THEORIES OF INTERPRETATION: ISLAMIC LAW V. INTERNATIONAL LAW(*)

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ABSTRACT

Whereas Europeans exercised influence over Muslim areas in the last century, Muslim countries and its legal systems were expected to be considered and to interact with international rules. The Hague Conferences of 1896, 1902 and 1905 were established for the purposes of developing agreement on private international law. These conferences did not invite Muslim countries though these states situated outside Europe could have treaties applied on their territories when they were under the jurisdiction of European states. In the same line several conferences and arenas have called and recommended the study of the Islamic legal rules. For example, *North Sea* case the judge argued that the principle of 'sovereign equality' protected in Article 2(1) of the United Nations Charter, necessitates the court to refer not only to European legal traditions but also to Islamic legal principles when seeking for a general principle of law. This paper argues that the Islamic law has its unique methodologies of interpretations, can share common views compared to the rules of interpretations in international law, and can offer unprecedented solutions to many international disputed issues. This article questions the ways in which the international scholarship and legal community could benefit from such an 'exquisite understudied art.'

Keywords

Interpretation, Theories of Interpretation, Methodology, Islamic Law, International Law.

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YORUM TEORİLERİ:
İSLAM HUKUKU VE ULUSLARARASI HUKUK

ÖZET

Avrupalılar geçtiğimiz yüzyılda Müslüman bölgeler üzerinde nüfuz sahibi olduklarından, Müslüman ülkelerin ve onların hukuk sistemlerinin uluslararası kurallarla birlikte kabul görmeleri ve onlarla etkileşime girmesi beklenmiştir. 1896, 1902 ve 1905 yıllarında yapılan Lahey Konferansları, uluslararası özel hukuk alanında anlaşmaların geliştirilmesi amacıyla yapılmıştır. Avrupa dışında yer alan Müslüman ülkeler bu konferanslara davet edilmemelerine rağmen Avrupalı devletlerin yetkisi altında oldukları için topraklarında bu anlaşmalar uygulanabilmiştir. Bunun yanında birçok konferans ve arenada İslam hukuk kurallarının incelenmesi çağrısında ve tavsiyelerinde bulunulmuştur. Örneğin, Kuzey Denizi davasında yargıç, BM Şartı'nın 2(1) Maddesinde korunan 'egemen eşitlik' ilkesinin, mahkemenin, bir hukuki çözüm ararken yalnızca Avrupa hukuk geleneklerine değil, aynı zamanda İslam hukuku ilkelerine başvurması gerektiğini savunmuştur; ki bu esasen genel bir hukuk ilkesidir. Bu makale, İslam hukukunun kendine özgü yorum metodolojilerine sahip olduğunu ve uluslararası hukuktaki yorum kurallarına kıyasla sıklıkla ortak görüşler paylaşılabildiğini ileri sürmektedir. Aynı şekilde İslam hukukunun birçok uluslararası tartışmalı konuya benzeri görülmemiş çözümler sunabileceğini iddia etmektedir. Bu noktada ortaya çıkan esas mesele, uluslararası alanda çalışmalar yapan akademisyenlerin ve hukuk camiasının bu denli "az çalışılmış bir sanattan" nasıl yararlanabileceğidir.

Anahtar Kelimeler

Yorum, Yorum Teorileri, Metodoloji, İslam Hukuku, Uluslararası Hukuk.

INTRODUCTION

No doubt, examining Islamic Shari'a law in the context of a modern topic such as diplomatic and international relations is highly significant when addressing the current Islamic principles in comparison with the principles of international law. The decrees of Islam and its unique laws has many influences on the general laws and policies of each of these states. Addressing, however, questions of diplomatic and international relations, while disregarding the relevant moral, historical, conceptual, and legal background of Islam, will only provide a slanted view of the study. It is relevant at beginning to shed light on the noted interaction and overlapping norms between Islamic law and international law. The basis to assessing the relationship between Islamic law and international law is to understand the nature and origin of Islamic law, its features, and uniqueness. Also, its compatibility and incompatibility with international law will be discussed. The starting point is the investigation of whether Islamic law can be viewed as a legal system. Another issue may be raised, which is whether or not this legal system is in any way comparable to the rules of international law. With some 1.6 billion people of the Islamic faith worldwide, the effects of Islamic law or Shari'a are now inescapable worldwide. After civil law and common law systems, Shari'a is now a major legal system in the world.[1] Law exists in the form of customs, traditions and practices which govern all society members. A law may be in the form of orders and prohibitions issued by an authoritative person, such as a tribal chief or king, or in the form of instructions issued by a body to which society has entrusted the right to issue laws. The source of these various types of law (whether in relation to domestic or international affairs) is human beings. So, it is called positive law. There are laws whose source is not human beings. They are rendered by the Creator of human beings. They are divine laws. Human beings are aware of these different types of law: the positive laws established by human beings, and

[1] **Esmaeli, Hossein** (2011) "The Nature and Development of Law in Islam and the Rule of Law Challenged in Middle East and the Muslim World", Connecticut Journal of International Law, V:26, p. 329.

the divine laws made and inspired by Allah (the Creator).[2] Shari'a is law derived directly from the word of Allah as was revealed in the Qur'an to the Prophet Muhammad and in the Sunna. Islamic scholars ascribe the term Shari'a as the revealed or canonical law of Islam.[3] In this sense, Shari'a represents a series of rules, either identified directly in the Qur'an, or in religious sources. Islamic law, through Islamic jurisprudence, also has plenty of room for jurists to interpret the primary sources of the *Qur'an* and the *Sunnah* using methods such as *Ijtihad* (which involves interpreting a text in such a way as its legal implications became apparent) and comparative *Qiyas* (which is concerned with deriving a particular ruling from general statements; or adopting a specific interpretation). These methods eventually became known as the secondary sources of Islamic law, which are applied to new areas of law where there is no applicable text in the *Qur'an* or the *Sunnah* concerning the area in question.

Much of this element of Shari'a is largely historical and may be traced back to around the Ninth Century.[4] Unlike most other religions, Islam is wholly embedded in every aspect of its followers' lives. For those who practice Islam it is 'a complete way of life: a religion, an ethic and a legal system all in one.'[5] Sir Thomas Walker Arnold[6] stated in his book, *The Caliph*, that 'Islam is a religion and government, belief and law'. Professor Joseph Schacht[7] says 'Islam is not just a religion but more than a religion'. Professor Stratham wrote 'Islam is a religious and political phenomenon and the Messenger of Islam; Prophet Mohammad was not just a prophet but also a wise politician and a statesman'.

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2 **Zaidan, Abdulkareem** (2003) Introduction to Islamic Shari'a, Alrisalah Press.

3 **Karmali, Ayla** (2007) "Sharia and Muslim Legal Thought in the 21st Century", Yearbook of Islamic and Middle Eastern Law, V:13, p. 3-4.

4 **Abu-Odeh, Lama** (2005) "Commentary on John Makdisi's Survey of AALS Law Schools Teaching Islamic Law", Journal of Legal Education, I:55, p. 589.

5 **Zaidan** (2003).

6 Thomas Walker Arnold (1864-1864) studied Arabic and wrote many books on Islam. In 1916 he joined the School of Oriental and African Studies, University of London.

7 Professor Joseph Schacht (1902-1969) worked as Professor of Islamic law at Colombia University, United States.

Sir Hamilton RA Gibb[8] wrote that 'Islam is not just an individual religious belief, but it required establishing an independent society having its own style of government, its own rules and regulations'. Also, Professor Louis Gardier stated that it is a religion and includes in its basic teachings a community which defines to all of its members equally the conditions and rules of life according to the rules of Islam: family life, social life, political and religious life. Islamic Law (Shari'a) is therefore the law upon which Muslims legislate. It is wider in meaning and denotation than the European meaning of law. Islamic law includes all Islamic law provisions related to faith, morals, worship or transactions, while jurisprudence is part of Islamic law. Jurisprudence means the knowledge of the practical provisions of Islamic law, either worship or relationships. Jurisprudence means the science of Islamic law.[9] Islamic law includes subjects discussed by positive laws and other subjects not addressed by these laws. Therefore, the Orientalist Carlo Alfonso Nallino[10] argued that the word Islamic *Fiqh* (jurisprudence) has no comprehensive equivalent term in Western languages. He says that the term *Fiqh* means Islamic law (Shari'a) which searches for a Muslim's relationship with Allah, with himself and with all mankind. He added that jurisprudence includes more than the law does in the West. Nallino says, 'worships are mentioned in jurisprudence and they include several things some of them are available to us in the form of general rights'.[11] In juristic terminology, Islamic Shari'a means the provisions of Islam including rules of belief, morals and human actions, including worship and transactions taken from the Holy Qur'an and the Prophetic Traditions.[12]

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8 Sir Hamilton RA Gibb (1895-1971) studied Semitic languages and worked as a lecturer in Eastern and African studies at London University, 1921. He then became a professor of Arabic at Oxford University.

9 **Alashqar, Omar** (1991) History of Islamic Jurisprudence, 3rd edition, Nafayes House.

10 Carlo Alfonso Nallino (1872-1938) learned Arabic at Toronto University then worked as a professor in the Eastern scientific institute in Nabloy, followed by Islamic and historic studies at Roma University.

11 Alashqar quoting from 'Has the Roman Law any effect on Islamic jurisprudence' (First edn., Scientific Research House 1973).

12 **Zaidan** (2003).

I. UNIVERSALITY AND RECOGNITION OF ISLAMIC LAW

People in the East and the West, in the past and the present, have researched Islamic legislation. They commended it, showed its advantages, and proved its precedence over other legislation on the basis of several principles, and formed the view that the benefits of Islamic legislation are for humanity as a whole. Examples are numerous; Bowen[13] argues:

> Far from being an immutable set of rules, Islamic jurisprudence (*Fiqh*) is best characterised as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community. In other words it is imbricated with social and cultural life, as is Anglo-American law.

Also, Sait and Lim[14] note, 'the distinguishing feature of Islamic law is that it was not born in a vacuum or constructed out of current needs and priorities. Rather it is the product of centuries of legal thought and experiences'. Schacht[15] observes that Islamic law represents an extreme case of a 'jurist's law'; it was created and further developed by private specialists.

> Generally speaking, Muhammad had little reason to change the existing customary law. His aim as a Prophet was not to create a new system of law, it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the day of Judgement and to enter Paradise. This is why Islam in general, and Islamic law in particular, is a system of duties, comprising ritual, legal, and moral obligations on the same footing, and bringing them all under the authority of the same religious command.[16]

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[13] **Bowen, John R.** (2003) Islam, Law and Equality in Indonesia, Cambridge, Cambridge University Press.

[14] **Sait, Siraj/Lim, Hilary** (2006) Land, Law & Islam: Property and Human Rights in the Muslim World, New York, Zed Books, p. 35

[15] **Schacht, Joseph** (1964) An Introduction to Islam Law, Oxford, Clarendon Press.

[16] **Schacht Joseph** (1982) An Introduction to Islamic Law, Oxford, Oxford University Press, p. 11.

The Conference on Comparative Law held in Brussels (Belgium) in 1958 decided that Islamic jurisprudence with its various schools could respond to all the requirements of modern life and could reconcile its needs. Edouard Lambert, the French jurist of comparative law, confirmed the importance of unanimity and discretion, both at present and in the future, in knowing the provisions concerning new facts for which there are no provisions. Islamic jurisprudence received the recognition of the majority of legislators all over the world as the widest and greatest legal jurisprudence in the history of legislation to date. In this respect, the Hungarian orientalist Femberi said 'your Islamic jurisprudence is very wide and I feel surprised whenever I remember that you did not extract from it the rules and provisions appropriate to your country and time'.[17]

Islam, as a legal legislation, includes several rules in all branches of law (private, general, domestic and international). Therefore, Islam has its distinguishable law and its unique rules. Additionally, Islamic texts include several principles and basics required for state building and legislation. They are not mentioned in detail,but presented on the whole in main principles (called *Nusus*), as each place and time requires legislation to cope with the interests of the people to live in an advanced society, and to facilitate this, Muslim scholars extract rules and laws within the scope of these broad legal principles. They can move within the scope of these principles for the good and advancement of their society.[18]

An example of the ability for the Islamic law to adapt with the modern state is found in the Ottoman area. The Ottoman legal system consists of two basic eras: The first era started from the creation of the empire until the "Regulations Era" (the year 1839); the second era was from the "Regulations Era" until 1917. During the first era, the Ottoman legal system was established on the principles of Islamic *shari'a* law, Islamic *fiqh*, and the norms and resolutions issued by the Sultan (the ruler). With the introduction of the modernity the Ottoman empire

[17] **Alsamorraie** (1984).

[18] **Khallaf** (1987), p. 2.

has done some reforms. The reform period known as the Era of Regulations. In 1839, the reform regulations aimed at modernizing the Empire therefore it introduced some western legislations (for example the French Law of Commerce) in order to enhance commercial activities between the empire and Europe. With the introduction of the reform regulations the empire regulated and harmonised by law the rules that were based on religion, norms, and the Sultanic Law.

There are texts which govern the relations of an Islamic state with other countries concerning peace, war, and conciliation. When we look at the sector of international relations and diplomacy, we find that it is known in modern times, but the jurists of Islamic Law have long established the parameters and framework of these issues. Unquestionably, Islam is a religion and a law that is not the opinion of Muslims alone, but is declared to be of value by non-Islamic scholars and the international legal conferences previously mentioned.

II. INTERNATIONAL LEGAL SCHOLARSHIP & RECOGNITION OF ISLAMIC LAW

Legal conferences, moreover, declare that Islamic jurisprudence is a belief and law, that its legal principles include a rich wealth of principles and theories, and that a comparative study of it should be adopted and encouraged. The Conference on Comparative Law held in The Hague in 1937 decided the following:

1. Islamic Law (Shari'a) shall be deemed a source of general legislation;
2. Islamic Law (Shari'a) is live and capable of development;
3. Islamic Law (Shari'a) is an independent legislation and not taken from other sources.

Furthermore, the Lawyers' International Conference held in The Hague in 1948 and attended by delegations from 53 countries, decided the following: as Islamic legislation is flexible and important, the International Society of Lawyers has to adopt a comparative study of this legislation. During the discussions held

in the International Conference on Comparative Law (dedicated for the week to Islamic jurisprudence) held in Paris in 1951, a lawyer who was a former Lawyers' Union member, declared that:

> I do not know how to conciliate between the stagnation of Islamic jurisprudence and its unfitness for being a legislation to satisfy the requirements of the advanced current community and between what we hear in the lectures and their discussions which clearly prove the opposite by evidences of texts and principles.[19]

The last conference was concluded by adopting a report which included the statement that the principles of Islamic Shari'a law have an unquestionable value, and that the various jurisprudence schools of this great law include a rich wealth of legal concepts and information. They are admirable as through them this law can respond to all the requirements of modern life and reconcile their needs. These developments include some modern agreements, such as the international law, which is the main focus of this paper.

Interpretation according to Islamic law and international law:

The above discussion has also shown that Islamic law can be viewed as a legal system, and this legal system can be comparable to the rules of international law, as they share common rules and principles. For instance, they share similar source 'customs'. It has been therefore proven that international legal scholarship has recognized the important tradition provided by Islamic law. In the following discussion, a focal topic which is specifically concerned with the issue of legal interpretation will be discussed. The next discussion will compare theories of interpretation in both systems, separately and in common. All players are engaged in the interpretation of international law, including the judiciary, international lawyers, organizations and scholars. Their attentions

[19] **Alzarqa, M** (1961) General Introduction to Jurisprudence, Damascus, Damascus University Press p. 209; The International Society for Comparative Law summarized the minutes of the sessions of Islamic Jurisprudence Week. This summary was published in 30 pages in its International Magazine for Comparative Law 1951, 4. Also Institute of Comparative Law, Paris University, the complete texts of conference lectures (Sirey for Legal Research 1953).

have focused on the normative question of how treaties should be interpreted, particularly with reference to the Vienna Convention on the Law of Treaties (VCLT) referring, namely, to text, context, object and purpose, and preparatory works of a treaty[20]. Interpretation mostly focuses on treaty interpretation under the VCLT, the traditional sphere of the literature on interpretation. Nonetheless, many have focused on other spheres in international law, including decisions by international organizations, unilateral acts of states, and customary international law.[21] To Waibel theory and practice principally interact in the art of treaty interpretation more than anywhere. International lawyers had handled the issue of interpretation for decades before the Vienna Convention on the Law of Treaties (VCLT) was adopted in 1969. Efforts on the part of all players to describe appropriate maxims for the interpretation of treaties and, to a lesser extent, for the interpretation of other rules and acts in international law, are multitude. Various methodological, hermeneutic and philosophical approaches of the international legal community have turned into a controversial debate on the appropriate means of interpretation, and on who has the authority to interpret them.[22] Therefore, interpretative methods and approaches have been debated for decades.[23]

International law interpreters attempt to look for the most appropriate approach, with some agreeing with the VCLT rules, and others strongly opposing them.[24] Nonetheless, most of the relevant scholarship is distinctively of European stance and tradition. Few have sustained the challenge to correlate

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[20] **Gardiner, Richard** (2008) Treaty Interpretation, Oxford, Oxford University Press; **Van Damme, Isabelle** (2009) Treaty Interpretation by the WTO Appellate Body, Oxford, Oxford University Press.

[21] Fernández de Casadevante Romani, Kolb, and Orakhelashvili.

[22] **Waibel, Michael** (2011) "Demystifying the Art of Interpretation", European Journal of International Law, V:22, I:2, p. 575-576, 571.

[23] **Gardiner** (n 21); **Van Damme** (n 21); **Waibel**, (n 23).

[24] **Myres, McDougal S.** (1967) "The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus", American Journal of International Law, V:61, I:4, p. 992-1000.

and associate Islamic legal perceptions on interpretation with those of international law.

This paper does not aim to encourage more controversy by supporting one method or theory over another. Nonetheless, the premise of this part is to implicate with such schools of thought in a 'solicitous manner'[25] that would have particular value for current and future scholarship. Islamic law, as is clearly acknowledged, is not the creation of legislators as in civil law, nor of judges as in common law, nor of customary and universal norms as in international law, but that of jurist Islamic scholars basing this evolution on divine sources.[26] Islamic law may interact with international law in different ways; Islamic law is a domestic source of law in many states which constitute influential elements in the international community, (i.e. the Gulf States). In the preceding discussion it was clear that Islamic law contains a great number of legal norms, and this was noticed from the recommendations of the international community including those of officials (i.e. international courts) and unofficial parties (i.e. international scholarship). In this part, the Islamic methodology of interpretation is reviewed in order to examine how international scholarship and the legal community could benefit from such an 'exquisite understudied art.'

VCLT: Interpretation of Treaties:

The VCLT itself provides and inspires rules for interpretation:

Article 31, General Rule:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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[25] The topic is understudied, and comparison of both laws is difficult, due to the different philosophical legal backgrounds.

[26] **Sherman, Jackson** (2006) "Legal Pluralism between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?", Fordham International Law Journal, V:158, p. 166-167.

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that the parties so intended.
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> Article 32: Supplementary Means of Interpretation:
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> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

Obviously, international law's principles for interpreting international agreements have therefore been codified in the VCLT. Those principles have been held by the International Court of Justice to constitute customary international law.[27] In *Libya v Chad*, for example, the ICJ definitely highlighted article 31's customary status:

[27] *Hungary v Slovakia* ICJ Reports 1997, 7, 35.

> The Court would recall that, in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.[28]

Other international tribunals, as well as national courts, repeatedly rely on the Convention to determine traditional rules on the law of treaty interpretation.[29]

It is apparent that the VCLT has two major provisions on interpretation. The first, article 31, bears the title 'General rule of interpretation'; the second, article 32, bears the title 'Supplementary means of interpretation'. It is clear from the general rule and the mandatory nature of the word 'rule' in article 31, as opposed to the secondary language of the word 'means' in article 32, that article 31 prevails here, while article 32 is supportive or supplemental to article 31. International law does therefore offer 'general rules' for interpreting treaties. These rules are set out in the VCLT to reflect customary international law, binding on all states. The VCLT offers two main principles. The first is that treaties must be interpreted in 'good faith', in conformity with the 'ordinary meaning' of the 'terms' or text of the treaty, in their 'context', and in the light of the treaty's 'object and purpose'. This determination of text, context, and purpose is described as a universal, non-hierarchical exercise, notwithstanding one that starts with the text of the treaty.[30] The VCLT provides a second main principle in that the 'preparatory work of the treaty and the circumstances of its

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28 Territorial Dispute (*Libya v Chad*) 1994 ICJ 4, 16.

29 *Opel Austria GmbH v Council of the European Union*, [1997] ECR 11-43, 70.

30 **Abi-Saab, George** (2006) The Appellate Body and Treaty Interpretation in Sacerdoti G, Yanovich A and Bohanes J (eds.) The WTO at Ten: The Contribution of the Dispute Settlement System Cambridge, Cambridge University Press.

conclusion' are only ancillary sources of interpretation to confirm meaning established under the first principle, or when the meaning of the treaty remains uncertain or leads to an irrational conclusion.

These VCLT rules generally apply to all treaties, regardless of the subject matter, objectives, or nature of parties to the treaty. Based on the requirements of the parties involved, they can contract out of these general rules by introducing detailed rules in a specific treaty. If no specific rules are provided (relevant for most treaties), the general VCLT rules apply. On one hand, the rules on interpretation provided in articles 31-33 VCLT seem to have resolved previous controversies. On the other hand, the VCLT simply simplified these debates to written form, and left considerable latitude for eccentric approaches of interpretation within the restrictions stipulated by the VCLT's general interpretive rules.[31] Brownlie therefore observed that 'many of the rules and principles offered are general, question-begging and contradictory'.[32] The codification in the VCLT refers to general rules and principles, and grants substantial room for autonomy to interpreters. Obviously, article 31 VCLT uses mandatory language ('the Treaty shall be interpreted'), but does specifically focus on how much burden each part in article 31 deserves. However, the design in article 32 that 'recourse may be had to supplementary means' clearly provides that the use of supplementary means is the interpreter's choice.

In contrast, Orakhelashvili observes that the methods of interpretation pre- and post- the VCLT have significantly changed, with the practice of interpretation currently being subject to written established rules. He emphasizes that it would be incorrect to view the interpretive principles as mere 'working assumptions'.[33] Relatively, 'the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative

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[31] **Waibel** (n 23); **Gardiner** (n 22).

[32] **Brownlie, Ian** (2003) Principles of Public International Law, 6th edition, Oxford, Oxford University Press, p. 602.

[33] **Orakhelashvili, Alexander** (2008) The Interpretation of Acts and Rules in Public International Law, Oxford, Oxford University Press, p. 594.

methods'.[34] Orakhelashvili emphasizes that the appropriate objective of interpretation is to 'deduce the meaning exactly of what has been consented to and agreed'.[35] According to Van Damme 'all interpretation is contextual' and he states that 'it is the prerogative of the interpreter to decide how context comes into play'.[36] Along the same lines, Gardiner emphasizes from the same perspective that the ordinary meaning cannot be dissociated from context, as it is 'immediately and intimately linked with context and to be taken in conjunction with all other relevant elements of the Vienna rules'.[37] Gardiner, however, highlights that the VCLT principles do not offer a "step-by-step formula for producing an irrebuttable interpretation".[38] The rules are not "simple precepts that can be applied to produce a scientifically verifiable result". Discretion by the interpreter is a serious act. They leave "some issues incompletely resolved"[39] and offer a great deal of room for substantial autonomy. The VCLT infers a variety of interpretive methods and approaches. Van Damme emphasizes, in the same vein, that the VCLT offers "principles of logic and order that both constrain and empower the interpreter".[40] They are continuously interrelating with customary principles of interpretation, rejecting concerns that the VCLT may be a 'straitjacket' for the interpreter, or insufficient to encounter changes that ascend in modern interpretation. To Fish, the interpretation is inherent in the communicative process through which an author conveys meaning to an interpreter, because words have no inherent meaning. They can be anything that the author wishes. Where the semantic meaning of a text is vague, interpretation is of no use. The interpreter in this case uses extra textual material, and this is referred to as 'construction'. According to legal construction, orthodoxy challenges that interpretation in

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34 **Orakhelashvili,** p. 309.

35 **Orakhelashvili**, p. 286.

36 **Van Damme**, p. 213.

37 **Gardiner**, p. 175-176.

38 **Gardiner**, p. 9.

39 **Gardiner**, p. 7.

40 **Van Damme** (n 22), p. 38.

international law is grounded on extracting an idea or rule from the text which exists objectively. In the interpretive process, one must not ignore the societal and ideological context.[41]

As Koskenniemi states, 'international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents.'[42] The language of international law in this regard provides an arena to accomplish conflicts and interpretation contains an exercise of power.

David Kennedy remarkably debates that in war the language of international law eventually disguises political decisions and obstructs second thoughts.[43] Arguing that international permanence depends upon political control rather than legal legitimization, Carr rejects the idea that international disagreements could be resolved through adjudication rather than diplomacy supported by force.[44] Morgenthau likewise overruled domestic adjudication as the machinery for determining treaty disputes:

> In the international field, it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments. They will naturally interpret and apply the provisions of international law in the light of their particular and divergent conceptions of the national interest. They will naturally marshal them to the support of their particular international policies and will thus destroy whatever

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41 **Fish, Stanley** (2008) "Intention Is All There Is: A. Critical Analysis of Aharon Barak's Purposive Interpretation in Law", Cardozo Law Review, V:29, p. 1109-1124, 1110.

42 **Koskenniemi, Martti** (2004) "International Law and Hegemony: A Reconfiguration", Cambridge Review of International Affairs, V:17, I:2, p. 17.

43 **Kennedy, David W.** (2002) "The International Human Rights Movement: Part of the Problem?", Harvard Human Rights Journal, V:15, p. 101; **Kennedy, David W.** (2001) "The Politics of the Invisible College: International Governance and the Politics of Expertise", European Human Rights Law Review, p. 463, 478.

44 **Carr, Edward Hallett** (1946) The Twenty Years Crisis 1919-1939, 2nd edition, London, Palgrave Macmillan, p. 111.

> restraining power, applicable to all, these rules of international law, despite their vagueness and ambiguity, might have possessed.[45]

Although the law of treaty interpretation was codified more than four decades ago, it has turned out to be one of the most dynamic in international law. It continues to evolve; these changes have incited international interpreters to take a sustained look at interpretation. The recent ample literature on interpretation has posed the need for an examination of this dynamic evolution. An ideal way to examine the art of treaty interpretation is to study the interpretative practice and approaches in parallel with different schools of thought through comparative analysis.

In international law there are three principal hermeneutic approaches or theories of interpretation where uncertainty exists:

(a) Textual approach: the literal text of the treaty;

(b) Subjective approach: the idea behind the treaty, treaties in their context, the intent of the writers to the treaty, or;

(c) Objective approach, the underlying objective that the treaty seeks to attain, the interpretation that best suits the goal of the treaty. Also referred to as 'effective interpretation'.

It is mostly agreed that the task bequeathed on interpreters is to examine the intentions of the parties involved.[46] The question raised here is where an interpreter must focus in order to find the intentions of such parties. The textual approach claims that the unsurpassed and most objective expression of intent can be detected in the treaty text itself. In contrast, the subjective approach infers that the text is a preliminary step. Nonetheless, the interpreter needs to pore over it in order to unveil the authentic, subjective intentions of the parties,

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[45] **Hans, Morgenthau** (1954) Politics among Nations: The Struggle for Power and Peace, 2nd edition, (revised) Alfred A Knopf.

[46] **Pauwelyn, Joost/Elsig, Manfred** (2012) "The Politics of Treaty Interpretation" in Dunoff Jeffrey and Pollack Mark (eds.) Interdisciplinary Perspectives on International Law and International Relations, Cambridge University Press, p. 445-474.

for example, by looking at the preparatory works associated with a treaty.[47] To the supporters of an objective approach, the interpreter must closely consider, not so much the raw text of the treaty or the subjective intentions of the writers themselves, but rather on the underlying objectives these writers were endeavouring to achieve. Some refer to it as a 'teleological approach'.[48]

Most of the scholarship focuses on how we are interpreting methods, approaches and techniques. Rather, it is imperative to focus on why we are interpreting and who are eligible or authorized to be involved in the art of interpretation. What is the role of the interpreter? The definition of interpretation varies, depending on what function it is intended to serve.[49] Some take the view that the role of the interpreter is to clarify the meaning from the text.[50] In contrast, others emphasize that the interpreter's role involves creativity and the construction of meanings. There are four elements involved in the culture of interpretation. First, the drafter (legislator), second, the object of the interpretation itself, third, the interpreter, and fourth, the environment in which the interpretation occurs.

The ILC clearly stated the following in their Commentaries regarding the contingency and contextuality of interpretative principles and maxims:

> Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is

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47 **Lauterpacht, H** (1949) "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", British Yearbook of International Law, V:26, p.48-85; Myres, p. 992-1000.

48 **Letsas, George** (2010) "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", European Journal of International Law, V:21, I:3, p. 509-41, 512.

49 **Kolb, Robert** (2006) Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public, Brussels, Bruylant - Editions de l'Université de Bruxelles.

50 **Patterson, Dannis** (1993) "The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory", Texas Law Review, V:72, p. 1-56.

> rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, re-course to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.[51]

'The phrase "original understanding," however, is ambiguous. It could refer to what the original author or authors had in mind, to his, or her, or their intention, or it could refer to how the words would have been understood by literate and informed persons at the time of their utterance or publication'.[52]

III. THE PHILOSOPHY OF INTERPRETATION IN THE EYES OF ISLAMIC LAW

In Islamic law, none of the main jurists involved in the art of interpretation follow one specific approach or theory as in international law, but they follow a 'hermeneutic circle' that contains different theories and approaches and sometimes a shared one. Although Islamic law recognizes several methodologies regarding interpretation from the perspective of Islamic law, all those involved in the art of interpretation have common principles and maxims that only differ on the specific tools or approaches. All jurists, for example, accept the two main

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[51] Commission, 'Draft Articles on the Law of Treaties with Commentaries' 218 para 4.

[52] **Fish, Stanley** (2008) "Intention Is All There Is: A. Critical Analysis of Aharon Barak's Purposive Interpretation in Law", Cardozo Law Review, V:29, p. 1109-1124, 1110.

sources (the Qur'an and Sunna) that generate general rules of interpretation, and all are agreed that the reasons for revelation come as the first step in the interpretation. Also, to interpret a verses in the Qur'an, you first must look at other Quranic verses. If this is not possible, you should refer to the Sunna and then to other sources, and to interpret Hadith you must look at the Qur'an first, then to the Sunna, and then to other sources.

A. ISLAMIC LITERALISM (ZAHIRI)

In Islamic law, a textual interpretive approach is demonstrated in the 'Zahiri' School, which promoted observance of the literal or apparent meaning of divine words. The Zahiri view called for keeping the law from juristic interpretation in order not to add hypothetical human estimation.[53] In parallel, the other schools of thoughts relied on *ijtihad* reasoning. The Zahiri approach claims that every single word in the divine source texts exists for a reason. Anyone, from the Zahiri point of view, who examines an issue beyond its textual state, will introduce personal subjectivity, prejudice and whim into the law.[54] Chejne, therefore, explaining Ibn Hazm's approach, stated:

> The Qur'an and the authenticated Traditions [*hadith*; stories of the Prophet Muhammad] are self-contained and perfect and embody the infallible truth and the perfection of religion... Anything beyond them is sophistry, charlatanry, and lies. They are the sole foundation of the religious law (*shari'ah*), which should be understood as it is and in its literal meaning with no interpretation, personal opinion, analogical reasoning, or any other human criterion.[55]

The Zahiris therefore did not accept all the *fiqh* tools developed by the other schools of thought, such as analogical reasoning, consensus, and different mechanisms of juristic discretion. The Zahiri approach was stipulated by the prominent Andalusian Zahiri jurist, Ibn Hazm: 'whoever gives a legal decision

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53 **Chejne, Anwar G.** (1982) Ibn Hazm, Chicago, Kazi Publications.

54 **Chejne.**

55 **Chejne,** p. 113-14.

on the basis of his personal opinion will be making decisions without knowledge, for there is no knowledge about religious matters outside the knowledge of the Qur'an and the Traditions [of the Prophet Muhammad].'[56]

Using only the apparent meaning of such texts, Zahiris emphasise, will guard the Law of God from exploitation by human whim or subjectivity. Importantly, 'when God's ruling on something has itself been removed from our intellects, we may not perform *ijtihad* and adopt our own arbitrary opinions'.[57] The Zahiri theory encouraged:

> [T]hat each Muslim rely solely on the Qur'an and traditions and derive legal decisions independently of any established school of law... The literal meaning of the holy texts will lead to the actual rather than an implied meaning, thereby putting an end to speculation and to the intervention of human criteria such as imitation, analogical reasoning, personal opinion, interpretation and the like, which are no more and no less than innovations ... and an affront to the spirit and letter of the religious law (shari'a).[58]

In parallel, and in the same vein, international textualism can contain both rigid and liberal results, the same as is applied in the Zahiri approach. The Zahiri practice has been described as a less lenient method than those of other schools of thought. Nyazee, commenting on the Zahiri approach, referred to it as 'a new theory in itself; a theory that works without analogy' determining to focus only on the textual meaning, and to 'confine all interpretation to the apparent (zahir) meaning of the textual evidences'.[59] The opponents of the Zahiri position argued that literalism as an approach to textual interpretation is thoughtless and impractical, as its opponents Madahib in the Islamic jurisprudence have described them.

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[56] **Chejne,** p. 125.

[57] **Devin S/Muhammad B** "Dāwūd āl-Zāhirī's Manual of Jurisprudence: Al-Wusūl ilā ma'rifat al-usūl" in Weiss, Bernand (ed.) (2002) Studies in Islamic Legal Theory, London, Brill, p.138-158.

[58] **Chejne,** p. 44

[59] **Nyazee, Imran Ahsan** (1995) Theories of Islamic Law: The Methodology of Ijtihad, Chicago, Kazi Publications.

Chejne observed, 'Ibn Hazm's aversion to the rigidity of the Malikite legal school and to the apparent neglect of the study of the Qur'an and Traditions' and desire 'to reform and rejuvenate religious beliefs and practices', describing Ibn Hazm's Zahirism as 'essentially a revisionist school' and that Ibn Hazm 'hoped ... to rescue his society from its predicament' with his methodology 'if only the religious scholars would discard the shackles of traditionalism and look again at the Holy Scriptures'.[60] He further referred to the historian al-Marrakushi, outlining Ibn Hazm as 'the most famous scholar of al-Andalus and the most talked-about man in the assemblies ... of leaders and scholars ... no one before him had ever attained such a fame among us'.[61] Chejne states further, 'Zahirism allows ample room for individual inquiry (*ijtihad*) whereby the researcher (*mujtahid*) will determine on the strength of the holy text and logic the validity or invalidity of any question at hand'.[62] He further commented on Ibn Hazm's approach that the law should not 'espouse the scholars' personal opinions, or advocate their particular points of view' and explained that '*Ijtihad* should not give license to anyone to legislate beyond what is in the Qur'an and the Traditions'.[63]

Notably, these international and Islamic legal thinkers did not fight with intellectual thinkers, nor did they oppose the use of reason in legal analysis. However, they ostracised those who wished to use legal reasoning rather than personal opinion, and they argued that sticking to the plain meaning of the text, as one would expect, cause substantial criticism from other schools of thought. The opponents of the Zahiri School described it as a profoundly impracticable approach to law-making.[64] They argued that its attention on only the plain meaning of texts, refusing other methodical tools such as analogical reasoning,

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60 **Chejne**, p. 16, 45, 55.

61 **Chejne,** p. 7.

62 **Chejne**, p. 45.

63 **Chejne**, p.131.

64 **Khaldun, Ibni** (1986) The Muqaddimah: An Introduction to History, V:3, (Translator: Franz Rosenthal), London, Routledge.

might produce an insufficient *fiqih* that might not be able to resolve various factual cases straight away as it appears in the text. The Zahiri approach was actually opposed by the majority of Islamic legal schools. The Zahiri has now disappeared as a legal school of thought, although its supporters argued that such an approach will protect the 'Divine Text' from interpretation incorporating human subjectivity and personal whim.

In the famous Hadith of 'afternoon prayers at Bani Quraizah,' the Prophet sent a group of companions to Bani Quraizah,[65] and ordered them to conduct their afternoon (*asr*) prayers there. The restricted time allowed for *asr* prayers started to expire before they reached Bani Quraizah. Thus, the group was divided into supporters of two different opinions, one of which necessitated praying at Bani Quraizah in any event, and the other opinion necessitated praying on the way (before the prayer time expired). The reasoning behind the first opinion was that the Prophet's instruction was pure in asking everyone to pray at Bani Quraizah. On the other hand, the opponents' reasoning was that the Prophet's 'purpose/intent' in terms of the instruction was to ask the group to hurry to Bani Quraizah, rather than 'intending to' postpone prayers until after its due time. Based on the narrator, when the companions later reported the event to the Prophet, he accepted both opinions.[66] The approval of the Prophet, as jurists commented, infers the tolerability and rightness of both opinions. The jurist who disagreed with the companions who prayed on the way was Ibn Hazm al- Zahiri (the literalist), who observed that they should have prayed the 'afternoon prayer' once they reached Bani Quraizah, as the Prophet had said, even though it was after midnight.[67]

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[65] **Al-Bukhari** (1986) Al-Sahih, V:1, 3rd edition, ed. Mustafa al-Bagha, Dar Ibn Kathir, p.321; **Muslim** (1391H) Sahih Muslim, V:3 (ed.) Mohammad Foad Abdul-Baqi, Dar Ihya al-Turath al-Arabi.

[66] Narrated by Abdullah Ibn Omar, according to al-Bukhari (n 65) 321 and Muslim (n 65) H1391.

[67] **Hazm, Al-Muhalla** (ed.) Lajnat Ihiya' al-Turath al-Arabi, Dar al-Afaq, p. 291

B. ORIGINALISM & ISLAMIC THEORY

To find the meaning of a text by searching for the intent of its author, raises the question of how a jurist could determine an author's intent when that author was not available for discussion. One could look for any extra material published by the author, and this might be in the form of the author's other sources or documented explanations by those who lived with the author. From an Islamic perspective, the authorial record is not an easy topic. It is well acknowledged in Islam that the Prophet did not 'author' the Qur'an, therefore 'authorial record' of the Qur'an cannot be attributed to the Prophet. The Qur'an was revealed from Allah; it has a Divine Author. However, the Prophet's statements and actions (called the Sunna and narrated in the form of Hadith) are binding norms for Muslims, and the practical records of the Prophet's life provide some indications as to the meaning of his actions and statements. The Prophet was considered the first and best interpreter of the Qur'an and the Sunna. However, Muslim scholars faced noticeable difficulties when they identified the Hadith as being authentic so that it could be an authority. Other questions and differences appear when considering whether or not a jurist can use Hadith that is not authentic as an authority.[68] All jurists agreed that to understand the law, one shall refer to the Companions of the Prophet. The Malikis offered absolute primacy to the practice of the community of Medina because they had witnessed the implementation of that revelation. They differ, however, on how far their understanding should stand when challenged with incompatible evidence.

Asifa Qurashi's detailed study expressed the difficulties that the supporters of the originalism theory might face, when she compared the topic from different perspectives, namely American and Islamic (although the Maliki way of thinking cannot exactly be named as originalism theory). She states:

[68] **Kamali, Hashim** (2003) Principles of Islamic Jurisprudence, Cambridge, Islamic Texts Society, p.58-116. For more detailed information on the science of *hadith* collection and classification.

> The debate evokes parallels in the arguments of American "originalists" who have asserted that to determine constitutional meaning one should look to what eighteenth Century Americans understood its words to mean, since these Americans represent the community and background ideas of the Framers. In this section, we will compare this impulse to look to early America with the Maliki focus on Medina. Critics of these historically-focused methodologies, in both legal communities, pointed not only to the logistical difficulties of accurately unearthing past understandings of these texts, but also the pitfalls of human subjectivity embedded in this process. It is not uncommon, for example, to find historically-focused methods attacked for being merely a false cover for subjective preferences. That is, just as in plain meaning literalism, no matter how objective one attempts to be in searching for historical meaning, individual predilections about meaning will inevitably influence, if not direct, the result, the originalist defence has been equally aggressive, staking a claim for being inherently superior in ability to maintain fidelity to the supreme law.[69]

In this regard, a famous debate arose between the Islamic jurists of law, specifically the debate between the Imam Malik and the Imam Shafi'i. Maliki argued that, to show real commitment to the Prophetic Sunna, a Muslim jurist must comprehend the Hadith against the context of Medina. In contrast, for Shafi'i, abiding by the comprehensive Hadith texts is an unquestionable religious obligation for all Muslims, and even when a comprehensive Hadith carries less authoritative weight (i.e. an isolated Hadith), it is better to apply it other than the absence of text at all.[70] Nyazee, however, highlighted that Shafi'i was the first jurist to emphasize the principle that God 'has left out nothing for which a hukm (legal ruling) has not been laid down'.[71]

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[69] **Quraishi, Asifa** (2007) "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence", Cardozo Law Review, V:28, p.67-123.

[70] **Zahra, Muhammed Abu** (2001) The Four Imams Their Lives, Works and Their Schools of Thought (translator: Aisha Bewley), Dar al-Taqwa.

[71] **Nyazee**, p. 47.

However, according to the Malikis, the sayings or actions of the Prophet cannot be understood remotely without also taking into consideration the context in which they occurred, which is connected with the Medinan practice. Ibn al-Qasim states, if a Hadith is 'accompanied by Medinan *'amal* (practice) ... it would indeed be correct to follow it. But [one need not follow a *hadith* that is] only like other *hadith* that have not been accompanied by *'amal*.'[72] It is important to note that Ibn al-Qasim's assertion does not necessarily question the authenticity of those Hadith texts, but rather sets forth the methodological principle that 'whatever the reason for the discrepancy between the legal implications of such texts and the content of *'amal*, it is not valid to institute such legal implications into *'amal* if the first generation of Muslims did not do so'.[73]

Shafi'i, in contrast, strongly argued on the unconditionally binding quality of the Sunna of the Prophet, and rejected the Maliki evidence that the practices of Medina should be the determinative indicator of the meaning of the divine law. Indeed, Shafi'i underscored the notion of the comprehensiveness of the revealed texts,[74] for, as the Qur'an says, 'We have neglected nothing in the book.'[75] In the opinion of Shafi'i, a legitimate interpretation of God's Law must be connected to something in the Qur'an or some verified Hadith.[76] Shafi'i goes further and states that any attempt by human beings, other than relying on a text, might affect the meaning of divine text and thus debase the scholarship and perfection of the Law of God. Such attempts are considered jurisprudential error in Shafi'i's opinion. On the other hand, the Malikis rejected Shafi'i textualism for being unable to differentiate the normative from the non-

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[72] **Abd-Allah, Umar Faruk** (1978) "Malik's Concept of Amal in the Light of Maliki Legal Theory" (unpublished PhD dissertation), University of Chicago, p. 379.

[73] **Abd-Allah**, p. 680.

[74] The Qur'an 6:38 **Al-Shafi'I** (1987) Risala: Treatise on the Foundations of Islamic Jurisprudence, 2nd edition, (translator: Khadduri Majid, Cambridge Islamic Texts Society, p.66 (quoting several Qur'anic verses in support of this point, including 14:1, 16:46, 91, 42:52).

[75] The Qur'an 6:38.

[76] **Al-Shafi'I**, p. 66.

normative in the Hadith record. Shafi'i treated all 'valid' Hadith as normative and binding, no matter how unusual their content, and criticized the methodical means of classification used by the Malikis to which of the Hadith is binding or not.

From an in-depth look at the literature in this area, one cannot dispute that although there is a clear difference between Maliki and Shafi'i, on the methodology and epistemology of interpretation, both however share a joint objective and purpose. Indeed, they have hardly insisted on seeking the best route to evade human subjectivity and arbitrary whim in the explanation of the Prophetic Sunna. Asifa Qurasi,[77] made a strong statement in this regard when she compared the interpretation of the Islamic law with the interpretation of the American Constitution, when she stated:

> In this sentiment there has been agreement from both literalist and not-so-literalist scholars, together rejecting historical readings that reduce the meaning of the text to incidental understandings of a discrete population at a discrete time. American originalists have not tolerated these criticisms any more than the Medina-focused Malikis did. Some originalists have insisted on a strong epistemological reason for relying upon historical evidence to decode ambiguous, cryptic, and abstract language. And she cited the words of Gary Lawson from the American scholarship, 'early actors, especially those who operate[d] near the time of the Constitution's promulgation, are a likely source of wisdom concerning the meaning of ambiguous constitutional terms ... and their views are accordingly entitled to weight in the interpretative process.'[78] Others have returned to an emphasis on authorial intent, asserting that interpretation is about ascertaining the intent of the authors, and historical understandings are the most reliable way to do that

[77] **Qurashi**, p. 99.

[78] **Lawson, Gary S.** (1997) "On Reading Recipes and Constitutions" Georgetown Law Journal, V:85, p. 1823, 1834.

C. AL-MAQASID (PURPOSE ORIENTED THEORIES OF INTERPRETATION) V 'TELEOLOGICAL APPROACH'

The purposive theory states that one should not look only at the literal meaning of the text, but rather there must be a holistic view linked to the higher objectives of Islamic law. Al-Maqasid is introduced as a commonly agreed principle between all schools of Islamic law. In accordance with the methodology that considers the wisdoms behind the rulings, Qaradawi comments in this regard:

> Zakāh is due on every growing wealth ... The purpose of zakāh is to help the poor and to serve the public good. It is unlikely that The Legislator aimed to put this burden on owners of five or more camels (as Ibn Hazm had said: There is no zakāh on horses, commercial goods, or any other type of wealth[79]), and release businessmen who earn in one day what a shepherd earns in years ...
>
> Al-Qarafi writes in his *al-Furūq* (The Differences):
>
> There is a difference between the Prophetic actions as a conveyer of the divine message, a judge, and a leader ... The implication in the law is that what he says or does as a conveyer goes as a general and permanent ruling ... [However,] decisions related to the military, public trust, ... appointing judges and governors, distributing spoils of war, and signing treaties ... are specific to leaders.[80]

Najmuddin al-Tufi explained maslaha as 'what fulfils the purpose of the Legislator.[81] Al-Qarafi interrelated maslaha and maqasid by a 'fundamental rule' when he stated: 'A purpose (maqasid) is not valid unless it leads to the fulfilment of some good (maslaha) or the avoidance of some mischief (mafsadah)'.[82] Al-Juwaini, one of the early jurists who wrote on the maqasid

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79 View strongly expressed in **Hazm**, p. 209.

80 **Al-Qarafi** (1998) Al-Furuq (Ma'a Hawamishih), V:1, (ed.) Khalil Mansour, Darul Kutub al-Ilmiya p. 357.

81 **Al-Tufi** (1419 H) Al-Ta'in Fi Sharh Al-Arba'in, al-Rayyan, p. 239.

82 **Al-Qarafi** (1994) Al-Dhakheerah, V:5, Dar al-Arab, p. 478.

issue, states that these fundamentals of the law, which he obviously called 'al-maqasid,' are 'not subject to opposing tendencies and difference of opinion over interpretations'.[83] Al Juwaini, in this regard, comments that 'mutual agreement' in the laws of trade is one of the fundamentals of law that should never be abolished.[84] Abu Hamid al-Ghazali further developed the theory of maqasid in his book, *al-Mustafa* (The Purified Source). He put the 'necessities' that his teacher al-Juwaini had suggested in an obvious order as follows: (1) faith, (2) soul, (3) mind, (4) offspring, and (5) wealth.[85] Al-Ghazali also coined the term of 'preservation' (Hifd) with regard to these necessities. Though he has articulated a unique design for the subject, al-Ghazali insisted it did not provide independent juridical legitimacy (hujiya) to any of his proposed maqasid or masalih, but nonetheless termed them 'the illusionary interests' (al-maqasis al-mawhuma).[86] He justified his observation for the use of terminology; the maqasid are extracted from the scripts, and cannot literally be implied, as other 'undisputed clear general Islamic rulings'. In *al-Mustasfa*, al-Ghazali wrote:

> In its essential meaning, *al-maslaha* is a term which means to seek something beneficial [*manfaa*] or avoid something harmful [*madarra*]. But this is not what we mean, because to seek the beneficial and avoid what is bad are the objectives [*maqasid*] intended by creation, and good [*sahah*] in the creation of humanity consists in the attaining of these objectives [*maqasid*]. What we mean by *maslaha* is the preservation of the objective [*maqasid*] of the Law [*shar*], which consists in five things: the protection of religion, life, intellect, lineage, and property. Whatever ensures the protection of these five principles [*usul*] is *maslaha*; whatever goes against their protection is *mafsada*, and to avoid it is *maslaha*.[87]

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[83] **Al-Juwaini** (2008) 'Al-Ghayyathi' in Jasser Auda (ed.) Maqasid Al-Shariah, An Introductory Guide, IIIT.

[84] **al-Juwaini,** p. 490.

[85] **al-Juwaini**, p. 258.

[86] **al-Juwaini,** p. 172.

[87] **al-Juwaini**.

The jurist, al-Izz Ibn Abdul-Salam, also added further development to the topic of maqasid when he commented 'Every action that misses its purpose is void,'[88] and, 'when you study how the purposes of the law brings good and prevents mischief, you realise that it is unlawful to overlook any common good or support any act of mischief in any situation, even if you have no specific evidence from the script, consensus, or analogy'.[89]

Ibn al-Qayyim has also argued on the issue of intention and its connection with maqasid. He comments:

> Legal tricks are forbidden acts of mischief because, first, they go against the wisdom of the Legislator, and, secondly, because they have forbidden maqasid. The person whose intention is usury is committing a sin, even if the outlook of the fake transaction, which he used in the trick, is lawful. That person did not have a sincere intention to carry out the lawful transaction, but rather, the forbidden one. Equally sinful is the person who aims at altering the shares of his inheritors by carrying out a fake sale [to one of them] ... Shari'a laws are the cure of our sicknesses because of their realities, not their apparent names and outlooks.[90]

In terms of analogical reasoning, Shafi'i insisted that to use any *'illa* (*ratio legis*), it must be explicitly traced to an authenticated divine text in order to be valid as a basis for analogy, and not traced to Medinan tradition as was the Malikis' opinion. Ghazali, as a Shafi'i follower, proposed an outstanding compromise; *ijtihad* based upon the purposes of Islamic law can permit analogical legal reasoning from a general principle, and not be particularly connected to a specific text, providing that it maintains one or more purposes of the maqasid. In this way, Ghazali proposed to use text and to take into account purpose, in order to articulate the rule. This can be performed by using non-textual sources and, at the same time, not fall into the trap of subjectivity. In

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88 **Abdul-Salam, Al-Izz** Qawaid Al-Ahkam Fi Masalih Al-Anam, Arabic, Dar al-Nashr, p. 221.

89 **Ibn Abdul-Salam,** p. 160.

90 **Al-Qayyim** (1973) I'lam Al-Muwaq'een, (ed.) Taha Abdul Rauf Saad, Dar Al-Jeel.

Ghazali's opinion, the law is a combination between revealed text, its rooted legal principles, and the superior purposes of the law. In this regard, Malikis consider *maslaha* to be itself a norm of Shari'a. As a result, it is not a barrier for Malikis to integrate *maslahas* that have 'no textual source' into their jurisprudence.[91] However, 'When the *Shari'ah* is totally silent on a matter; this is a sure sign that the *maslahah* in question is no more than a specious *maslahah* (*maslahah wahmiyyah*) that is not a valid ground for legislation.'[92] Shatibi expressed the view that the inductive method can create the idea of *maslaha* in the *shari'a*, 'both as a general theme ... and in the description of the *'illa[s]* of various commands in detail.'[93]

Shatibi contends that:

> ... the attainment of *masalih* is an ultimate purpose of Islamic law on the basis of inductive study [*istiqra'*] of Islamic law. Shatibi observes that the signifying analogies and the points of wisdom [*hikmas*] that lie behind rulings of Islamic law pertaining to social and economic transactions [*mu'amalat*] are often set forth with clarity in the textual sources of the law, which he takes to be an indication that the [legal scholar] is expected to concern himself with following the purposes of those rulings when applying them and not to concern himself only with adhering to the form of the ruling.[94]

Bagby comments that in this line, Shatibi criticizes the jurists' excessive dependence on formal *qiyas* in deriving legal rulings on the basis of isolated established cases. By depending on *qiyas,* the job of the jurist is reduced to hunting for, and finding, that one clear established case from which he can derive an *'illah* and then generate new rulings.[95] He further adds:

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91 **Abd-Allah,** p. 268-70.

92 **Kamali,** p. 362.

93 **Masud, Muhammed Khalid** (1998) Shatibi's Philosophy of Islamic Law, Delhi, Kitab Bhavan, p. 226-27.

94 Abd-Allah, p. 271.

95 **Bagby, Ihsan Abdul-Wajid** (1986) "Utility in Classical Islamic Law: The Concept of Maslahah in Usul Al-Fiqh", (PhD dissertation), University of Michigan, p. 37.

> [I]n one sense al-Shatibi's argument can be seen as an indictment of the doctrine of atomism that pervades all fields of classical Islamic thought. The atomistic characteristic of focusing on the particular as opposed to the universal has greatly influenced Islamic thought, including legal theory. Al-Shatibi's aim is to loosen the hold of atomism on legal theory by introducing into legal reasoning a holistic approach to the law as opposed to a completely particularistic approach.[96]

Hallaq comments, 'this new method is not as the conventional it goes beyond atomic view of the Qur'an of some jurist; Shatibi provides a unique theory in which the text is seen as an integral whole'.[97] In the eyes of Shatibi, this can create a parochial and slanted view of the law, missing the importance of *maslaha* because of failing to take into consideration the totality of the authoritative sources.

> Shatibi criticizes the jurists' excessive dependence on formal *qiyas* in deriving legal rulings on the basis of isolated established cases. By depending on *qiyas* the job of the jurist is reduced to hunting and finding that one clear established case from which he can derive an *'illah* and then generate new rulings.[98]

In one sense, al-Shatibi's argument can be seen as an indictment of the doctrine of atomism that pervades all fields of classical Islamic thought. The atomistic characteristic of focusing on the particular as opposed to the universal, has greatly influenced Islamic thought, including legal theory. Al-Shatibi's aim is to loosen the hold of atomism on legal theory by introducing into legal reasoning a holistic approach to the law, as opposed to a completely particularistic approach.[99] Shatibi ranks alongside Shafi'i in significance, because

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96 **Bagby**, p. 138.

97 **Hallaq, Wael** (1997) A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh, Cambridge, Cambridge University Press, p. 195.

98 **Bagby**, p. 17.

99 **Bagby**, p. 138.

his exposition of the goal and spirit of Islamic law made it possible for Islamic law to escape the impasse into which the strict adherence to the limits defined by Shafi'i in *usul al-fiqh* had led. Shafi'i's *usul al-fiqh* paved the way for juridical theology which defined *usul* in terms of sources, and limited the method of legal reasoning to *qiyas*. This method led to an impasse in solving modern legal problems in the absence of precedents. Shatibi sought a way out of this impasse by means of his doctrine of *maqasid al-shari'a*.[100]

IV. REFERENCE TO COURT LAW BY THE INTERNATIONAL COURTS

Several cases established references and recognitions, and this can be clearly seen before the International Court of Justice and other international tribunals. In the aforementioned topic discussion, namely treaty interpretation, there are clear indications and recommendations from judges in the international courts that refer to the interpretive methodology and hermeneutic sciences accomplished by Islamic law. From a survey of the international court cases one can clearly conclude that the judges did not discuss these principles in detail when referring to Islamic law. They only recommended the authority, but were unable to interact and compare these rules to its matching norms in international law. In *North Sea Continental Shelf* the judge argued that articles 38(1)(c) and 9 of the ICJ Statute, as well as the principle of 'sovereign equality' protected in article 2(1) of the UN Charter, necessitated the court to refer not only to European legal traditions, but also to Islamic legal principles, when seeking for a general principle of law. Judge Ammoun further added that the maxim *quieta non movere* (which allows states to take shelter behind situations consolidated by time) is a norm of general law that has long been realised in 'Muslim law, *Majallat El Ahkam*, Art 5.'[101] Judge Weeramantry observed, in his distinguishing view in the *Hungary v Slovakia* case, that when dealing with newly developing areas of international law, the court is 'charged with a duty' to

[100] **Masud,** p. 110-11.

[101] Article 5 of the Majalla provides: 'It is a fundamental principle that a thing shall remain as it was originally' (translation by CA Hooper: 1934.

pay attention to principles already existing in the legal traditions and cultures of the 'world's several civilizations'.[102] Any look at the world's legal traditions and civilizations (within the meaning of article 9 of the ICJ Statute) 'would not be complete without a reference also to the principles of Islamic law'.

In *Greece v Turkey*, Judge Tarazi moreover expressed the view that the rule contained in article 2(1)(a) of the 1969 Vienna Convention (which states that a 'treaty means an international agreement... *whatever its particular designation*') 'was no novelty' and that Islamic law had already provided that 'in conventions, one must consider the intention of the parties and not the literal meaning of the words and phrases employed'.[103] He referred to a French translation of Article 3 of the *Majalla*. He did not, however, make any reference to the fact that what he had mentioned is acknowledged in Islamic law as the theory of the objectives of law (*maqasid al Shari'a*) which refer to the intention behind the agreement, rather than the literal meaning. He did not discuss the Zahiri approach (literalists) when comparing other methodologies such as historical reference and Shafi'i and Maliki views, which are unique and which can enhance and indeed further develop and probably resolve some disputed cases, at least in particular situations, and especially where Muslim countries are involved. Judge Tarazi strongly recommended that Islamic principles should be used as further reference or sources of legitimacy.

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Qatar stated that the customary international law found in the 1969 Vienna Convention on the Law of Treaties (in particular, articles 2 and 32) was 'fully consistent' with the approach of the 'Arabo-Islamic legal tradition'.[104] Qatar proposed to look at treaty interpretation rather than using the conventional methods, and called to look at the hermeneutic approaches found in the Arabic and Islamic perspective. Qatar therefore attached the views of Professor El-Kosheri and

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[102] ICJ Reports 1997, p. 96-97.

[103] ICJ Reports 1978, p. 56.

[104] Memorial, Vol I, 10 February 1992, 100, para 5.09 and 119, para 5.57 <http://www.icj-cij.org/docket/files/87/7023> l.a.d. 10.03.2021.

Professor Ayyad to support its claim.[105] Qatar stated that the use of the past tense in an Arabic text (it was agreed) indicates that it contains binding meanings.[106] In contrast, Qatar further argued that it was not essential to look at the preparatory works of an international agreement.[107] In support of Professor El-Kosheri, the agreement did 'not confer any legal weight on the intention of the parties as manifested by the preparatory works covering a prior negotiation phase, since the interpretation of an agreement has to be based exclusively on the final text'.[108] In contrast, Bahrain argued that there is no Arabo-Islamic legal tradition which excludes recourse to preparatory work, even in the 'field of the interpretation of agreements within the domestic law of the various Arab countries.'[109],[110] Moreover, Bahrain argued that no concept within the Arab-Islamic legal tradition could override the terms and binding effect of the customary rule reflected in article 32 of the 1969 Vienna Convention. Furthermore, Bahrain disputed that 'the fact that in an evolving diplomatic process the steps along the way are recorded with the verb "agree" does not transform the documents of record into agreements in the sense of internationally binding treaties.'

Despite the fact whether an introduction of an 'Arab-Islamic' objective method to the interpretation of international agreements is found, the ICJ continues to use, for any dispute among Islamic states, the customary rule of interpretation provided in article 31 of the 1969 Vienna Convention, and will refer to supplementary means as a way of approval, unless the meaning of the international agreement is not clear. El-Kosheri argued that the expression 'Arabo-Islamic tradition' was not used in his first opinion in terms of an applicable legal system, but as a 'recourse to the relevant linguistic traditions in a certain socio-cultural community for guidance in the proper construction of a

[105] Memorial, Vol III, Annexes III.1 (at 249) and III.2 (at 315).

[106] Memorial, Vol I, 101, para 5.09 and Prof. El-Kosheri's first opinion, 266-267.

[107] Memorial, Vol I, 119, para 5.57.

[108] El-Kosheri's first opinion, 296, para 71.

[109] Counter-memorial, Vol I, 11 June 1992, 69, para 6.42.

[110] Counter-memorial, Vol II, Annexes II.1 (at 197) and II.2 (at 217).

text drafted thereunder.'[111] This time, neither the court nor any of its judges discussed the parties' argument regarding references based on the 'Arab-Islamic tradition'. The court, however, referred to article 2(1)(a) of the 1969 Vienna Convention and its decision in the *Aegean Sea Continental Shelf* case just to conclude that international agreements may involve an extensive amount of practices and names (including a joint communiqué).[112] In this regard, one can see that often judges refer to Islamic rules, but in a general way, and though often recommendations are found, the courts do not go further, and discuss or make a decision on the basis of these principles.

A further reference to Islamic law in an international case is in *Aerial Incident of 10 August 1999 (Pakistan v India)*. Judge Al-Khasawneh stated that when examining the separability of void or invalid reservations from declarations accepting the ICJ's compulsory jurisdiction, reference should not only be to article 44 of the 1969 Vienna Convention but also to the general principle of separability as found in the major systems of law such as Islamic law.[113]

Furthermore, in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway),* Judge Weeramantry indicated that Islamic law provides that earth's resources cannot be the subject of absolute ownership but of trusteeship for the benefit of all future generations. Accordingly, earth resources 'must be treated with the care due to the property of others' and 'the present must preserve intact for the future the inheritance it has received from the past.' He further states that Islamic principles 'may lie a key to many of the environmental concerns which affect the land, the sea and the air space of the planet.'[114] Another issue that was referred to the international court was

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[111] El-Kosheri's supplementary opinion, Reply, Vol. II, Annex III.1, 86-87, para 15.

[112] ICJ Reports 1994, 120-121, para 23.

[113] ICJ Reports 2000, 54, para 23 <http://www.icj-cij.org/court/index.php?p1=1&p2=8> l.a.d. 10.03.2021.

[114] ICJ Reports 1993, 278, para 243. See also, *Gabíkovo-Nagymaros Project (Hungary v Slovakia)* case, where Judge Weeramantry stated that that 'the first principle of modern environmental law - the principle of trusteeship of earth resources - is thus categorically formulated in' the Islamic legal system.

mentioned in the case of the *Legality of the Threat or Use of Nuclear Weapons*. Judge Weeramantry stated that humanitarian law and custom had an ancient and universal origin 'deep-rooted' in several civilizations, one of which is the Islamic civilization.[115] Moreover, in a case concerning diplomatic relations, the *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, it was stated that, 'the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution.'[116] In this regard, Judge Tarazi stated also that the principles of Islamic law contributed to 'the elaboration of the rules of contemporary public international law on diplomatic and consular inviolability and immunity.'[117]

CONCLUSION

The above introduction and discussion of the interpretive methodologies introduced and articulated by Muslim jurists such as Shafi'i, Maliki, Ghazali and others, are worthy of study. These methodologies often have their counterpart theories in international law, and sometimes they differ due to the divine nature of Islamic law. There are several areas in Islamic law that offer well-established principles. For example, the principles that govern domestic Islamic agreements can be extracted as doctrines, and applied to international agreements. The Islamic law has therefore paid special attention to interpretation and intention beyond the wording of an agreement. Parties to an agreement must be aware of the counter values intended to be exchanged as a result of their terms. If the contract parties' intention is ambiguous, a judge shall comply with the rules of legal interpretation. He must interpret the contract according to the real joint intention of the contract parties. Many theories have been adopted by Islamic law, indeed it recognizes international conventions and imposes strict

[115] ICJ Reports 1996, 443 and 478.

[116] ICJ Reports 1980, 40, para 86<http://www.icj-cij.org/docket/index.php?sum=334&p1=3&p2=3&case=64&p3=5> accessed 10.03.2021.

[117] ICJ Reports 1980, para 48.

punishments on those who disobey and violate an agreement without justification. Therefore, Muslim contractual parties cannot merely include ambiguous or fraudulent terms in a contract. The literal and apparent meaning of text is important as in Zahiri theories. In the Islamic methodology of interpretation, the text is the preliminary step. There are other norms and principles which must be examined, such as historical references and the purpose behind the text. There are many differences in approach between Muslim jurists who are involved in the art of interpretation. However, all agree on articulation and design methods in order to avoid human subjectivity and whim because, in the view of Muslims, the law is God's law and God has neglected nothing in the Qur'an and other divinely inspired sources such as the Sunna. The preceding arguments have shown that Islamic law can be viewed as a legal system. This legal system has its unique methodologies of interpretation often share common views compared to the rules of interpretation in international law. Islamic law has been appealed before the ICJ and cited by the Court or its judges in a number of cases. Islamic law was mentioned as an essential and original source that can, in certain situations in the area of interpretation, offer unprecedented solutions to many international disputed issues. Indeed, the references and discussion of Islamic principles, at least in the interpretation area, are mostly weak, and lack considerable legal references.

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