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FOUNDATIONS AND PRINCIPLES: AN INTRODUCTION TO ISLAMIC JURISPRUDENCE & A BRIEF COMPARISON TO AMERICAN JURISPRUDENCE

Zacky H. Sungkar[1]

INTRODUCTION

The concept of law and jurisprudence amongst humans in society has undergone countless cycles of definition, development, and reconstruction through the centuries. Beyond human interaction and societal function, the inquiry of legal origin and foundation is existential in nature. What is law? What is its fundamental purpose? From where does its roots derive? To whom does it apply? These are questions contemplated by legal philosophers for millennia. The foundations of Islamic law originated over 1,400 years ago and its systems of jurisprudence have remained prevalent and applicable ever since. This paper provides a background understanding of the comprehensive foundations, principles, and methodologies of Islamic jurisprudence and sheds light on core similarities and differences as compared to the American legal system. Although they differ on the nature of their respective supreme texts, the overall scope to which their laws apply, and the explicit role of a judge, both Islamic and American principles of jurisprudence share common ground in their reference to natural law, emphasis on justice and fairness, preferential hierarchy of legal proofs, and methods of constitutional interpretation.

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Part I serves to establish a rudimentary understanding of the major concepts, themes, and tools of Islamic jurisprudence that will be revisited and further established throughout the entirety of this paper. Part II provides insight on the goals and principles of Islamic jurisprudence through an analysis of the essence of Islamic natural law in relation to the application of Islamic positive law. Part III explains the adjudicatory framework of Islamic jurisprudence. Part IV provides a brief side-by-side comparison of core similarities and differences between Islamic and American principles of jurisprudence.

I. BASIC PILLARS OF ISLAMIC LAW AND JURISPRUDENCE

Islamic law's main primary concern is to protect the values of its religion and faith in one God, but it is also primarily concerned with establishing justice amongst mankind in its pursuit of life, religion, property, intellect, and family.[2] The principles and science of Islamic law, although its own independent field of study, requires a foundation in various academic disciplines such as, but not limited to, scholastic theology, Aristotelian logic, the classical sciences of the Quran and Sunnah, and the Arabic language.[3] Scholastic theology refers to the philosophical foundations regarding the origin and distinction of what is right versus wrong. Aristotelian logic is a form of reasoning that distinguishes the meaning and systematizes the interpretation of words.[4] The classical science of the Quran and Sunnah establishes the 'chain of narration'[5] from its ultimate divine source to humankind and the Arabic language is their language of origin.[6]

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[2] MOHAMMAD HASHIM KAMALI, SHARI'AH LAW 2-3 (Oneworld Publications 2008).
[3] FURHAN ZUBAIRI, INTRODUCTION TO USUL AL-FIQH 4-5 (Institute of Knowledge 2019).
[4] *Id.* at 5.
[5] *See infra* 8.
[6] ZUBAIRI, *supra* note 3, at 5.

The Arabic term for "Islamic law" is *fiqh*. In a literal sense, *fiqh* is translated as "to understand and to comprehend;" however, the more refined and technical definition is "the knowledge of practical legal rulings derived from their detailed evidences."[7] Although shari'ah is often used to refer to Islamic law, this is improper for our purposes because *shari'ah* is more general and inclusive of both spiritual beliefs and actions as revealed by God in the Quran and Sunnah; whereas, *fiqh* refers to the understanding of such law as interpreted and derived by legal experts.[8] Furthermore, *usul al-fiq*h is the science concerning the foundation and origination upon which the law is derived.[9] In other words, *fiqh* refers to the law and its rules as understood by legal experts, while *usul al-fiqh* is its theory of jurisprudence, and *shari'ah* is an umbrella of fundamental religious concepts in Islam as pronounced by God.

The Quran and Sunnah are the sources of Islamic law. In a basic sense, the Quran is the divine speech of Allah as revealed to the Prophet Muhammad[10], may peace and blessings be upon him ("pbuh"), and the Sunnah refers to the statements, actions and approvals made by the Prophet Muhammad (pbuh).[11] Allah is the Arabic word for "God" in the context of monotheism, being the one and only deity, and the Prophet Muhammad (pbuh) is Allah's final prophet and messenger to mankind. This relationship is illustrated in the Quran[12], where Allah says, "O Messenger! Convey everything revealed to you from your Lord. If you do not, then you have not delivered His message."[13] In Islamic legal tradition, the 'Lawgiver' refers to Allah; therefore, the Prophet Muhammad (pbuh) effectively acted as an agent of Allah, and his Sunnah effectively endorsed by

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[7] *Id.* at 2.
[8] *Id.* at 3.
[9] *Id.*
[10] FURHAN ZUBAIRI, INTRODUCTION TO THE SCIENCES OF THE QURAN XVII (Institute of Knowledge 2017).
[11] ZUBAIRI, *supra* note 3, at 53.
[12] *Quran* 5:67.
[13] MUSTAFA KHATTAB, THE CLEAR QURAN: A THEMATIC ENGLISH TRANSLATION 64 (Abu-Eesa Webb, Aaron Wannamaker & Hisham Sharif eds., Book of Signs Foundation 2016).

Allah. A brief overview of the history of Islamic jurisprudence from its inception through its development into modern times will establish further understanding of the concepts outlined above.

A. History & Development

The foundation of Islamic law and the methodology for jurisprudence were primarily developed over four eras between circa 610 C.E.[14] and 1,000 C.E.[15] Beyond these years, and through its established principles and tools of jurisprudence, Islamic law has been able to develop and prosper into modern times. Prefacing history and tracking development is crucial in order to establish the authenticity and foundation of Islam's primary legal authorities: Quran, Sunnah, *Ijma'* ("Consensus"), and *Qiyas* ("Analogical Reasoning"). The origin of Islamic jurisprudence begins at the start of Muhammad's (pbuh) prophecy.

1. Era of the Prophet Muhammad (PBUH): 610 C.E. - 632 C.E.

The beginning of the era of the Prophet Muhammad (pbuh) is marked by the first instance of Quranic revelation to the Prophet (pbuh) and ends at his time of death. This divine legislation by Allah was not revealed to the Prophet Muhammad (pbuh) all at once; rather, it was revealed over the 23-year[16] span of his prophethood.[17] The first 13 years instilled belief in monotheism, prophethood, the afterlife, and concepts of morality, ethics, justice, and fairness as well as

[14] *Id.* at 7.
[15] *Id.* at 17.
[16] The Islamic tradition is based on the Hijri calendar, which begins with the year of Prophet Muhammad's migration from Mecca to Medina. Since the Hijri calendar follows a lunar calendar schedule, the Hijri calendar years are shorter than Gregorian calendar years; thus, the Era of Prophet Muhammad (pbuh) spanned over 23 Hijri years and about 22 Gregorian years.
[17] *Id.* at 8.

character values such as excellence, gratitude, honesty, modesty, humility, patience, forbearance, and integrity.[18] The following 10 years aimed to reform private and societal human conduct through legal rulings governing acts of worship, transactions, crimes, family, and politics.[19] This method of progressive and prudent revelation embodies one of the miracles and wisdoms of the Quran's revelation, whereby Allah steadily established belief in the hearts of mankind before instructing reform in their actions and behaviors.[20]

The Quran was not compiled into a book until the following era; however, the Quranic chapters and verses were recorded in its entirety by memory through recitation.[21] Likewise, the Sunnah was not officially compiled, but was recorded through personal notes and collections by the Prophet's (pbuh) Companions.

2. Era of the Caliphs: 632 C.E. - circa[22] 660 C.E.

The era of the Caliphs begins after the death of the Prophet Muhammad pbuh). The caliphs were individuals known to be the best and highest ranked of Prophet Muhammad's (pbuh) Companions due to their unwavering devotion to the Prophet (pbuh) and his divine message, Islam. This era faced the issue of adjudication in the absence of the Prophet Muhammad (pbuh) and necessitated the development of new legal methodologies: *Ijma'* ("Consensus") and *Ijtihad*.[23] Specifically, *'ijtihad'* refers to the "the effort made in order to derive law, which is not self-evident,

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 10.
[22] The Islamic tradition is based on the Hijri calendar, which begins with the year of Prophet Muhammad's migration from Mecca to Medina. Since the Hijri calendar follows a lunar calendar schedule, the Hijri calendar years are shorter than Gregorian calendar years; thus, most Gregorian dates in this paper are approximate.
[23] *Id.* at 10.

from its sources,"[24] and is based on '*ra'y*', which is simply defined as one's personal opinion based on core Islamic legal values.[25] This inherent evolution was required as Islam expanded and the Companions began to face issues and situations that were not addressed during the life of the Prophet Muhammad (pbuh).[26]

The new methodologies were built atop the foundation of the Quran and Sunnah. The most beloved of the caliphs to the Prophet Muhammad (pbuh), known as Abu Bakr, outlined the approach to adjudication in an authentic narration summarized by Maymun ibn Mahran:[27]

> Whenever a dispute was referred to him, Abu Bakr used to look in the Quran; if he found something according to which he could pass a judgment, he did so. If he could not find a solution in the Quran, but remembered some relevant aspect of the Prophet's Sunnah, he would judge according to that. If he could find nothing in the Sunnah, he would go and say to the Muslims: 'Such and such a dispute has been referred to me. Do any of you know anything in the Prophet's Sunnah according to which judgment may be passed?' IF someone was able to answer his question and provide relevant information, Abu Bakr would say: 'Praise be to Allah Who has enabled some of us to remember what they have learnt from our Prophet.' If he could not find any solution in the Sunnah, then he would gather the leaders and elite of the Companions and consult with them. If they agreed on the matter then he passed judgment on that basis. If none of the above resulted in a satisfactory answer he would then do *ijtihad* and form his own opinion. When Abu Bakr would form his own opinion he would say, 'This is my opinion. If it is correct then it is from Allah and if it is wrong then it is from me and I seek forgiveness from Allah.'[28]

In fact, this framework was approved as Sunnah during the life of the Prophet Muhammad (pbuh) when he sent one of his Companions to a distant land to serve as an Islamic ambassador.[29] As a part of the Sunnah, this method of adjudication becomes law and establishes in ranking order the Quran, Sunnah, Consensus and *Ra'y* ("Personal Opinion") as the four primary sources of Islamic law at the time. However, there was a split in the caliphs' attitudes towards the use of Personal

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[24] *Id.* at 3.
[25] *Id.* at 12.
[26] *Id.*
[27] *Id.* at 11.
[28] *Id.* quoting al-Jawzi, *'Alam al-Muwaqq'in* 1:65.
[29] *Id.*

Opinion as law: those who applied it frequently, and those who applied it sparingly.[30] Thus, establishing the first two distinct legal methodologies, or schools of thought, that emerges in the third era known as the School of *Hadith*[31] (i.e., traditionalism) and the School of *Ra'y* (i.e., rationalism).[32]

During the era of the caliphs, the Quran was compiled into a single book and distribution of copies began throughout the Muslim world; still, the Sunnah was not formally compiled and codified until the following era.[33]

3. Era of the Companions and Successors: circa 660 C.E. - circa 816 C.E.

The era of the Companions begins after the death of the last Caliph of Prophet Muhammad's (pbuh) time. By then, Islam and Muslim society had progressed far beyond its original regions, and this expansion to foreign lands created an urgent need for Muslim ambassadors to migrate to new places to teach Islam.[34] There were many factors that catalyzed this development of Islamic legislation. First, the spread to foreign lands required the Islamic legal analysis of new cultural customs and traditions, as well as different societal and economical practices, which effectively widened the scope and application of Islamic law.[35] Secondly, the education, compilation, and narration of the Sunnah by the Companions grew exponentially, which facilitated the application of the Islamic legal framework established by the Caliphs in the previous era.[36] Third, as prefaced above, the dawn of the traditionalist and rationalist schools of thought

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[30] *Id.* at 12.
[31] *Hadith* refers to the collection of Sunnah.
[32] *Id.* at 13.
[33] *Id.*
[34] *Id.* at 14.
[35] *Id.*
[36] *Id.* at 15.

demanded further development and application through expanding societies and emerging issues.[37] Traditionalists held tight to the blackletter law and cautioned against affecting their own opinions in order to avoid contradicting the text of the Quran and Sunnah;[38] whereas rationalists felt the responsibility to extract deeper intended meanings and wisdoms behind the text of the Quran and Sunnah.[39]

4. Era of the Expert Jurists: circa 816 C.E. - circa 1058 C.E.

The fourth primary era in the development of Islamic jurisprudence is known for the foundational establishment of the four formal juristic methodologies of extracting rules from the Quran and Sunnah.[40] The four prominent legal schools of thought–Hanafi, Maliki, Shafi'i and Hanbali–are named after their respective Expert Jurists and have left an immeasurable footprint in the Islamic legal framework as studied and applied today.[41] Each school of thought had their own jurists who formulated a distinct set of principles and methodology for textual interpretation and extraction of legal rulings.[42]

The fourth era is also known as the Golden Era of Islamic legal tradition for its wide-spread growth and refinement; additionally, this era is known as the Era of Codification because the Sunnah was gathered into books and, with Islamic law, was taught and studied as formal academic disciplines.[43] It was throughout this era that the Sunnah was compiled, organized, and preserved to be passed down for generations,[44] which has enabled the Prophet Muhammad's teachings (pbuh)

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 16.
[40] *Id.* at 17.
[41] *Id.* at 19.
[42] *Id.* at 18.
[43] *Id.* at 17.
[44] *Id.* at 18.

to be analyzed, studied, and annotated by scholars and universities through present-time.[45] With the codification of the Quran and Sunnah, and the establishment of the four primary sources of Islamic law, the foundation and principles of Islamic jurisprudence have set the stage for widespread application and further developed into modern times.

B. Foundational Concepts and Premises

1. Tools of Jurisprudence

As briefed above, *usul al-fiqh* refers to the rules and principles concerning the foundation and origination upon which law is derived.[46] The Quran eloquently provides the methodology and hierarchy regarding the order of authorities as applied to Islamic jurisprudence:[47]

> O believers! Obey God[48] and obey the Messenger[49] and those in authority among you.[50] Should you disagree on anything, then refer it to God and His Messenger,[51] if you 'truly' believe in God and the Last Day. This is the best and fairest resolution.[52]

Thus, *usul al-fiqh* is the framework used by a *mujtahid*[53] to extract practical rulings from the four primary sources in Islamic jurisprudence: Quran, Sunnah, Consensus, and Analogical Reasoning.[54]

The chain of narration ("*isnad*") is the methodology of authentication and preservation of *Hadith* ("compiled Sunnah") implemented since the era of Prophet Muhammad (pbuh).[55] The

[45] *Id.* at 19.
[46] *Id.* at 3.
[47] *Quran* 4:59.
[48] Follow guidance of the Quran.
[49] Follow teachings of the Sunnah.
[50] Seek consensus amongst the Caliphs and Companions.
[51] Apply analogical reasoning based on the Quran and Sunnah.
[52] KHATTAB, *supra* note 13, at 48.
[53] A jurist who exercises *ijtihad*.
[54] ZUBAIRI, *supra* note 3, at 43.
[55] FURHAN ZUBAIRI, INTRODUCTION TO HADITH STUDIES 45 (Institute of Knowledge 2019).

system of *isnad* ensures that the words and actions of the Prophet Muhammad (pbuh) were correctly and accurately passed down from teacher to student.[56] Essentially, *isnad* verifies the authenticity of reports made from the Companions and their successors, as passed down to subsequent generations.[57] Appropriately, there is an entire field of studies dedicated towards the study of reliability from generation to generation, beginning from the era of Prophet Muhammad and continuing through present day.[58] Students in the field of *isnad* study the biographies of narrators and evaluate their individual level of uprightness and reliability in reference to "moral integrity, accuracy, and verifiable transmission."[59] Abdalla ibn al-Mubarak, who was a prominent scholar and considered an expert in Hadith during the era of Companions and Successors, referred to *isnad* as "an intrinsic part of [Islam]" that upholds the sanctity, historic authenticity and veracity of Islamic jurisprudence and theology.[60]

Secondary sources may provide meaningful persuasive value through juristic preference[61], public interest, presumption of continuity[62], custom, opinion of a Companion[63], laws of those before us[64], and blocking the means;[65] however, these sources are only consulted if the basis for such rulings cannot be found in the primary sources and must never contradict the primary-source law.[66] Another classification of legal evidence is the distinction between transmitted and rational

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Considering one ruling more preferable over another on the same issue.
[62] Maintenance of legal status quo until change becomes necessary.
[63] Opinions of the Companions were compiled, narrated, and passed down for generations similar to the Sunnah. These opinions are not endorsed by Allah like the Prophet Muhammad's (pbuh) but may carry significant weight as precedent where no direct answer can be found from the primary sources and if relevant to the issues and facts at hand. An example is found in the quoted narration of Abu Bakr *see supra* 6.
[64] The body of rules ordained to the prophetic nations preceding Islam in monotheistic tradition, such as Christianity and Judaism.
[65] Forbidding the means to what is already established as forbidden.
[66] ZUBAIRI, *supra* note 3, at 44.

proofs.[67] Transmitted proofs are independent of rational justification and are treated as self-evidenced principles that do not require demonstration of validity for authoritative purposes, whereas rational proofs must fit with the former to have authoritative value.[68] To clarify, rational proofs must be derived from rulings established within the transmitted proofs, such as the Quran, Sunnah, and Consensus.

Evidence of legal sources can also be categorized as definitive or speculative pertaining to authenticity and/or meaning.[69] Such evidence is only esteemed as definitive proof if it is considered definitive in both authenticity and meaning; on the contrary, proof is speculative if found speculative in either authenticity, meaning, or both.[70] This delineation establishes a foundation for exercising the concept of juristic preference mentioned above. For example, a jurist will overrule precedent ruling that was based on evidence that is definitive in meaning but speculative in authenticity, for a prevailing rule that is based on evidence that is definitive in both meaning and authenticity.

2. Characteristics of Legal Rulings

There are four elements to every legal ruling in Islam: first, there is the divine Legislator, Lawgiver, or ultimate source from which the law originates (i.e., Allah, the Quran, and Sunnah); second, is the act or object upon which the law applies; third, is the subject for whom the law is given; and fourth, is the actual law itself.[71] For example, Allah says in the Quran,[72] "O believers!

[67] *Id.* at 45.
[68] *Id.*
[69] *Id.* at 44.
[70] *Id.*
[71] *Id.* at 24.
[72] *Quran* 5:1.

Honor your obligations."[73] Here, Allah is the Lawgiver speaking through the Quran, contractual obligation is the object upon which the law applies, Muslims are the subjects to whom the law is given, and fulfillment of contractual obligations is the actual law itself. The actual law itself, known as the *hukm*, is more technically defined by scholars as "God's address[74] in relation to the acts[75] of the legally responsible[76] through a command,[77] option,[78] or declaration.[79]"[80] Such laws can be distinguished into two categories as either defining or declaratory.[81]

a. Defining Law

Defining law establishes the boundaries of an individual's freedom of action.[82] What can an individual do? What must an individual abstain from doing? What should an individual do? What should an individual avoid doing? What does an individual have free choice to do? These are all questions that defining laws address. In technical terms, it is "a communication from Allah that commands the accountable person to do something, or forbids them from doing something, or gives them the option between the two;"[83] thus, all defining laws can be broadly understood as one of five legal values that govern human behavior: obligatory, recommended, prohibited, disliked, or permissible.[84]

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[73] KHATTAB, *supra* note 13, at 58.
[74] Quranic verse or Sunnah.
[75] Directive from God.
[76] Concerned with the conduct of human beings.
[77] Obligation, prohibition, recommendation, or dislike.
[78] Expressed as with freedom of choice.
[79] Expressed as a thing to be a cause, condition, impediment; or an action as valid or invalid.
[80] ZUBAIRI, *supra* note 3, at 24.
[81] *Id.* at 27.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 23.

Obligatory acts that are those "the Lawgiver commands an [accountable person] to do in certain and binding terms."[85] Examples of obligatory law include establishing the daily prayers,[86] fulfilling valid contractual agreements,[87] and paying the annual alms tax.[88] Compared to obligatory laws, recommended laws are similar except that they are formatted in non-binding terms that are associated with religious practices,[89] which typically manifests one or few of the character values mentioned above.[90]

Prohibitory acts are those that have been "prohibited by the Lawgiver in certain and binding terms," and must be derived from definitive proofs.[91] Prohibitive laws that are binding in terms but derived from speculative proofs are considered prohibitively disliked;[92] moreover, prohibitive laws that are presented in non-binding terms are acts that are considered to be disliked and discouraged.[93] Terms are distinguished and understood as binding or non-binding from syntax, context, grammar, or external evidence.[94] In other words, binding laws are express and definitive. Examples of prohibitive law include dealing with financial interest,[95] committing murder or theft,[96] consuming intoxicants,[97] making false accusations[98] or oaths,[99] and engaging in unlawful intercourse.[100] Incidentally, the distinction between laws that are prohibitive from those that are

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[85] *Id.* at 29.
[86] *Quran* 2:42.
[87] *Id.* at 5:1.
[88] *Id.* at 2:110.
[89] ZUBAIRI, *supra* note 3, at 30.
[90] *E.g.*, excellence, gratitude, honesty, modesty, humility, patience, forbearance, and integrity; *see supra* 4
[91] ZUBAIRI, *supra* note 3, at 32.
[92] *Id.* at 34.
[93] *Id.* at 33.
[94] *Id.*
[95] *Quran* 2:275.
[96] *Id.* at 4:29.
[97] *Id.* at 5:90.
[98] *Id.* at 24:4.
[99] *Id.* at 3:77.
[100] *Id.* at 17:32.

disliked are typically clear and unambiguous. An example can be found in the narration of Prophet Muhammad (pbuh) saying, "Truly Allah has prohibited the disobedience of mothers, burying daughters alive, and withholding while asking. And He has disliked three things for you: vain talk about others, excessive pointless questioning, and wasting wealth."[101] This hadith[102] provides a clear illustration of distinguishing prohibitive laws from disliked laws through syntax.

Permissible acts are those where the Lawgiver is silent. Any act that the Lawgiver has neither commanded nor prohibited is considered permissible and left to mankind's freedom of choice.[103] Permissible acts are those which are neutral in manifesting core character values; thus, there is no reward and no punishment for its action. However, they can be considered an act of worship that is deserving of reward if done with pure intention or liable of punishment and blame if done with evil intention.[104] This concept of religious reward and punishment is reflected in the other categories of legal value as well. Accordingly, obligatory acts are rewardable for their fulfillment and punishable for their neglect, whereas prohibitory acts are punishable for their action, and rewardable for their abstention. Comparably, recommended acts are rewardable for their fulfillment but are not blameworthy for their neglect, and disliked acts are rewardable for their abstention but not blameworthy for their defiance. In this regard, prohibitively disliked acts fall within the fold of prohibited acts.[105]

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[101] ZUBAIRI, *supra* note 3, at 44, quoting *Sahih al-Bukhari* 2408.
[102] Narration of Sunnah
[103] ZUBAIRI, *supra* note 3, at 34.
[104] *Id.*
[105] *Id.*

b. Declaratory Law

Declaratory law is "a communication from [the Lawgiver] that enacts something into a cause, condition, or a hindrance to something else"[106] and serves as a law that is explanatory of meaning and of any relationships shared among defining laws.[107] Declaratory laws can be classified in three ways: first, as a cause, a precondition, or a hindrance; second, as valid or null; or third, as an original law or a concession.[108]

The first classification of a declaratory law identifies between cause, precondition, or hindrance. The Arabic word used for 'a legal cause' is '*sabab'* and is defined as "the incident whose existence is the prerequisite for the existence of the ruling and its absence is an indication of the absence of the ruling."[109] In other words, a legal cause is the basis of which a rule is established, and the relevant inquiry is whether or not the cause exists in order for the ruling to be applied. For example, a contract is the cause of a duty, and a sale is the cause of ownership; hence, without the existence of a contract there is no duty and without the transaction of a sale there is no ownership. Moreover, the Arabic word for 'a legal precondition' is '*shart'* and is defined as "something that is needed for the ruling or act to exist, but its presence does not necessarily mean the ruling or act will exist."[110] Here, the relevant inquiry is whether the precondition exists in order for a ruling to be in effect. For example, a contract must be valid in order for it to be enforced, and a couple must be married in order for a spouse to claim divorce rights. Finally, the Arabic word for 'a legal hindrance' is '*mani'* and is defined as "something whose existence necessitates the absence of the [legal ruling] or nullifies the cause of the [legal ruling]."[111] The inquiry here is

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[106] *Id.* at 28.
[107] *Id.* at 35.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 36.
[111] *Id.*

whether a condition exists that prevents a legal ruling from being applied. For example, doubt in criminal cases for prescribed punishments[112] and a difference in religion between the heir-at-law and the decedent in property cases.[113] In such cases, the slightest amount of doubt is enough to prevent a prescribed punishment from being carried out, and the difference in religion between heir-at-law and decedent excludes the heir from his or her right to inheritance.[114]

The second classification of a declaratory law evaluates legal consideration by establishing an act as valid or null based on preconditions prescribed by the Lawgiver through the Quran or Sunnah.[115] An act is valid when it satisfies all of its preconditions; oppositely, an act is null when at least one of its preconditions are left unfulfilled.[116] For example, an offer met with acceptance between two sane adults may become a valid contract; however, if the offeree does not accept the proposed terms, then the contract becomes invalid. Furthermore, a contract can either be valid or invalid; thus, only a valid contract warrants a legal claim of obligation, whereas an invalid contract nullifies any claim.[117]

The third classification of a declaratory law distinguishes between original law and concession. Original law is the law as prescribed by the Lawgiver through the Quran and Sunnah, and a concession is an exemption from the original law that arises due to a valid cause.[118] There are three types of concession that are excused due to hardship, duress, or necessity. The first type of concession permits a prohibited act out of necessity or when faced with undue hardship; the second permits neglecting an obligatory act due to difficulty; and the third permits contractual

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[112] Punishments prescribed within the Quran and Sunnah for crimes such as adultery, theft, murder, etc.
[113] *Id.* at 37.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 38.

agreements that are typically impermissible based on necessity or custom.[119] For example of the first type of concession, dealing with financial interest is prohibited in Islam; however, modern Islamic jurists in the United States allow the use of interest for first-time home-buyers because its prohibition, under this circumstance, would create an undue hardship on Muslim U.S. residents who are looking to purchase a home to establish their livelihood.[120] As an example of the second type of concession, Muslims who are traveling or are ill are excused from fasting during the month of Ramadan due to the difficulty it may cause them, regardless of the act's obligatory legal value. Finally, to illustrate the third type of concession, Islam originally prohibits contracting the sale of goods that are not already at hand or in existence; hence, the advanced sale of manufactured goods was not allowed.[121] However, this practice became allowable through concession due to its necessity as customary business practice.

II. OVERARCHING GOALS AND PRINCIPLES OF ISLAMIC LAW

A. Foundation of Natural Law

Natural law is a system of rights and moral principles that is held in common as the basis of all human conduct. Throughout history, philosophers have shared their various opinions on the origin of natural law. Not surprisingly, the monotheistic traditions adopt their natural law from a divine Lawmaker[122]; accordingly, Islam's natural law is rooted in the Quran and Sunnah.

1. The Quran

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[119] *Id.*

[120] ASSEMBLY OF MUSLIM JURISTS OF AMERICA, AMJA RESIDENT FATWA COMMITTEE RESOLUTION ABOUT ISLAMIC HOME FINANCING COMPANIES IN THE US (2014), https://www.amjaonline.org/amja-resident-fatwa-committee-resolution-about-islamic-home-financing-companies-in-the-us/.

[121] *Id.* at 38.

[122] *E.g.*, through the Torah, Bible, or Quran.

The clearest and most concise description of the Quran is agreed upon by scholars as "the inimitable Arabic speech of Allah that He revealed to Muhammad (pbuh) through the Angel [Gabriel], which has been preserved in [writing], and has reached us by [successive] transmission."[123]As mentioned in the Quran,[124] "[t]his message cannot be a fabrication, rather it is a confirmation of previous revelation,[125] a detailed explanation of all things, a guide, and a mercy for people of faith;"[126] thus, the Quran is understood to be a divine book of eternal guidance and reform for humanity, and is the primary source of Islamic faith and tradition. The contents of the Quran can be separated into four topics: beliefs, history, parables, and law.[127] Each verse and chapter of the Quran aims toward one, or both, of two objectives: to enlighten mankind on the absolute truths and realities of this life and its dimensions, and to codify the rules and regulations that govern mankind.[128] The former establishes the Islamic system of beliefs through explaining the relationship between creation and its Creator; whereas the latter details the Islamic system of morality, ethics, and law through individual, familial, societal, economical, and political aspects of life.

The legal verses in the Quran are of two categories: religious matters that govern the relationship between creation and its Creator, or transactional matters that govern the relationships between humans and humanity.[129] The laws governing transactional matters envelop the legal

[123] *Id.* at 48.
[124] *Quran* 12:111.
[125] Referring to the Torah and the Bible.
[126] KHATTAB, *supra* note 13, at 132.
[127] ZUBAIRI, *supra* note 3, at 51.
[128] *Id.*
[129] *Id.* at 52.

fields pertaining to familial,[130] commercial,[131] criminal[132], civil,[133] and political[134] matters.[135] In addition to a legal code, the Quran also provides moral and ethical guidance complete with verses that promote individual values such as kindness,[136] generosity,[137] compassion,[138] patience,[139] forgiveness,[140] forbearance,[141] and much more.

2. The Sunnah

As mentioned above,[142] the Sunnah refers to any statements, actions, or implied approvals made by Prophet Muhammad during his lifetime that were captured and described within narrations and reports from his Companions known as *hadith*. Furthermore, the Sunnah provides practical ways of implementing the general teachings outlined in the Quran. Specifically, regarding legal rulings, the Sunnah confirms, reiterates, explains, and clarifies the legal verses of the Quran, and also establishes rulings that are not expressly written in the Quran.[143]

Islamic law and belief would be incomplete without the Sunnah of the Prophet Muhammad (pbuh). Correspondingly, Imam Abu Hanifah[144] is reported to have said, "Had it not been for the Sunnah, none of us would have understood the Quran," and Imam al-Shafi'i[145] is reported to have

[130] *E.g.*, marriage, divorce, parental rights, and inheritance.
[131] *E.g.*, contracts, sales, leases, and loans.
[132] *E.g.*, murder, robbery, theft, intoxication, adultery, and slander.
[133] *E.g.*, justice, equality, evidence, consultation, personal rights, and freedoms.
[134] *E.g.*, international relations and treaties.
[135] *Id.* at 52.
[136] *Quran* 4:36.
[137] *Id.* at 2:272.
[138] *Id.* at 93:6-11.
[139] *Id.* at 42:43.
[140] *Id.* at 3:159.
[141] *Id.* at 41:34.
[142] *See supra* 3.
[143] ZUBAIRI, *supra* note 3, at 60.
[144] One of the four renowned Expert Jurists referred to above *see supra* 8.
[145] Another one of the four renowned Expert Jurists.

said, "Everything the imams[146] say is an explanation of the Sunnah, and the entire Sunnah is an explanation of the Quran."[147] Indeed, the Quran provides general legal principles whereas the Prophet Muhammad (pbuh) provided clarification and explained its specific details through his speech, action, and approvals.[148] As an example regarding inheritance laws in the Quran,[149] Allah explicitly outlines what portions of an estate is owed to a testator's off-spring and parents, and obligates that such portions should be calculated only "after the fulfillment of bequests and debts."[150] The Quran is silent on the limits imposed on a testator regarding bequests; however the Prophet Muhammad (pbuh) clarifies these boundaries by stating in one narration, "One-third [is permissible for a bequest], yet it is still too much, for you'd better leave your inheritors wealthy than leave them poor, begging of others,"[151] and in another narration, "No legacy is to be left to an heir unless the other heirs are agreeable."[152] As such, the Prophet (pbuh) is considered to be the epitome of a judge and the primary foundation of Islamic law is, and always will be, rooted in revelation through the Quran and Sunnah.

B. Basis for Legislation of Positive Law

Aristotelian thought suggests that positive law is the attempt to realize natural law ends through legislative means.[153] As mentioned above,[154] The purpose of Quranic revelation was to systematically reform human behavior; therefore, Islamic natural law aims to improve human

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[146] Referring to the leaders of Islamic studies and development during the fourth era.
[147] ZUBAIRI, *supra* note 3, at 55.
[148] *Id.*
[149] *Quran* 4:11.
[150] KHATTAB, *supra* note 13, at 43.
[151] *Sahih al-Bukhari* 5354.
[152] *Mishkat al-Masabih* 3074.
[153] HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 16 (Liberty Fund 1998).
[154] *See supra* 5.

welfare by removing that which is harmful to society and confirming that which is beneficial.[155] However, as Islam expands through space and time, positive legislation becomes increasingly essential to bridge the gap between Islamic legal values, public welfare, and contemporary societal customs. By design, the systematic development of Islamic legal methodology propagated a firm foundation for legislative building through adaptable and cooperative reformation, rather than through control and government. Such mechanisms, rooted in the Quran and Sunnah, prove to acknowledge the value of human intellectual activity while freeing the intellect from irrationality.[156] To meet the goal of reformation, Islamic legislation incorporates four basic principles: removal of difficulty; reduction of religious obligations; realization of public welfare; and realization of universal justice.[157]

Islamic laws are not designed to burden mankind, but are rather meant to facilitate individual and societal needs;[158] correspondingly, prohibited acts are few and specific, whereas permissible acts are broad and general.[159] Removal of difficulty and reduction of religious obligations generally fall under an inquiry akin to reasonableness, asking whether an act is acceptable under the umbrella of *al-maslahah*[160] *al mursalah*[161] or '*urf*.[162]

Realization of *al-maslahah al mursalah* ("Public Welfare") is a prevalent theme throughout Islamic natural law,[163] and is described by Islamic scholars as "considerations that secure a benefit or prevent a harm but which are simultaneously harmonious with the objectives of the *shari'ah*[164]"

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[155] BILAL PHILIPS, THE EVOLUTION OF FIQH: ISLAMIC LAW & THE MADH-HABS 27 (International Islamic Publishing House 2006).
[156] *Id.* at 28.
[157] *Id.* at 53.
[158] *Id.* at 29.
[159] *Id.* at 31.
[160] *Al-maslahah* is the Arabic word linguistically defined as a benefit or interest.
[161] *Al-mursalah* is the Arabic word linguistically defined as something that is absolute.
[162] *'Urf* is the Arabic word linguistically defined as something that is known, common, or familiar.
[163] *See, e.g.*, *Quran* 2:185, 22:78, and 65:7.
[164] Previously defined as Islamic belief and legal tradition.

that protect religion, life, intellect, lineage, or property.[165] There are three general types of Public Welfare that the Expert Jurists unanimously agree may serve as a basis for legislation:[166] the absolute essentials; the complementary; and the embellishments.[167] Absolute essentials pertain to the primary objectives of *shari'ah* listed above;[168] interests upon which humanity depends, and those which its neglect would lead to disorder.[169] Complementary interests are those that remove hardship on humanity.[170] Embellishments are interests that simply lead to improvement towards desirable ends for humanity.[171] Overall, the realization of Public Welfare gives precedence to public interests over individual interests, and the prevention of greater harms over smaller harms.

The Expert Jurists define *'urf* ("Custom") as "the recurring practices that are acceptable to people of sound nature" and "the collective practice of a large number of people,"[172] which can further be classified as verbal or actual.[173] Actual custom is understood as commonly recurring practices accepted by a population, while verbal custom is the generally understood use and meaning of words not being used in their literal sense.[174] In application, verbal custom takes preference in contracts, oaths, and transactions, whereas the literal meaning becomes the exception because it is unlikely to accurately reflect the parties' intended purposes.[175] However, customary law cannot contradict any principles and teaching of the Quran and Sunnah in order to be adopted

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165 ZUBAIRI, *supra* note 3, at 85.
166 *Id.* at 87.
167 *Id.* at 86.
168 Protection of religion, life, intellect, lineage, and property.
169 *Id.* at 86.
170 *Id.*
171 *Id.* at 87.
172 *Id.* at 89.
173 *Id.* at 90.
174 *Id.*
175 *Id.*

as valid legislation. Hence, Islamic positive law requisitely cannot violate a definitive source of Islamic natural law and is restricted in scope and application.

Finally, the realization of universal justice is found within Islamic natural law[176] and explicitly makes no distinction between one group of humanity over another, regardless of one's class, caste, or race.[177]

III. JUDICIARY ROLE IN ISLAMIC LAW

As mentioned earlier,[178] a *mujtahid* is someone who practices *ijtihad*, which is the effort made to derive legal rulings from the Quran and Sunnah based on personal opinion and core Islamic legal values; however, the term '*mujtahid*' is generally reserved for the original Expert Jurists of early Islam. Today, an Islamic jurist is known as a *faqih*, who is simply someone who is accepted as an expert in Islamic jurisprudence[179] and Islamic law[180] in modern times. As prefaced above, the constant evolution of societal custom and development of civilization increasingly demands the need for Islamic jurists to extract sound legislation. The overall goal of Islamic jurists is to reach a Consensus and exercise judicial review through Analogical Reasoning.

A. Reaching Consensus ("Ijma'")

After the Quran and Sunnah, *Ijma'* ("Consensus") is the third primary source of Islamic legal ruling and is technically defined by scholars as "the unanimous agreement of the mujtahids

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[176] *See*, *e.g.*, *Quran* 4:58, 4:135, and 5:8.
[177] PHILLIPS, *supra* note 155, at 43.
[178] *See supra* 9.
[179] *I.e.*, *usul al-fiqh*.
[180] *I.e.*, *fiqh*.

. . . in a specific era on a legal ruling."[181] There are six conditions of reaching Consensus that the scholars of Islamic jurisprudence have agreed upon.[182] If any one of the conditions are unfulfilled, then Consensus has not been reached; therefore, all of the following conditions must be met in order for a juristic opinion to be adopted as binding legal proof:[183]

(1) The formulation of Consensus must be made by a group of jurists because consensus, by definition, is impossible with just one or two people;

(2) Consensus must be by unanimous agreement; thus, a majority opinion is insufficient;

(3) The unanimous agreement must be found during a period of time in which the issue is actually taking place;

(4) All jurists must express their opinion on the matter explicitly[184] or implicitly[185];

(5) Each jurist who reaches Consensus must be upright,[186] meaning he satisfies the following five conditions:[187] avoiding major sins,[188] staying away from minor sins, having sound beliefs,[189] restraining himself when angry, and adhering to common standards of observant Muslims of his generation and locality;

(6) The ruling must be based upon transmitted proofs established within the Quran and/or Sunnah.[190]

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[181] ZUBAIRI, *supra* note 3, at 64.
[182] *Id.* at 65.
[183] *Id.* at 67.
[184] Explicit through verbal or written statements.
[185] Implicit through silence on an issue; neither affirming nor refuting.
[186] Sane and of good moral character; not senile nor majorly ill.
[187] MUSA FERBER, THE ACCESSIBLE CONSPECTUS: A COMMENTARY ON ABU SHUJA AL-ASFAHANI'S MATN AL-GHAYAT WA-L-TAQRIB 278 (Islamosaic 2015) (2016).
[188] Major sins include fornication, murder, leaving the five daily prayers, sodomy, false testimony, disobedience to one's parents, receiving unlawful gain, taking an orphan's property, breaking one's fast during Ramadan without an excuse, neglecting to order what is right and forbid what is wrong.
[189] Subscribing to the foundational principles of Islam.
[190] ZUBAIRI, *supra* note 3, at 65.

If the basis for the Consensus is from a definitive proof within the Quran or Sunnah then the opinion reaffirms and strengthens the legal ruling, and if the basis is from a speculative proof then its authority is enhanced and becomes binding.[191]

This method of Consensus began in the second era of Islamic legal development during the time of the Caliphs;[192] a time when civilization and technology was not developed as it is today. In modern times it is virtually impossible to collect the opinions of every single jurist on Earth for any given legal matter; thus, making it impractical to meet a unanimous agreement. In effect, true *ijma'* consensus can no longer be obtained. In fact, one view is that the true practice ceased with the ending of the third era during the time of the Companions.[193] Furthermore, an issue that has been agreed upon through Consensus becomes firm in legislation,[194] as the Prophet Muhammad has been reported to have said, "My nation will not united on misguidance;"[195] thus the matter cannot be undone and subject to reconsideration once again.[196] As a result, reaching Consensus was a foundational responsibility among the Caliphs and Companions that had a significant impact on the development of Islamic law altogether.

B. Judicial Review Through Analogical Reasoning and Juristic Preference

Although true Consensus seldom takes place in current times, some scholars continue to hold hearings to discuss developing modern issues and determine appropriate reasoning for

[191] *Id.* at 66.
[192] *See supra* 5
[193] ZUBAIRI, *supra* note 3, at 70.
[194] A compendium of these rulings can be found in *Mawsu'at al-ijma fi al fiqh al Islami* by Sa'di Abu Jayb. This book has not been translated and is only available in Arabic.
[195] *Sunan Ibn Majah* 3950.
[196] ZUBAIRI, *supra* note 3, at 70.

modern legislation.[197] This practice, akin to judicial review, is the fourth and final primary source of Islamic law and legislation known as *Qiyas* ("Analogical Reasoning").

1. Analogical Reasoning ("Qiyas")

Analogical Reasoning is a method of legislation that is only applicable when the legal ruling of a new case is unprecedented in the Quran, Sunnah, or Consensus; hence, it is simply an extension of already existing law.[198] *Qiyas* is defined by scholars as "the extension of a legal ruling from an existing case to a new case on the basis of a common effective cause."[199] Within this definition, there are four elements required for a legal matter to be justiciable through Analogical Reasoning.

First, there must be an original case whose ruling is derived from the Quran, Sunnah, or Consensus.[200] This preceding case is the basis upon which the analogy is built. Second, there must be an effective cause that is calling for a new ruling to be made;[201] in other words, there must be an identifiable claim and issue. Furthermore, scholars emphasize the principle that "legal rulings are based on their effective causes not on their objectives."[202] Scholars reason that the effective cause is something that is always a constant, whereas the objective is inconstant and is not always necessarily specified; accordingly, if the effective cause is identified then the legal ruling will also be perceptible even if the objective may not be.[203] To illustrate, a red light is the effective cause of stopping at a traffic light and its objective is to prevent accidents and facilitate organized traffic;

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[197] *Id.*
[198] *Id.* at 74.
[199] *Id.* at 73.
[200] *Id.* at 74.
[201] *Id.*
[202] *Id.* at 75.
[203] *Id.*

however, driving through a red light is a punishable offense regardless of whether or not there was actually an accident or if there were other cars on the scene. Third, there must be a new case whose specific facts are unprecedented from, and whose ruling has not been explicitly mentioned in, the Quran, Sunnah, or Consensus.[204] The new case provides the set of facts for which the analogy is constructed.[205] Fourth, the ruling from the original case that is extended to the new case.[206] These four elements must be satisfied in order for a jurist to have the jurisdiction to formulate their own legal opinion based on core Islamic values and legal principles.

2. Juristic Preference

The Quran and Sunnah is the primary foundation of Islamic natural law and provides the methodology of Islamic jurisprudence and a workable framework for the development of Islamic law. Consensus and Analogical Reasoning establish a positive means to realize the Quran and Sunnah's objective of reforming humanity and improving public welfare. Juristic preference is the order of authority in which legal opinions are enforced and reconciles what happens when multiple jurists come to the same legal conclusion based on a different proof or line of analogical reasoning. In other words, the principle of juristic preference clarifies when it is appropriate to abandon an established precedent in favor of adopting a different ruling, and there are generally three reasons: reaching Consensus, preference to a stronger proof, or exception to a general rule.[207] By definition, there is no difference of opinion if a consensus is found; thus, if one jurist's personal opinion is adopted unanimously then it becomes a definitive legal Consensus ruling. Moreover, an analogy can be overridden by a stronger proof such as the Quran or Sunnah, or a stronger analogy; for

[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 81.

example, leaving an obscure analogy for a clear one.[208] Alternatively, an analogy can be abrogated as an exception to a general rule to address necessity, custom, or public interest.[209]

C. Methods of Interpretation and Differences of Opinion

The Arabic language is vast in vocabulary and intricate in meaning. In fact, one of the major fields of study in Islamic scholarship is the science of Quranic interpretation. Likewise, it is incumbent for a jurist to have a deep understanding of the Arabic language in order to appropriately understand and interpret the law; therefore, jurists must become masterful in Arabic linguistics so as to obtain a deep understanding of Arabic words and their precise meanings, different usages, and connotations.[210] This study requires a deeper understanding of the methodologies of interpretation and is imperative to establish guidelines for resolving conflicts in meaning and interpretation.[211] Regarding word classifications, there are four distinct types: scope, usage, clarity, and shades of meaning.[212]

1. Classification by Scope

Classifying words by scope acknowledges whether a word typically holds one meaning or multiple, is specific in its application or general, and is qualified or limited in its application.[213] Within a word's scope, there are four types of classifications: specific, general, homonym, and understood meaning.[214]

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[208] *Id.*
[209] *Id.* at 82.
[210] *Id.* at 101.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 103.

A specific word is definite in its application, is typically not open to interpretation, and can be further classified as absolute or qualified. A word that is specific and absolute is one that is unspecified in its application and is not limited by a description.[215] On the other hand, a word that is specific and qualified is one that is restricted by a description or an adjective.[216] The overall rule of interpretation for words that are specific and absolute is that their application must remain absolute and cannot be limited by weak narrations of Hadith or *Qiyas* ("Analogical Reasoning").[217]

A general word is a word that is used as a blanket term that has a single meaning which applies to many things, includes everything to which it applies, and is not limited in number.[218] Words that are used in this general sense are interpreted definitively.[219] This is necessarily true because limiting the application of a general word without warrant and appropriate authority to do so would frustrate the Lawgiver's intended use of the word.[220] To clarify this point, if the Lawgiver intended a general word to be used in a particular and limited manner, then the word would be presented along with a restricting description or adjective; thus, the word would no longer be classified as general, but rather classified as specific and qualified.

Homonyms are words that are identical in sound or spelling but have different meanings. When homonyms are found in the Quran or Hadith, the word can only bear one of its meanings.[221] Accordingly, jurists and scholars must identify the Lawgiver's intended meaning through context and purpose of use.[222] Once the intended meaning is determined, it must be acted upon. Similarly, the understood meaning of a word is relevant when a word has two different meanings, which is

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[215] *Id.* at 107.
[216] *Id.*
[217] *Id.* at 108.
[218] *Id.* at 111.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 112.
[222] *Id.* at 113.

dependent on its use.[223] In this case, a word may literally mean one thing while its technical meaning refers to something else. In the legal context, the default rule is to assume the technical meaning unless there is existing evidence that suggests otherwise.[224]

2. Classification by Usage

Classifying words by usage acknowledges the different meanings a word can have, such as literal, technical, or customary meanings based on how the word is used. Within a word's usage, there are four categories of classification: literal or metaphorical, and plain or allusive.[225]

The literal meaning of a word is its primary meaning that the word was originally assigned to at the formulation of the Arabic language.[226] In the legal context, the default rule is to assume the literal or primary meaning unless there is existing evidence that suggests otherwise.[227] On the other hand, the metaphorical meaning of a word is a word's secondary meaning and is when a word is used in a way different from what it was originally created for.

A word's usage is plain when its intended meaning is absolutely clear as indicated through the speaker's intentions in conjunction with the word's apparent meaning.[228] Here, there is no room for interpretation of the speaker's intentions, because the speaker's words are plain, and the intended meaning is understood from the words themselves. On the contrary, a word's usage is allusive when its intended meaning is ambiguous and the speaker's intentions are not clearly

[223] *Id.*
[224] *Id.*
[225] *Id.* at 117.
[226] *Id.*
[227] *Id.* at 118.
[228] *Id.* at 119.

divulged through the word itself.[229] Here, the speaker's intention behind the word must be determined through context and circumstance.[230]

3. Classifying by Clarity

Classifying words by clarity acknowledges how clear or unclear a word is without remedy of interpretation.[231] An understood concept is conveyed by a word that is clear, and the basis for obligation is established by a ruling that is composed of clear words.[232] On the contrary, an ambiguous concept is conveyed by a word that is unclear, and its meaning is incomplete without further clarification.[233] There are eight total categories of clarity and the following two paragraphs will explain each one respectively from most ambiguous to most clear.

There are four categories of unclear words: intricate, ambivalent, difficult, and obscure.[234] An intricate word is one whose meaning is absolutely unknown and cannot form the basis for obligation because there is no way to understand the word or phrase.[235] An ambivalent word has a meaning that is unknown unless accompanied by clarification by the speaker.[236] A difficult word is one whose meaning is not easily discovered unless there is evidence available to remove ambiguity.[237] An obscure word has a concealed meaning with unclear intention due to a deficiency in the way the word is used; therefore, further investigation is necessary to determine proper meaning.[238]

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[229] *Id.* at 121.
[230] *Id.*
[231] *Id.* at 123.
[232] *Id.*
[233] *Id.*
[234] *Id.* at 124.
[235] *Id.* at 127.
[236] *Id.*
[237] *Id.*
[238] *Id.*

Likewise, there are four categories of clear words: manifest, explicit, unequivocal, and perspicuous.[239] A manifest word conveys a clear meaning but is not the primary contextual theme; therefore, manifest words are clear in meaning but are open to interpretation.[240] Such words are deliberately broad and can be made more specific; for example, a general term can be specified, an absolute term can be qualified, or a metaphorical meaning of a word can be understood over its literal meaning.[241] On the other hand, an explicit word conveys a clear meaning that is in tune with the primary contextual theme; thus, explicit words are not open to interpretation.[242] Unequivocal words within a text are made clear through explanation by the speaker; thus, in Islamic legal context, the Lawgiver has clarified His intentions of word choice with clarity, making the meaning unequivocal and not open to interpretation.[243] Finally, perspicuous words within a text are absolutely clear and are not open to interpretation or abrogation.[244]

4. Classification by Different Shades of Meaning

Classifying words by different shades of meaning acknowledges the intricate nature and vastness of the Arabic language. Appropriately, a jurist does not derive laws from a text except after carefully understanding the text of its words, meanings, usages, and connotations in the Arabic language.[245] There are four different shades of meaning: explicit, alluded, inferred and required.[246] The explicit meaning refers to the most apparent meaning of a text that is conveyed

[239] *Id.* at 123.
[240] *Id.* at 124.
[241] *Id.* at 125.
[242] *Id.* at 124.
[243] *Id.* at 126
[244] *Id.*
[245] *Id.* at 129.
[246] *Id.*

by its plain words.[247] The alluded meaning is also understood by its plain words, but is not the primary theme of the text; thus, the alluded meaning refers to a secondary meaning that accompanies a text's primary understanding.[248] The inferred meaning is extracted from the rationale behind a legal text, rather than understood by its plain words; therefore, the inferred meaning comes from analogic reasoning.[249] The required meaning is one on which the text is silent and requires further investigation in order to derive its true objective.[250]

5. Differences of Opinion

The toleration for differences of opinion amongst scholars and jurists is a feature of Islamic Jurisprudence that has allowed it the flexibility and adaptability to remain relevant more than 1,400 years later.[251] However, the issues subject to interpretation and scholarly differences are limited to those that do not have definitive proof.[252] Here, it is necessary to reiterate that every Islamic legal ruling is based on a textual proof–Quran or Sunnah–and each proof can be labeled as either definitive or speculative in its authenticity and/or meaning.[253] Proofs that are speculative in their authenticity, meaning, or both are considered speculative proofs and are therefore subject to interpretation and scholarly differences.[254]

The nuance in issues of Islamic Jurisprudence requires scholars to be experts in the Quran and Sunnah in order to appropriately apply the rules of the Arabic language, the principles of *fiqh*,

[247] *Id.* at 130.
[248] *Id.* at 131.
[249] *Id.* at 132.
[250] *Id.*
[251] *Id.* at 135.
[252] *Id.*
[253] *See supra* 11.
[254] ZUBAIRI, *supra* note 3, at 139.

and their analogical reasoning to extract legal rulings.[255] Furthermore, jurists and scholars necessarily must familiarize themselves with relevant texts concerning the conclusions of previous scholars to understand their reasonings and arguments for particular conclusions.[256] The natural outcome is the possibility for two scholars to inspect the same speculative proof but arrive at different conclusions due to their different principles and methodologies for interpretation.[257]urf

6. The Four Prominent Schools of Thought

The four prominent schools of thought that were briefly introduced above[258] are just a few of many; however, they are the four predominantly followed schools of thought in modern times and are known as the Hanbali, Maliki, Shafi'i, and Hanafi schools of thought.[259] Each school of thought was influenced by the views of their respective Imam and carries their own set of guidelines for interpretation and methodologies for adjudicative legislation through *Qiyas* ("Analogical Reasoning").[260] Volumes of books have been written regarding the intricacies and nuances of each school of thought,[261] but such detail is beyond the scope of this paper; thus, the following paragraphs serve as a brief introduction to each methodology for the purpose of application and analysis.

Imam Ahmad ibn Hanbal influenced the Hanbali methodology, which is textualist in nature and prioritizes the literal interpretation of the Quran and Sunnah.[262] Imam Ahmad and his followers stay disciplined to the Quran, Sunnah, and the *Ijma'* ("Consensus") of the Caliphs and

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[255] *Id.* at 140.
[256] *Id.*
[257] *Id.*
[258] *See supra* 7.
[259] ZUBAIRI, *supra* note 3, at 19.
[260] *Id.*
[261] *See*, *e.g.*, Shaykh Abd al-Rahman al-Jaziri, *Al-Fiqh 'Ala al-Madhahib al-Arba'ah* (Vol. 1-5).
[262] 'UMAR AL-ASHQAR, HISTORY OF ISLAMIC FIQH 203 (2020).

Companions.[263] The Hanbali methodology is simple in its strictness, as they only turn to the application of Qiyas when absolutely necessary, and they completely reject the application of *'urf* ("social custom").[264]

Imam Malik ibn Anas influenced the Maliki methodology, which subscribes to more of a traditionalist approach to deriving Islamic legislation and its adjudication.[265] Imam Malik and his followers hold tight to the Quran, Sunnah, and *Ijma'* of the Caliphs, Companions, and the Successors,[266] but are also of the opinion that "[w]hen the people of Medina[267] unanimously agree on something, this is regarded as undisputable consensus[268] even if others oppose it."[269] In short, Malikis hold the consensus of the people of Medina in high regard when deriving legislation and adjudicating; accordingly, and in contrast with the Hanbali methodology, Malikis are slightly more open to the application of *'urf* and *Qiyas* so long as they are in compliance with Medinan tradition.[270]

Imam ash-Shafi'i influenced the Shafi'i methodology, which follows a conservative rationalist approach to deriving Islamic legislation and its adjudication.[271] Imam ash-Shafi'i is known for his use of deduction and reasoning; as a matter of fact, he wrote the first book on the science of *usul al-fiqh*[272] in which he says, "No one can ever say that something is lawful or unlawful except by way of knowledge [and] knowledge means being informed through the Quran,

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[263] *Id.*
[264] *Id.* at 204.
[265] *Id.* at 188.
[266] Note the contrast here between Hanbali and Maliki: Hanbali does not subscribe to the opinions of the Successors.
[267] Medina is a holy city in Islam in which the Prophet Muhammad (pbuh) established the first Muslim community. Medina represents the origin of Islamic culture and civilization and is also the location of the Prophet Muhammad's (pbuh) gravesite.
[268] This assumes accordance with the Quran, Sunnah, and *Ijma'* of the Caliphs and Companions.
[269] *Id.* quoting Ibn Taymiyah, *Al-Muswaddah* 331.
[270] AL-ASHQAR, *supra* note 262, at 188.
[271] *Id.* at 197.
[272] The fundamentals of Islamic jurisprudence.

Sunnah, scholarly consensus, or Qiyas."[273] Imam ash-Shafi'i and his followers prioritize literal interpretation of the Quran and Sunnah, but also consider the apparent meaning of the texts in order to extract deeper understandings and wisdoms where applicable.[274] Such considerations for apparent meaning is applicable where the text is speculative,[275] non-binding,[276] or ambiguous,[277] as distinguished through the syntax, context, and/or grammar of a text, or external evidences.[278] Additionally, the Shafi'i methodology subscribes to a presumption of continuity approach in deriving legislation, which is similar to the Hanbali approach which calls for Qiyas only when absolutely necessary.[279]

Finally, Imam Abu Hanifah influenced the Hanafi methodology which follows a liberal rationalist approach to deriving Islamic legislation and its adjudication.[280] Imam Abu Hanifah and his followers loosely employed the practice of juristic preference[281] to abrogate speculative proofs or *Qiyas* to address necessity,[282] custom, or public interest.[283] However, Imam Abu Hanifah subscribed to this liberal approach because he lived before the other Imams,[284] and was born during the era of the Companions and Successors;[285] thus, he was unable to collect as many *hadith* as the other Imams.[286] For this reason, the Hanafi methodology became known as one that loosely grants

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[273] *Id.* quoting Imam ash-Shafi'i, *ar-Risalah* 39.
[274] AL-ASHQAR, *supra* note 262, at 198.
[275] *See supra* 11.
[276] *See supra* 12.
[277] *See supra* 30.
[278] *See supra* 13.
[279] AL-ASHQAR, *supra* note 262, at 199.
[280] *Id.* at 180.
[281] *See supra* 26.
[282] *See supra* 16.
[283] *See supra* 21.
[284] AL-ASHQAR, *supra* note 262, at 176.
[285] *See supra* 7.
[286] AL-ASHQAR, *supra* note 262, at 180.

concessions for hardship, duress, and necessity, in order to escape overly restrictive circumstances in the perspective of social custom and public interest.[287]

V. JUXTAPOSING ISLAMIC AND AMERICAN LEGAL TRADITIONS

1. Core Differences

The differences between Islamic and American legal traditions begin at the very roots. To begin, the underlying foundation and origins of Islamic jurisprudence are theocratic in nature whereas American jurisprudence is secularist. Specifically, Islamic law and jurisprudence governs the soul in its interactions and relationships among mankind, the state, and the divine; on the contrary, American law and jurisprudence strictly governs human interactions and relationships between mankind and the state. In fact, the First Amendment's Establishment Clause creates a firm division between church and state by forbidding Congress from endorsing any religion by law.[288]

Moreover, Islamic natural law is divine through the Quran and the teachings of Prophet Muhammad (pbuh), while American natural law is established in the Declaration of Independence and the Constitution. The Quran is the literal word of Allah; as such, it is definitive, inimitable, and perfect as revealed. Likewise, the Sunnah was endorsed by Allah and, together with the Quran, leaves no room for misguidance or uncertainty in legal application. On the other hand, the Declaration of Independence and the Constitution were drafted by man and has been amended twenty-seven times.[289]

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[287] *See* "third classification of declaratory law" *supra* 15.
[288] U.S. CONST. amend. I, cl. 1.
[289] *See*, *e.g.*, U.S. CONST. amend. XXVII.

Another primary difference in foundational application of Islamic and American jurisprudence is the role of a judge. In Islam, a jurist assumes the role of both legislator and adjudicator. Recall above, Islamic jurists interpret and derive legal rulings to legislate new laws through *Ijma'* ("Consensus") and *Qiyas* ("Analogical Reasoning");[290] however, they must also adjudicate the implementation of such laws as applied based on the facts of individual circumstance, societal custom, and/or public welfare.[291] Contrarily, American legal tradition has a clear separation of powers and a system of checks and balances between the legislative branch[292] and the judicial branch;[293] thereby, limiting the role of a U.S. court judge to interpreting the law and applying it to specific facts of a case.[294] Regardless of the major core differences between Islamic and American legal traditions, there are few common principles that both share in high esteem.

2. Similar Principles

Both Islamic and American legal traditions reference natural law. Islamic law references the Quran and Sunnah, whereas American law references the Constitution. Accordingly, both legal traditions acknowledge a hierarchy of law and have preference for a primary source text. For example, in Islam a jurist must look to the Quran and Sunnah before resorting to *Ijma'* or *Qiyas*, and U.S. court judges must look to the Constitution and Federal laws before looking to state and local laws.[295] Furthermore, Islamic law is primarily concerned with establishing justice among

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[290] *See* Part III. Judiciary Role in Islamic Law, *supra* 22.
[291] *See* section on Juristic Preference *supra* 26.
[292] U.S. CONST. art. I.
[293] U.S. CONST. art. III.
[294] *Id.*
[295] U.S. CONST. art. IV.

mankind in its pursuit of life, religion, property, intellect and family;[296] likewise, the Declaration of Independence and the Constitution[297] aims to protect man's right to life, liberty, property, and the pursuit of happiness.

Islamic and American legal tradition also share similar methods for interpretation of legal proofs and the flexibility for differences of opinion. As explained above,[298] the four predominant schools of thought in Islam can be classified as textualism, traditionalism, or rationalism, similarly, U.S. court judges typically exercise one of three predominant methods of constitutional interpretation known as textualism, originalism, and living constitutionalism.[299]

An example of textualism in application to the Constitution can be found in Justice Antonin Scalia's opinion in District of Columbia v. Heller.[300] In Heller, the issue was whether the D.C. law banning possession of handguns, except for law enforcement officers and other authorized individuals, was a constitutional violation.[301] In Justice Scalia's majority opinion, the Court held that the Second Amendment protects an individual right to bear arms for self-defense, and that the D.C. law violated that right.[302] Here, Justice Scalia based his ruling on the idea that the text of the Constitution is a legal document with a fixed and determinate meaning, and that judges should not read their own policy preferences or moral values into the text.[303]

An example of originalism in application of the Constitution can be found in Justice Neil Gorsuch's dissenting opinion in Sessions v. Dimaya.[304] In Dimaya, the issue was whether or not

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[296] KAMALI, *supra* note 2, at 2-3.
[297] U.S. CONST. amend. V.
[298] *See* Section on 'The Four Prominent Schools of Thought' *supra* 33.
[299] *See*, *e.g.*, split opinions in *Obergefell v. Hodges*, 575 U.S. 644 (2015); *see also* split opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[300] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

the provision in the Immigration and Nationality Act defines “crime of violence” in a way that allowed noncitizens convicted of such crimes to be deported was unconstitutionally vague.[305] In his dissenting opinion, Justice Gorsuch argued that the provision was unconstitutional not because it was vague, but because it delegated too much power to the executive branch to define what constitutes a "crime of violence." Here, Justice Gorsuch relied on an originalist interpretation of the Constitution's separation of powers, which he argued limits Congress's ability to delegate legislative authority to the executive branch.[306] This opinion also serves as an example of differences of opinion in American legal tradition; however, different from Islamic differences of opinion, dissenting opinions do not create binding precedent.

An example of living constitutionalism, or pragmatism, in application to the Constitution can be found in Obergefell v. Hodges.[307] In Obergefell, the issue was whether or not the Fourteenth Amendment’s Due Process and Equal Protection Clauses applied to grant same-sex couples the right to marry.[308] In his majority opinion, Justice Kennedy acknowledged that the meaning of marriage has evolved over time and that the understanding of the institution has broadened to include same-sex couples.[309] Here, in applying a living constitutional approach, the majority rejected the argument that the meaning of marriage was fixed at the time of the Framers' drafting of the Constitution, and instead emphasized the importance of contemporary understandings of liberty and equality.[310]

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[305] *Id.*
[306] *Id.*
[307] *Obergefell*, 576 U.S. 644 (2015).
[308] *Id.*
[309] *Id.*
[310] *Id.*

CONCLUSION

For over 1,400 years the system of Islamic jurisprudence has remained intact, thrived through generations, assimilated into various cultures, and spread worldwide. Although they differ on the nature of their respective supreme texts, the overall scope to which their laws apply, and the explicit role of a judge, both Islamic and American principles of jurisprudence share common ground in their reference to natural law, emphasis on justice and fairness, preferential hierarchy of legal proofs, and methods of constitutional interpretation. The core difference between Islamic and American legal traditions, in tandem with their parallel principles, is what allows for the two theories of law to coincide with one another.