficult word is obscure by its nature and the difficulty existed in the meaning of the

word itself and needs construction and deep understanding of the text. The example is
the text: “And if you divorce them before you have touched them . . . then pay half of
that (bridal money) unless the women agree to forgive (yahibu) it or who in whose
hands is the marriage tie agrees to forgive.”804 The word “that in whose hands” in this
text is difficult to understand to whom it is indicating to the husband or to the
guardian of the wife? Similarly the pronoun “Alladhī byadihi” is difficult to
understand whether it leads to the guardian or to the husband.805 The rule regarding
the interpretation of a vague Qur’ānic text is that the vagueness of the meaning cannot
be removed through logical reasoning or by way of construction based on the context
or public interest rather an interpreter has to wait some explanation through proper
legislation, i.e., revelation or Sunnah. But after the termination of the revelation the
question of vague word is no more important because mujmal words such as “ṣalāt”
and “zakat” have been explained either through revelation or by the prophet.806

The general rule regarding the interpretation of a word of mystery is that this
type of word may or may not be interpreted by way of logical reasoning. For example,
the text: “His Kursī extends over the heavens and the earth.” 807 This text is
unintelligible to understand because the word Kursī literally means a chair or
footstool. The Muslim jurists are differed as to the intended meaning of the word
Kursī. Some of them consider it similar to the ‘Arsh (Throne) while others take it
distinguish from ‘Arsh (Throne). It is reported that the Holy prophet once said that
Kursī if compare to the ‘Arsh is nothing than a ring thrown out upon open space of the

804 The Qurʾān: 2:237.
805 Ibn Qadūmah, Al-Mughnī,8:360; Ibn Rushd, Bīdūyah al-Muṭtahid,2:336; Ibn al-‘Arabī, Aḥkām al-
806 Al-Bazdawī, Uṣūl al-Bazdawī, 1:32; Ṣadr al-Sharīʿah, Al-Talwīh ʿalā al- Tawdīḥ,1: 48; Al-
Sarakhsī, Uṣūl al-Sarakhsī, 1:168-174; Ibn Amīr, Al-Taqrīr wa Al-Taḥbīr, 1:155.
807 The Qurʾān: 2:255.
If Kursī extends over the entire universe than how much greater is the ‘Arsh. In another ḥadīth it is narrated that the Kursī is in front of the ‘Arsh and it is at the level of foot. This term is opposite of muḥkam because it neither explains the purpose of the text nor there exist any inference which may help in its interpretation.

2.1.3.3 Interpretation of the Word based on to its Use and Extent

A word of a legal text may have different uses according to its textual and contextual implications. Sometimes a word gives a clear and proper understanding in its primary or grammatical meaning and need not to be used in any other sense but in some cases, the use of primary or grammatical meaning of a word leads to some absurd or unjust result, hence it becomes necessary to use it in the meaning other than its primary or grammatical one and such use is based on the context and circumstances of the text.

When a word is used in its primary and grammatical meaning it is said that the word is used in its literal or ḥaqīqī meaning and when a word is used other than its primary meaning it is considered to be used in its metaphorical or majāzī meaning. A word is declared as Ḥaqīqah when it is used in its literal or original meaning. A word is declared as majāz when it is used other than its literal or grammatical meaning. In this case a word cannot be used in its grammatical meaning due to lack of a necessary word or something missing from the wording of the text so it is used in its figurative meaning. The metaphorical usage of the word is decided in the light of the context of the relevant text. On the basis of the usage of a word, Jamḥūr al-‘Ulamā` divided the word in to two types such as literal use of a word (Ḥaqīqah) and metaphorical use of a word (Majāz). Like ḥaqīqah word, a majāz word is used in different forms and

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808 Ibn Taymiyyah, Majmū’al-Fatāwā, 5:54-55.
809 Ibid.
810 Al-Bazdawī, Uṣūl al-Bazdawī, 1: 35; Al-Sarakhsī, Uṣūl al-Sarakhsī, 1:169; Ibn Amīr al-Hājj, Al-Taqrīr wa Al-Taḥbīr, 1:158; Al-Baṣrī, Al-Muˈtamad fi Uṣūl al-Fiqh, 1: 15.
811 Ibid.
modes. The difference between *haqīqah* and *majāz* is that *haqīqah* ensures the grammatical and original meaning without any addition and reduction while a *majāz* meaning is derived through secondary meaning attached with an addition and reduction. Secondly, unlike *haqīqah*, the *majāz* meaning is based on the logical reasoning. The general rule regarding the use of a word is that it must be used in its primary and original meaning but where the use of primary or grammatical meaning of a word leads to some absurd or unjust result it may be used in its secondary (*majāz*) meaning. The *Jamhūr al-‘Ulamā* maintain that it is duty of an interpreter to take a word in its plain literal meaning by applying its linguistic, *Sharī‘* and customary meaning and where it seems impossible to draw a correct and proper meaning of the text or where there is some evidence found to lead to the metaphorical usage of a word it may be used in its secondary meaning. For example the text: “And marry (*nikāḥ*) not women whom your fathers married.”

The Muslim jurists have differed regarding the use of the word *nikāḥ* whether it is used in its literal meaning or secondary meaning. The Shafi‘ī jurists took the secondary meaning of the word *nikāḥ* that leads contract of marriage and contended that *nikāḥ* is condition precedent to live as a married couple and for valid sex relation. Therefore, if a person commits the sin of fornication with a woman, it is permissible for his son to marry with that particular woman. On the other hand, the Ḥanafī jurists considered the literal meaning of the word *nikāḥ* that is union and leads sexual intercourse and contended that fornication committed by father will prohibit the son to marry a woman with whom his father has fornicated. The general rule regarding the metaphorical usage of a word is that it must associate with some indication. For

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813 The Qur’ān: 4:22.
example, the text “And ask from the town (al-qaryah).” In this text the word ask is associated with the word al-qaryah which indicates that it must be given a meaning suitable to the word al-qaryah so it is interpreted as to the residents or people of that village. In case where a word has more than one secondary meaning such as literal, customary, and Sharī‘ī etc, the interpreter may adopt that meaning which is most suitable in the light of the context of the text. For instance, the ḥadīth; “He who does not intend fasting before the prayer of Fajr has no fast.” The literal meaning of this text leads to the negation of the fast if not intended before Fajr prayer but other texts and the practices revealed that the literal meaning is not intended because many other ḥadīth and practices of the prophet and the companions lead that a fast is valid without intention and even after Fajr time. So the word “Laa ṣiyām” has been interpreted in its secondary meaning that is imperfection of ṣiyām. One of the semantic canons is that every word should have both literal and metaphorical meanings and that it is impossible that a word has only metaphorical meaning and has no literal meaning.

Contrary to this, it is quite possible that a word may have only literal meaning without having metaphorical meaning. On the basis of this canon, the Muslim jurists have different opinions regarding the usage of a word both in its literal and as well as in its metaphorical meaning at the same time. The Shafi‘ī jurists contended that there is no harm in using a word in both meaning at the same time while Ḥanafī jurists did not permit it and argued that it is against the linguistic rules that a word may be used in its literal and metaphorical meaning at the same time. For example, the verse: “Or you have been touched upon (lāmastum al-Nisā’) women” The word “lāmastum al-Nisā’” literally means touching by hand, while its metaphorical meaning is sexual

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815 The Qur’an:12:82.
816 Abū Dāwūd, Sunan abī Dāwūd, 1:175.
817 The Qur’an: 5:6.
intercourse. In this case, the Ḥanafī jurists maintain that the word lāmastum al-Nisā refers to its metaphorical meaning not literal meaning and in case where a person comes in to contact with woman only by touching with hand ablution is not broken because the word “lamastum al-Nisa” is used in its metaphorical sense. Contrary to it, the Shāfiʿī jurists contended that the word lāmastum al-Nisā refers to both literal and metaphorical meaning, so touching by hand will invalidate the existing ablution and will necessitate a fresh ablution.818

2.1.4 Interpretation of the Word based on its Implied Meanings

(Al-dalālāt)

The Ḥanafī and Shāfiʿī jurists have different opinions regarding the division of a word in the light of the implications and inferences of the text. The Ḥanafī jurists divided a word regarding its textual implications in to four types such as: The apparent meaning (ʻIbārah al-Naṣṣ), the associated meaning (Ishārah al-Naṣṣ), the analogical meaning (Dalālah al-Naṣṣ) and the logical meaning (Iqtiḍāʾ al-Naṣṣ). The apparent meaning of the text is perceptible by the clear wording of the text and requires no further explanation or interpretation by any means because it is self evident in its scope and meaning. For example the text: “Allāh has made trade permissible and riba prohibited.”819 The associated meaning of the word is derived by way of connotation to which a text indicates. This association is existed in the wording of the text itself and can be deducted easily by the implication of the text. For example, the text: “And the father of the child shall bear the cost of the mother’s food and clothing according to the customary law.”820 The analogical meaning of a word is derived in fact by way

819 The Qurʾān: 2:275.
820 The Qurʾān: 2:233.
of analogy from the same text. In case where neither the apparent meaning nor the associated meaning leads to cover a contemporary case within the purview of the text, the interpreter has to draw a meaning by way of analogical deduction based on the apparent and explicit meaning of the same text. Such meaning has the same attribute of apparent meaning. For instance the text: “Verily, those who eat up unjustly the property of orphans, they eat up only fires into their bellies and they will be burnt in the blazing fire.”821 The auxiliary or logical meaning of a text is based on some additional proposed words in a text to make the apparent meaning of the text comprehensive and obvious. For example, the text: “Prohibited to you are your mothers, your daughters, your sisters, your father’s sisters.”822

The apparent meaning of the text leads that the mother, daughter, sister and father’s sisters are prohibited or forbidden to a man but it is not clear in its principal theme that is to “marry with them”, so it is incomplete and the interpreter has to resort that the text must be read in the context of an additional word “marriage”. 823 Textual rules of interpretation deal with the significances, terminologies, indications, background and circumstances of the text. This type of interpretation denotes a process in which different ways of explanation, amplification, and significance of relevant texts and traditions are considered and used to derive law. It involves a close examination of the words, their meaning and their contexts. Primarily, it consists of three sets of interpretive rules such as rules regarding textual implication, rules concerning adhesive text and lastly rules relating to the policy of the text.824 The general rule of interpretation leads that the apparent meaning of the text required no

822 The Qur’ān: 4:22.
824 Al-Sarakhsi, Uṣūl al-Sarakhsi, 1:26; Al-Rūzī, Al-Maḥṣul fī Uṣūl al-Fiqh, 2:651; Al-Isnawī, Sharah al-Ihtijāj,3:154; Al-Bazdawī, Kashf al-Asrār, 1:69; Taqi Amini, Fundamentals of Ijtehad, 52.
further explanation or interpretation by any means because it is self evident in its scope and meaning. In this case, the wording of the text leaves no room for further inquiry to find out the true intent of Law-giver and the obvious meaning reveals both purpose and a plain meaning of the text. The task of the interpreter is to apply the most obvious and apparent meaning of the word to the situation at hand. The application of the most obvious and dominant meaning is known as the apparent meaning or 'Ibārah al-naṣṣ. Most of the rulings of Sharī‘ah related to fundamental principles convey their meaning by way of 'Ibārah al-naṣṣ. For example, the command to perform obligatory prayers, to observe the fast of Ramadān, to enforce the prescribed penalties for certain offences and the matter of distribution of the property of deceased person etc. The effect of this type of interpretation is that it conveys a definitive ruling on its own but if the text is transmitted in general terms then it may be a subject to qualification and in that case it may not impart a definitive rule of law but speculative evidence only.825

The interpretive rule of Ishārah al-naṣṣ is that the ruling of the text is drawn either from the connotative meaning of the text or from certain indications existed therein and that the function of the interpreter is to derive that particular ruling which is hidden in the text. In this case the text has no obvious and clear meaning and only a rational connected meaning can be drawn through a deep investigation into the indications and signs that might be detectable from the text. Here, the interpreter has to derive law by way of rational reasoning based on the connotative meaning of the text which is not the main theme of the text. The meaning so derived through this process is declared as Ishārah al-naṣṣ or connotation of the text.826 Here, the question arises whether illegitimate child can be attributed to his father if he is willing to adopt

825 Ibid.
826 Ibid.
him? Is it possible to solve this issue for the sake of an innocent life through implied meaning of the text or through associated meaning of the word “lahu” prescribed by the Law-Giver? Sometimes a text does not cover a contemporary issue through its apparent or connotative meaning then the interpreter tries to find out a compatible and just meaning by way of analogy if he finds that the contemporary issue is based on the same cause of action as that of the original text, then he assigns the ḥukm of original case to the new case brought for solution. The rule of new case is derived through analogy on the basis of an effective cause ('illaḥ) common between the explicit meaning and the meaning that is derived through analogical deduction.827

Construction by way of Iqtīḍā’ al-nass or additional supposed words is suggested only where a text cannot be understood either through its apparent and connotative meaning or through analogical meaning, the insertion of the meaning of some “additional words” is presumed to make the text meaningful and comprehensive. The supposed additional words however, are not unfamiliar to the text and is a part of it though not explicitly mentioned. The meaning of the text is delivered in its totality only when such a word is added to it.828 For example, the Qur’ān states: “Then let him call upon his council (nādiyah).”829 The word nādiyah literally means a place and subsequent to the word “let him call” that makes it unintelligible and beyond logic because a place cannot be called upon for help rather these are its residents who can be called upon for help. Thus, the text needs that meaning of some additional word should be attached to the text compatible to it like

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828 Ibid.
829 The Qurʾān: 96:17.
the word “people or member of council. By adding meaning of such words the text becomes correct logically. 830

The above mentioned rules do not stand on the same footing rather they may be utilized in the light of their hierarchy. It is the duty of interpreter to invoke first apparent meaning and give it preference over the three. If the apparent meaning fulfils the demand of the case and provides a solution for new problem no need to investigate further to apply a connotative meaning, however a connotative meaning can be derived for another ruling. In case of contradiction between apparent and alluded meaning, the apparent meaning shall prevail. In case of contradiction between alluded and analogical meanings, the alluded meaning will be preferred over the other. If is there is a clash between apparent meaning and the logical meaning of the text, the apparent meaning takes precedence over the logical meaning. 831

Unlike Ḥanafī, the Shafiʿī jurists divided a word in the light of its textual implication into two categories such as enunciated meaning or dalālah al-manṭūq and conceptual meaning or dalālah al-mafhūm. Enunciated meaning is the meaning which is clear and understood easily by the wording of the text such as the text regarding prohibition of ribā and permission of trade. Enunciated meaning of a text corresponds to the apparent meaning of the text which is prescribed by Ḥanafī jurists. Conceptual meaning (dalālah al-mafhūm) is derived from the text by way of deviation from the enunciated or apparent meaning of the text which cannot fulfill the objectives of legislation. This type of the text is further divided in to six kinds: The logical meaning (Iqiṭdāʿ al-Naṣṣ), the connotative meaning (Ishārah al-Naṣṣ), the attributed meaning (Al-Īmā), the agreed meaning (Mafhū al-Muwāfiqah), the conflicting meaning

831 Ibid.
(Maṣfūm al-Mukhālīfah), and the meaning based on public interest (Maṣlaḥah). 832

The logical meaning of a text means that the meaning of some additional word is attached and is taken into consideration to the original and apparent meanings of the text which is incomplete without such additional meaning. For instance, the ḥadīth: “lifting up mistake, forgetfulness and coercion from my Ummah” is unable to lead to a comprehensive meaning unless the meaning of proposed word “ithm or sin” is attached to the wording of ḥadīth because lifting up the attributes of human being is unnatural.833

The connotative meaning of a text is derived from the indications of the text not from the wording. For example, the text: “And period of pregnancy and suckling is thirty months.”834 It describes the period of pregnancy and suckling of a child in its totality but if this text is read in the context of another text “And suckling of him (child) for two complete years” leads clearly that the suckling period of a child is two years. In the context of both texts another rule can be drawn that the minimum period of pregnancy is six month. The attributive meaning of the text is drawn from the understanding of the cause or ‘illah of a text upon which a ḥukm is based. For example, the text: “Cut off the hand of a thief” leads the ḥukm of the theft of cutting hand by its wording and clear meaning but it did not describe the reason or cause upon which the ḥukm is based. The interpreter draws the reason or ‘illah behind this ḥukm by deep and through study of the text and declares that the ‘illah behind this ḥukm is “theft”. In case of maṣfūm al-muwāṣiqah, a meaning is derived from the implications of the text which is appropriated and agreed to the apparent and enunciated meaning of the text. This type of text is also declared as the text of

833 Ibid.
834 The Qurʾān: 46:15.
In case of *mafhūm al-mukhālifah*, a meaning is derived from the opposite sense of the meaning of the text or its contradictory situation. For example, the text: “If a sinful person (*fāsiq*) brought about some news or information so verify it.”[^835] The enunciated meaning of this text leads that news given by a *fāsiq* can be accepted after verification, its opposite and contradictory meaning leads that news given by a righteous Muslim must be acknowledged without verification. In case where a clear ḥukm or ruling is not existed in Sharī‘ah, the interpreter has to derive a rule from the existing text related to the new contemporary case by way of maṣlaḥah.[^836]

In case of *dalālāh al-manṭūq* the law is derived from the obvious meaning of the words which a text contains. In this case, the jurist has to interpret the text according to its apparent meaning and find out the rule in the wording of the text. For example the text: “And cut off the hand of thief male and female” obviously prescribed a law of crime that the punishment in case of theft is cutting hand. This type of meaning is declared as Ḣīrah al-Naṣṣ according to Ḥanafī jurists. In case of *dalālah al-mafhūm* the law is derived from the inferences of the text rather than from its obvious meaning. *Dalālāt al-mafhūm* is sub-divided in to six types and each of them is interpreted through a different rule. In case of *Iqtīḍā‘ al-Naṣṣ* or the auxiliary meaning the rule is derived through logical reasoning. In case of *Ishārah al-Naṣṣ*, law is derived from the indications associated with the text. In case of the attributed meaning or *al-Īmā*, a text may be assigned a meaning based on the reason and cause of the text. For example, the text regarding the punishment of theif leads that the reason behind this ḥukm of cutting hand is theft. In case of agreed meaning or *mafhūm al-muwāfidīyah* a meaning is derived from the inferences of the text which is

compatible and agreed to the intended meaning of the text. In this case a contemporary issue is based on a stronger cause than original case dealt by the text. The example of this type is the case of unlawful consumption of the wealth of orphan and the case of its destruction by any other means such as by putting it into fire or water. The rule regarding the conflicting meaning or mafhūm al-mukhālifah leads that a law may be derived by considering the conflicting or opposite meaning of the text which is against its intended and obvious meaning.

In case where no evidence is found regarding an issue the case will be solved in the light of public interest and an appropriate meaning will be assigned to the text by way of maslāḥah mursalāh. For example, issue of hanging of a group in retaliation of one person, issue of wine, and issues solved by way of juristic preference fall in this category.837

2.2 Fundamental Rules of Interpretation

Starting from the preliminary level to the established structure, the interpretive system of Islām introduced and framed many interpretive rules to make the process easy and intelligible in each phase of its development. In this way, Islāmic system of interpretation performed dual role: To lead gradually to the well-organized and definite strcuture and secondly, to introduce certain new rules to keep pace with the changed scenario. Fundamental rules of interpretation can be defined as interpretive methods and rules adopted by the prophet and the companion jurists during the early period of the development of Islāmic system.

2.2.1 Plain Meaning Rule

Like modern interpretive systems, Islāmic system of interpretation is based on the presumption that each word of a text should be considered in its ordinary and natural meaning unless there is some indication intended otherwise. The general rule regarding the plain meaning is that where a word of a text bears only one explicit meaning which can be understood easily by the reading of express wording, the word is declared as plain in its meaning and scope and cannot be modified or altered by any means of interpretation. In this case the natural meaning expressly shows the intention of the Law-giver behind an enactment. According to this rule, each word of the Qur’ānic legal text should be assigned the meaning which the ordinary speaker of Arabic language understand in the context at the time when it was revealed and used. Where an ordinary user of Arabic language would have no doubt about the meaning of the words of a text, the court or jurist is bound to interpret the text in such manners as to give those words their ordinary plain meaning as the words themselves alone best adjudicators to declare the intent of the Law-giver.

For instance, a muḥkam word undoubtedly has been declared as a word clear in its meaning and does not need interpretation by way of logical reasoning. Unlike manifest and explicit word it accepts no specification, substitution or change. A khāṣṣ or specific word is also subject to plain meaning rule because it is a word having single meaning and a single application. In some cases a word bears more than one explicit and ordinary meaning, then the rule is that the most common and well-established meaning will be preferred. For example, an absolute word will be interpreted according to its inbuilt characteristics related to its subject-matter. The
absolute word does not admit any foreign characteristic or factor and is interpreted according to its express meaning and the kind of the substance.\textsuperscript{838}

\section*{2.2.2 Contextual Interpretation}

Contextual rule of interpretation is based on the presumption that each word of an enactment should be construed according to its associated words, inferences and as well as the circumstances under which a text was revealed. The main theme of contextual interpretation is that the Qur’ānic legal texts should be understood in the light of both text and the context. Context here does not confine simply to the linguistic context. It consists of the subject matter, scope, purpose and the background of the text which are also taken into consideration in the process of interpretation. The reason is that there is a strong connection between the revealed texts and the circumstances of the people to whom the texts revealed, so this fact must not be ignored during the process of interpretation. Contextual rule of interpretation demands that an interpreter or jurist should consider not only the apparent, allusive meanings and the inferences of a text but examine the relevant circumstances and the causes of the text for the purpose of derivation of law of Sharī‘ah.

In historical perspective, the origin of contextual interpretation is found in the interpretive modes and techniques of the prophet and his companions. During the prophetic period whenever an issue brought before the prophet, he had to resolve the issue with the help of apparent meaning and inferences of the Qur’ānic legal text and as well as according to the conditions and circumstances of the parties concerned. There are number of cases which were solved by the prophet in the light of their context and where the prophet rejected the strict literal interpretation by his practice.

\textsuperscript{838} Ibid.
For example, the Qurʾān has prescribed a specific number of stripes as punishment in case of fornication or adultery through its express and explicit text by ordering that the convicts should be flogged with hundred stripes. The textual meaning of the text leads that everyone who commits fornication must be flogged irrespective of his condition or circumstances. But the Holy prophet did not apply this rule in all the cases brought before him for judgment rather he examined the conditions and the circumstances of the parties and where it seemed unjust or against the interest of the public, he postponed the punishment and forgave the convict. For example, once an Anṣārī was seriously ill but fell victim to the persuasion and committed the crime of fornication. Later on, he confessed his crime and asked for prescribed ḥadd punishment applicable in his case. The Prophet was informed by the people that he was very ill. Thereupon, He postponed the actual ḥadd punishment of hundred stripes and ordered to lash him only once by a bunch of soft branches, numbering one hundred.\textsuperscript{839} In this case, the judgment of the prophet was based on the contextual interpretation in which he considered not only the textual ruling but the contexts of the case and when he found the guilty man ill, he postponed the actual punishment for the sake of the life of convict.\textsuperscript{840}

Likewise, the companions explained and interpreted the Qurʾānic legal texts according to their contexts and circumstances of the parties rather than literal interpretation. The companions solved every new case with the help of both textual and contextual approaches of interpretation. On the one hand, they had to consider the syntax of Arabic, its grammar and associated words and on the other, they had to examine the prevailing condition of the society, circumstances of the case and cause of the revelation. If textual interpretation seemed contradictory to the true intent and

\textsuperscript{839} Abū Dūwūd, \textit{Sunan abī Dāwūd}, 4:188.
\textsuperscript{840} Ibn al-Qayyim, \textit{Iʿlām al-Mawaqīʿīn}, 1:23.
object of the enactment or led to some unjust and absurd result, they preferred contextual interpretation over the strict literal interpretation of the text. In such cases, they acted upon their own reasoning based on their knowledge of the contexts of the legal texts. For instance, the text: “Those who take an oath to refrain (give up) from their wives must wait for four months, then if they return (change their idea), verily Allāh is Oft-Forgiving, Most forbearing.”

The literal meaning of the text leads that if a husband intends to leave or divorce his wife and takes oath that he will not touch her must wait for four moths and think about the consequences and if he changed his idea and wants to reconcile with his wife, then Allāh is Oft-Forgiving, Most forbearing. The intention and purpose of this text becomes clear by further explanation in next two verses of the same sūrah that from the words “Īlā” means intention to divorce his wife. A question was raised before the companions what would be the ḥukm or law if four month passed and the husband did not retain to his wife and still refrain from her? The companions of the prophet interpreted this verse to answer the question according to their independent logical reasoning. Ḥaḍrat ʿĀishah, Ḥaḍrat ʿUthmān, Ḥaḍrat ʿAfi, Ibn ʿUmar and some other decided that in such a situation the husband should divorce his wife or retain to her in matrimonial manners, but the divorce will not occur unless the husband himself declares it. Contrary to this judgment, Ḥaḍrat ʿAbd Allāh bin Masʿūd and some other declared that if four months passed and husband did not retain her wife, it will convert into divorce bāʿin and after that the husband could not return to his wife with out re-married her. The point of difference among them was the understanding of the meaning of letter “Fa’” used in the text. ʿAbd Allāh bin ʿUmar and his fellows

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841 The Qurʾān: 2:226.
842 Imām Bukhārī, Ṣaḥīḥ al-Bukhārī, 7:5290.
considered it as tartīb al-zikra while others took it tartīb al-ḥaqīqī and took it in the meanings of demand.\textsuperscript{843}

Like companions, the traditional jurists based their interpretive techniques upon the rules of textual and contextual interpretation. They strive hard to achieve the best result through the process of interpretation and construction according to the needs of people of each particular area and a specific time period.\textsuperscript{844} They declared taht contextual rule of interpretation deals with two types of investigation: First, it inquires in to the syntax of the word along with its implications, associated words and inferences of the text and second, it evaluates and examines the cause and the circumstances that forms the setting for revelation.\textsuperscript{845} For example, the text: “Prohibited to you your mothers”, literally used in the meaning of sexual intercourse and technically for prohibition of nikāh with mothers but in the context of prevailing custom, it is interpreted in the meaning of prohibition of touching, kissing and looking at them with sexual lust or shawah.\textsuperscript{846} In many cases an imperative and negative modes of the texts are needed to be interpreted in the light of the context and here plain meaning rule cannot draw the intended meaning of the text.\textsuperscript{847}

2.2.3 Rule of Logical Reasoning (Rā’y)

Interpretation by way of personal reasoning forms an important part of Islāmic law. The term logical reasoning or ijtihād is a developed form of the use of personal reasoning or rā’y which means exercise of personal opinion in the process of

\textsuperscript{843} Al-Jaṣṣāṣ, Al-Fuṣūl fi al-Uṣūl (Egypt: Dār al-Kutub al-Miṣriyyah, 1978), 221; Al-Baṣrī, Al-Mu’tamad, 2:733; Al-Ghazālī, Al-Mustaṣfā, 2:120.

\textsuperscript{844} Ibn Qayyim, Ilām al-Mawaqqiʿīn, 1:32; Al-Ghazālī, Al-Mustaṣfā, 2:124.

\textsuperscript{845} Imām Ghazālī, Ilām ʿUlūm Id-Dīn (Lahore: Islāmic Publications, 1985), 1:23.

\textsuperscript{846} Al-Qurṭabī, Al-Jāmiʿ Li ʿAḥkām al-Qurʾān, 3:277; Al-Jaṣṣāṣ, Aḥkām al-Qurʾān, 3:92.

\textsuperscript{847} Ibn Qayyim, Ilām al-Mawaqqiʿīn, 1:32; Al-Ghazālī, Al-Mustaṣfā, 2:124;
derivation of law from the legal texts. Originally, the concept of logical reasoning is a developed form of personal opinion in cases where no explicit rule of Sharī‘ah is found. Rule of logical reasoning is based on the presumption that traditions (naqš) and reason (‘aqīl) are harmonizing and mutually supporting each other and one can not be looked upon separately from each other.

Islāmic legal system motivates an interpreter to use his vision and reasoning to deduce rules and to reach a conclusion. The settlement of disputes by way of reasoning was encouraged by the Qur’ānic revelation and as well as by Sunnah and it was considered that a text whether of the Qur’ān or of the Sunnah could not be applied to a situation without reasoning. There are number of Qur’ānic verses which emphasize on the use of reasoning and vision of a person. For example the text: “In their stories there was a lesson for those who have vision.” In this text, the word “vision” indicates that a wise man learns and derives a conclusion from every event or text. The fact is that the settlement of an issue on the basis of sound opinion was also a well established rule of interpretation in Pre-Islāmic society of Arab. Men of opinion (dhu al-rā‘y) and lay men (mufannad) were two distinct categories of people in respect of reasoning. The Qur’ān revealed on the Arab and the Law-giver did not condemn good practices and ‘urf of the people rather He appreciated certain usages and ‘urf by acknowledging their validity and by keeping them in practice through revelation. Rā‘y at that time was a generic term used for personal opinion and exercised frequently by the companion jurists to solve a contemporary issue for which no direct ruling found in the Qur’ān or Sunnah. The Qur’ān not only encourages

849 Ahmad Ḥasan, Analogical Reasoning in Islāmic Jurisprudence, 7.
use of personal reasoning but insists to consult and to solve issues relating to social, political and cultural affairs of the people by mutual consent. Similarly, the Holy prophet consulted his companions on many issues which were not settled down by revelation. He then adopted the opinion which was sound and reasonable in his eyes. In this way mutual consent designed to elicit public opinion.  

In the early period of the development of Islāmic law logical reasoning was one of the most affective tools of interpretation and until the 3rd century of Hijrah the scope of rā’y was not restricted to the logic based on the text which later developed rule of analogy rather any sound and logical opinion which might reach the status of sound judgment adopted and applied to the issue. The overall policy of the Qur’ān lays great stress on the use of rational reasoning and insists upon thinking and deducing inferences. The companion had to use their logic frequently in matters of law. In a number of cases Abū Bakr, ʿUmar, ʿAlī and Ibn Masʿūd are reported to have said: “aqūlu fīhā bi al- rāʾy that I have decided the case according to my personal opinion.” The use of rāʾy by the companions means that their judgments were based on speculative indications and signs. They had to derive legal meaning of a text through their own logical reasoning and justified that meaning on some argumentations for the purpose of its application to a particular factual situation. They never read a text in isolation rather they took into consideration both context and objectives of legislation and then applied a text to a specie situation in the light of overall teaching, spirit of the Qurʾān and their own logic. The conflicting between the the personal opinion and logical reasoning began at the time when they were

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852 Al-Jaṣṣāṣ, Al-Fusūl fī al-Uṣūl, 222.
853 Al-Baṣrī, Al-Mu’tamad, 2:733.
thought exclusive of each other in an absolute sense. To restrict the scope of free opinion and to bring it in to a systematic form, the traditional Muslim jurists divided ῥα῾y in to four types: Sound opinion, doubtful opinion, approved opinion, and lastly, void opinion. The term sound opinion means opinion of the companions which explained the text and which is agreed upon by the community and handed down from the past to the present generation. Similarly an opinion if based on the text or Sunnah or on the opinion of four rightly guided Caliphs, or on the verdicts of the companions declared as sound opinion. The doubtful opinion was allowed only in case of exigency where no sound opinion was found. This permission was based on the legal maxim “Necessity makes prohibited things permissible” just as eating of prohibited food is permitted in case of necessity, so resort to doubtful opinion is permissible in similar situation. Approved opinion means an individual opinion of a jurist. Lastly, void opinion mean an opinion against the spirit of Shari‘ah. The rule of logical reasoning helps the interpreter to justify the legal, political, economic and social changes occurred in behaviour and acts of the people due to changed circumstances and needs of people. In case where a particular word or text bears more than interpretation, rules of logical reasoning help the interpreter to prefer one among numbers of similar meanings and apply it to a particular situation at hand through judicial activity.

2.2.4 Rule of Analogical Reasoning (Qiyās)

Analogical reasoning means deductive reasoning by analogy through which a detailed rule of Shari‘ah is applied to a new case on the basis of common attributes between the two. In this case no explicit rule is found in Shari‘ah and the interpreter finds that

856 Ibid.
some existing ruling contained in Qurʾān or Sunnah has some common and similar attributes to the new case and that both can be treated under one and same law, so he applies the rule of original case to the contemporary case on the basis of common attribute. The word qiyās literally used in the meaning of measuring and estimating of one thing over the other. In its figurative sense it is used in the meaning of an established rule. In the early legal literature the word qiyās has been used in the meaning of a general principle.\textsuperscript{857} It is also used in the meaning of consideration and comparison of two things having certain similar or common attributes. It is stated in the Qurʾān: “Consider O you possessors of eye.”\textsuperscript{858} In this text the word consider has used in the meaning of comparison between two similar things.\textsuperscript{859}

2.2.4.1 Origin and Development of the Rule

The chief exponent of this rule was the Qurʾān itself. The Qurʾān uses many similitude employing words mathal, mithl, and ka to signify similarity between different cases. These similarities however, are different from the technical and strict sense of qiyās described by the traditional jurists.\textsuperscript{860} For example, the text: “And those who have no knowledge say: “Why does not Allāh speaks to us or why does not assign come to us?” So said the people before them word of similar (mithl) import. Their hearts are like.”\textsuperscript{861} In this text the word mithl denotes similarity between two types of people: People of past nations; and people of the time of the prophet. In this way the Qurʾān enunciated the fundamental concept of qiyās in its basic form.\textsuperscript{862} The use of this rule is also found in the Sunnah of the Holy Prophet who decided certain

\textsuperscript{857} Ibn Manẓūr, 
\textit{Lisān al-Arab}, 5:35; Ahmad bin Fūris, Maqūʿīs al-Lughah, 5:40.
\textsuperscript{858} The Qurʾān: 59:2.
\textsuperscript{859} Ibn Qayyim, 
\textsuperscript{860} Ibid.
\textsuperscript{861} The Qurʾān: 2:118.
cases measuring upon one another. For example, once a woman came to the prophet and said that her father determined to perform *Hajj* but died without performing the *Hajj*. Then she asked, would it benefit if she perform the *hajj* on her father’s behalf? The prophets asked her: “suppose if your father had debt would you pay that on his behalf”? She replied, yes.” Then prophet said: “The debt owed to God merits even greater consideration.”

Likewise, the companions exercised frequently *qiyās* in their process of interpretation. They deduced certain laws by way of analogical deduction by using *qiyās* in its ordinary and simple meaning. During that formative period of Islāmic law, the rule of analogy was not considered as distinct from the rule of logical reasoning. The companions had to use *qiyās* in the sense of reason, established rule and similarity. At that time, it was a simple process to deduce law from legal texts and used in its elementary form and was based on parallel cases. Whenever a case seemed to be similar to a new contemporary issue the *hukm* of the earlier case was given to it without prescription of particular common attribute or *illaḥ*. Minor resemblance was sufficient to employ *qiyās* by the companions.

Analogy in its more strict sense was established by the traditional Muslim jurists substituting and restricting the scope of personal opinion and declared as *ijtihād* *Istinbāṯ*. The traditional Muslim jurists developed the rule of analogy in a systematic form and declared it as effective tool for deduction of hidden meaning of a text by way of analogy where its apparent meaning is unable to cover the situation at hand. It is a process to extend the scope of an existing legal rule by way of measuring and estimating it over a new issue having same cause or *illaḥ*. Al-Baṣrī defines *qiyās* as attainment of the law of original case in the parallel case by reason of their

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863 Ibid.
864 Ibid.
similarity in respect of the legal cause ('Illah) in the opinion of the jurist. In this sense analogy amounts not to establish a rule of law but merely a process to discover the law hidden in the existing text by way of estimating it over new case when both have common attribute or 'illah. The rule of analogy established by the traditional jurists was based on the assumption that for every decision or juristic opinion there must be some logical reasoning existed in or behind an enactment. For a jurist is not allowed to exercise his personal opinion without any evidence from Sharī‘ah. It could not however, be defined systematically until the 4th century of Hijrah.

The Ḥanafī jurists considered it as an extension of law from the original text to which the process is applied to a particular case by means of common 'illah which cannot be ascertained merely by interpretation of the language of the text. Imām Shāfi‘ī considered qiyās in prospect of ijtihād and declared that anything which befalls a Muslim there is a binding rule (ḥukm lāzim) or an indication (dalālah) as to the right path. In absence of definite ruling, the indication to the right path should be sought by ijtihād and ijtihād is qiyās. Analogy although known as a well established and well recognized principle of interpretation yet remained controversial among the Muslim jurists. The majority of the jurists among four Sunnī Schools however agreed on the validity of qiyās and considered it a valid source of interpretation. Others like al-Zāhirī and Ibn Hazam rejected both rā‘y and qiyās even though the legal cause is mentioned explicitly in the text of Sharī‘ah. The Ḥanbalī jurists rejected rational (aqlī) qiyās and recognized only Sharī‘ī qiyās. Mālikī jurists however, contended that mere identity in attributes without identity of causes was sufficient ground for application of analogy. Imām Mālik however held that the

865 Al-Baṣrī, Al-Mu‘tamad, 2:697.
866 Ibid.
saying or juristic opinions of the companions are preferable over analogy and in case of contradiction the former will prevail over the later.870

2.2.4.2 Analogy in Contemporary Period

The traditional concept of analogy has been lost its validity in this changed scenario. The modern scholars opined that on the basis of analogical reasoning solution of the new contemporary issue seems to be impossible. The traditional concept of qiyās is incapable of addressing untouched areas of the law which cannot be covered by textual rulings. The traditional jurists failed to establish a sound and agreed ground for preference of analogical reasoning over personal opinion rather this rule has restricted the scope of juristic opinion which forms a considerable part of Islāmic law developed during the early period of Islāmic legal system. The issues regarding subject-matter, effective cause and validity remained uncertain.871 It led to the rigidity in legal thought and to arrest the creative and original thinking.872

2.2.5 Rule of Public Interest (Maṣlaḥah)

The word maṣlaḥah literally means benefit or interest. Anything which leads to the attainment of benefits is declared as maṣlaḥah.873 Technically, it may be defined as an interest or benefit intended by the Law-giver or based on the objectives of the text.874 In this sense the word interest in Islāmic legal system is used in different meaning from other legal systems of the world. Islāmic legal system recognizes only that interest which is in accordance with the overall policy of Sharī‘ah or not against to its

872 Ahmad Ḥasan, Analogical reasoning in Islāmic jurisprudence, 13.
873 Ibn Manẓūr, Līsān al-‘Arab, 2:348; Muḥammad bin Ya‘qūb, Fyrwz Ābūdī, Qamūs al-Muhīt (Cairo: Muṣṭafā Bābī al-Halbī, 1371),1:277.
spirit. For instance, in pre-Islamic society, the Arab people had to bury alive their daughters and they considered it good or beneficial for them but when Islam came it declared it prohibited and rejected the view of people that there was some benefit in that. And the text revealed: “And when they will be asked about buried alive. For what reason she was killed.” Similarly, they considered their benefit in the business by riba but it was declared prohibited by God.

2.2.5.1 Historical Development of the Rule

The interpretive rule of public utility or maslaḥah owes its origin in the texts of Qur'an and Sunnah. There are number of texts which expressly disclose that the prime focus of Sharī'ah is to work for the interest of people. For instance the text: “Allāh intend for you ease and He does not want to make things difficult for you.” Not only is this but interpretive modes of the Qur'an are based on the policy of public interest. For example, it is stated in the Qur'an: “And We made Solomon to understand and unto each of them We gave judgment and knowledge. And We subdued the hills and the birds to hymn (His) praise along with David. We were the doers (thereof). This verse shows that both David and Solomon were equal in knowledge and judgment, but in understanding an affair and appreciating the demands of public interest Solomon excelled. For this reason special perception finds a mention in this verse. Once, two men brought their suit in the court of David. The bone of contention was that during the night time a number of sheep of one person damaged the crops of another. David, on the basis of comparative estimate of loss of crop and the price of sheep decided the matter that the sheep were handed over to the owner of the crops. When Solomon heard this judgment, he suggested another

876 The Qur'an:2.185.
877 The Qur'an: 21:79.
decision that the sheep were handed over to the owner of the crop, so that he may
derive benefits from their milk and wool while the fields be placed in the custody of
the shepherd till it bring it to its pre-condition by expanding labour, irrigation and
proper care. Thereafter to each of them his property shall be returned. This judgment
was done on the basis of public interest and was beneficial to both parties. It also
provided the re-imbursement of the loss of the infringed party. David liked it and
withdrew his own judgment. 878

Interpretation through public interest was exercised by the prophet on many
occasions where he decided cases by way of public interest. For instance, the Jews of
Medîna believed that a menstruated woman not only became impure physically but all
her activities and acts became impure thus, they did not allow her to sit, to eat with
them or to do any work and threw her out from their houses till she became pure.
Under these prevailing situation, the Muslims asked the Holy prophet about the status
of a menstruated woman how she should be treated? In this context, God revealed:
“They ask you about menstruation. Say: ‘It is harm as keep away from women during
menses. And do not approach them until they have become purified.’” 879 This is a
general provision and in the prevailing circumstances it might be understood in the
same meaning as was considered by the Jews at that time because the wording of the
text was not associated with any indication which led the exact meaning of the word
“fa’tazilâ” or to keep away them. The text was interpreted by the prophet in the light
of the objectives of Sharî‘ah and public interest and he explained the text by saying:
“Sit with them in your houses, and you may do everything with them except
intercourse.” 880 During the era of the companions certain new problems were

878 Ibn al-‘Arabî, Aḥkâm al-Qur‘în, 1: 185; Al-Qurṭabî, Al-Jîmi‘ li Aḥkâm al-Qur‘în, 3: 128; Al-Jaṣṣûs,
879 The Qur‘în: 2:222.
880 Imâm Muslim, Šaḥiḥ al-Muslim, 1: 178; Abû Dâwûd, Sunan abî Dâwûd, 1: 67.
confronted by the Muslims due to rapid cultural expansion, variety of invasions, growth and development of political, economic and moral values. The new issues for which if no direct ruling found they had to use personal opinion frequently by way of public interest by saying: “Lā Yuṣlih al-nās illā dhāka” that there was no way except that. The interpretive function of the companions was based on the presumption that Sharī‘ah intends to provide ease to people and to remove difficulty from them. Haḍrat ʿUmar exercised this mode of interpretation frequently and decided many cases differently from existing rules due to changes that took place in the Muslim community. At that time it was the most authentic source to decide a question upon any legal issue. In case where no direct evidence found or where it seemed necessary to modify a certain rule to make it compatible with the changed circumstances, the companions never hesitated to create a quite new rule of law by way of interpretation and construction based on public utility and to modify the laws established by the express provisions of the Qurʾān or Sunnah and to apply them on further cases when they felt that the existing rule is no more required or not sufficient to fulfill the needs of changing conditions and circumstances of the society.

They avoided application of rigid and inflexible literal rule. They just examined the circumstances and the demands of the issue and when found that there was no way to relief the parties, they decided the case by way of public interest. For example, marriage with the women of the people of Book was permitted during the life time of Holy Prophet, but Haḍrat ʿUmar changed this rule and prohibited to marry with the women of the people of Book as the earlier rule worked caused harm for Muslim Women under the circumstances at that time. He also postponed the prescribed penalty of theft during the period of famine though there was no exceptional rule concerning that issue. He gave this decision by way of public
Similarly, Haḍrat ‘Uthmān permitted the rounding up of stray camels and sale thereof, after the expiry of a certain waiting period in spite of the fact that such permission was denied by the Holy Prophet. The reason was that when Haḍrat ‘Uthmān realized that immorality and dishonesty had made deep inroads into the value judgments and the character of the people, who no more feel any fear and freely indulged in prohibited acts, he and allowed it which later excluded the possibility to a certain extent of a thief or miser rounding up camel for unlawful personal profit.

Like the companions, the traditional jurists utilized this approach at a large degree and framed certain new interpretative rules to cope with the changing circumstances of the people and to enable the Ummah to compete the challenges of contemporary nations of the world. Although the companions did not explained the logic behind their judgments based on the public interest yet traditional jurists of later centuries studied and examined thoroughly all the judgments of the companions and derived certain principles to explain the logic and maṣlaḥah behind those judgments and as well as prescribed certain conditions to restrict the scope of public interest.

2.2.5.2 Classes of Maṣlaḥah

The traditional Muslim jurists not only recognized the policy of public interest but classified maṣlaḥah into many categories and grades according to its authenticity, need, strength, and scope. Among the traditional jurists Imām al-Ḥaramayn883 was the first who discussed maṣlaḥah in detail and divided it into different kinds based on the legal strength of maṣlaḥah.884 He divided it into three types such as maṣlaḥah

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883 ‘Abd al-Malik bin ‘Abd Allāh bin Yūsuf, al-Nisā Būrī was born in 419 A. H and died in 478 A.H. He was a great Shafi’ī jurist and Uṣūlī. He wrote many writings such as Al-WarqĀt wa al-Talkhiṣ fi Uṣūl al-Fiqh and Kitāb-Burhān. See, Taqqāt al-Shāfi‘ī Tah, 3:278.
884 Imām al-Ḥaramayn, Al-Burhān, 2: 931- 947.
mu’tabirah or maṣlaḥah recognized by Sharī‘ah which means a maṣlaḥah approved by the express texts of the Qurʿān or Sunnah or ijmā‘.885 The maṣlaḥah recognized by Sharī‘ah may be divided into three types according to its required extent and facility to sustain the objectives of Sharī‘ah such as maṣlaḥah based on necessities (darūrah), maṣlaḥah based on needs (ḥajāt) and maṣlaḥah based on supplements (taḥsīnāt).886 Second is maṣlaḥah mulghāt a benefit that has been rejected by the Law-giver and declared as against Islāmic spirit.887 Third is maṣlaḥah leftover by Sharī‘ah (mursalah) in case where no express ruling or legal text is found, the case may be solved in the light of the spirit of Sharī‘. For it has neither been declared by the Law-giver as reliable nor superfluous and the Law-giver is silent about it. No order supports it and no precedent and no order rejects it.888

To recognize a maṣlaḥah and to act upon it, the Muslim jurists divided maṣlaḥah into three types: Definite maṣlaḥah (qat‘ī), probable maṣlaḥah (zannī), and assumed maṣlaḥah (wahmī). The first type of maṣlaḥah is that which is certain and is based on the legal texts of Sharī‘ah. The second type of maṣlaḥah though has no express recognition from Qurʿān or Sunnah yet got recognition from the general principles of Sharī‘ah. The third type of maṣlaḥah means an assumed interest which is not proved by legal texts of Sharī‘ah.889 Likewise, the Muslim jurists divided maṣlaḥah regarding its scope and application into two types: general interest and private interest. General interest means the interest of Ummah or a large community of Muslims. For instance, the interests of Ummah lie in the unity among Muslims,

885 Ibid.
886 Al-Shātibī, Al-Muwafaqāt, 2:9-12.
887 Al-Shawkānī, Irshād al-Fihūd,191.
888 Al-Shātibī, Al-I‘tiṣām, 2:287.
889 Al-Ghazālī, Al-Mustasfā, 2:284.
protection of Islām, and knowledge of Qurʿān and Sunnah etc. Similarly matters of general interest regarding law and order, peace and war, social culture, issue relating to inheritance and economic policy of a Muslim states are treated by this type of maṣlahah. Private interest means interest of a person or a group of persons like interest of parties in a court proceeding, interest gained by an agreement or contract or interest relating family matters. In case of contradiction between public and private interests the public interest will prevail over private interest.

2.2.6 Rule of Necessity

The rule of necessity occupies a very important place in Sharī‘ah because of its many benefits and advantages. It has its origin in the divine provisions of Qurʿān and Sunnah. It takes cognizance of the genuine needs of the society and provides facilities to those who are confronted with extreme urgency. For example, the Holy prophet prohibited sale of non-existing object but he permitted sale by way of Salam. Bay al-Salam is a trade in which price of object is determined and paid in advance but delivery is delayed.

Law is not changed under this rule rather the law ceases to operate in case of emergency and as soon as the emergency is over the status quo of law is thus maintained. Rule of necessity is that amazing rule of interpretation which represents reconciliation between stability and change. Necessity is estimated by the extent hereof and so is the time limit. Whatever becomes permissible owing to some valid excuse ceases to be so with the disappearance of that excuse. Rule of necessity is based on the presumption that necessity permits prohibited things and that necessity

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892 Imām Bukhārī, Ṣaḥīḥ al-Bukhārī, Kitāb al-Salam, 3:44.
893 Tyser and Haqqi, The Mejelle, Article, 22 at 68.
knows no law and can be applied in case of urgency. Need either of public or of private nature is treated as necessity. The determination of the extent and the time of necessity and need and whether it is necessity or need, depends upon one’s conscious and taqwā in the case of individual. The rule of necessity can be applied under many circumstances such as:

(i) Where the necessity arises in matters of financial nature such as loan, transfer of debt and incapacity etc.

(ii) Where necessity arises in cases of hiring. For example, extension is given in time period in case of hiring a boat or ship for a certain period if expired before reaching the destination.

(iii) Where the issue is relevant to matters of competency and transfer of property;

(iv) Where the necessity relates to the customary laws of the commercial nature which are not contradictory to the spirit of Shari‘ah.

(v) Where the demands of the majority lead to remove hardship creating by general rule. For example, the general rule regarding the liability of loss occurred due to false information of any person was that the doer (mubāshir) was responsible for that and not the informer. But in later period this rule seemed to be caused hardship for people due to corrupt attitude of people so the rule was changed by the later jurists and the reporter of false reports held to be responsible for that loss.

(vi) Where customary law of a particular community contains some exceptional rule of transactions which seems necessary to continue for the benefit of people.

(vii) Where the existing rules of procedure leads to hardship to the people and demands a justified and flexible approach. For example, Abū Ḥanīfah held that if a judge personally trusts the reliability of witness who testifies before him there is no

need for recourse to cross-examination or tazkiyah. But in later period, this rule caused difficulty for people due to corrupt attitude of witnesses, so the rule was changed and tazkiyah was applied as regular judicial practice for the witnesses.897

(viii) Where the necessity permits prohibited things and fall within the prescribed manners of Sharī‘ah.

2.2.7 Rule of Flexible Interpretation

On the basis of the rule of necessity the rule of flexible interpretation is drawn to treat with the dire needs of social, political and economic should be interpreted liberally to maintain peace and order in the society. If any existing rule regarding worldly affairs of the people causes to create anomaly and hardship in the life of the people the prescribed rule must be relaxed to the extent to remove such hardship from people. This rule gets its validity directly from the explicit texts of Sharī‘ah. For example, the text: “Allāh burdens not a person beyond his capacity.”898 And: “God desired for you ease. He desired not hardship for you.”899 The argument from Sunnah is ḥadīth: “Religion is facility. The most beloved religion to God is tolerant orthodoxy.” And the ḥadīth: “God loves to see that His rukhas observe in the same way as His general rules are obeyed.”900 This rule originally has been derived from the relaxed rules of Qur‘ān related to the matters of rituals and Ḥibādāt. An important legal maxim has been established on the basis of this rule that hardship begets facility.901 This principle allows a flexible interpretation in case of hardship and difficulty. Sharī‘ah steers a middle course between the two excessive hardship and permissiveness by

897 Al-Sarakhsi, Uṣūl al-Sarakhsi, 2:45; Badran, Uṣūl al-Fiqh, 232.
898 The Qurʾān: 2: 286.
899 The Qurʾān: 2:185.
901 Tyser and Haqqi, The Mejelle, article 17 at 55.
relinquishing general rule of law if it bears excessive hardship and by adopting exception to remove this undue hardship from the subject.902

2.2.8 Interpretation through Custom (‘urf)

The term custom or ‘urf is applied to what is common or customary among the people and to which they have habituated, whether it is word or deed.903 There are many Qur’ānic provisions which support the consideration of custom during law making process whether be legislation or interpretation. For example, God says: “Enjoin what is right and turn away from the ignorant.”904 This verse conveys the permissibility of the consideration of custom in matters about which no text of Sharī‘ah is found. The Law-Giver Himself recognized the customs of Arab prevailing at that time, adopted some of them by way of revelation and amended some of them by reformation to bring them into harmony with the spirit of Sharī‘ah and terminated some of them which were against that spirit. For example, according to the prevailing customs of Arab, a wife became permanently prohibited to her husband in case where the husband pronounced the words constituting ẓihār by declaring his wife as prohibited as his mother to him. During the life time of the Holy Prophet a companion pronounced ẓihār to her wife. His wife Khawlah bint Tha‘labah came and prayed to the Apostle of Allāh regarding the modification of rule. The prophet decided the case in the light of prevailing custom and declared: “According to my opinion you are now forbidden to your husband.” But this judgment was very painful for Khawlah who had no recourse to support herself and her children. She repeated her request again and again and started to cry. God heard her crying and abolished that custom by saying: “If any men among you divorce her wife by ẓihār, they cannot be their mothers: None

902 Al-Shaṭibī, Al-Muwafaqāt, 2:111-114.
904 The Qur’ān: 7:199.
can be their mothers except those who gave them birth…..but those who divorce their
wives by ẓihār, then wish to go back on the words they uttered, should free a slave
before they touch each other; this is ye admonished to perform: God is well-
aquainted with what ye do,”

This event describes not only the validity of Arab customs but also that if some custom was neither condemned nor adopted by Sharīʻah remained valid and applicable by people. The wording of Holy Prophet was “according to my opinion you are now forbidden to your husband” shows the acceptance of prevailing customs of Arab by the Prophet as they were.

Likewise, the Prophet (PBUH) amended only those laws which originally based on the understanding of common good or have a locus standi in his time. For instance, it was customary among the Arab that where the buyer before an examination of goods or before the completion of the transaction touched the article or the seller threw it towards the buyer or where the buyer placed a small stone over it, then in all such cases the sale was treated as complete. In this case, though the mutual consent is there but an element of fraud and deceit and thus unjust profit making was not ruled out, then all such transactions fell within the ambit of the negative rule and hence were prohibited. The effective cause in this case unjust profit making was prohibited and the prevailing customs and practices constitute the details. During the few decades after the prophet’s death, when the capital of state was still in Mecca, the jurists of the Muslim community fashioned their conduct on the basis of pre-Islāmic Arab customary law and the Qur’ān. These were mainly two

905 The Qurʾān: 58:4.
907 Ibid.
908 Ibid.
sets of principles and laws which provide basis for legislation of all types of contemporary issues.  

2.2.8.1 Validity of Customary Laws

The majority of the Muslim jurists held that custom which is not against the spirit of Sharī‘ah is a valid custom and must be followed by the court of law. The Shafi‘i jurists declared custom as to equivalent of the ḥukm of naṣṣ that what is proven by custom like that which is proven by Sharī‘ah. Imām Abū Ḥanīfah and his followers gave it great wattage in their juristic decisions and modified many existing rules which deemed to be caused hardship to people by way of customary laws. The Sharī‘ah of the prophet Muḥammad had its material sources in the religious and social customs of the people of Banū Ismā‘īl, as the objective of divine law was to reform what people had and not to confound them with new things with which they were not familiar.

2.2.8.2 Customs in Contemporary Period

In modern times the custom or ‘urf should be taken by the Muslim jurists as a source of interpretation. The transactions and dispositions made by the people as customs should be declared legal and valid so long as they are not contrary to any text of Qur‘ān and the Sunnah. If the usage had been changed during the life time of Holy Prophet, He would have commanded according to the change of the usage. So usage will be relied upon in case of the absence of any ruling of Sharī‘ah. A custom in this contemporary scenario should be territorial and confined to a particular state, so that the custom of one state may not affect the general law of another state. Similarly

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910 Ibn Nujaym, Al-Ashbūh wa Al-Naẓā‘ir, 39; Ibn Taymiyyah, Majmū‘ al-Fatūwā, 4:44.
911 Al-Sarakhsi, Uṣūl al-Sarakhsi, 2:115; Ibn ‘Ābidīn, Nashr al-‘Urf, 69; Al-‘Uqud, 1:118.
912 Ibn Taymiyyah, Majmū‘ al-Fatūwā, 4:45; Qūdikhūn, Fatūwā al-Khayriyyah, 2:67.
it is not necessary that custom of one age if got validation by Sharī‘ah should be continued among the next generations if not necessary.914

2.2.9 Rule of Abrogation (Naskh)

Interpretive rule of abrogation originated by the Law-giver himself. It is stated in the Qur’ān: “Whatever verse I have abrogated or cause to be forgotten, I will bring another better than it or equal to it.”915 This text clearly shows that existing laws if cause hardship or seems outmoded may be abrogated in favour of new flexible and contemporary laws. The word abrogation literally means elimination, taking out, replacement of or removing something. It is also used in the meaning of conversion and transformation. 916 Ahl al-Ẓāhir contended that the word abrogation is used literally in the meaning of removing of or taking out while in its figurative sense it is used for conversion.917 The majority of the jurists contended that the word abrogation literally used for conversion and metaphorically in the meaning of removing something.918 Some of the Muslim jurists like Qādī al-Bōqlūnī and Ghazālī declared it as a homonym word common between two meanings removing of something and conversion from one state into another.919 Technically, it may be defined as a communication from God to lift up or to remove some previous Shari‘ ʿhukm.920 Hence abrogation means cancellation or conversion of an existing ʿhukm into a new ʿhukm. For example, the text: “O you believe! Fasting has been made obligatory for you in the same way that was made for those before you.”921 According to the

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914 Ibid., 3:809.
915 The Qur’ān: 2:106.
916 Ibn Manẓūr, Lisᾱn al-Arab, 5: 275; Ahmad bin Fᾱris, Maqᾱʿūs al-Lughah, 5: 140.
917 Ibn Hazam, Al-Abkᾱm fi Uṣūl al-Abkᾱm, 6: 58; Mu’jam al-Fiqh, 2:238.
920 Ibid.
921 The Qur’ān: 2:183.
former law of fasting if a man intended to fast, he had to take food at night and once he prayed for night or went to sleep eating, drinking and sexual intercourse with wife were forbidden to him until the next sunset. Then the text revealed: “At night of fasting intercourse (Rafath) with wife has been made lawful to you.” And by this text the ḥukm of fasting made easier for believers from dawn to sunset.

2.2.9.1 Development of the Rule

Abrogation of one Qur’anic precept with another one was introduced and developed during the Međinite life of the prophet when due to expanded needs of people, changes in the conditions of life and changed circumstances of people led to the conversion of some existing legal texts and their ruling into new rulings. The companions had to utilize this rule and whatever deemed contradictory to the practice of the people they had to replace it by a new rule without mentioning the rule as it was familiar to them. Likewise many of the rulings of the Qur’ān and Sunnah were replaced by Hadrat ʿUmar with new and changed rulings due to changed circumstances. Among the jurists who closely associated with the discussion on abrogation were Ibrahim al-Nakhai (d.95/713), Muslim b. Yasir (d. 101/719), Mujahid b. Jabir (d.104/722) and al-Hassan al-Basri (d.110/78) who focused exclusively with the ramifications of those verses that had direct bearing on legal issues. Among the traditional jurists, Ibn-e-Khaldun was the first who investigated the totality of the repeated basic process taking place in the course of organized group. 923

The traditional Muslim jurists not only discussed the purview of this rule but

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922 The Qurʾān: 2:187.
established certain conditions and made it confined to the rationale judgments and thus and restricted the scope of this rule.\textsuperscript{924}

\subsection*{2.2.9.2 Modern Theory of Abrogation}

The modern theory of abrogation contends that the detailed rules of \textit{Sharī'ah by way of ijtihād} are subject to abrogation and can be replaced by new rules to accommodate changes of time and changed needs of people. Al-Āmidī stated that when it is evident that time changes bring about change in policy considerations, then it is not impossible that Allāh may prescribed a particular rule for an individual according to the policy conditioned by the circumstances of that particular time and may substitute it by another order with the change of policy considerations.\textsuperscript{925}

\section*{2.3 Traditional Rules of Interpretation}

Traditional rules are those techniques and methodologies which were adopted by the traditional jurists in their process of interpretation. These rules have no direct evidences in Qurʿān and Sunnah for their validity and justification however; they were based on the general principles laid down in the Qurʿān and Sunnah. Like the companions, the traditional jurists adopted different approaches to lay down a juristic opinion such as:

\subsection*{2.3.1 \textit{Ijtihād al-Maqāṣidī} (Purposive Interpretation)}

Interpretation by way of purposive approach takes into account not only the wording of an enactment but the context and the ultimate object of that enactment intended by the Law-giver. Purposive approach of interpretation is based on the presumptuoin that all the general principles and detailed rules either positive or negative are based on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{924} Ibid.
\item \textsuperscript{925} Al-Āmidī, \textit{Aḥkām fī Uṣūl al-Aḥkām},3:166.
\end{itemize}
\end{footnotesize}
certain objectives for which the texts have been so designed, so the legal texts of Qurʾān and Sunnah should be re-interpreted in the light of these objectives. The primary duty of an interpreter is to interpret law in such manners as to achieve the purposes. The word *maqāsid* is plural of the word *maqṣad* and has been used in different meanings. Literally, the word *maqṣad* is used corresponding to the word purpose in English language and has more than one meaning such as it is used in the meaning of intention. For example, the statement that whenever pagans indented (*qaṣad*) to murder a Muslim, he murdered him (without any reason). Here, the word *qaṣad* has used in the meaning of intention. It is also used in the meaning of determination as one’s aim. For example, the verse: “And upon Allāh is the responsibility (*qaṣad*) to explain the straight path.” In this text, the word *qaṣad* has been used in the meaning of determination or aim. It is used in the meaning of a moderate or a balanced attitude towards something. For example, the verse: “And be moderate (wa-*aqṣid*) in your walking.” Here, the word *aqṣid* has been used in the *amr* mode and means that one should adopt a middle walk neither fast nor slow.

It is also used in the meaning of justice. Technically, the term *ijtihād al-*maqāsidū* was not defined by the traditional Muslim jurists and *Uṣūlīyūn*. They however, utilized it in their judicial process with different names and terms such as *ʿillah* or cause and *ḥikmah* or wisdom. The later Muslim jurists however, discussed and defined objectives of *Sharīʿah* in different manners. Shūh Walī Allāh has defined objectives as to the knowledge of secrets of Dīn to find out wisdom (*ḥikmah*) and

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926 It was happened when Usamah bin Zayd was sent to fight with the people of Juhaynah. See, Imām Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-Imām, 2:288.
ends of legal rules (*aḥkām*) and to know the particulars of conduct and their relevancy to them. 932 Tāhir bin ʿĀshūr933 defined objectives as the meanings and wisdoms existed in all of or in majority of the legislative enactments in the manners not confined to any particular field of Islāmic law. He observed that these meaning and wisdoms are purposes of Islāmic law intended by the Law-giver and which can be discerned in all of the situations to which the law applies.934 ʿAllāmah ʿAllāl al-Fāsī935 defined *maqāsid* as the end of Sharīʿah intended by the Law-giver hidden behind every legal text.936 Some of the contemporary scholars defined *maqāsid* as they are those ends which have been prescribed to achieve for the benefits of people.937

Among all the definitions, the definition of ʿAllāmah ʿAllāl al-Fāsī is more comprehensive definition of *maqāsid* and consisted of both general and specific objectives. The words “the purpose” indicates to the general principles of Sharīʿah while the words “underlying reason” indicates toward the specific purposes of Sharīʿah. He described that the sole purpose of Islām is to provide benefits to people to enable them to perform their responsibilities in good manners. That Islāmic legal system is based on its own distinct features and has capacity to accommodate every new change appeared in the life of people in every aspect whether related to the

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933 Muhammad bin Tāhir bin ʿĀshūr was Māliki jurist of the 20th century and was born in 1879 and died in 1973. He was expert of Arabic language, Islāmic knowledge and Shariʿah. He was an independent jurist and was assigned the title of Shaykh al-Islām in his writings are: Maqāsid al-Shariʿah; Al-Tahrīr wa al-Tanwīr fi al-Tafsīr and others. See, ʿĀdil Nūyahḍ, *Muʿjam al-Mufassirīn*, 2:541.
935 ʿAllāl bin ʿAbd al-Wahdān ʿAbd al-Salām born at Fās in 1908 and died in 1974. He was one of his contemporaries who discussed maqāsid in his treaties and wrote many books on the topic. In his writings are: Maqāsid al-Shariʿah al-Islāmiyyah wa Makārimihā; Dīfīr ʿan al-Shariʿah etc. See, Al-Zarkaṭi, *Al-ʿIlm li al-Fikr al-Islāmī*, 4:246.
matters of worship or to matters of public and private transactions. He suggested that for better result the legal texts of Qurʾān and Sunnah must be reconstructed in the light of their objectives.  

2.3.1.1 Development of Ijtihād al-Maqāṣidī

In Islāmic legal theories of statutory interpretation, the first who dealt with purposive interpretation under the discussion of objectives of legal texts of Sharīʿah was Al-Tirmidhī
during the era of 3rd century of Hijrah. The word purpose to find out a particular object or wisdom behind an enactment was firstly used by him in his writings regarding the process of interpretation or ijtihād. In his book Al-Ṣṣalāt wa Maqāṣidihāh, he discussed certain objectives of the obligations of ṣalāt, fasting of Ramaḍān, and jihād etc., which might be intended by the Law-giver. He thus contended that behind every issue relating to Ḥbādāt or muʿāmlāt certain objectives (hikmah and secret) are intended by the Law-giver and to achieve them should be the prime focus of an interpreter. But this approach was not taken into consideration by the traditional jurists rather they emphasized to solve new problems of Ummah by way of analogy and public interest. In later century, Al-Shāshi discussed on the topic and insisted to find out the objective of every enactment to arrive at true and just result. He contended that when a jurist finds out relevant Ḥillah or characteristic of a text he must follow that to derive law of obligation. For instance, when someone gives money to a poor person, it is assumed that he gave him money to discharge his need

938 Allāl, Al-Fāsī, Maqāṣid al-Shārīʿah al-Islāmiyyah wa Makārimihā, 12.
941 Ahmad bin Muhammad bin Ishāq, al-Shāshi was a jurist of Baghdad and a Hanafī scholar. He was expertise of Uṣūl and wrote Uṣūl al-Shāshi. He was died in 344 A.H. See, Naṣr Allāh al-Qarṣī, Jawāhir al-Maḏīʿ, 1:262.
and that the object behind this charity is to get reward. So it is necessary to locate object of each text intended by the Law-giver to achieve.\textsuperscript{942}

Among the Shāfiʿī jurists, Imām al-Ḥaramayn discussed \textit{maqāṣid} as independent source of ijtihād and divided them into different categories according to their legal strength and scope. He established certain objectives under the category of the dire-necessities of human kind and put others in the categories of needs and complements. He interpreted certain detailed rules of Sharīʿah on the basis of purposive approach. He then discussed ways to protect these objectives according to their strength and grading. He declared that every \textit{hukm} whether of 'Ībādāt or \textit{muʿāamlāt} is based on some purpose and he who does not admit the notion of purpose regarding the obligations and prohibitions has no capacity to perform the task of ijtihād or interpretation.\textsuperscript{943}

Among the jurists of the 13\textsuperscript{th} century (660 A.H) 'Izz al-Dīn ‘Abd al-Salām\textsuperscript{944} dealt with the subject in great detail and wrote an independent book \textit{Qawāʿid al-Aḥkām fī Maṣāḥeh al-Ānām}. In his work he characterized each of the \textit{maqāṣid} and addressed the various aspects of the \textit{maqāṣid} especially in relationship to 'illah and maṣlaḥah. He defined maṣlaḥah in the meaning of pleasure (ladhdhah) and happiness (\textit{Farah}). He contended that Sharīʿah aims to provide benefits to people and to secure them by establishing preventive measures against each maqṣad. He observed that the whole policy of Islāmic law dealt with obligations, prohibitions and permissions is based on the notion of securing benefits of the people in this world and the hereafter because God is indifferent of the worship and loyalty and disobedience and disloyalty.

\textsuperscript{943} Imām al-Ḥaramayn, \textit{Kitāb al-Burhān}, 2: 1200-1209.
\textsuperscript{944} 'Izz al-Dīn ‘Abd al-Salām was born in 575 A.H and died in 660 A.H. (1262 A.D.) He was Shāfiʿī jurist and inclined to taṣawuff. He was expert in Arabic and Islamic jurisprudence and got status of mujtahid. In his writings are: Qawāʿid al-Āhkhām fī Maṣāḥeh al-Ānām; and Qawāʿid al-Ṣuğhrā. See, Ibn ῾Amīmūd al-Ḥanbali, \textit{Shadhrat al-Dhahab fī Akhbār min Dhahab}, ed. ῾Abd al-Qādir (Danishq: Dar Ibn Kathīr, 1988), 7:522.
Whatsoever has been prescribed by Him only for the benefits of people to provide them ease and to remove harm from them. He divided the objectives in to two types: Dunyawiyyah or worldly Masālih which can be perceived by reason, and Ukhrawiyyah or interest of hereafter which can be known only by revelation or traditions. He then discussed these objectives in the parameter of high and low levels according to the approach of people to them. The lowest level is that which is common to all. The higher level of maslahah is conceivable only by the wise people (azkiyā) and the highest level is peculiar to the friends of God alone (awliyā’ Allāh) who prefer the interest of hereafter over the worldly interests.

Imām Ghazālī has a considerable contribution in the development of objectives and their completeness. First, he followed the style of his teacher Imām al-Ḥaramayn and then he compiled an independent book on the objectives of Sharī‘ah named as al-Mustaṣfū”. In his writing he added certain complements (mukammīlūt) to the objectives. He also presented certain arguments from Qur’ān and Sunnah in favour of these objectives. He divided maslahah into three types and prescribed certain conditions to apply them. He then categorized them based on their legal strength and necessity of human being. He also discussed legal maxims based on the objectives of Sharī‘ah and divided them into general and specific types. In his process of interpretation, he preferred general objectives of Sharī‘ah over its specific objectives and declared that public interest will be preferred over the interest of an individual or group of individuals. Al-Shūṭibī was a renowned Mālikī jurist of the 14th century who examined the rapid changes in the political, social and economical fields of life and the challenges of changed scenario and realized that the problems

946 Ibid., 24.
947 Al-Ghazālī, Al-Mustasfū, 1:300-313.
arising from these changes could not be solved by way of deductive mode of qiyās. Consequently, a principle more comprehensive than qiyās was required. He made a thorough study of the rule of Istiṣlāḥ and established a more effective principle of objective or purpose of law derived through inductive mode. He studied Islāmic legal texts from a different perspective and derived certain objectives behind criminal laws of Islām and discussed ḥudūd penalties of Sharī‘ah by way of purposive approach. He pointed out five major purposes behind the ḥudūd penalties which are intended by the Law-giver to achieve and upon which the whole system of administration and justice is dependent. He explained these objectives clearly and linked them with the rules expounded by the theorists. He discussed the sources of law in the light of these objectives and ends of laws. He though confined himself to the field of ḥudūd penalties and constructed them by way of purposive interpretation yet he was a great jurist of his time and presented a distinct methodology of interpretation of Islāmic legal texts among his contemporaries.

It is this reasons that al-Shāṭībī declared that one of two fundamental factors of ijtiḥād is the understanding of the purposes of Sharī‘ah which are based on the determination of Law-giver Himself and which may or may not agree with the goals determined by the human reason. He observed that the purposes of Islāmic legal system have been determined from the texts through a process of induction rather than through deduction. The second factor is the understanding of Arabic language, Aḥkām al-Qur‘ān and Sunnah, knowledge of different sources of Islāmic law and differences of Muslim jurists. He declared that when a Muslim gets capability to understand the intention of Law-giver behind any legal text of Sharī‘ah, he becomes able to be a

948 Muhammad Khalid Mas’ud, Shāṭībī’s Philosophy of Islāmic Law (Islāmabad: Islāmic Research Institute, 1995), 253.
vicegerent of the Holy Prophet (pbuh) in education and in issuing a judgment or fatwā. He thus founded a new mode to understand the legal texts of Qurʾān and Sunnah and to interpret them in the light of their objectives. He presented a modern concept of Islāmic law in the light of maṣlaḥah and objectives of Sharīʿah. He contended that the legal texts of Qurʾān and Sunnah must be constructed according to their objectives intended by the Law-giver. He made it clear that every text of Sharīʿah consists of a task to act upon, an aim to recognize, a reason for enactment, and lastly, an intention to discover. It is duty of interpreter to understand legal texts of Qurʾān and Sunnah in the light of these characteristics to achieve benefits to human being or to remove harm from them. These objectives sometimes are so clear to conceive by a reading of the explicit legal texts of Qurʾān and sometimes are hidden in the implied meaning or inferences of the texts and can be derived through a deep study of these texts by way of construction. In this way through re-evaluation and re-examination of an existing law it becomes possible to arrive at the intent which it aims to fulfill and to make the benefits clear which it aims to achieve and to remove harms for which it is so designed. He thus invited all the jurists to a sound and well-founded understanding of the Qurʾān and Sunnah in the light of their objectives instead of their literal or grammatical meanings.

Al-Shāṭībī adopted inductive method to understand the Qurʾānic legal texts. He discussed objectives as a branch and part of jurisprudence and wrote Al-Muwafaqāt. He discussed objectives in the light of wisdom and ijtihād and discussed certain causes and reasons to elaborate these objectives. Al-Shāṭībī defines the term ‘illah in the meaning of benefit which a law aims to achieve or the harm which it aims to remove. He also used the terms wisdom or ḥikmah synonymously with the term

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950 Al-Shāṭībī, Al-Muwafaqāt fi Uṣūl al-Aḥkām, 4:56.
intention or qaṣd. But he did not defined objectives in its technical meaning. The reason was that the objectives of Sharīʿah were so clear at that time in the mind of the jurists that he felt no need to define this term.⁹⁵² The other reason for the absence of definition of maqāṣid is that al-Shāṭibī focused on a particular filed of Islāmic law and confined himself to the interpretation of Islāmic criminal law or ḥudūd penalties and adopted purposive approach to construct the issues relating to ḥudūd.⁹⁵³ Al-Shāṭibī however defined ʿillah in the meaning of wisdom and benefits related to the aḥkām of Sharīʿah and on the basis of this definition, the objectives can be defined as causes of Islāmic law and as well as intention and goal which underlie Sharīʿah.⁹⁵⁴ In this way, Imām al-Shāṭibī developed theory of purposive interpretation and has been considered as father of this discipline who focused on the study of higher objectives of Sharīʿah. He not only developed the concept of maṣlaḥah as the basis of rationality and extendibility of Islāmic law to the changing circumstances but also presented it as a fundamental principle for the universality and certainty of Islāmic law.⁹⁵⁵

Among the contemporaries of Imām Shāṭibī were Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah who emphasized on the objectives of Sharīʿah and their importance in their process of interpretation. Ibn Qayyim was more concerned with the causes and wisdom of the laws of Sharīʿah and focused on the derivation of laws by way of public interest in the light of the objectives of Sharīʿah. But these jurists brought into consideration the objectives prescribed and identified by al-Shāṭibī and did not add them or derived more objectives from the legal texts of Sharīʿah.⁹⁵⁶ This

⁹⁵² Ibid.
⁹⁵³ Al-Yūbī, Maqāṣid al-Sharīʿah al Islāmiyyah wa ʿIlā qātiʿīhāh bil Ḥadīlah, 35.
⁹⁵⁴ Al-Shāṭibī, Al-Muwafaqāt fī Uṣūl al-Aḥkām, 1: 265; Dr. Ḥimādī al-ʿAbūdī, Al-Shāṭibī wa al-Maqāṣid al-Sharīʿah (Dāmīshq: Dūr Qutaybah, 1992), 133.
⁹⁵⁵ Khālid Masʿūd, Shāṭibīʾs Philosophy of Islāmic Law, viii.
⁹⁵⁶ Ibn Qayyim, ʿIlām al-Mawaqqīʿīn, 1:34.
was al-Qarafī who added a sixth objective that is the protection of honour deducted from the hudūd punishment prescribed for false accusation of adultery (qadhf).\textsuperscript{957}

During the 18\textsuperscript{th} century, Shāh Wali Allāh was that great scholar who worked for the renaissance of purposive approach of interpretation and drew the intention of Muslim jurists towards the objectives of Sharī‘ah. He invited the contemporary jurists to the reconstruction of Islāmic legal texts in the light of their objectives. He defined objectives as hidden or secret meanings of the texts depend upon the wisdom of aḥkām and related to the particulars of human conduct and their consequences. For him there is dire need to understand the Qur’ānic legal texts in the light of their objectives and to allow interest based interpretation to arrive at true and just meaning of these texts.\textsuperscript{958} The theory of purposive interpretation remained neglected by the Muslim jurists until the late 19\textsuperscript{th} century when the legal theories of al-Shūṭibī, Ibn Qayyim, Shūh Wali Allāh and others were started to be revised and considered by the contemporary jurists as a source of interpretation and as a unique contribution in the philosophy of Islāmic law.

Among the modern jurists Muhammad ᾳAbduh (d.1905) and Rashīd Riḍā (d.1935) founded their legal theory of interpretation on the basis of the objectives of Sharī‘ah. The more effective theory of interpretation was presented by Muḥammad ᾳAbduh whose commentary on the Qur’ān became very famous and well accepted by the modern jurists. Tāhir bin Āshūr contributed in the development of purposive interpretation by his writings. He described that every piece of legislative enactment has an object behind it in the form of hidden meaning and wisdom intended by the Law-giver and declared as purposes of Islāmic law which can be determined in all of the circumstances to which the law applies. He observed that Islāmic law contains

\textsuperscript{957} Al-Qaraf, Sharah Tanqīh al-Fuṣūl, 345.
\textsuperscript{958} Shūh Wali Allāh, Ḥujjah Allāh al-Bālighah, 1:21.
certain purposes of general nature having universal application and are demanded in each time by each generation. Theses purposes have been derived from the foundational principles of Sharī‘ah and cannot be modified or changed. Then Sharī‘ah is consisted of specific objectives hidden in the meaning of the texts intended by the Law-giver to achieve for the benefit of human being related to their conduct. There are some general purposes which Islāmic law aims such as the preservation of order, achievements of benefits, prevention of harm, set-up of equality among people, and enabling the Ummah to become powerful, confident and respectful. The specific objectives are those which are intended by the Law-giver for the benefit of human being through their private conduct which may be different from time to time. The specific objectives intended by the Law-giver may be divided into many types such as intention relating to the conducts of family matters, fiscal issues, Judicail matters and court proceeding regarding civil and as well as criminal issues.959

2.3.1.2 Classification of Maqāṣid

Among the Muslim jurists who emphasized on the study of purposes of Sharī‘ah, Imām al-Ḥaramayn was the first who discussed and classified maqāṣid into different kinds based on the strength of their effects and discussed some maqāṣid al-ḍarūriyyah and the ways to protect them.960 Imām Ghazālī however, classified maqāṣid into two types: Maqāṣid relating to the world hereafter (ukhrawī); and the maqāṣid related to this world (dunyawī).961 Al-Shāṭibī divided the objectives into two types objectives based on the intent of Law-giver and the objectives based on the intent of mukallaf or subject.962 Al-Shāṭibī then divided the fundamental objectives regarding their effects on the life of people into three types which is declared the most important division of

959 Ṭūhir bin ʿĀshūr, Maqāṣid al-Sharī‘ah al-Islāmiyyah, 173.
960 Al-Ḥaramayn, Al-Burhān, 2:1150.
Maqāsid. There are some fundamental purposes upon which the whole structure of life (both aspects worldly and the hereafter) is dependent. These maqāsid have been declared as maqāsid ẓarūriyyah and have their origin in the criminal laws of Islām established by the Law-Giver like murder, theft, fornication, drinking of wine etc. Maqāsid ẓarūriyyah are those maqāsid which are necessary to sustain the life of people in the manners that if they are not available their life may cause destruct and fall in danger which may lead to chaos and disturbance in the society. These necessary objects are five in number and include protection of Dīn, life, progeny, intellect and wealth. The ẓarūriyyāt are made to be supported by ḥājāt (needs) and tahsīnāt (luxuries). Ḥājāt means to make the life of people easier in case of some difficulty arising due to some external cause or reason. For this the rukhaṣ or exceptions have been prescribed by the Law-giver to provide ease to people in cases which cause hardships them such as journey which causes hardship for them in searching of water, direction of qiblah and rest etc, so the Law-giver made their journey easier by providing them rukhsah in ṣalāt by making it permissible to shorten prayer or to make tayammum and to leave fast during journey.963

Maqāsid tahsīniyyah leads to that glory of life which makes the life most comfortable, easiest and luxurious. When people started to enjoy all basic necessities and needs in order to smooth their lives in easy manners, the luxury stage started and what is acquired by them in order to beautify their lives and conduct will be part of tahsīnāt.964 The Holy prophet once said: “Verily! Allāh is beautiful and loves beauty.”965 The example of this type of objectives is cleanness and satr during ‘ibādāt

963 Ibid., 1:301.
965 Imām Muslim, Ṣaḥīḥ al-Muslim, Kitāb al-Imān, 2:276.
and antiquates and table manners in ᾿Ādāt and in business transactions the manners not to sale any prohibited thing.966

2.3.1.3 Validity of Ijtihād al-Maqāṣid

The Muslim jurists argued with the texts of the Qurʾān and the Sunnah for the existence of purpose behind every legal text. For example the verse: “And I have sent you O Muhammad) not but as a mercy the mankind (all the existed creatures).”967 In this text God has described the objective of prophet hood is mercy to all the creatures of the world. Similarly the verse :“Those who follow the Messenger, the Prophet who can neither read nor write, whom they find written down with them in the Torah and the Injil, he commands them al-maʿruf (good) and forbids them al-munkar (evil), and makes lawful to them the good things and makes unlawful to them impure things, and removes from them their burden and the restraints which were upon them; so (as for) those who believe in him and honor him and help him, and follow the light which has been sent down with him, these it is that are the successful.”968 This text reveals what has been made for mankind legal and illegal, good and bad things, so it will be for his benefits and whosoever goes astray, it will be for his destruction.969 The ḥadīth “iḍā ḍarar wal-ḍīrūr”970 is a general rule related to the purposes of Sharīʿah and leads that Islām does not allow causing harm to people.971

2.3.1.4 Ijtihād al-Maqāṣidī in Contemporary Period

The modern theory of purposive interpretation leads that not only ḥudūd penalties but all the legal texts are based on certain objectives the derivation of which is primary task of a modern jurist. In interpreting a text, the interpreter learns about the objective

966 Al-Shāṭibī, Al-Muwāfaqāt, 2:12.
967 The Qurʾān: 21:105.
969 Al-Rāzī, Al-Tafsīr al-Qurʾān,3:17.
971 See for detail, Shūh Wālī Allāh, Ḥujjah Allāh al-Bālighah, 1:26-32.
not only from the wording and the inferences of the text but from the implied meaning and surrounding texts and circumstances. In this process he may go beyond the restrictions of the apparent meaning of the wording. The future scope of purposive interpretation is very bright and the contemporary Muslim scholars are concerned regarding the solution of contemporary issues of Ummah in the light of the objectives of legal texts. Among the contemporary Muslim scholars who seek to exercise purposive interpretation is Yūsuf al-Qarḍówi. He is a well known jurist of contemporary Muslim world and issued many fatāwā in the light of the objectives of legal texts of Sharī‘ah. In his process of interpretation he prefers objectives of text over its manifest meaning.

2.3.1.5 Importance of Ijtihād al-Maqāṣidī

The theory of purposive interpretation has gained much importance among the contemporary jurists of all over the world whether of English-European legal system or of Islāmic legal system. The notion that each legal text contains a specific object intended by the law-giver has become a principal theme behind statutory interpretation. The reason is that purpose or object has definite nature and can express the true intention of law-giver behind an enactment. Renaissance of purposive interpretation can helps the interpreters of Muslim world in many aspects such as:

(i) Purposive approach guides the interpreter to reform and to develop his way of thinking and to interpret the law in the light of its object intended and ascertained by Sharī‘ah rather to confine to the literal meaning

(ii) It provides help to re-evaluate and re-examine the existing interpretation in the light of the objectives of Sharī‘ah to accommodate new changes of the society. It

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972 Yūsuf ’Abd Allāh al-Qarḍówi was born in 1926 at Egypt and memorized Qur‘ān in his childhood. He got his PhD degree from Al-Azhar in Sharī‘ah. He is well known for his liberal interpretation. He has launched his own web-site and is heavily involved with Islām Online. See, ʿIṣām Tilmīyyah, Yūsuf al-Qarḍówi Faqīḥ al-Dā‘ūt wa Da‘wāt al-Fuqahā’ (Damashq: Dūr al-Qalam, 2001), iii.

973 Yūsuf al-Qarḍówi, Al-Ijtihād fi al-Shari‘ah al Islāmiyyah (Kuwait: Dūr al-Qalam, 1985), 43.
makes sure that every legal text of Qur’ān and Sunnah reflects the culture and social environment of Arab society so it should be interpreted accordingly.

(iii) Purposive interpretation helps the interpreter to understand the fact that Qur’ānic legal text revealed to reform and to moderate existing legal structure based on the culture and social norms of Arab society and supported and acknowledged many existed rules. In this way Sharī‘ah makes it clear that Law-giver intended to maintain the prevailing good manners necessary for the progress and development of societies.

(iv) In case of contradiction between literal interpretation of a related text and the contextual meaning, the purposive interpretation replaces the strict literal meaning into flexible interpretation.

(v) With the help of purposive interpretation the interpreter first finds out the true intent or object behind a legal text and then evaluates it in the light of the prevailing circumstances to whom it addressed and finally applies it to the relevant current situation brought before him for solution;

(vi) Purposive interpretation helps to determine the meaning of ambiguous legal texts arising from the ambiguity and absurdity of the language of the texts

(vii) Purposive interpretation helps to establish a general policy to evaluate different rules and modes of interpretation;

(viii) Purposive interpretation demands concentration to both apparent meaning and as well as to the intent of Law-Giver. A jurist interprets a text according to its purpose and within the context of all related texts by looking into the spirit of Sharī‘ah (legal system) and thus becomes successful in his efforts of interpreting a law according to the true intent of Law-Giver. Maqāṣid are different from maṣlaḥah in many aspects such as: Maqṣad is based on the direct intent of Law-giver while maṣlaḥah is based on the overall policy of Sharī‘ah. Maqṣad is derived through inductive process but
maṣlaḥah is derived by way of deduction. However, maqṣad and maṣlaḥah both are definite and certain rules and are valid source of interpretation.

2.3.2 Literal Rule of Interpretation (Lughwī)

Literal rule deals with the grammatical meaning of the text according to which if the words of a legal text are in themselves clear, precise and unambiguous, then the words must be given their linguistic meanings because the words themselves alone can declare properly what is the intention of the Law-giver behind a rule or law. Literally, it means linguistic or lughwī meaning of a word. Technically, it may be defined as linguistic meaning of the wording of a text of Qurʾān and Sunnah in isolation. The literal rule of interpretation of a legal text is based on the notion that an interpreter must try to find out the legislative intent strictly from the wording and the language of the text only. For this the interpreter has to derive law by the application of linguistic upon the wordings of the Qurʾān and Sunnah. Only in case where the text itself is ambiguous and is difficult to understand, the interpreter may adopt some other technique to construct a legal text for its application to the situation at hand and to arrive at the true intention of the Law-giver.

2.3.2.1 Origin and Growth of the Literal Rule

The concept of literal interpretation introduced in Islāmic system of interpretation by the jurists of later centuries to restrict the scope of personal reasoning. Since the traditional Muslim jurists adopted different measures to interpret legal texts of the Qurʾān and Sunnah which caused the establishment of different Schools of law or madhāhib and caused serious disagreements among them, the rule of literal

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interpretation was established to remove variety of disagreements and juristic opinions. The followers of each school adopted juristic opinion of their imām blindly and unprecedented because during the period of the companions the notion of taqlīd was not existed and there was no particular School of law to be followed and the Muslim had to follow the opinion of any jurist to solve the issue faced by him and did not consider any of them the final authority regarding the judgment of an issue. In majority of the cases, the companion applied ordinary and customary meaning of the text, in some cases however they disagreed regarding the application of an ordinary prevailed meaning of the given text and its literal grammatical meaning. For example, the text: “And for you half of the property which is left by your wives if they have no child.”

The companions had different opinions regarding the distribution of the property and share of the parents and husband of a deceased female. ’Abd Allāh Ibn-ʿAbbās the greatest interpreter of the Qurʾān adopted contextual meaning and decided the case according to his logical understanding of the text in the light of prevailed context that the half of the property will be given to the husband, one third of the property to her mother and the residue will be given to her father while Zayd bin Thūbit another companion decided that in such a case, for mother will be one third of the residue after giving the share of the husband. He thus applied the literal meaning of general principle of inheritance which declares: “God advice you regarding your children, for male there is twice of the female’s share.”

The fact is that the concept of literal interpretation in Islāmic legal system was not much important during the period of companions. It was established by the later jurists of 3rd century of Hijrah to avoid a variety of interpretations and explanations.

976 The Qurʾān: 4:12.
977 The Qurʾān: 4:11.
They established a rule that if the words of a legal text are in themselves clear, precise
and unambiguous, then the words must be given their literal meanings because the
words themselves alone can declare properly what is the intention of the Law-giver
behind this rule or law.\footnote{Ibn Hazam, \textit{Al-Ahkām fī Uṣūl}, 2:167; \textquote{Abd al-Barr, \textit{Jāmi`Bayān al-`Ilm wa Fadlīhī} (Cairo: Idārah al-Ṭaba`al-Muniriyyah, n. d), 2:137.} Before this, the use of personal opinion was very much
common among the jurists and there were not any hard and fast rule regarding the
evaluation and assessment of logical reasoning and its application to any situation
rose before them. Imām Shafī`ī (d.2o4 A.H) was the first who condemned severely
the use of free opinion not based on the logic of the text and conditioned that logical
reasoning must be a reasoning behind an enactment or text. The extreme contradictory
views regarding the use of personal \textit{ra`y} seemed to be appeared in the post Shafī`ī
period. Some of them condemned severely the use of personal opinion while others
were in favour of the use and were great exponent of \textit{ra`y}.\footnote{Ahmad Ḥasan, \textit{Analogical Reasoning in Islamic Jurisprudence}, 6.}

The movements against free use of personal opinion or \textit{ra`y} was launched by
Shafī`ī and concluded in the emergence of Literalist School of Interpretation. Dāwūd
al-Zāhirī\footnote{Dāwūd bin `Alī bin Khalf Asbahānī, al-Baghdādī al-Zāhirī was died in 270A.H. He was the
founder of al-Zāhirī School of legal thought and persisted on literal interpretation. Ibn Ḥazam was his
most prominent disciple. He rejected the rules of public interest, logical reasoning and context etc
except Qur`ān and Sunnah. He wrote, Kitāb Mufassar wa Mujmal, Kitāb Ibtal al-Qiyas, and Kitāb al-
Wuṣūl li-lī Ma`rifah al-Uṣūl, See, Al-Zarkalī, \textit{Al-ʿlām},3:8.} presented the theory of literal interpretation according to which
interpretation or \textit{ijtihād} must base on the explicit and manifest meaning of the legal
texts of Sharī`ah. That interpretation should be confined to the literal meaning of the
wording of the text. In his process of interpretation, Dāwūd al-Zāhirī did not care for
the context, reason, cause, and the circumstances under which the text was revealed
and in this way went to adherence to the manifest meanings of the texts of the Qur`ān
and Sunnah. He contended that the manifest meaning must be given priority over
alternative interpretation or public interest. He was extreme against the use of personal opinion or logical reasoning. His reasoning was centered on the explicit literal meaning of the text. The al-Zâhirî School of law was against both logical and analogical reasoning. For them analogy is applicable only in case where effective cause or illah in a text that can be applied to another case which though not covered by the language is covered by the cause or reason in the text if they are identified and declared by the clear text and confined the reasons and causes to the clear text alone. For every reasoning there must be a confirm cause to apply. They ware against to the rule of taqlid also.981 The use of râʿ y by the prophet was justified by the Literalists on the ground that he was always correct in his opinion and a part of revelation as declared by God whatever he speaks was from God. But the exercise of people other than him is a sheer speculation (zan) and artifice (takalluf). He and his disciple were quite extreme in their views and stigmatized their opponents (people of opinion) as the enemies of Sunnah. For them the only right path is adherence to tradition and what is made or legislated by use of personal opinion is innovation in religion.982

2.3.2.2 Causes behind the Development of the Literal Rule

Literal or grammatical interpretation in Islāmic legal system was favoured neither by the Prophet (pbuh) nor by his companions rather the whole scheme of interpretation based on the contextual and logical approaches of interpretation. The literal or grammatical interpretation succeeded to have a place in the process of interpretation of Qurʾānic legal texts with the evolution of Arabic language when new words took on new meanings and old meanings became lost, foreign words entered into the

981 Ibn Hazam, Al-Ahkām fi Usūl, 2:167; Mulakhkhas Ibṭāl al-Qiyās wa al-Rāʿ y; Ḥabd al-Barr, Jāmiʿ Bayān al-ʾIlm wa Fadlihī, 2:138.
982 Ibid.
language of the and various topics of the language fell into discussion.⁹⁸³ There were
number of factors which forced the jurists to adopt literal interpretation:

(i) Different tribes had their own vocabulary and sometimes a word revealed in the
Qurʾān had to use in many different meanings among different tribes and nations,
for instance the word “hand” revealed in the Qurʾānic legal text. The ‘Arab tribes
used this word in different meanings including the whole hand, hand till elbow, and
the hand till “kaf”; sometimes the word of Qurʾānic legal text had to use by ‘Arab in
its metaphorical meanings rather than in its original literal meaning; in some cases the
words of Qurʾānic legal text had to use in their technical meaning rather their literal
meaning, such as the words ṣawm, ṣalāt and ḥajj etc;

(ii) Some particular words of the Qurʾān were used by ‘Arab in two quite opposite
meaning as the word qurʾ and al-taʿzīr. The word qurʾ was used in the meaning of
purity and impurity at the same time. Similarly the word taʿzīr was used both for
respect and insult;

(iii) The natural process of the development of Arabic language necessitated the
explanation of some of the Qurʾānic words according to their literal and grammatical
meanings. For this purpose the linguists arranged to remove ambiguities arising from
the expansion of language and compiled dictionaries written specifically to deal with
the Qurʾānic Arabic glossary and philosophy;

(iv) The frequent use of personal opinion and differences among juristic opinions led
to the development of literal interpretation;

(v) With the expansion of Muslim territories, different madhāhib and doctrines of
law appeared on the scene which caused severe disagreement among the jurists and

⁹⁸³ Ibn Qayyim, Iʻlām al-Mawaqqīʻīn, 1:111; Shāh Walī Allāh, Al-Insāf fī Bayān Asbāb al-
Iḥkīlāf, 279; Abu Ameenah, Uṣūl at-Tafsīr, 213.
their followers; consequently rule of literal interpretation was favoured by some of the contemporary jurist and majority of the later jurists.⁹⁸⁴

2.3.2.3 Literal Interpretation in Contemporary Period

Like English-Europen legal systems, the scope of literal interpretation in Islamic legal system is limited and has been considred as an out dated mode of interpretation. Both modern legal writers and the judges have rejected the theory of literal interpretation on the ground that the most of the legisialtive work and the wording of the legal texts are allegorical in content and hence, there is enough scope for varied interpretation in the light of the context and objectives of legisialtion. Then no express provision is existed neither in the Qurʾān nor in the Sunnah regarding the appreciation of literal meaning rather many express provisions are there which ensure that the Qurʾānic legal texts must be understood in the light of their context and objectives.

The fact is that Qurʾān cannot be literally translated or interpreted for many reasons such as: Majority of its legal texts consisted of general and ambiguous words having more than one meaning and cause difference of opinions among jurists and interpreted differently under different circumstance; the Qurʾān is last divine Book revealed in the wording of God and no one knows what the exact intention of Allāh Almighty behind a particular enactment is? The Holy prophet did not interpret or explain the whole of the Qurʾānic texts rather he explained only what was unclear to the companions in answering their questions and left the room for his believers to interpret and to construct the texts in the light of changing times; lastly, the

companions did not adopt literal interpretation and that the bulk of Islām ic law has been derived through *ijtihad* not by way of literal interpretation.\textsuperscript{985}

2.3.3 Interpretive Rule of Consensus (*ijmā’*)

Consensus of legal opinions or *IJmā’* was introduced by the traditional jurists. Literally, *ijmā’* means determination upon a matter as declared by the text: “So be determinant upon your matters you and your partners.”\textsuperscript{986} It is also used in the meaning of unanimous agreement like the wording of *ḥadīth*: “My Ummah will never agree upon (*lā Tajtami’) what is wrong.”\textsuperscript{987} Technically, it has been defined as a unanimous agreement of the Muslim jurists of any age after the death of the Holy prophet upon a question of law.\textsuperscript{988} The rule of consensus has its origin in the personal opinion of an individual jurist. Such opinion if accepted and practiced by Ummah for long time gained the status and authority of *IJmā’*. The development of the rule of *IJmā’* is based on the presumption that where there is no direct evidence available regarding the *ḥukm* of any conduct or in absence of precedent over the issue concerned, the issue can be solved by the consensus of the juristic opinions of all the Muslim jurists.\textsuperscript{989}

2.3.3.1 Origin and the Development of the Rule

The concept of consensus neither evolved by the prophet nor by the companion jurists. At that time new issues and problems were to be solved by way of consultation and on the basis of majority opinions. Consultation to solve legal issues during the era of companions was one of the most favourable modes of interpretation for which no

\textsuperscript{986} The Qurʾān: 10:71.
\textsuperscript{988} Ibid.
\textsuperscript{989} Ibid.
evidence found in the Qurʾān or in Sunnah. To examine the validity of a juristic opinion council of leading jurists appointed by the Caliph had the sole authority to interpret and to legislate by their mutual consent. They discussed over the issue and when reached a conclusion announced it but they never called upon all of the jurists of their time to give their judgments over the issue. All major issues such as the selection of the head of the state, fixation of the rate of tax, issue of paying zakāt, and jihād were solved by the legislative council. The mode of the council was to look first into the Qurʾān and Sunnah and if no evidence was found then they ponder on a personal opinion of any jurist or judge which was put before the council for final decision and if agreed upon by the majority of the members of council then adopted as a ruling over that issue. Not only is this but Haḍrat ʿUmar forbade the companions from making different circles at different places and strongly condemned frequent issuing of fatwā based on personal opinion. The reason behind that order was the fear of disagreement without any logic among the jurists.990 The traditional jurists however, established rule of *ijmāʿ* as an authentic and more reliable source of interpretation. Until the end of 4th century of Hijrah, Muslim jurists defined *ijmāʿ* in different perspective. Some of them declared it as consensus of the whole community of Ummah over a religious issue while other made it confined to the unanimous agreement of the Muslim scholars of any age excluding the whole of Ummah.991

2.3.3.2 Validity of *Ijmāʿ*

As far as concerned the issue of validity of *ijmāʿ*, it has no direct evidence in the Qurʾān and Sunnah. There are however, certain texts and *ahādīth* which can be given as evidences by way of indications, implications and inferences. Primarily, İslām


motivates to solve the matters by way of consultation and for this there are explicit rulings of Qur’ān and Sunnah and as well as practice of the prophet and his companions. The four Sunni School of Muslim jurists opined that ijmāʿ is a valid source of interpretation and has binding force and declared that consensus of the four guided Caliphs or more companions would be considered as valid and definite consensus and would be binding upon all. For this they presented certain verses and ḥadīth to prove the validity of ijmāʿ. 992 Some of the jurists like Muʿtazilah and Shiʿite jurists opined that ijmāʿ as described by Jamḥūr al-ʿUlamāʾ is impossible to be held because the unanimous agreement of all of the Muslim jurists of an age cannot be gathered since the jurists are resident of different places, localities, and communities and some of them may be unknown to others; that it is possible that a jurist may deviate from his opinion before the occurrence of ijmāʿ at a particular time. 993

According to Shiʿite jurisprudence, only ijmāʿ of ahl al-Bayt is a valid rule of interpretation and constitutes a part of Sunnah. For them ijmāʿ is not binding in itself rather it becomes a binding source as it constitutes or discovers Sunnah. 994 Imām Aḥmad bin Ḥanbal and Al-Zāhiryyah contended that only consensus of the companion is a valid source of interpretation and they do not acknowledge ijmāʿ of later jurists if any. 995 Similarly Imām Mālik acknowledges only ijmāʿ if held by the people of Medīna as they were the witness of the practice of the prophet. 996 Some of

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992 Shāh Wafī Allāh, Al-Insāf fi Bayān Ashbāb al-Iḥkālāf, 289.
993 Asad Hayder, Al-Imām al-Sādiq wa al-Madhāhib al-Arb’ah, 2:367; Al-Baṣrī, Al-Mu’tamad, 2:528.
994 Asad Hayder, Al-Imām al-Sādiq wa al-Madhāhib al-Arb’ah, 2:367.
996 Ibid.

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the Muslim jurists opined that *ijmāʿ* is neither required nor necessary to be held as it is based on *ijtihād* or some rational reasoning based on the evidence of *Sharīʿah*.\(^997\)

### 2.3.3.3 Scope of *Ijmāʿ* in Contemporary Period

*Ijmāʿ* in contemporary period has lost its importance and the traditional concept of *ijmāʿ* seems to be impractical in modern context. Each of the Muslim states has its own system of government, administration, legislation and adjudication. *Ijmāʿ* in modern times appears too slow and stagnant process to solve the contemporary issues of Ummah while they demand speedy trial. Among the contemporary legal scholars Shāh Walī-Allāh and then 'Allāmah Iqbāl were the first who drew the intention of the Muslim scholars for the renaissance and restructure of this great rule of interpretation. He described that during the period of Caliphate *ijmāʿ* had to be held without making an effort and without issuing any legal verdict. When a rule of law was enforced by the command of Caliph and followed by the community became a valid rule and authoritative in *Sharīʿah* which later recognized as *ijma*.\(^998\) 'Allāmah Iqbāl gave a new and fresh interpretation to the rule of *ijmāʿ* and suggested that *ijmāʿ* should be understood in the term of an institutional process to decide cases with a declared and acknowledged authority according the principles of Islāmic jurisprudence. He declared that the power of *ijtihād* should be transferred to the Muslim legislative body and that in modern time *ijmāʿ* can be held only in this way.\(^999\) Muhammad 'Abduh (d.1323A.H.) defined *ijmāʿ* in a more liberal and progressive manner. He criticized the traditional approach of *ijmāʿ* and prescribed conditions for its validity. He declared that *ijmāʿ* is neither based on the Qurʾān nor on Sunnah. It is not unanimous agreement of Muslim jurists on any point of law rather

\(^{997}\) Ibid.


\(^{999}\) Muhammad Iqbal, *The Reconstruction of Religious Thought in Islām*, 173.
it is consensus of the men in authority as described by the Law-giver: “O you believe! Obey Allāh and obey the messenger and those of you who are in authority.”

He observed that the text leads that the function of *ijmāʿ* should be exercised by the people who are in authority. The term 'Uлу al-amr or men of authority in modern times includes eminent religious scholars, commanders of the army, big tradesmen, public servants, directors of companies and societies, leaders of political parties, writers, physicians, advocates managers, and editors of eminent journals etc. These people being men in authority should be in such a position that the ruler may be able to recognize them and assemble them for consultation. There must be an active organization or machinery for the selection of the jurists qualified to participate in the process of *ijmāʿ* and to ascertain, collect, and preserve the results of their deliberations in an authoritative forms. *İjmāʿ* in contemporary period can perform a great job to solve the current issues of the whole Ummah generally and people of Muslim countries particularly. For this purpose revival of the practice of the Caliphs is necessary who made new laws just after consultation with their Shūrā’. The principle of *ijmāʿ* should be studied in perspective of its original concept as founded by the rightly guided Caliphs. In this way it can be used for the betterment of Ummah and can restrict the free use of personal opinion. For this it is necessary that each Muslim state should have its own independent institution to perform the task of interpretation by way of *ijtihād* and *ijmāʿ*.

1000 The Qurʾān: 4:59.
1002 ʿAbd al-Rahim, Muḥammadan Jurisprudence,115.
2.3.4 Rule of Maṣlaḥah Mursalah

The rule of maṣlaḥah exercised by the companions was named as maṣlaḥah mursalah by the traditional jurists for securing desired objectives, regulation of administrative machinery and the affairs of the people. The concept of public interest in English legal system is not much different from that of Islāmic legal system. Literally, interpretation through public utility means a practical and convenient rule which provide ease and facility although possibly improper. Technically, it may be defined to interpret a law according to the spirit of law and demands of public. Ibn Taymiyyah defines it as an action undertaken by an authority who considers it reasonable according to the demands of interest though there is not any narrated argument in favor of such an action. His disciple, Ibn Qayyim defines it as nothing else than the needs of people.

Imām Ghazali stipulated three conditions to solve a new issue according to the rule of maṣlaḥah. That maṣlaḥah behind a judgment must be genuine or ḥaqiqī based on the objectives of Shari‘ah such as interest of Dīn, life, intellect, progeny, and wealth; that maṣlaḥah must be general to achieve interest of people at large; that the new ruling based on public interest must not against the spirit of Shari‘ah. For example, no rule can be laid down providing for equal share in the property of the deceased for his sons and daughters. Imām Malik adds two more conditions that maṣlaḥah must base on rational reasoning and can be perceived easily by the intellectuals; and that it must remover harm from the people.

1004 Ibn Taymiyyah, Al-Musawwaddah fī Uṣūl al-Fiqh, 235.
1008 Al-Ghazālī, Al-Mustaṣfā, 1:289; Al-Shūtbī, Al-I‘tiṣām, 2:309.
2.3.4.1 Circumstances to apply Maṣlaḥah Mursalah

There are any circumstances under which a contemporary issue can be solved by way of maṣlaḥah mursalah such as:

(i) Where the prevailing situation of operative order leads to chaos and harm;

(ii) Where the existing legal, moral and material norms though originally permissible but adversely affect the interests of an Islāmic society such norms can be changed by way of public interest.\(^{1009}\)

(iii) Where the prevailing legal rules become outmoded and ineffective due to changes in the circumstances and needs of society;

(iv) Where a contemporary issue cannot be held on the basis of existing legal structure;

(v) Where strict application of legal rule cause absurdity, the scope of the rule may be widened by way of public interest.\(^{1010}\)

2.3.4.2 Validity of Maṣlaḥah Mursalah

The majority of the Muslim jurists are agreed on the validity of maṣlaḥah mursalah as an effective tool of interpretation.\(^ {1011}\) Almost all later interpretive measures introduced by the traditional jurists are based on the public interest although they used different technical names to exercise it. For example, Imām Abū Ḥanīfah did not practice maṣlaḥah mursalah as an independent source but he established interpretive rule of Istiḥsān for the resolution of such issues which actually fall within the sphere of maṣlaḥah mursalah.\(^{1012}\) Imām Shāfīʿī also solved various issues of this nature by using the term analogy instead of maṣlaḥah mursalah. For instance, he held the view

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\(^{1012}\) Ramaḍān al-Būṭīy, *Ḍawāʿī al-Maṣlaḥāh*, 45.
that where the witnesses testified that a person had pronounced triple divorce and the court ordered separation on the basis of such evidence, but thereafter witness retracted their testimony, then they will be sureties for the payment of similar dower. Some of the jurists though rejected the principle of maṣlaḥah mursalah yet they treated it as effective cause (ʿillah) and placed reliance upon it and did not consider it necessary that there must be some particular proof for such reliance. They considered reasonableness enough to sustain such deductions. Others contended that where no legal text existed either in the Qurʾān or in Sunnah, the interpreter has to decide the case according to the general legal maxims of Sharīʿah which absolutely rely upon the public interests and protect them. Analogy and juristic preference are different from maṣlaḥah mursalah in the sense that in case of the farmer some specific original legal text already existed to provide base for analogical interpretation while the latter depends upon the general principles and overall policy of Sharīʿah.

### 2.3.4.3 Maṣlaḥah Mursalah and the Doctrine of Utility

Maṣlaḥah mursalah is one of the most living rules of interpretation in contemporary period. The theory of maṣlaḥah mursalah is similar to the theory of utility presented by Bentham. There is however a fundamental difference between the two. Unlike positive law where public interest means interest of the people recognized by them according to their rational reasoning and customary laws, Islāmic concept of public interest gets its validity not from the will and rational judgment of human being but from the divine instructions of God revealed through revelation. Here, Ummah has no authority to declare a thing beneficial for people unless it is examined in the light of the objectives of Sharīʿah and anything if seems contradictory or against the spirit of them must be declared as prohibited or unlawful. For this purpose Islāmic legal

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1013 Imām Shāfiʿī, Al-Risālah,178; Al-Ghazālī, Al-Mustasfā, 2: 309.
1014 Ibn al-Qayyim, Al-Ṭuruq al-Hikmiyyah, 238; Ramaḍān al-Būṭiy, Dowāʿīt al-Maṣlaḥah,47.
system provides a systematic framework contained certain objectives that have universal nature and cannot be ignored or left behind during the process of legislation as well as interpretation. For example the text: “Verily, Allāh orders you to deal with justice, goodness and to help relatives (by giving them shares from wealth) and forbids from vulgarity (illegal sexual acts), badness (acts against Islāmic way), and oppression (baghi)”\textsuperscript{1015} This text leads that Allāh has prescribed certain limits regarding acts and deeds of people which cannot be ignored while performing their duties and worldly affairs. The distinct features of Islāmic public interest may be described as:

(i) The concept of \textit{maslāḥah} is based on the general policy of Sharī‘ah. For example, the text: “And he who follows his own desires and do not care for guidance of Allāh is going astray or deviated from what is right.”\textsuperscript{1016}

(ii) Contrary to English-European legal system where public interest deals with the worldly affairs of the people and has no concern with the life after death, Islāmic public interest deals with both interests and the concept of \textit{maslāḥah} remains incomplete unless it taken in to consideration both element of the life of people. As prescribed by the Law-Giver: “He who created life and death so that He may examine you which of among you perform good deeds.”\textsuperscript{1017}

(iii) On the basis of this rule both legislative and interpretive activities in an Islāmic system must base on the concept of interest

(iv) Islāmic concept of public interest demands to justify the intellectual, physical, and spiritual aspects of life and does not confine to the demands of moral or immoral aspect of life.

\textsuperscript{1015} The Qur’ān: 16:90.
\textsuperscript{1016} The Qur’ān: 28:50.
\textsuperscript{1017} The Qur’ān: 67:2.
2.3.4.4 Maṣlaḥah Mursalah in Contemporary Period

The modern view regarding the use of maṣlaḥah is that the contemporary issues of Ummah must be solved on the basis of maṣlaḥah to remove hardship from people and to attain benefit for them. It is the only way through which Islāmic law can enable itself to meet the challenges of the new situations and issues which constitute an unending stream in all developing societies. Therefore it is necessary for the contemporary jurists to recourse to the interpretive modes of the companions and try to solve the contemporary issues of Ummah by way of public interest because now days Muslims are confronting many unprecedented issues and problems in economic, political, and social spheres of their life which require to be solved liberally and by way of public interest.

2.3.5 Interpretive rule of Inductive Reasoning

Rule of inductive reasoning leads to suppose hypothetical legal questions prior to their appearance and to solve them by way of logical reasoning for the purpose to make the people well known to them. For when such legal issues appear may have their solution. In this process of interpretation the general principles ascertain themselves gradually from the individual decisions of the particular cases, and the system of law ascertains general principles from the decisions of particular individual facts of the cases. Among the Muslim jurists Abū Ḥanīfah was the first who supposed hypothetical legal questions and derived their laws before they arise. This interpretive activity was based on the presumption that people must know the ḥukm of every act. The Ḥanafī jurists introduced this type of interpretation who assumed hypothetical rules from the established corpse of law. They then tested their validity in the light of

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1018 Taqi Amini, Fundamentals of Ijtehad, 108.
general principles of Sharī‘ah and then derived certain general rule based on the objectives of Sharī‘ah and verified hypotheses accordingly. Originally inductive reasoning is not favoured by the interpretive system of Islām. The Holy prophet forbade the people to ask regarding hypothetical issues for the answer might cause hardship for them. Complete it.\(^{1019}\)

2.3.6 Rule of Juristic Preference (Istiḥsān)

Interpretive rule of juristic preference or istiḥsān is founded by the great jurist Abū-Ḥanīfah. The word istiḥsān is derived from the word ḥasan and literally means to consider something to be good or ḥasan.\(^{1020}\) Technically, it may be defined as departing away from the application of explicit analogy to an implied analogy that is stronger than explicit analogy on the basis of some other evidence of Sharī‘ah.\(^{1021}\) Imam Malik defined istiḥsān as a mode of reasoning traceable in the text and not outside it. He held certain cases on the basis of juristic preference such as the ruling that an owner of land can be compelled to lease his property needed by the people to construct public baths or hand mill.\(^{1022}\) This rule is based on the presumption that sometimes a departure from strict analogy becomes necessary to facilitate the party concerned by way of concealed analogy where strict analogy leads to some absurd and hard result against the public interest. Abū Ḥanīfah had to derive law first from the Qur‘ān and Sunnah and in absence of an express ruling he had to deduce law either from precedents of the companions without any gradation which he thought appropriate to that case or from analogical deduction. In case of failure, he had to derive law by way of remote analogy upon any existing case and declared it as juristic preference. But he never mentioned analogy and istiḥsān in his method of

\(^{1019}\) Al-Bazdawī, Uṣūl al-Bazdawī, 3:267; Al-Taftūzūnī, Sharah al-Tawḍīḥ wa al-Talwīh, 401; Amīr Būdhshah, Al-Taqrīr wa al-Taḥbūr, 3:187; Al-Sarakhsī, Uṣūl al-Sarakhsī, 2:200.
\(^{1020}\) Ibn Mazūr, Lisān al-Arab, 2:45; Rohi BaalBaki, Al-Mawrid,470.
\(^{1021}\) Al-Bazdawī, Uṣūl al-Bazdawī, 4: 8.
\(^{1022}\) Al-Shātibī, Al-Muwāṣṣa, 4:200.
interpretation. He discussed only traditional sources of interpretation because analogy and istiḥsān have been derived from the given legal texts of Qurʾān and Sunnah and are based on the logical reasoning. He was distinguished among his contemporaries regarding his mode of interpretation as he adopted advance contextual and purposive approaches of interpretation rather to confine literal interpretation of the text. He elaborated and constructed the legal texts of Qurʾān and Sunnah in the light of their objectives, public interest, custom and his own logical reasoning.\textsuperscript{1023} In this way, through remote analogy, he re-interpreted many existing laws of Sharīʿah and many fresh and new laws derived through personal reasoning. For example, Abū Ḥanīfah and Abū Yūsuf held that there is no harm in using a sale as a cover for interest through juristic preference and if a man has a loan of ten dirham at the hand of the another person and he wants to turn them into thirteen dirham in the course of a certain time, he should buy from the debtor something for the same ten dirham, then take hold of the object to be paid in a year. In this way guards himself from doing what is forbidden. The Ḥanafī jurists declared istiḥsān as a type of analogy i.e. qiyās khaftī and preferred over qiyās jalī. For them qiyās khaftī is given preference for the reason that it aims to seek ease and convenience in legal matters and to set aside strict analogy if it lead to absurd and inconvenient result. The purpose of this rule is nothing than to provide ease to people and to remove hardship from them.\textsuperscript{1024}

\subsection*{2.3.6.1 Circumstance to apply Istiḥsāan}

There are certain circumstances under which qiyās jalī is rejected in favour of qiyās khaftī such as:


\footnotesize{$\textsuperscript{1024}$ Al-Bazdawī, \textit{Uṣūl al-Bazdawī},4: 12; Al-Sarakhsī, \textit{Uṣūl al-Sarakhsī}, 2:204; Shāh Wāfī-Allāḥ, \textit{Ḥujjāh Allāḥ al-Bālīghah}, 1:154.}
(i) Where practical consideration necessitates a departure from the strict analogy to remove hardship from people and to provide ease to them.\textsuperscript{1025}

(ii) Where strict analogy does not favour public interest rather opposes it;

(iii) Where strict analogy contradicts a prevailing custom of society and leads to sever harm to people. In this case, the strict analogy may be set aside and the issue may be decided by way of juristic preference;

(iv) In case where application of existing rule derived through explicit analogy opposes the consensus of opinion over an issue to remove harm and hardship from people

(v) Where the application of analogy leads two results a stronger; and a weaker but a conflict arises regarding the application of explicit analogy.\textsuperscript{1026}

2.3.6.2 Validity of the Rule of Juristic Preference (\textit{Istihs\={a}n})

The Muslim jurists have different opinion regarding the validity of \textit{istihs\={a}n}. A number of Qur\={a}nic verses and \textit{a\={h}\={a}d\={i}th} were presented by the \={H}anafi jurists to prove the validity of juristic preference. For example the text: “And follow the best what has been sent down to you from your Lord.”\textsuperscript{1027} The tradition which is produced to provide base for juristic preference is: “What is considered good by the Muslim is good in the eyes of God.”\textsuperscript{1028} Im\={a}m Sh\={a}fi‘\={i} on the other hand rejected this rule of interpretation categorically and considered it as a use of personal whim by saying: “He, who practices preference, assumes unto himself the power of law making. Im\={a}m Ghaz\={a}l\={i} does not recognize \textit{istihs\={a}n} if it is based on customs or arbitrary opinion.\textsuperscript{1029}

\textsuperscript{1025} Ibid.
\textsuperscript{1026} Al-Bazdaw\={i}, \textit{U\={s}\={a}l al-Bazdaw\={i}},4: 15; Al-\={A}mid\={i}, \textit{Al-Ahk\={a}m f\={i} U\={s}\={a}l al-Ahk\={a}m}, 4:140.
\textsuperscript{1027} The Qur\={a}n: 39:55.
\textsuperscript{1028} Abd al-Az\={i}z al-Bukh\={a}r\={i}, \textit{Kashf al-Asr\={a}r \textasciitilde an U\={s}\={a}l al-Bazdaw\={i}}, 4:14; Al-Sarakhsi, \textit{U\={s}\={a}l al-Sarakhsi}, 2:206; Al-Bazdaw\={i}, \textit{U\={s}\={a}l al-Bazdaw\={i}},4: 31; Al-\={A}mid\={i}, \textit{Al-Ahk\={a}m f\={i} U\={s}\={a}l al-Ahk\={a}m}, 4:140.
\textsuperscript{1029} Al-Ghaz\={a}l\={i}, \textit{Al-Mustasf\={a}}, 2:139.
2.3.6.3 *Istiḥsān* and Equity

The principle of equity in English-Common law system aims to cure the mischief and to advance remedy to remove hardship from people and to provide them ease. Likewise, the principle of juristic preference aims to remove hadship from people and to provide ease to the. Both *istiḥsān* and equity has certain similar attributes. For instance: Both are based on the principle of fairness and natural justice according to the consciousness of the people as the values of natural law and of the divine law of Islām are based on common attributes and are agreeable; both aim to remove rigidity of law and to make it flexible and convenient; both work for the benefits of people to remove hardship from them and to achieve benefits for them; both lead to a depart from an established principle of law where the application of established principle fails to fulfill the demand of justice and the circumstances of the parties. In such cases departure becomes inevitable; both work to accommodate the new contemporary issues arising from changed scenario and circumstances of people which can not be covered by established principles of law; both aim to cure the mischief arising from the generality of law.

The principle of *istiḥsān* is different from the principle of equity in some respects such as: *Istiḥsān* has its origin in the revealed instruction of Qur’ān and Sunnah while equity has its source in the natural law, born in the nature of things and in human rationality. It is not correct to assume that *istiḥsān* is equity according to the Western concept conveying the idea of natural law justice inherent in the nature of things, in the world and in human rationality and that it is foreign to Islāmic law.\(^{1030}\)

*Istiḥsān* aims to expand the application of the existing law to make it convenient and comfortable not to correct it while equity aims to correct the law where the law seems

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to be incorrect and leads to some unjust result. Equity is based on the values of natural justice plausible by human nature while juristic preference is based on the principle of justice acknowledged by divine instructions provided by Law-Giver. Equity is also considered superior to law while juristic preference derived its validity from divine law and not superior to it. Juristic preference or istihsān is used by way of analogy where explicit analogy does not meet the requirements and needs of the case or where it is against the objectives of Sharī‘ah and does not constitute an independent law while equity is as an independent principle and is not used by way of analogy.

2.3.6.4 Istihsān in Modern Times

Through the process of Istihsān the Muslim judges and jurists of the later period tried to cover new cases by way of modification and expansion of the existing laws. 1031 For example, in a case a woman whose husband set off on a trip and failed to return, so he was considered absent (Gha‘ib) or missing. The woman asked the court to allow her to borrow money in her husband’s name. Al-Ramlī allowed the woman for that on the basis of istihsān.1032 In contemporary period however, the Muslim jurists seem to be reluctant to use this mode to interpret and to solve the contemporary issues of Ummah and has been declared unsatisfactory mode of interpretation.

2.3.7 Rule of Rational Reasoning (Istidlāl)

The word istidlāl literally means to infer something from another thing.1033 The founder of this rule of interpretation is Imām Mālik who introduced rule of Istidlāl as a method of juristic deduction to derive laws from the texts which do not fall within the ambit of analogical deduction. It was developed to establish a rationale interpretive policy in the absence of express ruling of Sharī‘ah. On the basis of this

1032 Ibid., 1:69.
doctrines other rules of logical reasoning such as Mālikī rule of public good, presumption of continuity, authority of revealed laws previous to Islām and Ḥanafī doctrine of juristic preference were established and developed by the traditional Muslim jurists. The rule of istīdāl can be applied under certain circumstances for instance:

(i) Where a connection exists between two affirmative propositions of law but no effective cause exist there

(ii) Where connection exists between two negative propositions

(iii) Where a connection arises between an affirmative and negative proposition. For example the rule that a thing if permissible leads that it cannot be prohibited. That what is invalid is forbidden. Interpretation through the principle of istīdāl simply denotes rationale base interpretation which can be utilized by the contemporary jurists in the light of the objectives of law and public interest.

2.3.8 Interpretive Rule of Public Utility (Istiṣlāḥ)

The legal theory that Sharī‘ah is utilitarian and works for the promotion of the benefits of people (maṣlaḥah) not what they seem good or beneficial for them but what the Law-Giver considered good for them, provides a framework and policy to expand and to develop interpretive system of Islām. Among the traditional jurists, Imām Mālik introduced rule of Istiṣlāḥ which allows deduction of law based on maṣlaḥah mursalah. He decided number of cases in the light of the public interest and named it as rule of Istiṣlāḥ or consideration of public interest. For instance, Imām Mālik permitted imprisonment for obtaining confession where the allegation against the person was of either theft or misappropriation of the property. Some Malki jurists

also favor beating for this purpose as a legitimate stratagem.¹⁰³⁶ Imām Malik contended that if mašlahah seems compatible with the objectives of Sharīʿah or it falls within the genus recognized by Sharīʿah, it must be upheld and that the negligence of interest in such cases will be considered as negligence of the objectives of Law-giver.¹⁰³⁷ The majority of the Muslim jurists agreed that istiślāḥ is a proper rule to interpret a legal text of Qurʿān in the light of public interest and a suitable ground for further legislation. It is that valuable process by the use of which the contemporary issues of Ummah can be solved to provide them ease and to remove hardship and difficulty from them.¹⁰³⁸

2.3.9 Rule of Taghyīr al-ʿAḥkām bi Taghyīr al-Zamān

The traditional Muslim jurists formulated legal principles and legal maxims based on the customs which were later adopted by later jurists and daily invoked by our judges and lawyers during court proceedings. The rule of Taghyīr al-ʿAḥkām bi Taghyīr al-Zamān is based on the presumption that the laws are designed to fulfill the needs of a particular situation occurs due to changes in time and needs of people. On the basis of changed circumstances changes in the structure of existing law is required to meet the pressure of such changes.¹⁰³⁹

2.3.9.1 Development of the Rule

The origin of this rule can be traced in the texts of the Qurʿān regarding substitution and cancellation of certain legal rules prescribed by Law-Giver according to the changed scenario. The gradual revelation of the Qurʿān proves the whole scheme of Islāmic legal system to hand down existing rules designed on different occasions

¹⁰³⁷ Ibid.
¹⁰³⁸ Ibid.
¹⁰³⁹ Tyser and Haqqi, The Mejelle, article, 3.
under specific circumstances. With the change of the time when earlier rules became ineffective, the other orders were revealed. For example, in the early years of Islām fighting with the pagans was prohibited while later on it was permitted. Similarly, it was revealed that to pray and recite Qurʾān during the whole night or for half of it or a little than the half, if not possible, then there is forgiveness for you. But after a short period this order was replaced by another one and it was revealed that God is well aware that you cannot fulfill this therefore, you are now forgiven and recite Qurʾān to the extent you can easily recite. 1040

2.3.9.2 Circumstances to apply the Rule

Legal changes mostly occur in the field of morals and social character of the people and in the area of developmental activities. The reality of life reveals that instructions and adoption of new kinds of evils and injustices by the people have created corresponding legal rules to meet them effectively."1041 The rule of legal changes may be applied under the following circumstances:

(i) Where the legal rules are relevant the cultural and social issues of people;

(ii) Where the legal rules of economy failed to cover the contemporary issues of people and cause hardship to them and demand to be changed;

(iii) Where the old rules procedure became outmoded due to induction of new rules;

(iv) Where the trend of people and demands change due to scientific progress;

(v) Where the changed circumstances demand to restrict the scope of an earlier law, the law will be changed to keep pace with the changing time.1042

The majority of the Muslim jurists are agreed that changes in existing legal orders are correspondent to the changes in human and material affairs. 1043

1040 Ibn ʿĀbidīn, Radd al-Mukhtār, 1:28; Al-ʿUqūd, 1:305.
1041 Ibn Qayyīm, Ḳām al-Mawaqqīṭin, 1:345; Al-Qarūf, Al-Furūq, 2: 355; Al-Shawkānī, Irshād al-Fuḥūl, 346.
4.2.3.9.3 Validity and Scope of the Rule in Contemporary period

This rule was utilized by the traditional jurists as an independent source of interpretation. In contemporary period however, the more complicated and more intricated everyday problems demand rapid changes in the structure of existing Islamic law. The modern Muslim jurists should avail this rule at large scale to make the life of the people easier and happier. Society is an ever-changing and ever-developing phenomenon so is the structure of law and legal rules. With the passage of time, many of disapproved things became valid and limited has become unlimited. Therefore, it is necessary to produced corresponding legal orders to justify the changed circumstances.¹⁰⁴⁴

2.3.10 Rule of Continuity (Istiṣḥāb)

The term istiṣḥāb has been derived from the word suḥbah which literally means attachment or association of one thing with another.¹⁰⁴⁵ Technically, it may be defined as to maintain the status quo of a rule continuing in practice from the past until there is some evidence leads contrary to that practice. For example a living person if becomes missing, he will be presumed alive until some evidence proves that he has been died.¹⁰⁴⁶ Interpretation of legal text by way of continuity Istiṣḥāb is based on the presumption that a thing or state of a thing known to be existed in the past assumes to be continued until the contrary is recognized and established. The Muslim jurists have different opinion regarding the subject-matter of istiṣḥāb whether it is reliable only in positive cases or in negatives too?

¹⁰⁴³ Ibid.
¹⁰⁴⁵ Al-BaalBaki, Al-Mawrid,189.
2.3.10.1 Circumstances to apply the Rule

The presumption of continuity will be applicable under the following circumstances:

(i) Where a particular state or condition of any legal rule proved and established by the general principles of Sharī‘ah, the rule will be operative.

(ii) Where the existing state of any act or thing leads to the non-existence and freedom from obligation, the state will be considered continuing unless there is some legislation which made the acts obligatory.

(iii) Where existence of any thing is beyond doubt conceivable by reason or by Sharī‘ah.

(iv) Where the absence of any ruling is proved by evidence such as the text:

(v) Where a legal or social practice continued for long time but not proved against the spirit of Sharī‘ah.1047

2.3.10.2 Validity of the Rule

Among the traditional jurists, the majority of the Muslim jurists agreed that presumption of continuity is a valid rule of interpretation and should be followed in both cases, positive and negative. Some of them like Ḥanafī and Mālikī recognized this rule only in negative matters not in positive matters. On the other hand, the Ḥanafī and Mālikī jurists contended that in such case only the previous rights like right of ownership will be continued but no fresh right like the right of inheritance will be transferred to him unless he is proved to be alive by some evidence.1048

1047 Al-Shawkānī, Irshād al-Fuḥūl, 238; Al-Sarakhsī, Uṣūl al-Sarakhsī, 2:225; Ibn Qayyim, Iʿlām al-Mawaqqātīn, 1:295.
1048 Ibid.
Imām Shāfi‘ī, Aḥmad bin Ḥanbal and Zāhirī declared this rule as an independent rule of interpretation both regarding existed and non existed things. Contrary to it, Imām Abū Ḥanīfah, Imām Mālik and others do not consider it as an independent rule.1049

2.4 Contemporary Theories of Interpretation

The notion of contemporary and modern approaches is based on the assumption that to fulfill the demands of the changed circumstances, the Qur’ānic legal texts should be re-interpreted in the light of their objectives and public interest instead of literal interpretation. The modern time demands that ḥanāfī should be exercised more rapidly than by the earlier period to deal with the contemporary issues logically in the light of their contexts and public interest. The contemporary Muslim jurists called for re-interpretation in the light of the general principles of equality, social justice, freedom and moral values of Islām. The contemporary Islamic interpretive theories may be discussed as:

2.4.1 Sociological Theory of Interpretation

Sociological interpretation means to interpret legal texts according to the socio-economic and cultural changes of human society. In Islāmic legal system, sociological interpretation is based on the presumption that Islāmic law has a close connection with social changes, so the legal texts of Qur’ān and Sunnah should be re-interpreted in the light of socio-cultural changes, social background of a country, growing necessities of society, national issues and the complex issues facing the people in everyday life of that society. It is the only way to accommodate and to cover new changes and to resolve the contemporary issues of the public. There is sound relationship between law and social change ignorance of which results in many

1049 Ibid.
serious problems such as destruction of social set-up, rigidity in law, inefficiency of people, and backwardness of the whole society etc.

Human society is an organic individual. It is not just an aggregate of units joined by some artificial means or social contracts but a veritable living organism designed to evolve an ever-growing phenomenon. Law is an instrument to maintain social discipline and organization, welfare and prosperity which are like metals in the crucible of time and circumstances. They melt they gradually solidify into different shapes. They re-melt and assume diverse human society. Nothing is static except is dead and lifeless. Practically, in a society all actions of the members and all their relationships are crystallized clearly and consistently. The meanings, values, law norms and pattern of social systems define in details the right and duties of each member. The obligatory, prohibited and recommended relationships of the people are recognized by the law-making bodies in a society.

2.4.1.1 Development of the Theory

A comprehensive study of the Muslim state of Madinah makes it clear that the Holy Prophet organized and set up the administrative system according to the exhaustive social principles to run the policy of the government. It was established in such manners as to reconcile the problem of stability with the changes of legal rules in the light of social demands. Likewise, his companion adopted certain social measures to make life smooth and easy. It is this reason that every new social problem directly or indirectly was discussed and solved by the companions of the Prophet. When the new territories were conquered and Islam spread over the world, every new situation arose

1050 Shāh Wali Allāh, Ḥujjah Allāh al-Bālighah, 1: 89; Al-Budūr al-Bāzighah, 90.
was met by the companions in the light of its social background with the help of the arguments from the Qur’ān and Sunnah to accommodate social needs.\textsuperscript{1053}

Among the later Muslim jurists Ibn Taymiyyah and Shāh Wālī Allāh were the great exponents of this theory of interpretation. Ibn Taymiyyah held that Islām never advises to stick to a particular type of methodology. It always emphasizes to take into consideration social progress and social changes appeared and to adopt more efficient means to develop and to progress the society. For example, at the occasion of the battle of trenches (\textit{khandaq}), the Prophet adopted without any hesitation, the Iranian technique of digging the ditch around the city of Mecca.\textsuperscript{1054}

Shāh Wālī Allāh insisted on the re-interpretation of Qur’ānic legal texts in the light of social changes in order to bring changes in the existing structure of Islāmic law. He declared that social code comes into being by gradual process of evaluation based on the common efforts of generations not on the efforts and activities of single generation. It develops under the guidance of the people’s inherent tendencies of intellect and is modified and replaced in the course of their experience through the process of trial and error. Society evolves like an organic living individual. It obeys the laws of its own evaluation. It has an end and a purpose.\textsuperscript{1055} His philosophy of interpretation is based on the principles of ethics, theology, and social customs. His concept of ethics consists of the conduct (right and duties) of the whole humanity conducive both to the inner state of the virtuous mind and to the general welfare of the individual, society and humanity at large. He called these ethics as fiṭrah (nature) of human being adopted according to the demands of their specific nature. He declared that consciousness of God is intrinsic in the mind of human being. The real happiness of man lies in his approach to the consciousness of God in such way as it should aid in

\begin{footnotes}
\item \textsuperscript{1053} Ibn-e-Taymiyyah, \textit{Ma’ārij al-Wusūl}, 213
\item \textsuperscript{1054} Ibid.
\item \textsuperscript{1055} Shāh Wālī Allāh, \textit{Ḥujjah Allāh al-Ṭalīghah}, 1: 88-89.
\end{footnotes}
his progress and perfection. A man cannot attain any physical development without using the faculty of his will and of free choice. Anything that threatens its progress towards the attainment is unnatural and evil (sharr).  

He then divided ethics into ordinary ethics and advanced ethics. Ordinary ethics means the practical ethics that are beneficial for the greatest mass of the humanity and are necessary for the good behaviors of the people. By higher ethics he means the progressive manners. He contended that the habits of the individuals become the customs of the society. The individual’s memory of customs gives rise to traditions. He explained that forms and pattern themselves have no importance in the conduct of human society, the important is the end of the conduct to which it leads. In this way, theory of Wali Allāh is similar to the theory of utility presented by English legal writer Bentham regarding law.

2.4.1.2 Validity and Scope of the Theory

In contemporary period however, sociological theory of interpretation has gained a considerable importance. The legal writers and the contemporary jurists are inclined to consider it during the process of interpretation. Law in fact characterized with two attributes at a time, stability and change. All legal systems Islāmic or non-Islāmic face certain challenges to maintain a balance between the two and to become a standard legal system. However, the more rapid in adaptation of changes the more successful its society. The variety of legal theories of interpretation in the past and in the contemporary period have sole object to reconcile stability with change. For example, Common law originally is rigid and inflexible and to remove this rigidity the principle of equity was taken into consideration while interpreting law. Similarly, the Roman law adopted Jus Honorarium, a flexible attitude to apply it to Jus-Civilis that

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1056 Ibid. 1:58.
1057 Ibid.
was rigid to accommodate subsequent changes. In the same way, Islāmic system of interpretation has public interest, contextual and purposive approaches to remove conflict between stability and change and to reconcile them.

### 2.4.3 Rationale Theory of Interpretation

Rationale theory of interpretation contends that human intellect should have a significant role in the derivation of legal meanings of the Qurʾānic legal texts. It is based on the presumption that the legal texts of Qurʾān and Sunnah should be re-evaluated and re-interpreted in the light of the logic and rationale instead of literal interpretation. In this sense, the prime concern of the theory of rationale interpretation is the re-interpretation of Qurʾānic legal provisions in the light of the logic, modern context and human necessities.\(^{1058}\)

The founder of this theory was Muhammad ‘Abduh who declared that logical interpretation has a sound contribution in the development of Islāmic law. In his process of interpretation, he adopted a flexible approach and tried to re-instate the flexible nature of Islāmic law. The term rational does not mean logic according to one’s personal mind or perception rather it means to interpret Qurʾān and Sunnah by way of logic through *ijtihād* to discover what the welfare of the people in this world is based upon.\(^{1059}\) He contended that that Qurʾān is the foundation of Islām. The Sunnah of the prophet regarding religious matters is perfect and binding but the Sunnah regarding worldly affairs has possibility of error and thus is imperfect and non-binding. The Muslims must not ignore the fact they have been assigned delegated powers by God Himself to legislate and to enact to administer their worldly affairs in the light of the foundational principles of the Qurʾān such as principle of equality,

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justice and *shūrā* etc, so the Muslims of each generation have right to avail this authority because the traditional modes of interpretation of Islamic law have become inapplicable in modern times.\(^{1060}\) He then observed that the Muslims have become backward if compared with the other peoples of this world and have no knowledge of the world they live in. Due to stagnation of Islamic law the Muslims are unable to profit from the resources of their surroundings while the foreigners come and snatch these riches away from under their noses. Contrary to it, the Qur’ān has invited its believers to inquire into what is in the heavens.\(^{1061}\)

### 2.4.3.1 Fundamenatl Principles of Rationale Theory

Ibn Ḥabīb, in his process of interpretation took guidance from Qur’ān and sound Sunnah and from precedents of the companions. Ibn Ḥabīb’s theory of interpretation is based on some principles which made it distinct from traditional interpretation of the Qur’ān.

The first principle of rational theory is that there is a sound relation between revelation and reason and that revelation is in harmony with reason not contradictory to it. If something appears to be a conflict between them then it is because of misunderstanding of someone. According to this theory, the standard of right and wrong should be considered in the light of the reason and revelation.\(^{1062}\)

Another important principle of rationale theory is regarding the inapplicability of the existing and traditional Islamic law in modern context. This principle is based on the notion that the *ijtihād* done by the previous Muslim jurists was for the past generation and is not binding upon the modern Muslims as the word *ijtihād* means personal judgment, opinion or *rā’y* which is often used to assign an individual’s

\(^{1060}\) Rashīd Riḍū, *Yusr al-Islām*, 24-27.
\(^{1061}\) Ibid.
\(^{1062}\) Ibid., 1:5;
opinion not based on the Qurʾān or the Sunnah. In this way, the rationale theory rejected the traditional view regarding the interpretation of the Qurʾānic legal texts that all of them have been explained and constructed once for all the future generations by the traditional jurists and the authority and validity of their interpretation and construction have been confirmed by an irrevocable ijmāʿ which cannot be abrogated or violated. The third principle upon which the rationale theory is based is the consideration of the changed contexts during the process of interpretation that the Qurʾānic texts should be constructed in the light of modern context. The fourth principle of rationale theory is the generality of the Qurʾānic precepts. The Holy Qurʾān is general (ʿāmm) in its application. If a text however, revealed with regard to one particular occasion or event and leads that it has only a specific (khāṣṣ) application not general, it may be applied to that particular only. For example the text: “And Yūsuf Brothereh came and entered to him.” The context of the text reveals that the text is undoubtedly khāṣṣ in its scope and related to Yūsuf and his brothers and is not addressed to all mankind.

The fifth principle of rationale theory leads that a general principle can be drawn from a specific text. For example, the text: “He (the prophet) frowned and turned away: As there came to him a blind man.” The traditional interpretation of this text leads that it was revealed in the context of a particular occasion when the prophet was busy with some Makkah important persons and a blind man, came up to him and he took no notice of him but scowled and turned away, continuing his effort

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1063 Jansen, The Interpretation of Koran in Modern Egypt, 57-130; Melcom Kerr, Islamic Reform: The Political and Legal theories of Muḥammad ʿAbduh and Rashīd Riḍā (Berkeley: University of California Press, 1066), 102-23.
1064 Ibid.
1065 The Qurʾān: 12: 58.
1066 Rashīd Riḍā, Tafsīr al-Manār, 4:258.
at converting the local notable persons.\textsuperscript{1068} Abdūh then drew a general principle from this text that the message of Islām should be conveyed to everyone regardless of his social position.\textsuperscript{1069} The other principle of rationale theory leads that the issues relating to civil transactions and worldly affairs must be solved on the basis of \textit{mašlahah Dunyawiyyah}. The only condition is that it must not against the spirit of Sharī‘ah.\textsuperscript{1070} Lastly, that the mysterious words should not be interpreted and for this Abdūh contended that one should not comment the texts that are left mysterious by the Qur‘ān. For example the text: “So her Lord accepted her with good acceptance. He made her grow in good manners and put her under the care of Zakariyyah. Every time he entered al-mahrūb (sanctuary) to visit her, found her supplied with sustenance (\textit{rizqan}). He said: “O Maryam! From where have you got this? She said: “This is from Allāh.”\textsuperscript{1071} The traditional jurists interpreted the word “\textit{rizqan}” in the meaning of the fruits of summer during winter or the fruits of the winter’s season during the summer”\textsuperscript{1072} Abdūh rejected this interpretation by commenting that the Qur‘ān explains itself to everybody, hence there is no need to go into the defense of miracles contrary to the plain meaning of the wording of the Qur‘ān.\textsuperscript{1073}

\textbf{2.4.3.2 Some Cases of Rationale Interpretation}

Abdūh has treated Qur‘ānic texts differently from traditional jurists, so it is necessary to present some examples of his interpretation such as:

\begin{itemize}
  \item [\textsuperscript{1070}] Rashīd Riḍū, \textit{Yusr al-Islām wa Uṣul al-Tashrī‘}, 89; \textit{Tafsīr al-Manār}, 1: 242.
  \item [\textsuperscript{1071}] The Qur‘ān: 3: 37.
  \item [\textsuperscript{1073}] Rashīd Riḍū, \textit{Tafsīr al-Manār}, 2:201.
\end{itemize}
(i) Re-interpretation of the word furqān

It is stated in the Qur′ān: “A foretime as guidance to mankind. And He sent down Furqān.” In this text, the word “Furqān” was interpreted in different meanings by the traditional jurists. For instance, it has been defined as a criterion between right and wrong. Some of them explained the term as to discriminate truth from false. Al- Rāzī defined the word as knowledge of good and wicked.” Al-Ṭabarī defines Furqān in the meaning of moral code. In this way, the classical jurists presented different interpretations of a single word. Contrary to the traditional interpretation ʿAbduh described that the word Furqān in this text means reason by which man discriminates truth from false.”

(ii) Re-interpretation of the text regarding polygamy

Among other things, ʿAbduh re-constructed the text of polygamy and declared it a legal text while traditional jurists dealt with it as a moral being. The verse of the Qur′ān is as: “And if you fear that you shall not be able to deal justly with the orphan girls then marry (other) women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them) then only one or (slaves) that your right hand possess. That is near to prevent you from injustice.” The literal interpretation of this text sanctions for a male to marry up to four wives in the first place with one’s own choice then insist to keep only one wife in fear that one can not do justice. On the basis of literal meaning, the traditional jurists took the stance that it is just a moral duty of a husband to deal justly with his four wives and permitted a man to marry up to four wives without any solid condition or considerable measures

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1074 The Qur′ān: 4:3.
1077 Al-Ṭabarī, Jāmiʿ al-Bayān, 2: 231.
1078 Rashīd Riḍū, Tafsīr al-Manār, 2: 475.
1079 The Qur′ān: 4:3.
to secure or protect the interests of his first wife and her children and upheld that a Muslim man is free to marry four women at a time.\textsuperscript{1080} ‘Abduh however rejected the traditional literal interpretation of this text and re-constructed it on the basis of rational reasoning by emphasizing on the later part of the verse “but if you fear that you shall not be able to del justly (with them) then only one”, and argued that in the history and during current period, no one except the Prophet, could treat two are more wives with complete equality and justice. Moreover, under modern social and economic conditions a man is unable to treat them equally and justly hence, it is reasonable and rational to consider that the latter part of the verse which emphasized on equal treatment among the four wives supersedes the earlier part to permit a man to marry more than one wife without any proved genuine condition or in an exceptional case, such as incapability of existing wife to perform conjugal rights. To fulfill the pre-requisite of polygamy (equality and justice) is impossible for a husband and it is therefore polygamy is prohibited absolutely.\textsuperscript{1081}

(iii) Re-interpretation of the text regarding divorce

Another important issue of the contemporary period is the issue “whether a husband can be bound to exercise his right to divorce his wife by the formal proceeding in the court or family tribunal or not”? There is no direct ruling in Qurʾān or Sunnah regarding this issue. There is however, a Qurʾānic provision regarding the issue of “discord” between husband and wife” that is as: “If you fear a breach between (husband and wife) them, appoint two arbitrators, one from his family and other from her family; if both wish for peace, Allāh will cause their reconciliation.”\textsuperscript{1082} ‘Abduh contended that this Qurʾānic legal text was not fully treated by the traditional jurists.


\textsuperscript{1081} Jansen, The Interpretation of Koran in Modern Egypt, 131; Kerr, Islamic Reform, 223.

\textsuperscript{1082} The Qurʾān: 4:35.
and considered only as a moral precept and as a moral duty to appoint two arbitrators from the families of spouses in case of discord between husband and wife and thus confined the application of the text to the private affairs. He thus re-interpreted this verse in the light of the modern context and declared that the most crucial case of discord between husband and wife is the “pronouncement of repudiation by the husband” and that the court or the official tribunal is the best channel or authority to perform the task of an arbitrator. He thus declared ineffective the right of the husband to divorce his wife out side the courts or tribunals. On the basis of his judgment, section 30 of the “Tunisian Law of Personal status of 1956” states that any divorce pronounced by the husband out of the court of law is without legal effect.1083

2.4.3.3 Validity and Scope of Rationale Theory

ʿAbduh and his disciple Rashīd Riḍā both tried their best to search for an adequate and cohesive legal theory to interpret the legal texts of Qurʿān in the light of modern context and thus succeeded in their effort by presenting solutions of many contemporary issues through re-interpretation of relevant texts. In this sense, the scope of ʿAbduh’s theory is wide enough and it may be utilized by contemporary jurists to solve the problems of contemporary issues. The theory of interpretation presented by ʿAbduh and Rashīd Riḍā was in fact based on the exact spirit of the wording “ajtahidu walā Ālū” used by Muʿādh bin Jabal, a companion what he had replied to the prophet when the prophet asked him regarding his method of decision or judgment over an issue or litigation brought before him. Both ʿAbduh and Rashīd Riḍā argued that ijtihād is an unavoidable technique to make Islāmic law flexible and accommodative in the context of changing circumstance of the people and that by way of ijtihād the Muslim jurists may get success to refrain Islāmic law from being

1083 Jansen, The Interpretation of Koran in Modern Egypt, 131-157.
retard, stagnated and rigid and unfit for all people at all times. To quote ῾Abduh: “On the Last Day God will not question us one the opinions of the commentators and on how they understand the Qurʾān, but He will question us on his Book which he sent down to guide and instruct us.”1084

2.4.4 Hermeneutic Theory of Interpretation

The term hermeneutic refers principally to the textual interpretation and issues surrounding it which constitute its context. The term hermeneutics is derived from Greek verb hermeneutics which means to interpret something. Technically, it may be defined as intellectual discipline concerned with the nature and pre-supposition of the interpretation of expressions. 1085 In English-European legal system this theory of interpretation was introduced by the legal philosophers of the 17th century. It deals with written text and may be declared as theory of understanding of actions of people and their relations to the written texts. 1086 In Islāmic legal system, this theory though has its roots in the interpretive system of early period yet was not claimed until the late of the 19th century.

Among the contemporary Muslim scholars Fazlur Rahman adopted hermeneutic theory to interpret Qurʾānic legal texts in the light of their textual and contextual backgrounds. He argued that Qurʾān is divine response to the moral, social and the economic situations of Arab people among whom the prophet was. It is therefore necessary to understand the meaning of the Qurʾān on the basis of hermeneutics by considering both revelation and the then prevailing conditions of the people so that both the theological sections of the Qurʾān and ethico-legal, and socio-

1084 Rashīd Riḍᾱ, Yusr al-Islᾱm wa Uṣul al-Tashrῑ῾, 19.
1086 Ibid.
economic parts become a unified whole.\textsuperscript{1087} It is thus, duty of an interpreter to understand the nature and the hermeneutics of the text to find out its most appropriate meaning with the help of his own logic.\textsuperscript{1088} In this way, the meaning of a text is determined by the pre-suppositions and assumptions of both the interpreter and the people to which the text is being interpreted and this theory thus, tries to establish a strong connection between the text and the people to whom it is addressed.

Moreover, Fazlur Rahman severely criticized the views of the traditionalists who believe that if the Muslims are to follow, repeat and reproduce exactly what their ancestors did in 7\textsuperscript{th} century, they would recover their rightful position with God in this world and hereafter. Then he raised a question that how can a piece of history be literally repeated? He then contended that this dictum can yield only when the Muslims of the 20\textsuperscript{th} century must perform and enact that whom moral and spiritual dimensions must mach of those of the Muslim’s performance in the 7\textsuperscript{th} and 8\textsuperscript{th} centuries. A simple return to the past is of course a return to the graves.

Fazlur Rahman rejected the traditional theories and their holders who treated with the Qur’ān and Sunnah in narrow and static terms and adopted a fragmented view of revealed sources. For both the traditional legal jurists and the exegetes treated the Qur’ān verse by verse and the Sunnah report by report indifferent and isolated from their context. They did not try to understand and evaluate them in the light of their background and context. Due to their ignorance of textual and contextual sources they failed to bring a meaningful and effective interpretation applicable to every issue of life as a whole.\textsuperscript{1089} He observed that a thorough understanding of the Makkahn social, economic and tribal institutions are necessary in order to understand the import

\textsuperscript{1087} Fazlur Rahman, \textit{Islāmic Methodology in History} (Islāmabad: Islāmic Research Institute, 1984), 56
\textsuperscript{1088} Ibid.
of revelation for the purpose of universalizing it beyond the context of the Prophet’s
career. He then drew the intention of the contemporary scholars to the early history
and development of Islāmic legal system where the Qurʾānic teaching and Sunnah
were creatively elaborated and interpreted to meet the new factors and impacts upon
Muslim society into the living Sunnah of the community. For example, the issue of
wine was not prohibited earlier. The Qurʾān initially considered alcohol among the
blessings of God, along with milk and honey. The verse: “And verily, in the cattle
there is a lesson for you. I give to drink that which is in their bellies, from between
excretions and blood, pure milk; palatable to the drinkers. And from the fruits of date
palms and grapes, you derive strong drink (sakarn) and goodly provision . . . Then eat
of all fruits and follow the ways of your Lord made easy for you. There comes forth
from their bellies, a drink of varying colours wherein is healing for men.”

In these verses God mentioned drinks (wine) of various colours as a blessing
in which there is healing for men. Later, when Muslims migrated to Medīna, some of
the companions urged the prophet to ban alcohol. Consequently, the verse: “They ask
you about alcoholic drink and gambling; Say! In them there is great sin and some
benefits for people but the sin of them is greater than their benefits.” Even after
this revelation a group of people of Medīna still consumed alcohol and became
intoxicated, and one member of the group misread the Qurʾān. Immediately
thereafter, another verse was revealed: “O you believe! Approach not the prayer when
you are in a drunken state until you (the meaning of) what you utter.” Again on the
accession of another drinking party, a brawl was started and cause severs discord
among the Prophet’s followers. Hence, a verse was revealed: “O you who believe!

Intoxicants and gambling and al-Ansāb (animals slaughtered in the name of idols) and

1090 The Qurʾān:16:66-69.
1091 The Qurʾān: 2:219.
1092 The Qurʾān: 4:43.
al-ʿAzlām (arrows of seeking luck) are an abomination and the handy work of the Satan. So avoid them in order that you may be successful.”

From this gradual revelation of the verse regarding the status of alcohol, the Muslim jurists considered the last verse as it abrogated the earlier verses and interpreted it as a prohibition categorically. The reason so resorted that the Qurʾān sought to wean Muslims from indecent habits in a gradual process instead of commanding a sudden prohibition. However, the background of this prohibition was that in Makkah, the Muslims were small in number and the alcohol consumption among these Muslims was not common. But when the community of Muslims became larger and then converted in to a final state in which many people were habitual of drinking wine, hence the final Qurʾānic provision revealed and the consumption of alcohol declared prohibited for all the Muslims.

2.4.4.1 Fundamental Principles of Heremeneutic Theory

Fazlur Rahman argued that some general principles of interpretation should be drawn which must be based on the rationale and the contextual background of the texts. The traditionalists were failed to draw such principles of interpretation and led to chaos and blind imitation among Muslims. He suggested a critical re-evaluation of the interpretive methodologies established by the traditional jurists that neglected the construction of imagination.

The first principle upon which hermeneutic theory is based is that the religious texts should be read in a new contextual and textual paradigm. The teaching of Qurʾān and Sunnah should be looked upon not as something static and isolated but essentially as a thing that moves through different social forms and moves creatively. Hence, it is duty of interpreter to analyze each text.

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1093 The Qurʾān: 5:90.
1095 Ibid.
against a background and the background of the Arabian society in which Islam first arose. It is this reason that the early generation of the jurists was not bound by the letters of the text in their strict literal meaning.1096

The second principle of hermeneutic theory is that Sunnah should be taken as a behavioral concept whether applied to physical or mental acts. The fact is that the term Sunnah in early period of Islamic law was used in two concepts: The prophetic Sunnah, the valid and operative concept and the Sunnah of Arab that was consisted of a direct continuation of the pre-Islamic customs, mores of the ‘Arabs and decisions of the early legists of Islam. Moreover the earlier jurists incorporated new elements from Jewish sources and Byzantine and Persian administrative practices in the structure of Islamic law by their personal *ijtihad*. The traditional jurists however, did not differentiate between these two concepts in their process of interpretation and the whole content of the early Sunnah came to be attributed to the Sunnah.1097

The third principle of this theory is that the primary sources of higher knowledge in Islamic legal thought are Qur’an and Sunnah not the Books of the traditional jurists. He insisted that the core need of this time is that the Qur’an and the prophetic Sunnah should be understood in the light of the modern context identical from ‘Arab Sunnah.1098 The fourth principle of hermeneutic theory contended that the changes in time and circumstances of people lead to the changes in law. Fazlur Rahman then observed that the fiqh constitutes material for legal system but is not a legal system itself. He insisted to learn a lesson from the interpretation of the companion jurists who repeatedly brought certain changes in the developed structure of Islamic law by the prophet. For example, the prophet had to distribute the conquered lands among the Muslim soldiers according to the then prevailing rule

1096 Ibid., 171-181.
1097 Fazlur Rahman, Islāmic Methodology in History, 6-7.
1098 Ibid., 131.
acknowledged by the Law-giver. This act of the prophet is so clear, firm and unambiguous and is a kind of muhkam or manṣūṣ verdicts but ‘Umar refused to implement this precedent by considering socio-economic justice and based his decision on a general and broader principle enunciated in the Qurʾān: “And those who came after them say: “Our Lord! Forgive us and our brothers who have preceded us in faith and put not in our hearts any hatred against those who have believed. Our Lord! You are indeed full of kindness, Most Merciful.””\textsuperscript{1099}

Fazlur Rahman’s theory of interpretation emphasized on the deduction of general principle from specific text. He observed that the function of deducing general principles from specific rulings of the Qurʾān and Sunnah must be undertaken with full consideration of the sociological forces which cause these rulings. The Qurʾān gives directly or indirectly, the reasons for certain ethical and legal rulings, so it is necessary to understand these reasons to deduce general principles of Shari‘ah. He also deduced some specific principles from the general principles of Qurʾān.\textsuperscript{1100} Principle of reasoning has an important place in the theory of hermeneutic. For it, Fazlur Rahman argued that rationale understanding of Qurʾān and Sunnah is the only reliable method for arriving at moral and legal enactments. He declared that Qurʾān and Sunnah should not be taken into simple, narrow and static terms to reproduce exactly what was in practice in the seventh century.\textsuperscript{1101}

2.4.4.2 Cases Solved by Hermeneutic Interpretation

In his methodology of Qurʾānic interpretation, Fazlur Rahman solved many cases differently from traditionalists such as:

\textsuperscript{1099} The Qurʾān: 59:10.
\textsuperscript{1100} Hallaq, \textit{A History of Islāmic Legal Theories}, 242.
\textsuperscript{1101} Fazlur Rahman, \textit{Islāmic Methodology in History}, 189.
(i) Case of Bequest

Contrary to the traditional view according to which the provision of making bequest in favour of relatives has been abrogated by the provisions regarding the distribution of the property of deceased person, Fazlur Rahman argued that this text of the Qurʾān has general nature. It is there for necessary that all relatives must take compulsory wills in favour of all relatives unless it is specified by some other principle of specification.1102

(ii) Case of polygamy

Fazlur Rahman differed with the traditionalists regarding the interpretation of the text of polygamy. 1103 He contended that the text is a specific text and reveals that Qurʾān permits a man to marry up to four wives only under specific circumstances confined to the orphan girls. The other text reveals: “You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them, so as to leave the other hanging.”1104 This text however is of general nature which insists that justice can never be done in polygamous marriage. Hence, issue of polygamy has been dealt by two types of Qurʾānic provisions: The specific provision which permits a man to marry up to four women under specific circumstances and confined to the orphan girls only and the general provision which contends that to do justice among co-wives is impossible, so it must have a general application to all. The both verses then should be interpreted according to the general principle of interpretation that a general text must be given a general meaning and applied to all which it intends unless some indication leads otherwise and that a specific text must

1103 The content of the text has been given earlier. See above, 461-462. The Qurʾān: 4:127.
1104 The Qurʾān: 4:129.
be interpreted in such manners as to have only one meaning and a single application unless indicate to specify a general text.  

Contrary to this principle, the traditional jurists took the permission of polygamy under specific circumstances as a general rule applies to all women under all circumstances and declared polygamy permissible but above this having legal validity, whereas the demand to do justice was considered to be mere recommendation, far of any binding effect. By doing so they turned the issue of polygamy right on its head, taking a specific verse to be binding and the general principle to be a recommendation. In this way they overruled and neglected the core principle of interpretation that in deducing general principles of different orders from Qur’ān, the most general becomes the most basic and the most deserving of implementation, while the specific rulings will be subsumed under them.  

2.4.4.3 Scope and Validity of Hermeneutic Theory

The theory of hermeneutic interpretation presents an updated formula of interpretation. This is voice of modern legal writers and the jurists that every piece of legislative enactment must be understood in the light of its background history, context and object. To understand the progressive, moderate and accommodative nature of Islāmic system of interpretation, the scholars of the 21st century must get rid of the thinking of 7th and 8th centuries that led to speak a universal interpretation of a Qur’ānic text. The contemporary jurists must understand the fact that modern Muslim countries are under the great influence of the political and cultural environment of the developed countries of the West and due to incorporation of modern institutions of education, industry and communication etc., the Muslims are facing certain problems caused by their adaptation, rejection or modification of their own fabrics. All these

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1106 Ibid.
changes have their own effects and must be understood in the light of their context. To solve the contemporary problems of Ummah it is necessary to take into account the context of each text of Qurʾān and Sunnah because the Qurʾān and Sunnah were actually involved in society-building and provide concrete guidance to understand the changed circumstances in the light of changed context.  

2.4.5 Liberal Theory of Interpretation

The founder of the liberal theory of interpretation was Muḥammad Saʿīd Ashmawī who contended that legal texts of Qurʾān and Sunnah should be re-interpreted liberally in the light of their relationships with the society to whom they are addressed. The main thrust of the liberal theory leads that connection between the revealed text and the modern society does not turn upon literal interpretation but rather upon an interpretation of the spirit and broad intention behind the specific language of the text. This theory is based on the presumption that religion is different from religious thought which constituent legal system and that religion is a pure idea and religious thought is an elaboration of that idea. Religion is suprahuman in the mind of God and finds its expression in the Qurān and Sunnah of the prophet. The interpretation of the texts of Qurān and Sunnah are nothing but a system of religious thought that are mainly human and are susceptible to error. In this sense, religious thought can never be isolated from the particular reality and the history of that society. Thus religion is a system of ideas and beliefs and is divine and can not be located in a human context. On the other hand, religious thought is thoroughly human and so connected to society, can never be isolated from the particular reality and history of that society. 

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1107 Ibid., 144.
1108 Wael B. Hallaq, A History of Islamic Legal Theories, 231.
1109 Muḥammad Saʿīd Ashmawī, Uṣūl al-Sharīʿa, 52-53.
2.4.5.1 Basic Principles of Liberal Theory

Ashmawī then described some principles of general nature upon which he based his theory of liberal interpretation. The first general principle leads that Sharīʿah is a state of mind and is based on the commentaries and interpretation of the Qurʾān and Sunnah that are merely human, and thus inclined to err. In this way, the legal system of religion is constituted to govern and to administer societies which may be different from society to society and from time to time.\(^ {1110}\) This principle in fact is striking and idealistic in nature and declares the Sharīʿah is more than a brilliance total sum of rules and penalties.\(^ {1111}\) The second principle leads that there is dialectical relationship between revelation as a text and the human reality. This principle paves the way for correct interpretation of Sharīʿah which was revealed for particular reasons to a particular human society. The notion that the Qurʾān is an eternal speech and co-existing with God has led to the faulty view that the Mission of Muhammad constituted not a reason for, but an occasion for revelation. Such misapprehensions have had serious consequences, for they have led Muslim scholars to interpret the text in isolation from the particular human reality in which they were revealed.\(^ {1112}\)

The third principle requires that Sharīʿah intended to serve the public interest and that the abrogation of one verse by another has no function other than serving that interest. The Qurʾān represents a process of revelation inextricably connected with the constant changes that took place during the Prophet’s life time. For example on the issue of the legal status of intoxicants the Qurʾān takes slightly different positions on the matter. It is revealed in thrice according to the situation and conditions at that

\(^{1110}\) Ibid.
\(^{1112}\) Saʿīd Ashmawī, *Uṣūl al-Sharīʿa*, 70.
time. Such examples are many where revelation changed and progressed with the change and progress of the society.\textsuperscript{1113}

The fourth principle leads that prophetic Sunnah constitutes general principle of Shari’ah. The fifth principle leads that the provisions of Shari’ah are neither imposition from above nor of foreign origin, but a genuine expression of indigenous social values and customs. In this sense, revelation has a close connection the realities of pre-Islamic world. For instance, cutting hands was a pre-Islamic Arab penalty of theft which the Qur’an adopted as a part of divine law.\textsuperscript{1114} Lastly, the principle that the changes in conditions lead change in the Shari’ah also favoured by this theory which leads that religion is one and divine but the Shari’ah or the legal system which govern societies differ in accordance with the differences existing among these societies.\textsuperscript{1115} In this way, liberal theory of interpretation demonstrates the way in which these principles yield a fresh and flexible understanding of what positive law should be. The perfectness of Shari’ah can be obtained only by bringing it to bear, consistently and systematically, upon the social and human exigencies which are in a continuous state of change.\textsuperscript{1116}

\textbf{2.4.5.2 Some Cases of Liberal Interpretation}

Ashmawī’s theory of interpretation rejects the traditional views regarding the construction of Qur’anic legal texts and presented unprecedented interpretation of the Qur’an. Some cases are given here as:

\textbf{(i) Foreign policy of Muslim states}

Asmawī rejected the theory of traditional jurists regarding the foreign policy of the Muslim states and their relations with non-believers. The traditional interpretation of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{1113} Ibid., 72.
\item\textsuperscript{1114} Ibid., 73.
\item\textsuperscript{1115} Ashmawī, \textit{Uṣūl al-Sharīʿa}, 73.
\item\textsuperscript{1116} Hallaq, \textit{A History of Islamic Legal Theories}, 235-36.
\end{enumerate}
\end{footnotesize}
the texts related to the relations of the Muslims with non-Muslims led that Islām and Islāmic law opposed non-Muslims people and non-Muslim states and should remain in a continuous state of war with non-Muslim states until all the inhabitants of these territories are brought under Muslim dominion.  

Through his liberal interpretation Ashmawī contended that this type of political relationship neither favoured by the Qur’ān nor the Sunnah. He upheld that Islām was sent to the people as human not political being. He observed that the verses relevant to the orders of fighting with the non-Muslims must be understood in the context of the circumstances under which the Prophet (pbut) and his followers were forced out of Makkah, migrated to Mecca and attacked by the non-Muslims. For example the verse: “Permission to fight is given to those who are fought against because they have been wronged and surely Allāh is able to give them victory.” This text reveals that Qur’ān does not order to fight those who believe in other scripture, unless they first attack the Muslims. Likewise, Qur’ān does not command Muslims to launch war against non-believers with the view of converting them to Islām. For, if God’s plan was to convert all the people to Islām, he would have created them Muslims ab initio. Therefore, the texts which categorically command Muslims to fight the people of scripture should be considered specific have effect to the time of the prophet. By discriminating the specific circumstances of the texts, their reasons and rationale behind their language, one can easily come to the point that the commands to launch war against non-Muslims were relevant to the time of the prophet and should be interpreted specifically, and their interpretation in modern times must not be taken beyond self-defense.  

For instance, the verse: “Fight against those who believe neither in Allāh

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1117 Khaddūrī, War and Peace in the Law of Islām, 156.
1118 Ashmawī, Uṣūl al-Sharīʿa, 93-95.
1119 The Qur’ān: 22:39
1120 Ashmawī, Uṣūl al-Sharīʿa, 105; Hallaq, A History of Islāmic Legal Theories, 238.
nor in the last Day; nor forbid that which ahs been forbidden by Allāh.”\textsuperscript{1121} And the verse: “O you believe! Fight those of the disbelievers who are close to you and the let them find harshness in you.”\textsuperscript{1122} This and other similar verses should be understood in the light of their particular circumstances.\textsuperscript{1123}

\textbf{(ii) Economic policy of Muslim states and issue of interest}

Asmawī re-interpreted the Qur’ānic verses related to the issue of ribā\textsuperscript{1124} which is categorically prohibited by the Law-Giver. He declared that the economic policy of Muslims and Muslim states must not base on ribā. He then described the term ribā and its context under which ribā was declared prohibited.\textsuperscript{1125} The word ribā mentioned in the verses linguistically means to grow or increase.\textsuperscript{1126} The ‘Arab had to deal with two types of ribā: Ribā al-nasī‘a which means delay in payment and ribā al-faḍl in which a measure of wheat was sold for two measures at the time of harvest. In case of ribā al-nasī‘a, one person had to borrow money from other for a certain period on the understanding that he (debter) would pay a fixed amount every month until the prescribed period would mature. On maturity, if the debtor still appeared unable to return loan, the term prolonged and the interest increased.\textsuperscript{1127} Then, traditional Muslim jurists differed regarding the status of ribā al-faḍl whether it is prohibited or not. Some of them contended that both types of ribā are prohibited while other declared prohibited only ribā al-nasī‘a which has been declared categorically prohibited by the Qur’ānic injunctions.\textsuperscript{1128} On the basis of traditional interpretation, the traditionalists argued that the principle of levying interest of modern

\textsuperscript{1121} The Qur’ān: 9:29.
\textsuperscript{1122} The Qur’ān: 9:123.
\textsuperscript{1123} Ashmawī, \textit{Uṣūl al-Sharῑ‘a}, 107; Hallaq, \textit{A History of Islamic Legal Theories}, 239.
\textsuperscript{1124} The Qur’ān: 2:275-281 & 3:125-130.
\textsuperscript{1125} Ashmawī, \textit{Uṣūl al-Sharῑ‘a}, 109.
\textsuperscript{1126} Ibn Kathīr, \textit{Tafsīr al-Qur’ān}, 1:581-588.
\textsuperscript{1127} Ibid.
\textsuperscript{1128} Ibn Qayyim, \textit{I’lām al-Mawaqqī‘īn}, 1:203.
times is similar to *ribā* al-Nasī’a prevailing at the time of the prophet and is prohibited and *ḥarām*. Hence, any fiscal policy (private or public) if based on the principle of interest will be null and void and will be against the spirit of Sharī‘ah.\textsuperscript{1129} The current economy of the whole world is based on the principle of interest and the Muslim states are running their economic policy accordingly. For instance, the provisions of the Egyptian law currently in effect, regulate the levying of interest at the rate of four percent in civil transactions and five percent in commercial dealings.\textsuperscript{1130} Here, the apparent condition of the economic policy of Egypt seems contradictory to the traditional interpretation of the Qur’ānic verses that categorically prohibited *ribā*. Ashmawī upheld that the problem of *ribā* and interest can be solved by the application of second and third principles of liberal interpretation. The *ribā* practiced by Arab society was to charge the debtor too much amounts of interest that become with the lapse of time far larger than the principal amount. It was this reason that the usurious transaction was considered as exploitation of the debtor and thus Qur’ān decreed it prohibited to put an end to exploitation of the debtor.\textsuperscript{1131}

Contrary to the Arab usurious practice, the modern interest policy is not based on such exploitation rather the function of the interest is to protect the value of the money from the frequent instability. To days economy requires that the lender be permitted to charge such interest on his capital as to ensure that when the amount is paid back the actual value of the principal amount would not be less than that he had originally lent. Ashmawī presented many arguments in favour of modern interest. For instance, in contemporary scenario of economy, if the lender is not allowed to charge interest, he may have some loss regarding the value of his money and the economic

\textsuperscript{1129} Ibid.  
\textsuperscript{1131} Ibid.
effects of such a situation would be rigorous. Further, the activities of borrowing and lending money were limited to individuals among the Arabs while the major part of such activity is now days accomplished between commercial bodies and companies and not private individuals. Under contemporary circumstances, borrowing in a corporate economy is considered as a project of business and not as a matter of personal needs. The money that the corporations and companies borrow is used in investment which brings more profit than the amount of interest payable on the loan. In this way, the borrowers increase their shares of profit and consequently, economy under such situations can not be characterized as exploitative. The similar situation arises in case where the interest is compensated by the financial institutions to those who invest or bank with them. In this case, the institutions do not experience exploitation because they in turn invest the money handed over to them and make sufficient profit to pay back the principal and interest to the investor after getting certain profits for themselves. Moreover, when an individual invests with a financial institution, in the form of cash, bonds or otherwise, he is able to do so even if the principal amount invested is small. In this way, these institutions provide an opportunity to minor investors to make profit on their small capitals on the one hand and to bring a profitable return to them on the other. The issue of determination of the genuine need for financial assistance can be justified by setting a minimum rate of interest on behalf of state policy.

(iii) Case of consuming intoxicants

Ashmawī adopted a quite different approach regarding the issue of hadd punishment on consuming intoxicants. He contended that the Qur’ānic provisions of wine are clear in their meaning and scope that it is to be avoided in abundance but the

\[\text{\footnotesize 1132 Ibid.}\]
\[\text{\footnotesize 1133 Ibid., 110-116; See, Weal B. Hallaq, 239-240.}\]
categorical prohibition of consuming wine is not so clear. The Qurʾān states that with the exception of carrion, blood and swine flesh, no food or drink was prohibited by God. Likewise, the term khamr used in the Qurʾānic text is matter of disagreement among Muslim jurists. Some jurists however, took khamr to refer only to fermented grape juice, and it is only this that the Qurʾān meant, and it is the consumption of this drink that is prohibited. Further, the Qurʾān and the Sunnah did not set a penalty for intoxication. The eighty lashes for a drunken man was prescribed and implemented by the second caliph ʿUmar by way of analogy with the penalty of false accusation of adultery on the basis of common reasoning that both persons the false accuser and the drunkard use language that offends and defames. Ashmawī rejected this logic and contended that reasoning behind the two cases is not same in the sense that unlike the false accuser, the drunkard does not necessarily defame people. He thus suggested that whatever the penalty, it must be inflicted upon a person who consumes alcohol with the deliberate purpose of getting drunk. But he who drinks it as a consequence of a calamity that befell him is not subject to punishment. In favour of his opinion he argued with the Qurʾānic verse: “He, who is driven by necessity, neither craving nor transgressing, it is no sin for him. Lo! God is forgiving, merciful.”

2.4.5.3 Validity and Scope of Liberal Theory

In contemporary scenario, the liberal theory of interpretation has a wider scope and modern Muslim jurists may utilize liberal theory of interpretation to solve contemporary issues of Ummah.

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1134 The Qurʾān: 6:146. See for content of the verse, 464-65.
1136 The Qurʾān:2:173.
2.4.6 Interpretive Theory of Limits

Interpretive theory of limits is based on the notion that Qurʾān and Sunnah are consisted of divine provisions that prescribe lower and upper limits of every conduct of human being to declare it prohibited or permitted. The founder of this theory is Muhammad Shahrūr who started his theory by arguing with the text: “Verily, We, it is We Who has sent down the dhikr (Qurʾān), and surily I will guard it.” 1137 This text reveals that God Himself Protector of the Qurʾān. On the basis of this text, Shahrūr contended that Qurʾān is as much the asset of later generation as that of earlier or even the earliest generation. Therefore, each generation has right to interpret the Qurʾān in the light of the circumstances and contemporary needs of the time in which it lives. Consequently, the people of the 20th century have authority to interpret dhikr or Qurʾān in such manners as to reflect the circumstances of this age. He observed that the modern Muslims are more qualified and more cultured to understand the Qurʾān for their own purposes and exigencies than earlier generations were. 1138

Shahrūr observed that Sunnah represents the methodological model for legislation. Like the Book, it does not necessarily provide for specific and concrete cases of legislation but rather it furnishes the methodological path for constructing a system of law. Apart from the Book and the Sunnah relevant to the theory of limits all other traditional sources are irrelevant and the modern jurists are not bound by the traditional legal schools because an analogy can not be drawn between the 7th and the 20th centuries and the theory of limits provides a substitute to qiyāṣ. 1139

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1139 Ibid., 582.
The cases which do not come within the purview of the revealed texts indicate that God intended to leave these issues to the decisions of the Muslim jurists to determine their laws. Those which were dealt by the traditional jurists under *maslahah mursalah* must be determined by the government agencies. On such textually unregulated matters such as income tax, tariffs etc, the government and the people have right to decide. In the case of income tax, the lower limit would be zero where as the upper limit would be determined by the social and economic conditions prevailing at a particular place and time.¹¹⁴⁰

He rejected the notion of the consensus and declared that the traditional consensus is imaginary (wahmi) and in no way binding upon the Muslims of the modern ages. Law is ever changing and moves between the limits not beyond them. The only concept of consensus is that the agreement of the majority of citizens by voting on a proposed law, and after such proposal, law should be implemented.¹¹⁴¹ Likewise, Shahrūr differentiated between interpretation and *ijtihād*. He observed that interpretation involves changing in the meaning of ambiguous texts and creates two or more varied meaning of the same language. Ijtihād on the other hand, does not involve interpretation rather it is a process through which legal language is taken to yield a particular legal effect suitable to a particular place and time, when it may, in another place and time yield another effect.¹¹⁴²

### 2.4.6.1 Definition and Types of Limits

The limit presented by Shahrūr upon which his theory of interpretation is based may be defined as the edge of a conduct directed by the divine Provision of the Book and the Sunnah. These provisions further set a lower and an upper limit for all human

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¹¹⁴⁰ Ibid., 474-475.
¹¹⁴¹ Ibid., 582.
¹¹⁴² Ibid.
actions. The lower limit represents the minimum limit required by the law in a particular case and the upper limit represents the maximum limits of an action. What is short of the minimum limit and above the maximum will be legally prohibited. If these limits are exceeded by the conduct, penalties will be justified in proportion to the violation committed.\(^{1143}\)

The limits presented by Muhammad Shahrūr are of six types such as independent lower limit, independent upper limit, conjoinment of lower and upper limits, meeting point of lower and upper limits, limits based on some attributes and lastly, curvature between a positive and a negative limit. The first type of the limits is the lower limit which stands independently. For example, the Qurʾānic text: “Forbidden to you (for marriage) are your mothers, your daughters, your sisters, your father’s sisters, your mother’s sisters.”\(^{1144}\) This text imposed prohibition on marrying one’s mother, daughters, maternal and paternal aunts, etc. But if these relations are excluded, marriage to other relations and non-relations become permissible. The second type is the upper limit. For example, the limit that found in the text of Qurʾān regarding the punishment of thief: “For the thief, male and female, cut off their hands.” In this text the specific penalty represents the upper limit of theft that is cutting hand but that should not be exceeded. The penalty however, may be lessened according to the objective circumstances of a particular society. In this concern it is responsibility of mujtahidin to determine the extent of theft requires cutting off hands in light of the requirements of their society.\(^{1145}\)

The third type consists of lower and upper limits when they are conjoined. For instance, the Qurʾānic text related to inheritance: “Allāh commands you as regard
your children, to the male a portion equal to that of two females. If there are only
daughters, two or more their share is two thirds of the inheritance; if only one, her
share is half.\textsuperscript{1146} The general purpose of this text is that the male will get a share
equivalent of two females, in case of two or more females, they get two thirds of the
deceased property. In case of a single female, she gets half of the property of her
father. In this case the task of the mujtahid is to determine the upper limit for man
and lower limit for woman. But at any rate, the woman’s share can never be less than
33.3\% whereas the man’s can never get more than 66.6\% of the deceased property. In
such a case if woman is given 40\% and the man is given 60\%, then upper limit and
lower limit can not be said to have been violated. The percentage allocated to each is
determined in accordance with the circumstances of a particular society at a particular
time.\textsuperscript{1147} The fourth type is the meeting point of upper and lower limits together. Only
one Qur’\’\n\’anic text is of this type. That is: “The adulterer adulteress, flog each of them
with a hundred lashes.”\textsuperscript{1148} In this case both lower and upper limits are set at one
meeting point, namely one hundred lashes. God’s insistence that the adulterers should
not be mercy indicates that the punishment must not be lessened. It should neither be
les nor more than one hundred lashes.\textsuperscript{1149}

The fifth type of limits is based on some attributes contained curvature and
starightness. Curvature may be defined as a deviation from a straight path. The
opposite of curvature is \emph{istiq\‘āmah} that is the quality of being straight. Curvature is a
natural quality and intrinsic to human nature but straightness is not a natural quality
rather it is divinely ordained in order to co-exist with curvature and to contribute in
the organization of human societies. For instance, it is stated in the Qur‘\’ān: “Show us

\textsuperscript{1146} The Qur‘\’ān: 4:11.
\textsuperscript{1147} Shahr\‘ūr, \textit{Al-Kitāb wa\textendash;Qur‘ān}, 464; Hallaq, \textit{A History of Islāmic Legal Theories}, 248.
\textsuperscript{1148} The Qur‘\’ān: 24:2.
\textsuperscript{1149} Shahr\‘ūr, \textit{Al-Kitāb wa\textendash;Qur‘ān}, 465; Hallaq, \textit{A History of Islāmic Legal Theories}, 249.
the straight path.”1150 Here, man is represented as seeking the guidance of God by asking him to pray for straight path. On the other hand, there is no Qurʾānic verse in which a man is represented as seeking curvature because curvature is pre-existing in the natural order.1151 The curvature moves between the lower and the upper limit but never touch them. An example is the case of sexual relationship between man and woman. Beginning with the point above the lower limit, where the sexes are not to touch each other, the curvature moves upward in the direction of the upper limit where they come close to committing adultery but do not.

The sixth type of limits deals with that curvature which existed between a positive upper limit and a negative lower limit. The example of this type is the fiscal transactions. The upper limit is represented by the provisions of Ribā and the lower limit by the provision of zakāt. Since these limits are positive and negative, then there exists in between them a stage that is equivalent to zero. For example, the interest free loan, payment of tax and giving a loan with interest.1152

2.4.6.2 Cases held by way of Limits

Some cases held by way of limits are as under:

(i) Issue of interest based loan

The issue of taking loan on interest held bu sharūr in different way in the light of the lower and upper limits of the case. For this purpose, he argued with the text: “Indeed al-Ṣadaqāt are only for fuqarāʾ (poor) and al-masākīn (the poor who do not beg of people), and those employed to collect (funds) and to attract the heart of those who

1150 The Qurʾān: 1:5.
1151 Shahrūr, Al-Kitāb wal-Qurʾān, 469; Hallaq, A History of Islāmic Legal Theories, 249.
1152 Ibid.
have been inclind (to Islām), and to free the captives, and for those in debt, and for Allāh’s cause, and for the wayfarer, a duty imposed by Allāh.”

The text was revealed in favour of the poor class of the society. It shows that the poor and needy are those who can not re-pay their debts. Therefore, society must support its needy and poor without expecting any return. Likewise, a segment of poor class can repay their debts but without any addition of interest. Here, payment of debts is a middle point of positive upper limit and negative lower limit. This financial policy of the Qurʾān is based on the text: “And if the debtor is in strained circumstances, then give him time till it is easy for him to repay but if you remit the debt by way of charity, that is better for you if you did but know.” In this context, the remaining section of the society consists of prosperous people who do not qualify for this exception. The backbone of the economy is the merchants, industrialists, farmers, skilled professionals and their like who can repay borrowed money with interest and without any loss to them. The only limit is that the debtor shall not pay an amount of interest that is larger than the principal he borrowed. In other words the cumulative interest owed shall in no case exceed 100% of the original loan, irrespective of the debt’s duration. This represent the positive upper limit, defined by the Qurʾānic text: “O ye believe! Devour not usury, doubling and quadrupling (the sum lent).”

(ii) Issue of polygamy

There are two Qurʾānic verses that deal with the issue of polygamy. The first text (4:III) permits a guardian to marry with the orphan girls when they get age of maturity rather than to return their properties to them. The other text (4:129-130) reveals that it

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1153 The Qurʾān: 9:60.
1154 The Qurʾān: 2:280.
1155 The Qurʾān: 3:130.
is impossible to do justice among number of views.\footnote{1156} Both texts seem contradictory as one text permits a man to marry up to four wives and do justice with them and the other text insists that do justice can never be done in polygamous marriage. This contradictory situation can be reconciled by way of limits. The limits in these verses are of two types: quantitative and qualitative. Quantitatively the lower limit leads to marry to a single wife whereas the upper limit specifies it up to four wives. But the qualitative aspect of these verses is just as important to a complete understanding of the verse’s import.\footnote{1157}

The traditional jurists did not inquire into the particular class of women dealt by these verses. They took the text as general and reffered to the whole class of women without qualification. But the text does not permit to take the text as general because the phrase “if you fear that you will not deal fairly with the orphans” is associated with the following word “marry of the women”. In this context, the Law-giver permits a second, third and a fourth wife but He did not mention the first wife which leads that the first wife is qualitatively, not quantitatively, excluded from the permission. Thus the permission to marry a second, third and fourth wife should be taken as to affect to a permission to marry young widows who bring with them to marriage their young children. This is the whole point behind the permission. In this way Sharūr intepreted the word “women” associated weth the word “orphan” in the meaning of widow mothers who have orphan children and bring them to marry. In this case, in addition to the first wife and her children, the other co-wives along with their children are the responsibilities of husband. The words “doing justice” should be taken as the behaviour of husband with his children from first wife and with the widow’s children. Furthermore, the Book exempts men from paying dowry to their

wives as long as they effectively provide for their orphaned children who come to the
marriage with their widowed mothers. Similarly, the other text 1158 does not insist that
these co-wives should be treated with full justice because marrying them is done not
for their sake but rather for the sake of their fatherless children.1159 By the application
of the theory of limits, the concept of polygamy may be explained in historical terms
which can transform its image from a backward to a noble practice.1160

2.4.6.4 Scope and Validity of the Theory of Limits

Theory of limits provides a scientific evaluation of Qurʾanic texts and can be taken as
guideline during the process of interpretation by the contemporary Muslim jurists.
This theory has been considered as a unique contribution to the interpretation of
Qurʾān and Sunnah in particular and to law as a comprehensive system in general.1161

Conclusion

This chapter sketched out the fundamental growth and evolution of Islāmic legal
theories in the past and in the present. The caliber of the companion jurists was very
high and irrespective of flagrant cultural and educational weaknesses, they introduced
and developed flexible and moderate principles of interpretation. Like the modern
concept of explanation, interpretation and construction, they did not differentiate
interpretation from construction and held the contemporary cases in the light of the
changed context and public interest by way of construction. The term ʾijtihād was
utilized by them in its wider meaning that was nothing than to exercise one’s personal
opinion in the matters that were not covered directly by the express texts of the
Qurʾān and the Sunnah. Moreover, the companion jurists added and reinterpreted the

1158 The Qurʾān: 4:129.
1159 Shahrūr, Al-Kitāb wal-Qurʾān, 468-470; Hallaq, A History of Islāmic Legal Theories, 249-252.
1160 Hallaq, A History of Islāmic Legal Theories, 251.
1161 Ibid., 248.
earlier decided cases in the light of the changed context when it was felt that the
existing laws could not meet the objectives of the text. Personal opinion had a
considerable role in the explanation and interpretation of the Qur’ānic legal texts. In
this way the companion jurists set-up and established a general presumption that
changes in time and circumstances of the people justifies a change in the law. The
question of logical and analogical reasoning did not arise until the age of Shāfi‘ī. The
formation of legal schools had been accomplished by the middle of the 4th century of
Hijrah by the traditional Muslim jurists who developed the subject of statutory
interpretation by introducing many new and fresh interpretive principles such as
juristic preference, *Istiślāh*, *istiṣḥāb* and presumption of continuity. Principles of
hermeneutics were established as interpretive tools to understand and to interpret the
Qur’ānic texts. Interpretive techniques and modes were assigned hierarchical ranking
to restrict the scope of the personal opinion and to stable the interpretive system on
determined rules. The traditional Muslim jurists not only utilized the interpretive
methodologies of the companions but introduced many new rules and in this way,
expanded the scope of the science of interpretation. The Islamic system of
interpretation introduced almost all those techniques which have been considred now
by the philosophers and judges of the modern world as flexible theories of
interpretation such as contextual approach, logical reasoning, rule of necessity, public
interest and purposive interpretation etc. In the same manners, the Muslim jurists of
the lat two centuries worked for the renassiance of the past legacy which was
consisited of flexible approaches in the guise of contemporary legal language such as
sociological interpretation, rationale theory, liberal theory and theory of limits etc.
CHAPTER 5

COMPARISON, CONCLUSIONS AND RECOMMENDATIONS

Section One

Comparison between Islamic and Western Interpretive Systems

The whole discussion regarding law and interpretive policy of different legal systems reveals that the Muslim jurists and the legal philosophers of Islamic law played an inevitable role in the development of the science of statutory interpretation the importance of which has been recognized by the jurists an the djudges of the western world just before a few decades. The distinct feature of Islāmic system of interpretation is that it not only requires the explanation of the given text and but also motivates its believers to exercise their logic to derive a new law in the light of the objectives of the text and public interest. It also becomes clear that in the history of the modern world, the Muslim jurists were the first who founded a systematic policy of interpretation when the debate regarding this subject was totally absent form the theories and the writings of the western legal philosophers. In the same manners, until the last few decades, the jurists and the judges of the English-common law were not clear regarding their interpretive role while Muslim jurits and judges got expertise in this subject during the early phase of the development of Islamic law. Unlike earlier statutes of the English-common law where there was no concept of the division of a statute in to different parts, the divine Constitution of the Muslim Ummah was
divided into different parts by the Law-giver and structured in proper form through revelation. Hence, in the light of this research, it can be claimed that the judges and the jurists of the western world borrowed the flexible interpretive approaches from the Islamic system of interpretation in the guise of the contemporary approaches.

As this research is based on the comparative method, so, it is appropriate to draw a comparison and to discuss some point of differences and similarities of both systems in order to bring them in harmony and to establish a harmonized concept of interpretation. The primary and the fundamental difference between Islāmic and western interpretive system is that the former is based on the eternal and immutable divine general principles of the Qur’ān and the Sunnah (pbuh) while the later has its roots in the theories of legal philosophers and thinkers. This primary difference causes other secondary differences and some of them can be harmonized by way of reconciliation while others cannot.

It has been revealed that until the late of the 20th century, the canons of the interpretation were not existed at all in the legal discussion of the Western legal philosophers. The judges had to decide the cases according to their own perceptions and conjectures. Contrary to this, the Muslim judges and the jurists introduced many legal theories and framed different rules of interpretation during the early period up to the 4th century of Hijrah (7th-10th centuries).

The English-Common law system had no concept of equitable construction to put life to rigid and inflexible statutes but the principle of equity and justice was considered as the hallmark of Islāmic system of interpretation since its beginning.

Unlike English-common law system where the process to find out legislative intent is based on the literal rule of interpretation, in Islāmic legal system, this process is based on the contextual approach and the Muslim jurist is bound to consider the
context of the word. For instance, during the 20th century, the condition of both English and as well as American courts was that they were not agreed to decide the issues other than by way of strict literal meaning and in case where a statute contained a legislative innovation departing from the rigid common law, the courts not only refused to adopt any other mode but ever tried to interpret the term in its most narrow and restrictive meaning. On the other hand, the Muslim judges and jurists derived a bulk of Islamic law by way of analogy and logical reasoning and both principles are established by the Law-Giver Himself.

Until the 20th century, the academic condition of English law was so poor that teaching of the English law in the universities of UK started in late. Contrary to this, Islamic law and its theory of interpretation gained a respectable status and remained a blistering subject of the Muslim universities.

In the same manners, the Muslim judges played an important role in the development of the science of interpretation and were quite free in expressing their logical reasonings while the judges and the jurists of the Western world were not free in expressing their juristic opinions and were oppressed by the expectations of those who provided their remunerations.

The classical English judges and jurists were considered as part of different goups of intellectuals while in Islamic system of interpretation, both judges and djursts were considered from the same group and on equal basis. Further, Judges ever tried to pay great respect to the opinions of the jurists and the commentators. In English legal system, the rules of interpretation form a hierarchical order. The first is the literal rule. This rule is preceded by the golden rule. The third rule is the mischief rule which is brought in to use where there is a perceived failure of the other two rules to deliver an appropriate construction and the judges are not allowed to adopt an
appropriate meaning in the light of the changed facts while in Islamic interpretive system, the priority is given to the plain meaning of the text and in case of absurdity no such hierarchy existed and contextual and purposive interpretation is sought by a judge in the light of his logical reasoning.

In English-common law system judges are not expressly allowed to adopt a purposive approach. Contrary to it, in Islamic law, preference is given to the contextual and the purposive interpretation in the light of the public interest. Contrary to English-Common law system where judges are bound to consider precedents over a similar issue, Muslim interpreter is not bound to adopt or abide by the precedents.

Even today, the issue to restrict interpretive authority of the judges is a hot issue to debate and has been considered by the philosophers and the jurists as one of the most complicated issue and a hurdle in the way of correct interpretation and its implementation.\textsuperscript{1162} Islamic interpretive system by contrast, did not face this problem and the discretion of the judge is controlled by the limits and the bounds of Sharī‘ah.

Irrespective of the above mentioned differences, the existence of an interpretative system however, is inevitable for each legal system. The whole structure of the interpretive system whether Islamic or other depends upon two factors, the existence of an interpretative system and the presence of the judges and the jurists to interpret statutory law. A thorough study of the system of western and Islamic interpretation reveals that like English-common law and European-civil law system, the term \textit{ijtihād} is used into two senses. In narrow meaning it leads that the question of interpretation arises only in case of some ambiguity found in the meaning of the text and where the wording of the text is clear and has only one meaning the question of interpretation does not arise. In broader sense, it leads that every legal text

\textsuperscript{1162} Roscoe Pound, \textit{An Introduction to the Philosophy of Law} (London: n. p.,1953), 58.
of the Qurʾān and the Sunnah (pbuh) goes through the process of interpretation though it bears only one plain meaning. In this sense, the term *ijtihād* is similar to the contemporary English term Qasi-legislation which leads that during the process of interpretation a judge may exercise his own logical reasoning to derive an appropriate meaning of the text concerned.

Likewise, interpretation in both systems deals with the written text to find out the true intent of the legislature or law-giver. Statutes of both systems consist of different types of words such as perfect and imperfect or clear and unclear. Some of them have clear and explicit meanings and are explained according to their dictionary meaning while some of them are homonym words and have more than one meaning and an interpreter has to resort the difficulty by choosing one of them best to application to the contemporary issue.

In both systems, the primary function of the court or the jurist is to interpret law according to the legislative intent and the paramount objective of statutory interpretation is to find out the true intent of legislature. Under both systems interpretation is considered a process and a mental activity by which a judge or jurist constructs from the wording of the text, a meaning which he either believes to be that of the legislature or which he intends to attribute to it.

Both systems are based on the general principles of their constitutions. There are certain presumptions which are applied to the process of interpretation unless rebutted. Both systems are consisted of rigid and as well as flexible rules which may vary from time to time and from nation to nation and are subjects to modification and alteration according to the needs of time and people. In all legal systems, Islāmic law, European-civil law or English-common law, the sources of interpretation are divided in to two types such as primary sources and secondary sources. The problem of
determining the true intent of the legislature is a common problem among all interpretive systems Islāmic or western. Like European primitive societies which were governing under the palm-tree justice and where the legal cases were to be held in the light of their nature and inspiration at the discretion of the judges, Islāmic legal cases were to be held by the same process according to their nature and the inspiration of the moment keeping in view the fundamental general interpretive principles contained in the Qurʿān and the Sunnah (pbuh).

Like English-common law and European-civil law, Islamic system of interpretation is based on certain steps which are taken into consideration to arrive at true meaning and just decision such as to find out the relevant text, to inquire into the text, and to apply the text to the situation at hand.

Further, both systems have same presumption of interpretation that whatever a judge decides is presumed as a correct understanding of the text. In both systems, the legislative process is dependent upon the interpretation and the construction of the existing legal texts of the statutes.

Like the judges of the English and European courts of law, the Muslim jurists and the judges can differ from each other and can have contradictory opinions regarding the solution of a new case not covered directly by the explicit legal text of the Qurʿān and the Sunnah (pbuh).

Under both systems, judges have authority to modify, to alter and to abrogate disagreed interpretive rules in the light of the changed scenario and to introduce a new rule of interpretation. In both systems, the rules and the approaches followed by the courts during the process of interpretation may be divided in to four major categories such as the linguistic rules, fundamental rules, traditional rules and lastly, contemporary legal theories. Linguistic rules of both systems are based on the rules of
logic, grammar, syntax and punctuation. Fundamental rules are the primary rules of each system adopted by the earlier judges during the process of interpretation and the traditional rules are those rules which were adopted by the traditional legal jurists. Contemporary theories are those which suggest to change and to modify the existing system of interpretation in the light of the changed scenario like objective interpretation and interpretation by way of public interest.

Like Islāmic system of interpretation, the juristic interpretation was considered a source of law in Europe along with the scripts and edicts. The jurists were active in producing juristic literature for the purpose of legal development and it was their most important work.

In the same manners, the criterion of interpretation is based on the same principle of qualification such as an interpreter must be a well-qualified person with all necessary knowledge and techniques of legal studies. He must have perfect knowledge of the language of the statute, the procedure of deducing rules from the prescribed laws of the legislature, the causes and the circumstances of the enactment and objectives of the legislature behind that enactment etc. He should be able to decide the cases in the light of the circumstances and conditions of each case.

Likewise, the era between 16-20th centuries was crucial for all interpretive systems of the world. For example, English and American common law courts were confused regarding interpretive approaches and first adopted equitable rule to remove hardship created by the strict interpretation of the law and then eliminated it and established again the strict rule of literal interpretation during the 20th century. Similarly, the same era has been declared as dark period of Islāmic law and its system of interpretation due to its rigidity and blind imitation of the past juristic opinions. Moreover, the contemporary western theories of interpretation are consisted of some
attributes existed in the Islamic legal theories of interpretation and an analogical deduction can be drawn easily such as the “Theory of Models of Rules” presented by Hart is based on the presumption that a “descent legal system” consists of two types of rules, the primary and the secondary rules. The primary rules deal with the conduct of the people by declare something (conduct) permissible, prohibited and mandatory while the secondary rules deal with the detail situations and the problems arising from the realities of the life and suggest to modify the modes of interpretation to accommodate the changes of the time and the cases to apply them to the case at hand.

In this sense, the theory of Hart has certain common elements with the legal theory of Islāmic legal system. For instance, the sources of Islāmic law are of two types, the primary and the secondary sources. The primary sources are consisted of the immutable principles of the Qur’ān and the Sunnah (PBUH) and the secondary sources established by different legal theories and are subject to change and modification. In Islāmic legal system, judges or jurists are bound to follow the principles of interpretation prescribed by the Law-Giver and Hart declares such system as a “descent legal system” in which judges are bound to follow the pre-existing legal rules. Under Islāmic legal system, there are two types of legal texts such as definite and probative. The words of definitive meaning can not be assigned a different interpretation while words of probative meanings can be assigned an appropriate remote meaning in the light of the changed context to accommodate changes of time and changed needs of the people. Hart presents the same theory that in hard cases or ambiguous legal texts, the judge should not decide the problem on pure legal grounds rather he must consider extra-legal ground such as political, moral and social etc to arrive at a just and fair decision. In modern times, however,
interpretation in both systems has been declared as an institutional task and almost in every legal system the function of interpretation is performed by the courts.

Section Two

Conclusions and Recommendations

The quest for a legal theory and a general policy of interpretation has forced the legal systems of the modern world to the study of the others. The contemporary scenario is different from the old due to many reasons. Many unprecedented challenges have been appeared and almost all the nations of the modern world are equally confronting these challenges. For instance, changing in the international environment which led to the establishment of nationalism, ethnic conflicts, awareness of the fundamental rights and concept of global economy etc., pushed the contemporary states to establish a thinking to be accommodative for others irrespective of their state and religion. The most effected discipline thus, is politics of the world. At present, each state of the world tends to adopt that type of the government which ensures a representative system in the administration of justice to provide ease to people and to lesson their problems. To achieve this goal, there must be a sound and logical system of interpretation of statutes to ensure equality before law and to satisfy all the segments of a society.

Talking about the development of the science of statutory interpretation all the contemporary legal systems such as English-common law, American law, European civil law and Islāmic legal system are facing daunting challenges and suffering from
lack of clarity of thought to formulate a general theory of interpretation to overcome
the increasing problems of the people at national and international level. The reason
behind such a development is also same particularly, Islamic and English common
law both are confronting two contradictory approaches regarding statutory
interpretation.

The legal philosophers and the jurists of both systems have been divided into
two contradictory groups. Some of them insisted on exercising literal interpretation in
all cases without any concern with the consequences while other declared it as an
obsolete and dead rule and are in favour of the purposive approach to ensure public
interest which is the prime object of each legal system. The restrictive approach
holds that the judges should look primarily to the wording of the legislation in order
to construe its meaning in the light of its grammatical construction and should not
look behind it in an attempt to find out its meaning. Contrary to it, the purposive
theory of interpretation suggests that the role of the judges should not confine to the
literal meaning of the text rather it should be expanded to the objectives of the law to
find out the true intent behind an enactment.

So far as Islamic law and its contemporary system of interpretation is
concerned, it has been facing the problem as being retard and outmoded. A thorough
study of the history of Islamic law makes it clear that the intrusion of the principle of
taqlīd played an important role to make Islamic law and its system of interpretation as
static and retard. In their attempt to protect the madhhab of their Āimmah, the
disciples of the traditional Muslim jurists established a rule of discovering hukm of a
contemporary issue by way of analogy not from the texts of the Qurʾān or the Sunnah
(pbuh) but from the juristic opinions of their respective Āimmah. They restricted the
scope of ītīhād and made it confined to the issues for which no juristic opinion was
found. In searching for the solution of any contemporary issue, *ijtihād* was made connected to *qiyās* and *ijmāʿ* of the traditional Muslim jurists and other dynamics of the interpretive system were thrown away by them. Moreover, they mixed up Islamic legal system or *Sharīʿah* with Islamic law and rejected any change in the existing structure of the law established by their predecessors. The sources of their knowledge were consisted of the writings and the collections of *fatāwā* of their teachers which restricted their intellectual capacity and made them ignorant of the dynamics of Islamic law and field of its interpretation. They studied objective of *Sharīʿah* but under the umbrella of five objectives established by the traditional Muslim jurists. This resulted in sever controversies among the followers of the two most well known *madhhab*, the Ḥanafī and the Shāfiʿī.

Changing in the socio-cultural environment, awareness of the fundamental rights, efforts for a unified economy and the concept of a global political environment led the contemporary states to be accommodative for others irrespective of their state and religion to provide ease to people and to lessen their problems.

In Islamic legal system, the failure of the scholars (during the 10th A.D) in their attempt of reconciliation between the older and the modern legal development led them to declare that the door of *ijtihād* has been closed and now *taqlīd* of a particular *madhhab* is binding upon all including philosophers, scholars and common man. The ground reality was that if any of the contemporary Muslim scholars raised his voice against *taqlīd* or tried to bring changes in the traditional structure of the law, faced sever criticism by his contemporay intellectuals. Muslim jurists failed to maintain a sound relationship between law and society. This development caused to creat chaos among the Muslims and destructed the whole structure of Islāmic law and system of its interpretation. Not only is this but it has created a grave
misunderstanding among the jurists of the developed world to whom Islamic law appeared as static not dynamic.

A slight change, however, occurred during the second half of the 19th century, when some contemporary Muslim scholars declared traditional legal theories outmoded and presented some legal theories to make Islamic law accommodative and flexible. They suggested for reinterpretation and reconstruction of the legal texts of the Qur’ān and the Sunnah (pbuh) in the light of their objectives and public interest.

Looking at the political, socio-economic and religious aspects of life of the Muslim Ummah, it reveals that the Muslim population constitutes one third of the whole population of the world and almost 57 so called independent Muslim states are existed but none of them can be declared as a welfare and Islamic state rather majority of the Muslim states is governing under monarchs instead of the democracy or representative form of government as guided by the Law-Giver Himself.

Further, for economic growth and state development, the Muslim world is dependent upon the socio-economic and political policies of the developed Western world. Not only is this but the foreign policies of the Muslim states are designed under the guidance of their leaders from the developed world and this the reason that Muslim world has been failed to introduce its own independent block or economic system like European Community. None of the Muslim states is able to present itself as a representative state of Islām. Muslims are left behind in the walk of scientific research and technology irrespective of their rich heritage and resources. Ummah is suffering from many new and unprecedented cases for which they find no solution in the traditional juristic doctrines and modes of interpretation and this has made them confused and put them into doubt regarding the scope of the existing structure of Islamic law. Muslim countries are considered as third world countries and the people
are forced to rush towards the developed countries in searching of better life and money. They are facing certain problems over there such as problem of covering face for Muslim women, issue of banking interest, issue of marriage with *ahl al-Kitāb* and many more but no one knows the path which may lead to the highest ideas and policies on which Sharī‘ah is founded. By disregarding the progressive policy of Sharī‘ah, the Muslim states are running under the influence of western legal systems.

Talking about the religious intellect of the Muslim world, unfortunately, Muslim Ummah doesn’t have independent jurists. Lack of modern scientific knowledge, Immature understanding of Islamic jurisprudence and lack of expertise of Qur’anic sciences led the Muslim scholars to rely upon the past juristic opinions by way of weak analogy. All of them are attached to particular sects while non-sectarian *fiqh* is not available. For the contemporary Muslim muftīs the sources of the derivation of Islamic law are the writings and fatawa of their teachers and they are unable to interpret the relevant texts of the Qur’an independently in the light of the methodology and practices of the Holy Prophet and his companions.

The Muslims are confronting with a number of new problems for which no clear injunctions available neither in the Qur‘ān and the Sunnah nor in the work of the earlier jurists. These problems demand either modification of the existing legal rules or reinterpretation of the texts of the Qur‘ān and the Sunnah in the light of the changed context and their objectives but are being solved in static and ignorant manners. The contemporary Muslim scholars proudly declare themselves as followers of this and that religious sect and condemn contemporary legal theory and interpretive modes which are in fact based on the general principles of Sharī‘ah.

In Pakistan most of the contemporary muftīs are in favor of the binding status of the principle of *taqlīd* and are trying to save the traditional structure of Islamic law. The
problems and issues arising by the changes of time are being solved by way of amalgamation and selection of any of the juristic opinions. The imitators or *muqallidin* have no intellectual vision and are not willing to modify or to alter the existing structure of Islamic law in the light of the changed context and public interest rather proved themselves as dissociated from the changing occurred due to the changed circumstances and changed needs of the people. Muslim *muftīs* are unable to reevaluate or to re-examine the traditional methodology in the light of the changed context. Irrespective of the fact that Hadrat Umar suspended the Hadd punishment of theft due to famine, they are insisting on the implementation of Hadud in a state where more than 50% people are living below the poverty line.

In the same manners, the contemporary Muslim judges of the Higher Courts who are legally authorized to reinterpret the texts of the Qur’an and the Sunnah (PBUH) are performing their duties as ad-hoc consultants. The legal study in Pakistan can prepare a person to become a judge of English common law system rather than expertise of Qur’ānic sciences. There are hardly two or three courses Islamic jurisprudence of preliminary nature which taught at Pakistani law colleges and universities. In this way, a student of law who studies for five years remains inexpert and unskilled in the Qur’ānic sciences.

Lack of scientific understanding of the Qur’an, interpretive methodology of the Prophet (PBUH), the companions and the traditional jurists led the contemporary judges to adopt foreign interpretive rules such as literal rule, golden rule and rule of equity etc to interpret legal texts and to make the existing structure of the law flexible which is itself against the spirit and the objectives of Sharī‘ah as Islamic system of interpretation is the most commendable system of the world the ignorance of which should be condemned. For instance, in Islamic Republic Pakistan three major
institutions have authority to do independent *ijtihād* but none of them are capable to exercise independent *ijtihād* and thus, performing their functions by way of selection/*thkyīr* and amalgamation/*talfīq*.

The interpretive techniques adopted by the Supreme Court of Pakistan lead that Supreme Court has double standard. On the one hand, it claims not following any *madhhab* and claims that the term *ʿUlū-al-amr* mentioned in the Qurʾān is equally applicable to the members of the judiciary and on the other, in majority of the cases, it follows western rules of interpretation. The majority of the judges has no sound knowledge of the principles of Islamic jurisprudence and does not fulfill the pre-requisites to become a jurist in the light of the conditions prescribed for a jurist.

The issue of re-interpretation and re-construction of the legal texts of the the Qurʾān and the Sunnah has become a matter of great conflict and tension among the contemporary *muftīs* and scholars (who got scientific knowledge of Islamic jurisprudence). The *muftīs* insist on the implementation of the traditional juristic opinions and are not agreed to re-open the closed door of *ijtihād* while the intellectuals advocate liberal and contextual approaches. The fundamental difference between the two is of education and professional skill. The majority of the *muftīs* got traditional education from Madāris which could not establish in them professional skill and could not make them expertise of Islamic jurisprudence and sciences of the Qurʾān. They are unable to re-evaluate and re-examine the interpretive approaches of the traditional jurist and to compare them with the flexible approaches of the Holy prophet (pbuh) and his companions. Many of the *muftīs* cannot differentiate Islamic legal system from Islamic law rather claim that Islamic law is immutable and unalterable and has no mach with the state legislation. Contrary to it, the intellectuals got scientific education along with religious sciences and have expanded vision and
intellect. Majority of them suggest consulting interpretive techniques of the companions and the traditional jurists in the light of the changed context.

The contemporary Muslim scholars have no direct involvement in the state legislation and judicial interpretation. Further, the stagnation of Islamic law gave rise a rigorous misunderstanding among the critics of Islāmic law who considered Islāmic law as opposed to Anglo-American common law, European civil law and Roman-Canon law as lacking rigorous set of logical links among the various aspects of the overall body of the law. 1163 It is due to retard attitude of the holders of Islamic law that the Orientalists made a sharp division between the early phases (7th-11th A.D.) of the development of Islamic law and between later developments which lasts till today.

The static attitude of the followers of the traditional Muslim jurists however, is unprecedented and against the teaching of their Āimmah because the traditional Muslim jurists unanimously agreed upon the prohibition of taqlid for a jurist.

It is evident historically, that neither the Caliphs nor the four Imāms led to say that their opinions were binding for the later generations. For example, Imām Abū Ḥanīfah declared: “It is not appropriate to adopt what we opine unless one knows from where we derived it”.1164 Imām Mālik said: “I am but a human being. I may be wrong. I may be right. So first examine what I say. If it complies with the Book and the Sunnah (pbuh), then you may accept it. But if it does not comply with them then you should reject it.”1165 And Imām Ḥanbal declared: “Do not imitate me or Mālik, or Shafiʿī or al-Thawrī and derive law directly from where they themselves had derived”.1166

1163 Schacht, An Introduction to Islāmic Law, 67.
On the whole, the Muslim muftīs and the scholars are confused and confronting with two serious issues. First, they have been failed to understand the contemporary issues of the Muslim Ummah in the light of the radical changes of social, economic and political spheres and second, they are reluctant in acknowledging the fact that the past juristic opinions were for the past generations and are no more applicable to the issues of the 21st century. Some of the scholars, legal writers and the judges of the Muslim world however, consider the need of re-interpretation of the texts of the Qurʾān in the lights of modern context. They declared that the interpretive rules established by the traditional jurists became insufficient and inadequate tools as they were bearing upon the laws according to their time and circumstances of their own people. They are trying to draw the intention of the contemporary Muslim muftīs to the renaissance of the approaches adopted by the companions in the guise of the contemporary approaches.

The correct application of the policy of Sharī‘ah through rationale and purposive interpretation is necessary for the welfare of the people. One should not ignore the fact that the Qurʾān is the last guiding Book of Allāh and the prophet Muḥammad (pbuh) is His last Messenger. The present generation is equally authorized to derive law directly from the legal texts of the Qurʾān and the Sunnah in the light of their objectives and public interest as the past generations got their guidance from them in the light of the changes of their own time. The Qurʾān itself invites its believers to ponder and to draw change legal rules to provide ease to people and to remove hardship from them. It is this reason that the majority of the legal texts of the Qurʾān consists of imperfect words which can be interpreted in different manners and meanings in the light of the changed circumstances and changed needs of the people. God has prescribed only some general principles regarding politics,
administrative issues, social structure, and economic policy of a Muslim state while the detailed issues are left at the discretion of the government to decide through the principle of consultation.

The declaration for closing the door of *ijtihād* was based on the attempt to secure Islamic law from foreign intrusion and to provide a uniform structure of law to the whole Ummah resident at different places, societies and states of different cultures, this assumption however, itself a wrong and unnatural concept because law is derived through interpretation in the light of the cultural and customary context of a society and can be different from time to time and from society to society.

Hence, this research suggests to go back to the past legacy of the Muslims to the Qur’ān, the Sunnah (pbuh), the practices of the companions and as well as of the traditional Muslim jurists to re-evaluate them in the light of the changed context. It is obligatory for the contemporary Muslim *muftīs* and the intellectuals to examine how their predecessor were conscious of the contemporary problems of the people and held them with flexible interpretation.

It is also necessary that *ijtihād* should be exercised as a collective duty in each Muslim state. For this, the contemporary Muslim legislative bodies must consist of well-educated and well-acquainted people of Islamic legal theories and the requisites of *ijtihād*. Not only is this but they should be well-informed with all modern sciences including social, economic and psychological needs of the Muslims. They must be open-minded to accept the changed conditions and to reconstruct the legal texts of the Qur’ān and the Sunnah in the light of their objectives and public interest.

It is necessary for the courts working in the Muslim states to review their interpretive techniques in the light of the Islamic techniques of interpretation. The
literal ruel, golden rule and the mischief rule have no worth if we compare them with the contextual rule, public interest and *ijtihād al-maqāsidī*.

Likewise, judges of the Supreme Court of Pakistan, Council of Islamic Ideology and Federal Shari‘ah Court should get scientific knowledge of Islamic jurisprudence and sciences of the Qur‘ān along with western legal knowledge to be able to re-interpret the legal texts of the Qur‘ān and Sunnah in the light of the contextual and purposive approaches rather than by way of *takhyyīr* and *tafṣīq*.

In the same manners, foreign laws and legal theories should be re-examined in the light of the objectives of Shari‘ah to recognize them Islamic. Islamic legal system does not feel hesitation to adopt the most effective prevailing technique to solve the contemporary issues of the Ummah. The best example is the charter of Medīna which was consisted of both national and international laws and framed by the order of the prophet to administer justice in the presence of the divine revelation.

Further, in Pakistan, the authority of issuing fatwa should be restricted by way of legislation and only legislative body (well versed in Qur‘ānic sciences and Islamic jurisprudence) should be given authority to issue fatwa to resolve the contemporary issues. In the madaris, the Qur‘ānic sciences should be taught scientifically with the help of the Sunnah of the Prophet (PBUH) Āthār, traditional and the contemporary *tafāsīr* in the light of the changed context and public interest.

In order to promote reconciliation and exchange of views, the study at madāris should not be confined to the study of the particular imam and his theories rather theories of the companions, the traditional and contemporary Muslims jurists should be taught in a comparative manner. The students at madāris should be taught verses which motivate to explore the nature and the science. The scientific nature of the Qur’an can be judged by estimating that only 250 verses are relevant to the legal
issues while 750 verses which constitute 1/8th of the total Qur’ān motivate them to use their logic, to ponder and to explore the nature. It is also necessary that the minimum level of required education to become a muftī should be enhanced from primary/ middle to at least graduate level because the Qur’ānic sciences are not easy to understand and only a person of scientific understanding can understand them correctly.

It is also suggested that the contemporary Muslim muftīs should recognize the constructive role of the customary laws and should avoid declaring them prohibited without its investigation in the light of the objectives of Sharī‘ah and public interest. Well-known customs of society should not be ignored by them for public interest.

It is also suggested that the problems of the modern period should be solved by way of flexible approaches and in the light of the objectives of the texts. The contemporary interpretive methodology should be based on the general principles of Sharī‘ah and interpretive methodologies of the prophet (PBUH) and his companions such as contextual rule, public interest, rule of logical reasoning and *ijtihad al-Maqasidi* etc. Moreover, the modern interpretive theories introduced by the Muslim jurists of the last century such as sociological approach, rationale theory and theory of limits are of great value and capable to reinterpret Qur’anic legal texts law in accordance with the objectives of Sharī‘ah.

It is suggested that each Muslim legislative or interpretive body must have two factors in his mind that the Qur’ān is a revealed and divine code and cannot be compared with any constitutional code of positive law and secondly, that Islāmic law and Sharī‘ah are different from each other in the sense that Sharī‘ah means legal system consists of immutable general principles of the Qur’ān and the Sunnah (pbuh).
while Islāmic law is a result of the legislation and interpretation derived through logical reasoning and is subject to change and abrogation.

It is also necessary that the traditional interpretation of the Qurʾān must not be taken as binding upon the modern Muslim societies. Each Muslim state must train and educate the expertise from each segment of the society such as science and technology, medicine and surgery, engineering and social sciences as independent Muslim jurists to solve the contemporary issues of their relevant fields.

To establish a coherent interpretive policy of the Qurʾānic texts, Fiqh Academy of OIC can play a significant role regarding two aspects. Firstly, by making getting scientific knowledge of social sciences compulsory for all the religious scholars and muftīs who want to issue fatāwā and secondly, by making them bound to re-interpret the legal texts of the Qurʾān and the Sunnah in the light of their objectives and public interest. The role of the Muslim states and scholars in this respect should be progressive not rigid.

It is also suggested that there is need to establish some general interpretive principles acceptable by all the legal systems of the world and applicable to all types of the law. In this context it is duty of the Muslim jurists and the judges to frame certain general interpretive principles based on the foundational principles of the Qurʾān and the Sunnah (PBUH). The sole purpose of the interpretive activity should be to make Islamic law compatible and accommodative to the needs of the society to meet the challenges of the changed period. To achieve this target, the judges and the jurists of all the legal systems must study and utilize contextual and purposive approaches in order to establish a harmonized legal theory of interpretation. It is unavoidable both for Muslim jurists and contemporary English philosophers and
judges to understand the changed scenario and to reconstruct the existing laws to cope with the challenges of the world.

May God guide us to the right path? If there is some mistake it is mistake of my understanding. God knows best.

Further Research

The researcher tried her best to do a comprehensive research regarding the topic and tried to provide a useful work. However, further research is suggested regarding the scope of the contemporary legal theories whether these theories can replace the traditional modes to re-interpret the Qur’ānic legal texts in the light of the changed context?

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