ISLAMIC JURISPRUDENCE

AN INTERNATIONAL PERSPECTIVE

C. G. WEERAMANTRY

ISLAMIC JURISPRUDENCE

Also by C.G. Weeramantry

THE LAW OF CONTRACTS, Being a comparative study of the Roman–Dutch, English and customary laws of contract in Ceylon

THE LAW IN CRISIS: Bridges of Understanding

EQUALITY AND FREEDOM: Some Third World Perspectives

HUMAN RIGHTS IN JAPAN

APARTHEID: The Closing Phases?

AN INVITATION TO THE LAW

THE SLUMBERING SENTINELS: Law and Human Rights in the Wake of Technology

LAW: The Threatened Peripheries

NUCLEAR WEAPONRY AND SCIENTIFIC RESPONSIBILITY

Islamic Jurisprudence

An International Perspective

C.G. Weeramantry

Professor of Law, Monash University, Australia
formerly Justice of the Supreme Court of Sri Lanka

Foreword by
M. Hidayatullah

formerly Chief Justice and Vice-President
of the Republic of India

Message from
His Eminence the Grand Sheikh of Al-Azhar University, Cairo

Palgrave Macmillan

ISBN 978-1-349-19458-2 ISBN 978-1-349-19456-8 (eBook)
DOI 10.1007/978-1-349-19456-8

Softcover reprint of the hardcover 1st edition 1988

First published in the United States of America in 1988

ISBN 978-0-312-01204-5

Library of Congress Cataloging-in-Publication Data
Weeramantry, C. G.
Islamic jurisprudence: an international perspective / C.G. Weeramantry: foreword by M. Hidayatullah: message from His Eminence the Grand Sheikh of Al-Azhar University.
p. cm.
Bibliography: p.
Includes index.
ISBN 978-0-312-01204-5: $39.95 (est.)
1. Islamic law. 2. International law (Islamic law) I. Title.
LAW <ISLAM 7 Weer 1988>
340.5'9—dc19 87–32917
CIP

To the cause of international peace through cross-cultural understanding

Table of Contents

Foreword xi
Preface xv
Message from His Eminence the Grand Sheikh of Al-Azhar University xvii

1 The Origins of Islamic Law 1
The *Shari'a* 1
Arabia Before and After Islam 2
The Prophet Muhammad 3
The *Qur'an* 5
Submission to God 8
The Territorial Expansion of Islamic Law 9

2 The Arabic Resurgence of Learning 14
The Explosion of Knowledge 14
Arabic Libraries 15
The Synthesis of Knowledge 17
The Entry of Arabic Knowledge into the West 19
The Religious Stimulus to Learning 26
The Place of Jurisprudence in the Realm of Knowledge 27

3 The Sources of Islamic Law 30
The Primary Sources 32
(a) The *Qur'an* 32
(b) The *Sunna* 34
The Dependent Sources 39
(a) *Ijma* (Consensus) 39
(b) *Qiyas* (Reasoning by analogy) 40

4 The Schools of Law 46
Sunnis and Shi'ites 47
The Sunni Schools 49
(a) The Hanafi School 49
(b) The Malikite School 51
(c) The Shafi'ite School 52
(d) The Hanbalite School 54

Institutions of Learning 54
The Role of the Jurist 55
The Legal Profession 56

5 Some Basic Islamic Legal Ideas 59
The Notion of Sharing 59
The Notion of Caring 60
The Notion of Trusteeship of Property 61
The Notion of Brotherhood and Solidarity 62
The Notion of Universalism 62
The Notion of Fair Industrial Relations 63
The Notion of Human Dignity 63
The Dignity of Labour 64
The Notion of the Ideal Law 65
The Notion of Fair Contract 65
The Notion of Commercial Integrity 66
The Notion of Freedom from Usury 66
The Notion of the Rights of Women 68
The Notion of Privacy 71
The Notion of Abuse of Rights 72
The Condemnation of Anti-Social Conduct 72
The Notion of Charitable Trust 73
The Notion of Juristic Personality 74
The Notion of Individual Freedom 75
The Notion of Equality Before the Law 76
The Notion of Legal Representation 77
The Presumption of Innocence 78
The Notion of Non-retroactivity 78
The Notion of the Supremacy of the Law 79
The Notion of Judicial Independence 79
The Notion of Judicial Impartiality 80
The Notion of Limited Sovereignty 81
The Notion of Bidding unto Good: Am I my Brother's Keeper? 83
The Notion of Tolerance 85
The Notion of Democratic Participation 92

6 Islamic Influences on European Legal Philosophy and Law 94
Revealed Law and Human Reason 94
The Doctrine of Double Truth 95

The Kindling of the Scientific Spirit 96
The Islamic Encyclopaedists 98
The Reaction of Orthodoxy 99
Islamic Aristotelianism 100
Averroism and Thomistic Philosophy 102
The Influence of Islamic Concepts on European Philosophers of Liberty 105
The Influence of Islamic Law on Modern International Law 109
The Influence of Islamic Law on Modern Commercial Law 110
The Birth of Sociological Thought 111

7 Islam and Human Rights 113
Individual Dignity 114
Justice in Rulership 115
The Theocentric Approach 116
The Islamic Theory of the State 117
The Lack of Formalism 118
Alternative Routes to Human Rights Doctrine 120
The Universal Islamic Declaration of Human Rights 121
The Conduct of State Business 123
Some Islamic Contributions to Contemporary Human Rights 125

8 Islamic International Law 128
Past and Current Misconceptions 128
The Nature of Islamic International Law 131
The Oneness of Mankind under Islamic Law 133
The Content of Islamic International Law 134
(a) The Law of War 134
(b) The Law of Peace 138
Private International Law 144
Islamic Law and Internationalism: The Notion of *Jihad* 145
The Impact of Islamic International Law on Western International Law 149
(a) Some General Observations 149
(b) The Possible Impact upon Grotius 150
Islam and the Contemporary World Order 158

9 The Value of Islamic Jurisprudence to the Non-Islamic World 164
Knowledge of the History of Ideas 164
Comparative Law 165
Practical Diplomacy 166
The Growing Influence of the Islamic World 167
Preventing the Breakdown of a Global Concept of Human Rights 168
Generating Mutual Appreciation and Understanding 168
Potential Contributions to Human Rights 169

Appendix A Documents
The Bedrock of Islam: *The Qur'an* 171
The Farewell Sermon of the Prophet Mohammed at Arafat 172
The Hadiths or Traditions 173
Directions of a Caliph to a Judge 174
Appendix B Universal Islamic Declaration of Human Rights 176
Appendix C Protection of Human Rights in the Islamic Criminal Justice System 184
Appendix D Key Words in Islamic Law 186
Bibliography and References 189
Index 201

Foreword

Professor Weeramantry has invited me to contribute a foreword to his latest book, *Islamic Jurisprudence: An International Perspective*. The book is a definite advance on other books in this field. Books on Islamic jurisprudence have been written before and, in India, Abdur Rahim's book *Muslim Jurisprudence* has been for a long time the only book suitable for scholars. However, it did not deal adequately, if at all, with Islamic jurisprudence in an international setting. This want has now been removed by Professor Weeramantry.

Islamic jurisprudence has many variations. The Prophet (peace be on him) had foretold that his people would be divided into 72 sects; Al-Ghazzali has said that the figure was 73. The number does not matter but what does matter is the diversity of rituals and usages and opinions. It is thus that we have many schools of thought and study becomes somewhat complicated by the variety of thinking.

The reach of Islamic jurisprudence is very vast and is not only legal but also moral. There is hardly any aspect of man's life, whether in its individual or in its corporate existence, which it does not touch. In Chapter 5, the learned author here has listed the far reach of moral and legal rules governing rights and duties and how the rights lead to duties and vice versa; the list will be found a revelation.

The dichotomy between belief and religious dogmas and reasoned and logical analysis which troubled Christian theologians and drove Al-Ghazali into despair and seclusion for many years, has been the subject of close examination and assessment by the author. It was the influence of Averroes which gave the proper importance to reason and thus led to scientific inquiry. How this came about may be seen in Al-Ghazali's *The Revival of Religious Sciences (Ihya 'Ulum ad-Din* and *The Beginning of Guidance (Bidayat al-Hidayah)*. In these books Al-Ghazali carries the Aristotelian logic further than Averroes and Ibn Sina. These studies reached researchers and European philosophers who have referred to the debt they owed to Islamic jurisprudence. Professor Weeramantry quotes from Rousseau, Montesquieu and Locke to show that they acknowledged their debt to Islamic jurisprudence, and Islamic philosophers and jurists. According to De Sentillana, Arab concepts of morality influenced European law in general and commercial law and international trade in particular.

Later Ibn Khaldun re-evaluated the position of man in his social surroundings.

In the realm of human and private rights also the Islamic thinkers made new approaches. The author has pointed out that in the matter of secular rights:

> the problem is not how man asserts his rights against man but how man discharges his duty toward God. It is not occupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man and his Maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place.

Thus morality and not legality is the source of relationships. In the *Qur'an* and the *Hadith* and even *Ijtihad*, will be found all the fundamental principles from which are derived the principles of human rights so assiduously framed as the Directive Principles of Human Rights, by the United Nations. They are to be found in the religious prescriptions of Islam, as pointed out by Arlene Swidler, and in 1981 the Universal Islamic Declaration of Human Rights had at its base a reliance on morality rather than legal compulsion.

Concerning the rules of war catalogued by A. L. Ghunaimi, it is sufficient to say that these rules preceded the Geneva Convention and the Protocols. Similarly the law of diplomatic immunity, and particularly the Law of Treaties so elaborately settled by the International Law Commission, were all set down centuries earlier in Islamic jurisprudence.

The learned author also explains the concept of *jihad* which could be by persuasion or as the *Qur'an* says, 'by heart, by tongue and by hands', and thus removes the error in opinion that Islam relies on the sword rather than gospelling as Christianity does.

This book shows the wide range of Islamic jurisprudence and the extremely modern aspects of the principles evolved by Muslim jurists. Starting from the basic belief in and submission to the will of God, the Islamic rules of law keep justice, truth, morality and equality ever present.

This book bridges the gaps between the concepts and established views of modern times and Islamic thinking, with much insight and learning. It addresses the interrelationship between the old and the new. It will serve to remove the false notions that Islamic jurispru-

dence is out of date, out-moded and outlandish. The book should have great success.

M. Hidayatullah, M.A.(Cantab.) LL.D., D.Litt., D.C.L., O.B.E.,
Barrister at Law, Bencher, Lincoln's Inn, and former
Chief Justice of India and
Vice-President of India

BOMBAY

Preface

This book has grown out of a series of lectures delivered to Western law students. It is also the result of a growing conviction that Islamic law and institutions are the subject of a great deal of misinformation and misunderstanding, which need to be corrected in the interests of international harmony. A non-Muslim myself, I have felt this intensely and have often been troubled by the manifest unfairness of adverse views formed on the basis of inadequate information or, perhaps even more often, on the basis of no information at all.

Law students, particularly in the Western world, enter the legal profession as fully fledged lawyers without any exposure whatsoever to some of the great legal systems of the world. A significant gap in their knowledge is in regard to the Islamic law. Of this system they often know nothing beyond the name. Such a gap in their knowledge must necessarily make them less suited to make their due contribution to the legal world of the future in which intercommunication between the principal cultural traditions of mankind will be an essential.

With the growing importance of Islamic law and with half a hundred Islamic states in the world's community of nations, it becomes doubly essential that this irreducible minimum of legal knowledge be part of the intellectual equipment of lawyers in every jurisdiction. One of the most powerful social, cultural, religious and legal forces the world has ever seen cannot be lightly passed over by lawyers in any jurisdiction as being too far removed from the sphere of their concerns.

This book seeks to demonstrate the important connections between Islamic law and Western legal and philosophical thought. It draws attention to the vital contributions of Islamic law in the past as well as to its potential for assisting towards a juster world in the future.

It is also essential that the intelligent layman in the non-Islamic world become familiar with the basic essentials of this great body of jurisprudence. An important barrier to international understanding is the widespread lack of information regarding Islam. Lack of information leads to misunderstandings and prejudices which in their turn lead to bitterness. Out of bitterness come tensions, national and

international. The contemporary world suffers from more than its fair share of these tensions. It is hoped there will be sufficient information in this book, couched in language well within the reach of non-lawyers, to generate a greater appreciation of this system and its attitudes.

Finally, it is no less important that this work should reach a wide readership within the Islamic world itself. It is essential that both lawyers and laymen in the Islamic world become aware that the richness of their cultural and intellectual traditions is viewed with respect and admiration by the outside world. A long history of lack of awareness and appreciation has generated within the Islamic world a reaction of distrust if not hostility. The cause of international harmony urgently requires that bridges of appreciation be built between the non-Islamic and the Islamic worlds. Each has too much to offer to the other for either section of mankind to discount the other's contribution as unimportant to its intellectual heritage or to its daily concerns.

Before I close, it is my pleasant duty to acknowledge the assistance and encouragement I have received in the preparation of this book from a number of friends and colleagues. I would wish to thank, in particular, Professor M. El-Erian, Professor of Islamic Studies at the Australian National University, and Mr H.M.Z. Farouque, Senior Lecturer in Law, University of Adelaide, for their numerous comments and suggestions, and Miss Lynette Cook, my secretary, for her painstaking efforts in typing an unusually difficult manuscript.

C. G. Weeramantry
Monash University, Australia

MESSAGE FROM HIS EMINENCE THE GRAND SHEIKH OF AL-AZHAR UNIVERSITY

Glory be to Allah, Lord of the worlds, and praise and peace be on the Prophet Mohammad, his family and companions, and those who follow him till the day of resurrection.

And now: Allah, Glory be to Him (GBTH), sent Prophet Mohammad, peace be upon him (PBUH) for all human beings, who is the bearer of glad tidings and who exhorts against misdeeds, and as a mercy offered to the world.

Allah said in the Holy *Qur'an*: 'We send thee not, but as a mercy for all creatures.' (*Sura Anbiyaa*, verse 107)

And from this last and all encompassing message (the Prophet's) – to show the people the general fundamentals of their religion and their life – which represents the stable and distinguishing pillars of Islamic legislation, recognising these fundamentals as a law from Allah, upon which is structured the Islamic nation, leaving out little branches to be decided upon by humans according to their different needs and according to time and place, and so as to satisfy their different needs with the objective of the Good of All.

Allah (GBTH) says in the Holy *Qur'an*: 'There has come to you from Allah a (new) light (Prophet Mohammad) and a book of great wisdom and clarity wherewith Allah guideth all who seek His good pleasure to ways of peace and safety, and leadeth them out of darkness, by His will unto the light and guideth them unto a path that is straight.' (*Sura Al Maida*, verses 17–18)

Allah (GBTH) also said: 'And verily thou dost guide (men) to the straight way, the way of Allah, to Whom belongs whatever is in the Heavens and whatever is on earth: Behold (how) all affairs tend towards Allah.' (*Sura Al-Shura*, verses 52–3)

And what is more truthful than Allah's sayings?

The message of Islam has an international scope, since Allah ordered His Prophet (PBUH) to call all humans to it, having established the basis of private and international agreements for almost 14 centuries now.

The companions of the Prophet (PBUH) were a group of glorious human beings from different tribes and nations, who recognised each other in Allah, and Allah led them to the right path. For example:

— There was Abu Bakr and Omar and Othman and Ali and Talha Ibn Zubair, from Quraish (Mohammad's tribe).

— There was Abu Dhar and Anas from the tribe of Ghafar, from Touhama on the banks of the Red Sea.
— And from Yemen came Abu Huraira and Tufail, as also came Abu Mussa el Ashary and Mouadh bin Zebel.
— And from Bahrain, on the Arabian Gulf, came Mounkidh Bin Hay'an, and Moundhir Bin A'idh from (the tribe of) Abdul Quais.

As came Faroua Bin Amer from Ma'an from the country of Sha'm.*

And the number of companions increased. Allah's blessings be upon them, and there was Bilal from Ethiopia, and there was Souhaid the Roman, and there was Salman the Persian, and there was Fairuz from Dailam; and the Prophet's message reached rulers and kings of all known lands of the time surrounding the Arabian peninsula and among these lands Egypt, Sha'm*, Persia, and Ethiopia.

The message of the Prophet (PBUH), to individuals and tribes, demanded the signing of charters and agreements in order to regulate and clarify arrangements between peoples. He laid down precise rules to which the Prophet himself subscribed. They guided the Caliphs after him, and it is the duty of everyone who believes in Allah and his Prophet to follow these rules until Allah inherits the earth and everything upon it.

Here it is incumbent upon us to repeat what is narrated about the just Caliph Omar Ibn Abdul Aziz. The people of Safad from Samarkand complained to the just Caliph that Kotaiba Ibn Muslim entered their country as a conqueror without giving them the choice between Islam, an agreement or fighting, as is the tradition in Islamic wars. And when they complained to the just Caliph (Allah's blessings be upon him), the Caliph ordered the judge to sit with the people of Safad and investigate the complaint and to bring together the complainants and the conqueror. The judge heard what Kotaiba and the people had to say and found the complaint well founded. He ordered the conqueror to leave Samarkand, and to return to his borders prior to the invasion, then to come back and give them the choice between Islam, an agreement or fighting, and the conqueror obeyed the judge's orders, and the people of Samarkand chose Islam.

It has pleased me tremendously that Professor C. G. Weeramantry, Professor of Law at Monash University and ex-Judge of the Supreme Court of Sri Lanka, has undertaken this academic investigation into international law and human rights and what glorious rules have been set by Islam in this field, and has emphasised in this study that Islam had anticipated these rules long before they became part of law studies in the West. It has also pleased me that this study has been reviewed by Professor Mohamed El Erian,

Professor of Islamic Studies at the Australian National University, Canberra, and President of the Islamic Federation in Australia. There is no doubt that this book will greatly help English speakers to share the treasures of Islamic legislation in various aspects of life, and particularly in what concerns the international rules which link different countries and nations, for whoever is ignorant of a thing fights it.

Allah says: 'Who is better in speech than one who calls (men) to Allah, works righteousness, and says, "I am of those who pay reverence in Islam"?' (*Sura fussilat*, verse 33)

And to practise what Allah (GBTH) says: 'Mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other (not that ye may despise each other). Verily the most favoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).' (*Sura el hujurat*, verse 13)

I pray to Allah that He may accept this work and bless it and open the minds of the people that they may realise and accept its 'good', and that He may unify the Islamic nation under His guidance and that of His Prophet, that He may improve its condition as He has done that of their ancestors, so that they may return to their glory; and may Allah offer the author and the reviewer on our behalf and on behalf of all Muslims the highest rewards.

And verily Allah fulfills his promise when he says in the Holy book: 'Allah has promised, to those of you who believe and work righteous deeds, that He will, of a surety, grant them in the land, inheritance (of power), as He granted it to those before them, that He will establish in authority their religion, the one which He has chosen for them; and that He will change (their state), after the fear in which they (lived), to one of security and peace: "they will worship Me (alone) and not associate aught with Me. If any do reject faith after this, they are rebellious and wicked".' (*Sura Nur*, verse 55)

In trust of Allah the All-Powerful
18 Jumada the 1st, 1406 H.
29 January, 1986 M.

Translated by: Mohamed El Hennawi Abdelkader Oulhadj. An English translation of the *Qur'an* was used to bring out the meaning of the Quar'anic verses as perfectly as one can expect from a translation.

* Today's Syria, Lebanon, Palestine and Jordan.

1 The Origins of Islamic Law

THE *SHARI'A*

Although the Islamic system of jurisprudence is one of the best developed and most adequate systems in the world, very little is known about it by Western law students. The average law course does not contain even a slight exposure to the richness of Islamic legal thought and the average law graduate passes out with no knowledge of it whatsoever. This brief outline is intended to convey a glimpse of the magnitude of this body of juristic learning and of the impact it has had on civilisation in general. It can only aim at picking out a thread or two in this vast and colourful tapestry, in the hope that it will help towards an appreciation of its scope and richness and of its importance in the universe of legal knowledge. It will also aim at showing some of the many interrelationships between Islamic and Western jurisprudence and philosophy.

Islamic law is based, as we shall see, on unqualified submission to the will of God. This is a fundamental tenet of the Islamic religion, and since Islamic law is based upon Islamic religion, it proceeds on the same fundamental assumption. The will of God embraces all aspects of life and the law hence covers all of them. It is a path or way guiding the Muslim and the revealed law governing all these matters is known as the *Shari'a* (the Arabic for track or road). The *Shari'a* governs in every detail the lives of several hundreds of millions, provides the basic moral and legal framework for dozens of nations and has now held sway for upwards of thirteen and a half centuries.

From these observations it will be seen that the *Shari'a* is not, strictly speaking, a legal system, for it reaches much deeper into thought, life and conduct than a purely legal system can aspire to do. (For a series of differences between the *Shari'a* and a legal system strictly so-called, see Rauf, 1985.) It places the individual in his relationship to society, the universe and his Creator. 'The sacred law of Islam is an all-embracing body of religious duties rather than a legal system proper; it comprises on an equal footing ordinances regarding cult and ritual, as well as political and (in a narrow sense) legal rules.' (Schacht, 1950, Introduction p.v).

At the conclusion of a recent international seminar on the *Shari'a* (International Seminar on *Shariah* and Social Order (ISSSO)) held at Chulalongkorn University, Bangkok on 12–15 December 1984, the Deputy Rector of Chulalongkorn, himself a non-Muslim, made the following observations on the significance of the *Shari'a* for Muslims and for the non-Muslim world in general: 'It has been a tremendously rewarding and revealing experience for me to attend this International Seminar on *Shariah* and Social Order. The subject of this seminar is especially significant as it has from the first day been conducive to a better understanding of how one billion people order their lives according to the dictates of their religion – Islam – and how the law of that religion can contribute to improved social conditions for all of mankind . . . This has been especially true for me as I am not a Muslim and therefore had never realised how truly liberal, progressive and broad-minded *Shari'a* is. I had never expected Muslim leaders, scholars and jurists to be so frank and open, so relaxed, easy-going and warm-hearted, even when exploring the most controversial issues.' (*Shariah Law Journal*, November 1985, p.3). The Deputy Rector of this leading university of a Buddhist country went on to observe that, as a result of this conference, his university now had 'a far better understanding of the role this religion, with its hundreds of millions of followers to whom it is an entire culture and way of life, can and must play in shaping a better future for mankind – a future enriched with a deepened sense of human values and higher regard for one's fellow man.'

The cause of international harmony needs more such dialogue leading to a better understanding of this globally vital theme.

ARABIA BEFORE AND AFTER ISLAM

Let us take our minds back to the beginning of the seventh century. Amidst the caravans winding their way through the Arabian desert, amidst the teeming market towns at which these caravans arrived, amidst the palm trees of the oasis and the sands of the desert, a fierce tribalism flourished. It knew no single religion and acknolwedged no superior law. Might was right, learning was despised, the poor were trodden underfoot. Many savage customs prevailed. Female infanticide was practised. Women's rights in a male-dominated culture varied according to local customs, taboos and other practices. Indeed the attitudinal frame of reference of the time, considering the female

as a slave – actual and potential – will appear from the *Qur'anic* verse concerning female infanticide.

When news is brought
To one of them, of (the birth)
Of a female (child), his face
Darkens and he is filled
With inward grief!
With shame does he hide
Himself from his people
Because of the bad news
He has had!
Shall he retain it
On (sufferance and) contempt,
Or bury it in the dust?
Ah! What an evil (choice)
They decide on!
(XVI: 158–9)

Move forwards a bare two centuries. It was as though a great lamp had been lit. A world religion had been born, a moral code proclaimed, a legal system inaugurated, an era of learning launched. The impact of the change was felt far beyond the Arabian desert and had spread from Spain to India and China. And the agency through which it worked could have been seen, if one had had the vision to see it, in an obscure young man moving humbly with those caravans and later to be called to his prophetic mission.

THE PROPHET MUHAMMAD

The Prophet Muhammad was an orphan, born in Mecca in 570 AD in the influential Quraish tribe. He was the posthumous child of Abdulla and his mother died when he was five years old. He was brought up first in the home of his paternal grandfather, Abdul Muttalib, and thereafter in the home of an uncle. Part of his childhood was spent with a Bedouin nurse in accordance with custom and as a young man he travelled with his uncle's trading caravans into Yemen and Syria.

He did not learn how to read or write but was quiet and meditative and sensitive to suffering. He married the widow Khadija when he

was 25 years old and managed her caravans. He acquired early a reputation for trustworthiness and integrity and was nicknamed 'Al Amin', meaning 'the trusty'. At the age of 40 he mentioned to Khadija that the Archangel Gabriel had appeared to him commanding him to restore on earth the faith of Abraham – the faith in the one God, all-powerful and compassionate, to whose will it was the duty of all men to submit.

Khadija was his first convert and around 613 AD he first preached publicly the faith which came to be called Islam, meaning submission to God.

The Prophet initially attracted no favour from the rich and powerful, for he condemned their avarice, licentiousness and idolatry. His call to generosity and care for the unfortunate did not appeal to the great merchants who were not willing to use their wealth for assisting the poor (Holt *et al.*, 1970, p. 34). They were anxious rather, to preserve their monopolies and looked upon the Prophet's teaching as a criticism of their selfish business practices and of the values by which they lived. As with Christianity, Islam in its initial days attracted its followers from among the poor and the oppressed, rather than from the ranks of privilege. The rich merchants made efforts to persuade Muhammad to abandon his preaching and be admitted into their inner circle but the Prophet would have none of this (Holt *et al.*, 1970, p 36).

Disapproval turned to persecution and some of his followers sought safety in other countries. What is known as the First Exile took place in 615 when a group of Muslims sought asylum in the Christian kingdom of Abyssinia. The persecutions continued however in Mecca, but the Prophet's resolution was not worn down and, rejecting repeated offers of honour and riches, he continued to face insult, humiliation and interference with his preaching. (For an account of these persecutions see S.A. Ali, 1981, pp. 21–31.)

The date of the inauguration of the Islamic state is 622 AD. This is the year of the *Hegira*, the Prophet's migration from Mecca to Medina with his band of followers to escape persecution. This year provides the starting point for Islamic chronology. The Prophet after nine days, travelling reached the outskirts of Medina on 24 September 622. Islamic chronology commences, however, with the first day of the Arab year in which the emigration took place, namely, 16 July 622 (Holt *et al.*, 1970, p. 41). At Medina the Prophet established the community of Islam and ten years later returned in triumph to Mecca. For a concise but comprehensive introduction to Islamic law,

dealing with the life and genealogy of the Prophet, the Caliphate, the Imamate, the Schools of Law and the Sources of Law, the reader is referred to the introductory chapter in Hidayatullah (1972) pp. xi–xxxiii. On the periods in Mecca and Medina, see respectively Watt (1953) and Watt (1956).

The Prophet Muhammad combined in the one person so many leadership roles that it is difficult for those accustomed to other leadership traditions to comprehend them all. Not only in the religious sphere but in the economic, social, political, intellectual, administrative and legal life of his community and his state he provided pre-eminent leadership. In the words of the *Cambridge History of Islam*,

> All in all the rapid Arab expansion, with the ensuing spread of Islam and growth of Islamic culture, was the outcome of a complex of historical factors; but the set of ideas and the body of men capable of giving a unified direction to the expansion could not have existed but for the unique combination of gifts in Muhammad himself. (Holt *et al.*, 1970, Chapter 2)

THE *QUR'AN*

The Prophet dictated to his amanuenses the word of God as revealed to him by the Angel Gabriel. The collection of these recitations is the *Qur'an*, or *Koran*, (meaning 'the recitation'), the bedrock of Islamic law, and a 'book of exalted power': 'And indeed it is a book of exalted power. No falsehood can approach it from before or behind it. It is sent down by one full of wisdom, worthy of all praise.' (XLI: 41–2). Its chapters are of unequal length and its contents range over not only the ordinances of religion such as prayer, fasting, almsgiving and pilgrimage, but also civil and criminal laws, personal laws and the laws of succession and inheritance.

The whole of the *Qur'an* was written down in the lifetime of the Prophet, unlike the scriptures of the other major religions which were recorded long after the lives of their founders – the Buddhist doctrines after the life of Buddha and the Christian gospels after the life of Christ. Its 114 chapters, called *Suras*, are with the exception of the opening chapter, arranged in order of length, the longest being placed first and the shortest at the end. Each chapter begins with the verse: 'In the name of God, the Merciful, the Compassionate'. The

chapters are thus not in chronological order of their revelation nor arranged according to their subject matter.

The verses of the *Qur'an* hence do not unfold in the neat and systematic order which the scholar would desire, but this has been looked upon in Islamic scholarship as similar to the apparent disorder of the stars in the sky. To the human observer with his limited intellect they appear to be in haphazard arrangement. Each star, however, has a greater reason for being in its particular place than the observer can comprehend and any rearrangement of its position would disorder the entire scheme.

In the words of a European translator of the *Qur'an* (Arberry, 1955, p. 28) 'Using the language of music, each *Sura* is a rhapsody, composed of whole or fragmentary *leitmotivs*; the analogy is reinforced by the subtly varied flow of the discourses.' Using a similar analogy, Marmaduke Pickthall, an English Muslim, writes: 'The *Quran* cannot be translated. That is the view of old-fashioned Sheykhs and the present writer. The Book is here rendered literally and every effort has been made to choose befitting language. But the result is not the Glorious *Quran*, that inimitable symphony, the very sounds of which move men to tears and ecstasy' (Pickthall, 1930).

Although at the Prophet's death the verses of the *Qur'an* had been committed to writing, they were scattered and the task was later entrusted to Zayd Ibn Thabit, who had been the Prophet's secretary, to gather together the fragments of the *Qur'an* into one book. This collection became the only standard text of the *Qur'an* and has been used throughout the Muslim world to this day.

The *Qur'an* wrought a phenomenal change upon the people and the societies which received it. The Rev. J. M. Rodwell, one of the translators of the *Qur'an* into English, draws attention to this when he attributes to the *Qur'an* the fact that, 'The simple shepherds and wandering Bedouins of Arabia are transformed, as if by a magic wand, into the founders of empires, the builders of cities, the collectors of . . . libraries, while cities like . . . Baghdad, Cordova and Delhi attest the power at which Christian Europe trembled' (Rodwell, 1943, p. 16).

The non-Muslim law student will not readily understand the extent of the dependence of Islamic law upon the *Qur'an*. It is hence necessary to examine briefly the unique position held by the *Qur'an* as a book of religion and a source of law. This must be viewed against the uniqueness of its position in the context of Arabic literature and the uniqueness of the contribution of this single book to world

civilisation and culture. Such a survey will provide a more ready understanding of the reverence in which this book is held, both for its being the word of God and for its triggering off one of the most outstanding intellectual movements in the history of the world.

In the *Qur'an* we have a book unique in many senses. Its text has stood unaltered and unalterable for nearly fourteen centuries. Dictated by a single individual, who had not learned to read or write, it is of a level of literary excellence commonly acknowledged to be of unsurpassed beauty and power in the Arabic language. It has been the subject of literally thousands of learned commentaries. Its words have been committed to memory by millions, of whom many could recite it from its opening invocation to its closing verse. The best scholars in each generation have devoted to it a lifetime of study. It is more authoritative than any book of statutes, for while statutes are the work of man, every word in the *Qur'an* is, for the Islamic world, the word of God. It provides for the Islamic world a single source of that higher law which stands above the law of nations and which in all other systems has to be painstakingly researched and compiled.

It is to be noted also that the *Qur'an*, as the word of God, is unchangeable. The 'permanence' of constitutions, entrenched clauses and the like are therefore as nothing compared to the permanence of the *Qur'an*. 'No change can there be in the words of Allah', (x: 64) says the book itself. Nor should it be lightly or hastily interpreted. 'Move not your tongue concerning the *Qur'an* to make haste therewith. It is for us to collect it and promulgate it. But when we have promulgated it follow then its recital as promulgated.' (*Qur'an* LXXV: 16–18). For the Muslim the word of the *Qur'an* is unalterable and everlasting.

This is not to say however that the *Qur'an* provides rules of conduct and law that are read in the same way by all Muslims. Schools of interpretation arose, as we shall see later, which differed in their interpretations of the same passage to the extent of producing dramatically different results. Moreover, in the sphere of the esoteric and the mystical there were those who contended that the book was capable of many layers or levels of interpretation. Thus the Sufis saw the *Qur'an* as a document with numerous meanings transmitted at the level and capacity of understanding of each reader. Some believers maintained that each *Qur'anic* verse embodied as many as fifty different layers of meanings, and some others that it had seven, seventy or seven hundred, depending on the intellectual and spiritual level attained by the reader. However this may be, the *Qur'an* is

supremely authoritative, unalterable, comprehensive and the source and touchstone of every legal rule.

SUBMISSION TO GOD

Submission to the One God in all things is the central theme of Islam and therefore the central theme of Islamic law.

The idea of *the* God as opposed to *a* god was known in pre-Islamic Arabia. Indeed the Prohet's father's name was Abdullah, meaning the slave of God. Yet this idea of the Supreme Being did not dominate the minds of pre-Islamic Arabs. There were many other deities, many lesser gods, who presided over harvests, wars and fertility, and many lesser spirits who inhabited the winds, the hills and the streams. (See generally on this topic Cragg, 1956, pp. 35–67.)

It was Muhammad's mission to proclaim not only that God existed – for this was accepted – but to teach also that no other deities existed apart from the one supreme God, Allah. He was supreme and beyond compare. He had no equals, no partners, no co-existents. He was Al-Wahid, the One. In the words of the oft-recited *Sura* of Unity (*Sura* cxii):

> He is God alone, God the Eternal (Undivided)
> He does not beget and He is not begotten
> There is none co-equal with him.

Tradition looks upon this verse as so central to Islamic belief that if one recites it one sheds one's sins as a tree sheds its autumn leaves.

The one God had many names and descriptions. Ninety-nine of the divine appellations are woven into the the thrice thirty-three beads which the pious Muslim recites as in a rosary. Most important of the attributes and most frequently used in the *Qur'an* are *Al Rahman al Rahim* – 'The Compassionate, the Merciful'. Both words, deriving from the same root, stress that God is merciful both by nature and by conduct. He not only is merciful but acts mercifully. All the chapters of the *Qur'an* begin with this invocation.

This is the background to Islam's approach to all things divine and temporal. The role and function of man in the universe and in society, his relationship to the things of this earth which come to him from God, his subjection to the laws laid down by God which govern

him in every detail of his daily life – all proceed from this central proposition.

Since God's existence was beyond dispute, his power beyond limitation, his oneness beyond analysis, Islam's central discipline was not theology or metaphysics. It was the law (the *Shari'a*). The word of God, itself beyond dispute, provided a firm foundation of unquestionable scripture that closed off many metaphysical arguments available in a less firmly based system. The main question was the meaning of that which was the unquestioned word of God – not whether God had said this or willed that or intended the other. Those latter questions were largely closed.

Hence in the words of Professor Hamilton Gibb, the distinguished Arabic scholar who was Professor of Oriental Studies at Oxford and Harvard:

> The master science of the Muslim world was Law. Law, indeed, might be said to embrace all things, human and divine, and both for its comprehensiveness and for the ardour with which its study was pursued, it would be hard to find a parallel elsewhere, except in Judaism. (Gibb, 1953, pp. 4–22).

THE TERRITORIAL EXPANSION OF ISLAMIC LAW

The call of the muezzin from the minaret – 'There is no god except God and Muhammad is the Apostle of God' – was, within a century of the Prophet's death, re-echoing in territories as far afield as Spain and China. This call, or *Adhan*, as the Muslims name it, has been described as the first clause of the Islamic creed and is a categorical profession of the Islamic faith.

It is beyond the scope of this work to trace even in outline the steps through which this immense expansion was achieved. For this study its significance lies in the expansion of the area of applicability of Islamic law. The Arab colonies planted in ever-expanding stretches of territory were not merely garrison cities. They were focal points of Islamic religion and law, gradually pressing into the Islamic mould the customs and traditions of a remarkable diversity of peoples. From them Islam radiated outwards in the same way as the Roman law radiated outwards from the garrison cities of the Roman Empire. The Roman law formed a blend with local custom, resulting in a new

amalgam peculiar to each territory – Franco-Roman law, Germanic-Roman law, Roman-Dutch law – each system being an amalgam of Roman principle and local custom. With Islamic law the character of the mix was different. True, there were local variations and differences. Yet the stamp of Islamic law was stronger, for the oneness of Islam and of its law was a concept running far deeper into all facets of life than the oneness of the *pax Romana*.

The territorial areas of expansion, after the conquest of Mecca (630) extended within ten years of the Prophet's death in 632 to Syria and Palestine which were wrested from the Byzantine Empire. Egypt was overrun, and in 642 the Persian Empire was defeated at the battle of Nahawand. By 660 the capital of the new Arab Empire had shifted to Damascus while Medina remained the centre of religious learning. The Caliphs of the Umayyad dynasty, who ruled from Damascus were succeeded by the Abbasid Caliphs whose rule began in 762, with Baghdad as the new capital. Islamic civilisation went through one of its most brilliant phases under this dynasty.

Islam had also spread to the African shores of the Mediterranean and to Europe itself. Christendom was threatened simultaneously from the east and the west, for Constantinople was besieged three times while Islamic armies had advanced into the heart of France. However, Theodosius III won a decisive battle before Constantinople in 716 and Charles Martel won a victory near Tours in 732. 'The battle of Poitiers decided whether the Christian's bell or the muezzin's cry should sound over Rome, Paris and London' and whether 'the theology and jurisprudence of the *Koran* and the Traditions should be studied at Bologna, Paris, Oxford and Cambridge' (Haig, 1928, p. 1).

In the east, Islam was proceeding as far afield as China. Indeed within a decade of the *Hegira* (622) some Muslims had arrived in China and had been permitted by the Emperor Li Shih-min to build a mosque at Canton, where a Muslim community settled. In 713 the Caliph sent an embassy to the Chinese court, and in 751 the Chinese army was decisively defeated by the Arabs at the battle of Talas.

The student of history must naturally wonder at this unprecedented expansion of territorial power and religious allegiance. He naturally searches for causes and asks why this system prevailed. H. G. Wells explained it as follows:

> Islam prevailed because it was the best social and political order the times could offer. It prevailed because everywhere it found

> politically apathetic peoples robbed, oppressed, bullied, uneducated, and unorganized, and it found selfish and unsound governments out of touch with any people at all. It was the broadest, freshest, and cleanest political idea that had yet come into actual activity in the world. (Wells, 1925, pp. 613–14)

As for its doctrinal content and basic attitudes, he comments further:

> It was full of the spirit of kindliness, generosity and brotherhood; it was a simple and understandable religion; it was instinct with the chivalrous sentiment of the desert; and it made its appeal straight to the commonest instincts in the composition of ordinary men. (Wells, 1925, p. 607)

But temporal power has its ups and downs. The Abbasid Caliphate declined during the tenth and eleventh centuries. Yet while temporal power in the sense of centralised political authority disintegrated, the authority of the law continued unabated. Indeed the disintegration at the centre promoted the authority of the law which proved to be the binding force, holding together with its moral authority the vast but fragmented territories under the sway of Islam.

As with the Roman Empire the Arab Empire fell prey, after a brilliant intellectual era, to conquerors from the north. As with the Roman Empire the conquerors themselves adopted the religion and the civilisation of the conquered. The invading Turkish tribesmen from Central Asia set up Turkish sultanates in western Asia, thus giving Islam further vitality. Fresh thrusts occurred, into northern India and Asia Minor.

While these movements were in progress there was at the same time an expansion of Islam in Africa. Berber tribesmen penetrated the Senegal and Niger basins thus bringing Islam to the Negro peoples of Africa. South of the Sahara great centres of Islamic learning grew up, one of the most notable of which was the University of Timbuktu, for many centuries a celebrated centre of learning. So little was known of such facts in later years that the word Timbuktu came to acquire in the English language the meaning of

'the back of beyond', a very remote place to which civilisation had scarcely penetrated – a total reversal of the role it played in the days when it radiated learning while Oxford, Cambridge and the Sorbonne lay unknown in the future.

Knowledge of Islam and its institutions also spread to the West during the Crusades. The extent to which the refined customs and manners of the now sophisticated Islamic world found their way into a Europe still in the grip of the dark ages has been the subject of many historical studies. Along with the silks and satins and carpets and cutlery, there came also to the West a knowledge of the rules of Islamic chivalry and of its gentler manners. When Richard the Lion Heart met Saladin there was a meeting between a civilisation still comparatively rough and unhewn and one whose courtly manners and customs functioned against the background of a rich intellectual tradition. Some knowledge of Islamic law thus found its way to the West, though the earliest treatises to appear in the English language had to await the age of printing. The earliest treatise the author has been able to trace is W. de Worde's *Treatise of the Turke's Lawe, called Alcaron*, published in London in 1519. The *Qur'an* had been translated into Latin by an English scholar, Robertus Retenensis, in 1143, at the instance of Peter the Venerable, Abbot of Cluny, and enjoyed a considerable circulation. Also 'newly Englished' versions from earlier French translations appeared in the seventeenth century (Arberry, 1955, p. 7).

In the thirteenth and fourteenth centuries invasions by the Mongols destroyed these centres of civilisation and put an end to the historic Caliphate at Baghdad. Yet Islam survived and as before converted the conquerors. In the dominions of the Mongols a brilliant Persian Islamic culture blossomed. This civilisation despite the onslaughts both of the 'Black Death' plagues and of Tamerlane provided inspiration for new Islamic empires growing up on either side – India to the east and the Ottoman to the west. With the establishment of these two powerful empires, Islamic law once more became, as it had been before, the legal system of highly organised and centralised imperial administrations.

Later commercial penetration took Islam into the Indian Ocean, and into Malaysia, Indonesia and the Philippines.

Thus, in a vast sector of the globe from Africa through Western and Central Asia to China, in Southern Russia, the Indian subcontinent and other countries of South East Asia, Islamic law applies, ranging in its influence from providing the dominant legal system to

being the governing personal law of significant sections of the population. It is impossible to understand contemporary global politics without some basic understanding of Islam and Islamic law.

2 The Arabic Resurgence of Learning

THE EXPLOSION OF KNOWLEDGE

The *Qur'an* must be looked at against the background of the fact that prior to the time of the Prophet the Arabic literary tradition was very slight. True, there had been a strong tradition of poetry which had reached a height of achievement in the period immediately before Islam and there was also a tradition of oratory. Poetry and oratory apart, there was not, however, any writing of particular significance in the Arabic language.

The appearance of the *Qur'an* transformed the scene. Four hundred years later Arabic literature could only be numbered in terms of thousands of books. These comprised history, geography, philosophy, political theory, historiography, literary criticism, science and medicine, and above all jurisprudence. It will help us to understand the extent of jurisprudential writing, if we take a brief look at some of the other disciplines, bearing in mind that jurisprudence transcended them all.

During the time when Europe was passing through the dark ages an era of dazzling intellectual achievement illuminated the Islamic world, and shed its light even beyond. It was the Islamic world that kept alive what Bertrand Russell (1961, p. 420) described as the apparatus of civilisation, and whether it was logic or metaphysics, chemistry or algebra, astronomy or medicine, the Islamic philosophers were in the forefront. The Arabs evolved the science of optics, developed studies on the velocity and refraction of light, pioneered new methods of sublimation and filtration in chemistry, discovered basic substances like alum, borax, sodium carbonate, silver nitrate, nitric acid and sulphuric acid, and made the first accurate descriptions of smallpox, measles and pleurisy. Muslim merchants developed modern commercial instruments such as cheques, letters of credit and joint stock companies. In the period from the eighth to the twelfth centuries of the Christian era, the civilisation of the Arab world was 'one of the cultural marvels of history (Carroll *et al.*, 1961, p. 237).

We can gather an idea of the extent of this resurgence of learning in all departments if we look at the lives of men of the Arab renaissance

such as Avicenna. In versatility and range of intellectual achievement Avicenna matched Leonardo da Vinci, the dazzling figure of the European renaissance. He was one of the outstanding jurists of the twelfth century and was at the same time a physician, philosopher, mathematician, philologist and astronomer. While being an outstanding lawyer and philosopher he was also an outstanding physician whose *Canon of Medicine* compiled in the twelfth century remained the standard textbook of medicine in Europe as late as the seventeenth century. It is important for the lawyer to remember that amidst all this wealth of learning the central discipline was the law.

Another interesting reflection is that the spread of knowledge was advanced by one of the principal requisites of Islam – the pilgrimage to Mecca (*hajj*). Muslims from all corners of the Islamic world met at Mecca in complete equality and in a spirit of fraternity. They exchanged not only information and opinions but also books, which they carried home in great numbers. Any tendency towards insularity of knowledge was thus countered and the pilgrimage operated as a central focal point for the rapid exchange and dissemination of learned literature as well as religious and political ideas.

A central theme of this book is that Islamic legal learning made a substantial contribution to the sum total of universal legal scholarship. This contribution did not, naturally, stand in isolation, but was part of an overall contribution to scholarship made by the Islamic world to the contemporary European. If the contribution in other departments of knowledge was admittedly substantial, there is no reason to suppose that in law alone, where the Islamic achievement was particularly rich, the flow of knowledge and ideas was restricted.

Commercial law, trusts, concepts of legal personality, notions of trusteeship of political power, the right of rebellion against unjust rulers and many basic concepts of the laws of war and peace in international law are some of the areas where a movement of legal ideas could well have taken place to a greater extent than is commonly supposed. Some of these will be considered more fully later in this volume.

ARABIC LIBRARIES

In his autobiography Avicenna (Ali Abu Ibn Sina) describes his visit to the Sultan of Bukhara in whose service he was enrolled. Avicenna requested that he be permitted to examine the Sultan's library:

> One day I asked his leave to enter the library to examine the contents and read the books on medicine. He granted my request and I entered a mansion with many chambers. Each chamber had chests of books piled one upon another. In one department were books on language and poetry, in another law and so on; each apartment was set aside for books on a single science. I glanced through the catalogues of the ancient Greeks and asked for those which I required; and I saw books whose very names are as yet unknown to many – works which I have never seen before and have not seen since. (Arberry, 1951, pp. 9–24)

There were libraries in Baghdad, Cordova, Damascus and other cities, consisting of tens of thousands of volumes. When, in 1171, Saladin entered the city of Baghdad the public library was said to contain 150 000 volumes. There was in the same city a great house of learning which was reputed to have over 700 000 volumes. It will place the history of knowledge in proper perspective if we recall that more than three centuries later there were no books at all in the University of Oxford, apart from a very few volumes in the chests of the library named after Bishop Cobham, and some others possessed by some of the wealthier Masters (Dunlap, 1972, pp. 113–14). The students had no access to books and all the teaching had to be done orally. In this context a donation by the Duke of Gloucester of 129 volumes in 1438 was hailed by the university authorities as 'a more splendid donation than any prince or king had given since the foundation of the University'. One of the more handsome of the earlier princely donations was the donation of 23 volumes to All Souls College by Henry VI. One can see why in 1438 the grateful scholars wrote to Parliament urging its members to thank the Duke publicly (Dunlap, 1972, pp. 114–15). Such libraries were clearly minuscule in comparison with the Islamic libraries of many centuries earlier.

A reference to Islamic libraries would be incomplete without a mention of the most famous of the medieval libraries, the library popularly known as the House of Wisdom of Al Hakim in Cordova. This library contained from 400 000 to 600 000 volumes and it is recorded that its catalogue alone consisted of 44 volumes containing nothing but the titles and the descriptions of the books (Ibn al Abar, quoted in Makkari, 1843, p. 170). Graphic details preserved for us are most eloquent on the encouragement of learning. Thus, this library maintained a staff of not only librarians but of copyists and

binders and admitted anyone without distinction of rank who wished to read or consult any of the books. All students were supplied with free ink, inkwells, reed pens and paper, as was the case with most other Muslim institutions of learning (Thompson, 1939, p. 357 and generally the chapter on 'Muslim Libraries'). Even the budget of this library has been preserved for us, containing interesting items such as provisions for matting in summer, carpets for winter use, repairs of curtains in summertime, repairs of felt curtains in wintertime, paper for the copyists and the salaries of librarians and servants.

Islamic learning necessarily receives prominent mention in any panoramic survey of the world's principal civilisations. In the words of Gibbon: 'The age of Arabian learning continued for about five hundred years . . . and was coeval with the darkest and most slothful period of European annals.' (Bury, 1900–02, vol. 6, p. 28).

Particularly in relation to science and, as we shall see, philosophy and jurisprudence, the influence of Islamic scholarship made a great impact on European knowledge.

THE SYNTHESIS OF KNOWLEDGE

A common attitude of non-Islamic historians and scholars is to look upon these centuries, when learning flourished in Islam, as merely a period of preservation by the Muslims of the ancient classical culture of Greece and Rome. According to this view the scientific and philosophical knowledge of the Greeks was acquired by the Muslims, preserved by them and then transmitted to the West when Western learning revived. Perhaps one of the most distinguished exponents of this view was Bertrand Russell (1961, p. 420): 'Mohammadan civilisation in its greatest days was admirable in the arts and in many technical ways, but it showed no capacity for independent speculation in theoretical matters. Its importance, which must not be underrated, is as a transmitter.' Some scholars describe this as the 'oven theory' of Islamic learning as it likens Islamic civilisation to a warming oven which kept the Greek legacy alive until a revived Europe was ready to use it (Sabra, 1983, p. 69).

Islamic scholarship was however something more than one of mere preservation. It synthesised, developed and pioneered ideas. Whether in science or in law or in philosophy, it was a developer and not only a transmitter.

The Abbasid Caliphs at Baghdad, whose reign is outstanding for its active encouragement of learning, founded in the ninth century a celebrated institute of research, the Bayt al Hikma, at which the great works of Greek science, medicine and philosophy were translated into Arabic. To this stream of knowledge thus flowing into the Islamic world was added the knowledge garnered with similar zeal from India, Persia and Babylon. All of these became available in Arabic, in a confluence of knowledge which till then had no precedent in history. It was in fact the first great internationalisation of scientific and philosophical knowledge.

The analogy of the warming oven was thus clearly inappropriate in one respect: it was not the classical stream of knowledge alone that was preserved for transmission.

The second error is the assumption that nothing was done by the Arab thinkers to synthesise or conceptualise the different thoughts mingling in this confluence. They were thinkers greatly given to the task of extracting the essentials of knowledge and of searching for the universals that lay behind the particulars. This aspect of Islamic philosophy is self-evident from a consideration of the works of philosophers such as Avicenna, Averroes and Al-Ghazali, whose independent conceptualisations heavily influenced later European thought (see Chapter 6).

A third error is the assumption that Islamic philosophers added nothing of their own to this synthesis of learning. In medicine and all the sciences they rolled back the frontiers of knowledge. In jurisprudence they created altogether new departments of legal study such as international law. In philosophy they opened up new pathways which many trod after them. See H. G. Wells (1925, p. 627) to the effect that algebra was practically their creation. They developed spherical geometry, inventing the sine, tangent and cotangent. They invented the pendulum and produced works on optics. In medicine they made great advances over the Greeks. In chemistry they made a good beginning, discovering many new substances. In manufactures they outdid the world in variety and beauty of design and perfection of workmanship. Wells goes on to give an impressive list of original achievements.

All these three aspects can be well illustrated through any one science such as mathematics. India was the source of 'Arabic' numerals and the decimal system. The science of arithmetic, wherein the Indian system acquired a permanent place in the Arab books, also included the theory of numbers derived from the Greeks (Sabra,

1983), and an attempt to integrate geometry as found in Euclid's *Elements* into the theory of numbers. Avicenna's eleventh-century enclycopedic work on knowledge contains such an integration. Indeed he went further, attempting a synthesis between these departments of learning and metaphysics.

In algebra, itself a word of Arabic origin, Greek, Babylonian and Indian knowledge was gathered together. Books appeared such as that of Al-Khwarizimi, which went beyond anything known before, not only in its syntheses and schemes of marshalling available knowledge, but also in its pioneering uses of geometrical constructions as illustrative devices. Upon solid foundations thus laid, later Arab algebraists carried the science considerably further.

As with the Greeks, there was always the search for essentials and universal truths, and the unravelling of fresh knowledge. The raw material available was unrivalled. The intellects brought to bear upon it were among the most outstanding in the history of knowledge. The result could not possibly have been the mere production of a conduit pipe. In science and in philosophy, as in more specific examples such as optics and jurisprudence, there was a considerable contribution and development of knowledge at the hands of early Islamic civilisation.

The original thought of the Arabs made a fresh breakthrough in a fourth way, particularly relevant to law. As we shall see in greater detail later, there was an important philosophical barrier standing in the way of the development of knowledge: the claim of holy scripture in both Christianity and Islam to be the sum total of all knowledge worth knowing. Human reason was dwarfed by divine revelation. Philosophy and all sciences depending for their development on the extended use of reason (law among them) were thus cramped and restricted. It was the Islamic philosophers who broke through this barrier and unleashed human reason (see pp. 103–5). They thus set off a train of events whose impact on all subsequent thought was immeasurable.

THE ENTRY OF ARABIC KNOWLEDGE INTO THE WEST

An important route of entry into Europe of Islamic medical, scientific and philosophical knowledge was through Sicily by reason of its close proximity to Southern Italy. Sicily was a Muslim province from 831 to 1090 and Southern Italy was at that time a Byzantine possession. Communication from the 'football' to the 'toe of the boot' was easy

and natural. The schools of Salerno, Otranto, Rossano and Monte Cassino were some of the first recipients of this Arabic learning. Later, Arabic learning was taken north of the Alps through the activities of scholars like John of Gorze who took with him a horseload of Arabic books to Germany, from where Arabic science later reached England. When King Canute (995–1035), the Danish King, conquered England, he imported Lotharingan and Flemish churchmen, several of whom had knowledge of Arabian science. The most notable of these was Robert de Losinga, Bishop of Hereford, a town which became a centre of Arabic studies in England and the foremost centre also of scientific knowledge. Adelard of Bath, a cousin of Henry I, and one who had travelled extensively in the Middle East, was one of the outstanding scholars of the time and his *Quaestiones Naturales* inaugurated an intellectual revolution. He had a knowledge of Arabic literature, having learnt that language during his travels. Another similar scholar was Roger of Hereford, by whose time Hereford had become the foremost centre for the study of science in England.

Another route of entry of Arabic knowledge to Europe was provided by the Crusades. These provided continuing opportunities for contact between the brilliant Islamic civilisation of the middle ages and the reviving civilisation of Western Europe.

The Crusades were, from the European point of view, a great joint enterprise sapping the wealth and the energies of the continent. From the Islamic point of view they did not enjoy the same importance. They were rather a series of sporadic assaults upon the peripheries of the vast and settled Islamic world. Yet for both groups they afforded a meeting point *par excellence* from which a better view of the other group could be obtained. For Europe it meant an immensely significant flow, not only of merchandise, but also of knowledge.

Missionaries and travellers followed in the wake of the Crusaders. The growth of scholasticism in Europe was promoted by contact with the grapplings of the Islamic mind with philosophical problems that were similar to the Christians'. Scholars such as Leonardo Fibonacci, the first Christian algebraist, brought back much knowledge from Syria and Egypt, and Raymundus Lullus the missionary induced the Council of Vienna to create six schools of Oriental language in Europe in 1311. New thrusts in chemistry, physics, astronomy, geography, history, poetry and commerce (the Arabic word 'tariff' entered Europe during the Crusades) were part of the intellectual and cultural follow-on from the Crusades.

Another means was through great 'intellectual clearing houses' – centres of universal knowledge from which a diffusion of learning took place through translations and the movement of scholars. Toledo was the principal centre but there were many others. Provence, Northern Italy and Sicily were entire regions and there were also 'open' cities such as Milan, Pisa, Montpellier, Salerno, Naples and Palermo, 'which were important vitalizing cells in the steadily mounting bloodstream of European intellectual life' (Heer, 1968, p. 238). An important door was thus opened to the flow of knowledge into Europe, without which the dramatic take-off in European intellectual life could well have been some centuries delayed. These lines of communication, which were kept open during the twelfth and early thirteenth centuries, were cut during the later Middle Ages.

To obtain an idea of the extent of transmission of knowledge from the Arabic World to Europe it is necessary to look at the work of translating from Arabic into Latin which took place in centres of knowledge such as Toledo in Spain. This was in fact the chief seat of translators, although there were translators in other cities such as Barcelona, Narbonne and Toulouse. Some great translators, such as the Italian Gerard of Cremona who lived in Toledo, translated as many as 71 scientific treatises from the Arabic into the Latin. Indeed the entire Aristotelian corpus was translated from Arabic into Latin as were also the works of great Islamic philosophers such as al-Kindi, al-Farabi, Avicenna and Al-Ghazali.

> It was from the example of Toledo that Europe first learnt to understand that learning knows no frontiers, that it is universal, global and 'human', that it concerns mankind as a whole, without respect of race or religion. At Toledo Arabs, Jews and Greeks worked with Spaniards, Frenchman and Germans, with Slavs from the Balkans and, last but not least, with Englishmen. (Heer, 1968, p. 240)

Toledo was under Muslim rule from 712 to 1085 and Arabic was still spoken there in the twelfth century.

It is to be noted also that some of the most learned men of the Middle Ages, such as Pope Sylvester II, Roger Bacon, Albertus Magnus and Thomas Aquinas, each of whom was considered to be perhaps the most accomplished scholar of his age, had considerable exposure to Islamic learning (see Chapter 6).

It should be noted also that just as Arabic was translated into Latin and thus was a means through which the learning of the Arabs was transmitted, the Arabs themselves at the peak of Arabian scholarship had translated into Arabic a large number of the works of the outstanding Greek philosophers. Works of Aristotle in particular were translated into Arabic and through their use by the Arab scholars eventually made their re-entry into the world of European learning. (On the philosophical and legal aspects of this transmission, see Stone, 1965, pp. 46–50).

This line of transmission of Greek thought to Europe through Arab philosophers overlapped with that of the Jewish philosophers. These latter, especially in Spain, were themselves under a continuous stream of Arab influence since the Islamic conquest in the eighth century. In the words of the eminent legal philosopher, Julius Stone, this association between the Arab and Jewish philosophers was an overlapping 'both in time and in mutual inspiration' (Stone, 1965, p. 49). Bertrand Russell notes on this matter that the Jews formed a useful link between the Spanish Moors and the Christians as there were many Jews in Spain who knew Arabic and, since they knew also the language of the Christians, were able to supply translations. Indeed even among the Jewish philosophers of the time, of whom Maimonides was the pre-eminent example, knowledge of some of the Greek writings came to them only through Arabic translations. For example Maimonides' book, *Guide to the Perplexed* – a guide to philosophers who had lost their way in the maze of disputation – contains a summary of Plato's *Timaeus* which Maimonides knew in Arabic (Russell, 1961, p. 421) thus showing how extensively Greek philosophical works had been translated into Arabic.

The extent to which the medieval universities of Europe were influenced by the Arabian system of learning has been the subject of discussion and controversy. We know that scholars from Islamic Spain influenced university communities in France, from the fact that a group of Christian Schoolmen known as Latin Averroists (from Averroes (Ibn Rushd) the Islamic philosopher of Cordova) had appeared at the University of Paris in the twelfth century. They adopted his teaching in relation to the active intellect of man and the doctrine of double truth (revealed by revelation and intellect) and were exerting such an influence on the university community that they were banned from teaching at the University of Paris. The Spanish scholar, J. Ribena y Tarrago has argued the possibility that the medieval European university owed much to conscious imitation

from the Arabian system of education. The rapidity of university development in the twelfth century and the grant of university titles or degrees (cf. the *ichaga* or licence of the Arabian schools), are some of the factors he points to in support of his theory (Ribena y Tarrago, 1928, pp. 334–40). This view is supported also by the German medieval historian, Friedrich Heer (1968, p. 235): 'There is no doubt that Islamic Spain was a stimulating influence [on the medieval European university]', but this is rejected by other scholars such as Hastings Rashdall (1936, p. 3), who considers the evidence unconvincing. There can be no doubt however that the learning of the great Islamic centres of scholarship filtered through to various European centres and made a considerable impact on the totality of medieval European scholastic knowledge. See also to this effect H. G. Wells (1925, p. 626): 'The light of these universities shone far beyond the Moslem world, and drew students to them from east and west'. Their impact on the Universities of Paris, Oxford and Northern Italy was, according to Wells, 'very considerable indeed'.

The extent of diffusion and imitation of Arabic learning may be gathered from the following lament of a ninth-century Christian ecclesiastic, San Alvaro of Cordova:

> Many of my co-religionists read the poems and stories of the Arabs, and study the writings of Muhammedan theologians and philosophers, not in order to refute them but to learn to express themselves most elegantly and correctly in the Arabic tongue. Alas! All the young Christians who become notable for their talents know only the language and literature of the Arabs, read and study Arabic books with zeal, and at enormous cost from great libraries, and everywhere proclaim aloud their literature is worthy of admiration. *Heu, pro dolor. Linguam suam nesciunt Christiani.* (cited in Thompson, 1939, p.360)

An interesting account of the similarity between Islamic universities and the medieval universities of Europe is given by Lord Bryce in his 'Essay on Law and Religion' (Bryce, 1901, pp. 219–37, especially pp. 231–6) where he recalls his visit to the 'ancient and splendid University' of Al-Azhar, the world's oldest surviving university, dating back to the tenth century. In the midst of an admiring comparison of its architecture with that of the early European universities, he mentions numerous points of similarity in curriculum organisation, teaching methods, funding arrangements and student

freedom between Al-Azhar and the medieval European universities which appeared a few centuries later. He compares the intellectual ferment in the two settings, where a multitude of scholars lived together without family ties or regular industrial occupation. At Al-Azhar, as in Paris and Oxford 'scholars were fired by religious or political excitement' at a time when 'the movements of public opinion and the tendencies we now call democratic found through the eager crowd of university youth their most free and prompt expression' (Bryce, 1901, pp. 231–2).

Who is to say what influence the earlier universities exerted upon the later in an era when there was a movement of knowledge westwards from eastern centres of learning?

This is particularly significant in the history of jurisprudence. For a period of over 1000 years, the jurisprudential thought of Aristotle had remained comparatively unknown in Western learning, although Plato had been adopted as the prince of philosophers by the Church. It is interesting to speculate on the reasons for this. One of them may be that the structure of Plato's philosophy, which aimed at entrusting government to a favoured few who had qualified for this position through their learning, experience and wisdom, appealed to a Church which enjoyed a virtual monopoly of learning. It was to this learned and privileged class that Plato would entrust government and the administration of the law. Aristotle on the other hand was the philosopher of individual freedom and of the full development of each individual's potential. He was also the logician *par excellence* of the Greek world, and he gave an elevated place to free intellectual inquiry.

Aristotle's work which had thus lain submerged for a millennium, did not escape the attention of the Arab philosophers, among whom the work of the Greeks had gained wide currency. In his autobiography, Avicenna relates this rather charming story regarding his first acquaintance with Aristotle's *Metaphysics*:

> I read the *Metaphysica* of Aristotle but did not understand its contents and was baffled by the author's intention. I read it over forty times until I had the text by heart . . . I despaired within myself, saying, 'This is a book which there is no way of understanding'. But one day at noon I chanced to be in the booksellers' quarter and a broker was there with a volume in his hand which he was calling for sale . . . he said to me, 'Buy this book from me. It is cheap. I will sell it to you for four dirhams. The owner is in need of

> the money.' So I bought it and found that it was a book by Abu Nasr al-Farabi, *On the Objects of the Metaphysica*. I returned home and hastened to read it; and at once the objects of that book became clear to me, for I had it all by heart. I rejoiced at this and upon the next day distributed much in alms to the poor in gratitude to Almighty God. (From Arberry, 1951, pp. 9–24; see also Carroll *et al.*, 1961, p. 238.)

The works of Aristotle must already have been circulating fairly widely in Arabic translations and commentaries at that time.

These two facets of the work of Aristotle – his philosophy of individual freedom and his pre-eminence in logic – appealed to the men of the Arabian renaissance. We shall see presently how the thought of Aristotle, which is a vital intellectual foundation of Western thought underlying politics, individual freedom, the separation of powers and the rule of law, was transmitted to Europe through outstanding Islamic philosophers such as Avicenna and Averroes and through Arabic translations of the Greek. It was through the bridge of Arab philosophy and thought that this learning reached Europe, fertilised the thought of Thomas Aquinas and resulted in a resurgence of European learning and thought concerning politics and law. Among the important factors which stimulated the progress of art and learning in medieval Europe from the Carolingian period (ninth century) onward were 'the new translations of the Greek philosophers and . . . the introduction of Arabic science into Christian Europe. The scholarly influences filtering in from Moorish Spain and the Near East further broadened the intellectual horizon.' (Carroll *et al.*, 1961, p. 337).

A Western jurist, despite an attitude of hostility running through his articles on Islamic law, states of this aspect:

> In short, in a moment when the darkness of ignorance seemed to engulf the Christian world in the ninth and tenth centuries, Asia, Africa and Spain were the centers of civilization. It was through them that, for the first time, the Greek philosophy was communicated to the West; and it was these translations which were the torches that illuminated the Middle Ages and were the first manifestation of the liberty of thought. (Ion, 1907, p. 396)

If the advent of Islam could have provided a factor triggering off this torrent of learning in the Arabic world, with its considerable

spin-off benefits to Europe, it becomes appropriate to enquire what particular facet of Islamic teaching produced this extraordinary result.

THE RELIGIOUS STIMULUS TO LEARNING

One does not have to go far to find the answer. The Prophet is reputed to have said: 'The ink of the scholar is holier than the blood of the martyr.' Learning, which stood at a very low ebb among the Arab tribes was profoundly elevated in status. The Prophet enjoined his followers to seek learning wherever they could find it. 'Go ye', he said, 'in search of learning, even if you have to go to China for it.' His followers, thus exhorted to go to the ends of the earth in search of learning, did just that, for as we have seen, his followers had arrived in China within ten years of the *Hegira*.

Indeed China is specially important in this catalogue of intellectual achievement, for it was from China that the art of paper-making entered the Arab world in the eighth century, thus enabling scholars to copy and multiply books in a manner impossible when papyrus or sheepskin was the standard recording material.

The *Qur'an*, containing for the Muslim the totality of the direct word of God as revealed to His Prophet, was essential reading for any who aspired to proficiency in knowledge of the religion. Acquiring this knowledge became an act of piety and the *Qur'an* was thus instrumental in creating the need for reading, writing and interpretation. This led to an overwhelming emphasis on literacy (Iqbal, 1981, p. xiv).

The position of the *Qur'an* in the world of Islamic learning is perhaps well symbolised by the description of the Cairo library of the Fatimid Caliph Al-Aziz (974–6) whose library of several hundred thousand volumes of bound books had, stored in a chamber above the library proper, 2400 *Qur'an*s beautifully illuminated in gold and silver (Dunlap, 1972, p. 57).

Not only was learning encouraged but also discussion and analysis. There is a tradition of the Prophet in which he said, 'if there is a difference of opinion within my community that is a sign of the bounty of Allah'. In other words, if there is a difference of opinion requiring scholars to pit their intellects against each other, this is a stimulus to intellectual advancement, for it is from the clash of

intellects that fresh knowledge results. In this way the Islamic intellect came to grapple with every known intellectual problem of the time.

THE PLACE OF JURISPRUDENCE IN THE REALM OF KNOWLEDGE

This has special significance for our studies because in the midst of all this wealth of learning the central discipline was the discipline of jurisprudence.

In the world of Western scholarship there are those who contend that jurisprudence is the queen of the humanities. Yet, other disciplines do not readily yield to such claims and argument results. In the Islamic world no argument was necessary. The pre-eminence of jurisprudence was self-evident. It resulted from the fact that *Qur'anic* principles applied to every aspect of law and living, and as such came to be the central concern of scholars in all branches of learning. The scientist, inspired by the *Qur'anic* exhortation to learning, set off on his voyages of enquiry into other fields of knowledge. The social scientist, and particularly the lawyer, had to make his voyages of inquiry within the *Qur'an* itself, for the principles of these disciplines – unlike the principles of science – were contained within the Book.

In the words of Joseph Schacht (1964, p. 1), 'Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. The very term *fikh*, 'knowledge', shows that early Islam regarded knowledge of the Sacred Law as the knowledge *par excellence*.'

Another factor of importance, especially with the orthodox, was that God had not in the *Qur'an* revealed Himself or His nature, but rather His law. The Divine Being was beyond the comprehension of humans but His commands were expressly revealed so that they may be known and understood. Speculation over God's nature or person hence yielded in importance to the understanding of God's commands. Having regard to the limitations of man's intellect this seemed therefore a more suitable and useful arena for study, thus giving law the edge over theology as the primary intellectual activity of Islam.

In each of the main cities there were groups of people who would meet for discussion in mosques or courtyards in private houses. Their aim would be to discover in respect of the new problems which were

constantly arising, what course of action was in accordance with *Qur'anic* principles. It is to be noted that when these discussions took place there was often a minority group which disagreed with the majority, thus provoking further discussion.

A simple illustration of the sort of legal discussion that could arise is the difference in interpretation of the *Qur'anic* text which states that the punishment for a person who breaks a contract made on oath is to fast for three days. Does this mean any three days or three consecutive days? Early scholars like Ibn-Masud read it as three consecutive days while later scholars tended to hold that separate days were intended. This was a comparatively uncomplicated matter of interpretation. There were also much profounder issues, some of them relating to the very nature of knowledge itself.

Modern jurisprudential studies have made it clear that no legal system ever achieves greatness if it is frozen in a set form and incapable of development and adaptation to changing times. British common law developed through long centuries of judicial decision by the judges. The Roman law developed through hundreds of treatises written by eminent jurists over the centuries. The Hindu law was contained not in one text but in a series; and these being of different degrees of authority opened up the possibility of learned argument in support of different interpretations.

Juristic ability was rich in the Arabic world, but how could this function against a background of immutable law contained in one all-embracing book, every part of which was of equal authority? How could national and international relations both within the rapidly expanding world of Islam and in relation to its neighbours be handled on the basis of an unalterable text?

To answer this question we must outline the main sources of Islamic law. This will be attempted in the next chapter, which will set out very briefly the broader principles. The reader should remember, however, that there was a great deal of sophistication in Islamic legal methodology which it is well beyond the scope of this work to consider. For example techniques of legal reasoning included primarily *qiyas* (reasoning by analogy) and secondarily *istishab* (presumption of continuity), *istislah* (consideration of public interest) and *istihsan* (a concept of equity developed, particularly by the Hanafi school, to offset a restrictive use of the technique of *qiyas*). (For a detailed account, see Makdisi, 1985. See also pp. 40–5, below.) The whole system was one in which the judge was closely controlled by the detailed doctrines of the school to which he belonged.

The process of expansion and adaptation was a controlled and ordered one, not one where the discretion of the interpreter was unbridled and at large. All this was a far cry from the uninformed judgments regarding Islamic law which sometimes appear in the highest places in Western jurisprudence. For example, one of the most eminent and scholarly American judges, Justice Frankfurter, in *Terminiello* v. *Chicago* [337 US 1 at 11 (1949)] felt himself able to say, 'This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.' In *Clarke* v. *Harleysville Mut. Casualty Co.* [123 F 2d. 499 at 502 (1941)] Judge Dobie of the Fourth Circuit Court of Appeals went even further: 'We sit, after all, as an appellate court, administering justice under the law, not as an ancient oriental cadi, dispensing a rough and ready equity according to the dictates of his own unfettered discretion.' Such misinformation still persists and tarnishes comparative assessments in the field of jurisprudence. (See a criticism of such statements in Rosen, 1980–1.)

3 The Sources of Islamic Law

We have already noted the vast and rapid territorial spread of Islamic law. As with the Roman law before it, it brought a unifying legal system to a vast diversity of peoples and countries. As with the concept of the respublica Christiana of medieval Europe, with its unifying body of Christian law, so also the republic of Islam had its unifying body of law.

There was, however, a fundamental difference between the laws of the Christian commonwealth and those of the commonwealth of Islam (the community of Allah). Christianity had a pre-existing body of well-developed law, namely the Roman law, upon which to build. This was the world's best developed system of law till then and was remarkable for its comprehensiveness and for its maturity of principle. The lawyers of the early Church only needed to superimpose upon it the essentials of Christian doctrine, and to ensure that there was no conflict of principle with any tenet of Christianity. Islam did not have a pre-existing base of any maturity to provide the foundation for its legal structure. It had to create this base for itself. Its achievement in doing this successfully and within such a short period is therefore all the more remarkable. Some jurists have sought to trace connections between Islamic law and the Roman law (see Fitzgerald, 1951).

The study of law and theology in Islam went hand-in-hand. No distinction was made between rules of law and rules of religion. The term *fiqh*, or 'understanding', applied to this joint body of learning – understanding of the word of God and of man's duties under it. The discipline of the law rather than theology played the primary part in the development of this understanding, for law became the central discipline of Islam. The term *fiqh* thus came to have exclusively legal undertones. Later the word, *Shari'a*, or 'the Way', became the accepted expression for describing this discipline.

There was indeed some resistance to the notion of lawyers acquiring a dominant voice in the interpretation and exposition of the *Shari'a*, for as in all systems there was the fear that the letter of the law could thus run away from its spirit. However there was a corrective to this in the presence of different schools of lawyers and different methods of interpretation. Moreover, the law was never, in the Islamic system, divorced from the word of God and lawyers could thus assert that a built-in axiom of their legal work anchored them always to a religious base.

It is important to remember, of Islamic law, that it deals with two broad aspects of regulation. First there is the set of laws dealing with man's duties towards God (*Ibadat*) – the five pillars of Islam (the profession of the faith, prayer, fasting, almsgiving and pilgrimage). This is always dealt with first in the *fiqh* books. There then follow the laws governing human relations (*mu'amalat*) such as marriage, divorce, succession.

This chapter will investigate the sources of the *Shari'a*. These sources fall into two main categories: the primary sources (which comprise the *Qur'an* and the *Sunna*) and the secondary or dependent sources, which are not sources *stricto sensu* but are rather means for discovering the law. These latter are principally *Ijma* or consensus, and *Ijtihad* or reasoning. For a very scholarly judgment on the sources of Islamic law, see that of the Pakistan Supreme Court in *Khurshid Bibi* v. *Muhammad Amin* (1967) 1 Pakistan Legal Decisions 97, SC.

The primacy of the *Qur'an* and the *Sunna*, over all other sources, can be illustrated from many passages in the literature of Islam. For example, when the Prophet appointed Muadh Ibn Jabal as a governor and judge in Yemen, the Prophet asked him, 'According to what will you judge?' He replied, 'According to the Book of Allah.' 'And if you find nought therein?' 'According to the Sunnah of the Prophet.' 'And if you find nought therein?' 'Then I will exert myself to form my own judgment.' The Prophet's response was, 'Praise be to Allah who has guided the messenger of His Prophet to that which pleases His Prophet.' (See ibn Said, 1917, pp. 107–8, 120. See also the reference to this tradition in Ibrahim, 1985, p. xciv.) It followed from this tradition that the *Qur'an* and the traditions of the Prophet (*Sunna*) were the roots of the law, while the opinions of jurisconsults (*ra'y*) could be brought in by way of supplementation where the main sources were silent.

THE PRIMARY SOURCES

(a) The *Qur'an*

This is, of course, the bedrock of Islamic jurisprudence. Amidst the vast mass of juristic writing one turns again and again to the basic words of the *Qur'an* to ensure that argumentation and the deductive process have not taken one astray from the foundation of it all. The historical background to the *Qur'an* has been dealt with in Chapter 1. The legal attitude to it, at all periods of Islamic history, was well summarised at the UN Conference on International Organisation, 1945 (Documents, Vol. XIV pp. 375–9) by Muhammad Abd Allah Darz of Al-Azhar University in the following terms: 'The *Qu'ran*, the word of God, is perfection itself – it is unchallengeably true, infallibly just.'

While noting the overriding importance of the *Qur'an* as a source of law, it is interesting also to note that 'no more than approximately eighty verses deal with legal topics in the strict sense of the term' (Coulson, 1964, p. 12). Still it was an entire moral code and the construction of every legal principle had necessarily to be related to this moral base.

The earlier revelations during the Meccan period deal largely with questions of belief and morals. It was later, after his migration to Medina, that Muslims lived in an organised society, and it is mainly during this period that the principles regarding such matters as contracts, torts, crime, succession, mercantile law, constitutional law and international law were revealed.

Many of these revelations were very short. The principle contained in a single sentence could be the foundation on which a whole structure of constitutional law might be built. Here are some *Qur'anic* verses on matters relating to law:

On commercial integrity

Give full measure when ye
Measure, and weigh
With a balance that is straight (XVII: 34)

On testamentary law

Let those (disposing of an estate)
Have the same fear in their minds
As they would have for their own
If they had left a helpless family behind (IV: 9)

On guardianship

Those who unjustly
Eat up the property
Of orphans, eat up
A fire into their own
Bodies: they will soon
Be enduring a blazing fire (IV: 10)

On trusteeship

God doth command you
To render back your Trusts
To those to whom they are due (IV: 58)

On treaties

(But the treaties are) not dissolved
With those Pagans with whom
Ye have entered into alliance
And who have not subsequently
Failed you in aught,
Nor aided anyone against you.
So fulfil your engagements
With them to the end
Of their term: For God
Loveth the righteous (IX: 4)

Though seemingly simple each of these verses has been the subject of a vast corpus of juridical interpretation.

It is important for the foreign lawyer attempting to understand the place of the *Qur'an* as a source of law to remember that 'its constant interweaving of spiritual teachings with practical legislation' is due to the *Qur'an* 'being a guidance not only to the spiritual good of the hereafter but also towards the good life – spiritual, physical and social – attainable in this world' (Asad, 1980, p. iii). Continuing this theme of unity, one must note also that the various injunctions and exhortations contained in the *Qur'an* are not to be read as individual provisions but as parts of one integral whole. This has led to the expressive statement of Muhammad Abduh (1849–1905), one of the most outstanding of modern Islamic thinkers, that the *Qur'an* is 'its own best commentary' (Asad, 1980a, p. vii).

The legal importance of this observation cannot be overemphasised when we realise what an important role interpretation plays in

the legal process of all jurisdictions. In Islamic law the role of the interpreter assumes even more importance in the light of the view that the *Qur'an* contains many layers of meaning and that 'more meanings hitherto unexpected keep revealing themselves in its pages' (Asad, 1980a). The more devout and learned the interpreter, the more the meaning of each *Qur'anic* passage expands – a concept one does not find in other legal systems where the interpreter plays an elevated role, such as the Roman, the Hindu or the Jewish. A modern translator of the *Qur'an* describes the 'inward joy, difficult to describe' which the reverent student of the *Qur'an* experiences when the meaning of the text enlarges even as his own capacity for understanding increases. 'It is like a traveller climbing a mountain: the higher he goes the further he sees' (A. Y. Ali, 1934, p. v). Like 'some watcher of the skies' in Keats' description of his discovery of Chapman's Homer, the author observes that as the reader progresses 'still newer, and again newer worlds "swim into his ken". The miracle deepens and deepens, and almost completely absorbs us. And yet we know that the "face of God" – our final goal – has not yet been reached'.

(b) The *Sunna*

If on a given matter the *Qur'an* is silent we need some guidance from a source external to it, and what better guidance than the teaching and example of the Prophet himself? This was ordained in several passages of the *Qur'an* itself, as for example, in terms that 'whatsoever the Messenger give you, take it and whatsoever he forbids, abstain from it' (LIX: 7). Hence the authority of the traditions of the Prophet, collectively known as the *Sunna* in Islamic law. In the event of contradiction between the *Qur'an* and the *Sunna*, the two must be harmonised if possible but otherwise the *Qur'an* prevails.

The word *Sunna* means literally a manner of acting, a rule of conduct, a mode of life. Applied to the life of the Prophet this meant, therefore, a rule deduced from the sayings or conduct of the Prophet. Such saying or conduct could take the form of a specific utterance of the Prophet, an action or practice of the Prophet, or the approval by the Prophet of the action or practice of someone else, as narrated in a *hadith* on tradition. The term *hadith* thus refers to the report of a particular occurrence. Although one often comes across the words *sunna* and *hadith* used almost interchangeably, the latter refers to a

tradition or story of the Prophet while the former term relates to the rule of law deduced from it (Fyzee, 1964a, p.19).

Islamic literature sometimes describes the *Qur'an* and the *Sunna* as an integrated whole, each supporting the other in the fashion of a book and a candle. The life and work of the Prophet provided the candle by the light of which the book is to be read. The book without the candle or the candle without the book would not achieve its purpose.

When the Islamic commonwealth was founded in Medina in 622 AD the Prophet was not only the spiritual leader but also the supreme judge of the Islamic community. A number of cases would be referred by his followers to the Prophet for his adjudication. The underlying principle was that the word of God was in the *Qur'an*, but if the *Qur'an* was silent, or needed interpretation, the Prophet as the Messenger of God, divinely inspired, would be the best authority for reaching a decision. The *hadith* literature contains numerous instances of cases decided by the Prophet. Not only such determinations but also the conduct of the Prophet constituted a binding precedent in Islam, on the basis that the Prophet was divinely inspired.

There was no attempt to record the *hadith* or *sunna* during the lifetime of the Prophet, a possible reason being the room for confusion with the *Qur'an*. Indeed there is a tradition that the Prophet was opposed to the writing down of anything he said, 'Do not write what I say. Whoever has written anything from me other than the *Qur'an*, let him wipe it out.' (Muslim quoting Sa'id al Khudri. See also Iqbal, 1981, p. 140). After about a century, however, when disputes started among the scholars about different rules of interpretation, the natural and logical thing to do in the event of doubt was to find out how the Prophet himself had decided in similar matters that came before him where there was no direct word of the *Qur'an*. His followers then set about what was probably the outstanding effort in the medieval world of analytical historical enquiry. They set out systematically to collect the traditions of the Prophet.

And how did they do this? By now Islam had spread enormously. Enquirers went out to every corner of the Islamic world to track down anybody who had knowledge whether on his own or through a chain of narrators of the sayings or doings of the Prophet. In this way the scholars recorded all the traditions they could find and they then

analysed the chain of connections between the narrator and the original tradition.

For example, someone might say, 'I heard this tradition from A who had heard it from his father B, who had heard it from his uncle C, who in his turn had heard it from D, a companion of the Prophet.' They would then research the strength of each link in the chain. If they found that A was reliable, B was reliable and so was C, the tradition would be accepted and confirmed. On the other hand they might say, 'We have found A to be reliable, B to be fairly reliable, but C to have been given to delusions of grandeur and to make false claims of association with the famous. Therefore we think this tradition is unreliable.' Every link was subjected to the most minute scrutiny. In this fashion various collections came to be made of the traditions of the Prophet and some books came to be regarded as particularly authoritative.

It is interesting to note that some of these compilers came from regions far beyond Arabia, although they wrote in Arabic. For example Al Bukhari hailed from Central Asia, thus showing the integrating nature of Islamic law as an influence binding together people of diverse geographical and ethnic backgrounds. All these compilations were distinguished by the meticulous care devoted to the selection of only the most reliable of the traditions. Apart from their pietistic value they are thus outstanding examples of critical scholarship. H. A. R. Gibb (1953, p. 66) observes of Al Bukhari, 'Viewed as a whole the *Sahih* (his collection) is a work of immense interest and scrupulous scholarship. Variants are carefully noted, doubtful or difficult points in the . . . texts are glossed. On any careful student the book produces a remarkable impression of honesty combined with piety.'

The scholars were prepared to go to such lengths in search of *hadith*s that they would travel hundreds of miles to collect even one tradition from a reliable source. For example, on hearing that a certain person in Syria knew of a certain *hadith*, Jabu ibn 'Abd Allah al-Ansari, one such researcher, is recorded as having immediately bought a camel and travelled a whole month to collect the *hadith* in question. According to the authority of Ahmad ibn Hanbal, as recounted by A. Iqbal (1981), Al-Bukhari, the foremost compiler of traditions, travelled hundreds of miles to meet a learned man to collect traditions from him, but on arrival at his door found the latter attempting to attract his horse from a distance by deceiving it into the belief that an empty meal-bag contained fodder. Concluding that the

man was unreliable, Bukhari departed at once (Abul-Fazal, 1980, p. xxiii).

These traditions were not only of judgments but also of what the Prophet did and what the Prophet said, all of which gave a background as to how Islamic life should be lived. Thus we find these traditions and the rules deduced from them becoming the most important source of Islamic law, after the *Qur'an*.

By about the end of the third century of the Islamic era the traditions had become the subject of a special branch of knowledge, with sub-specialities within itself such as biographies of narrators, classifications, terminology, commentaries and reliability (Rauf, 1974, p. 23). The collecting of the *hadith* had become one of the chief forms of activity of Islamic lawyers. Some outstanding lawyers such as Malik ibn Anas (718–96) of Medina had prepared the ground for this by making great collections of *hadith*s systematically arranged under logical headings and sub-headings. His work, *Al Muwatta*, presented several thousand *hadith*s for examination and adoption by theologians and jurists. Of the numerous collections, six became specially authoritative. They command great reverence in the Islamic world, for in them the 'golden chain' of authoritative narrators preserves the purity and force of each tradition in the collection.

Hadith scholarship was very demanding, not only because of the large volume of material unearthed, but also because the immense authority attaching to a genuine tradition of the Prophet made it imperative that every known method of psychological, historical, linguistic, logical and analytical inquiry should be used to test each *hadith* before it became part of the accepted corpus of tradition. Among the body of prerequisites worked out were:

1. That the narrator should have stated that he was present and saw or heard the utterance of the Prophet or, where not so present, he must give the complete chain of narrators from the last link up to the Prophet.
2. It must be proved that each one of the narrators actually met the person from whom he derived his information.
3. Each one of the narrators must have had a reputation for piety, virtue and honesty.
4. Each one of the narrators should have had the necessary learning to understand and convey faithfully what he had observed.
5. When each narrator heard the tradition he should have been of an age when he was competent to understand its full import.

In order to test the trustworthiness of each narrator an inventory was made against each one of them of:

(i) his name, title, parentage, occupation;
(ii) any untruthful statement made by him in his narrative;
(iii) his record of past conduct;
(iv) his proneness to error;
(v) whether he was given to relying on his imagination;
(vi) whether he was circumspect in his utterances;
(vii) whether he had any peculiar views on religion;
(viii) the degree of his learning and understanding.

For details see Abul-Fazl, (1980) pp. xx–xxi.

The *hadith* inquirers were numbered in their thousands and biographical details have been recorded in the early literature of Islam of upward of 100 000 such persons (Abul-Fazl, 1980, p. xxiv). The volume of *hadith*s can be appreciated from the information that Abu Dawud, one of the compilers, had studied half a million, of which he chose only 4800 as being 'sound' or nearly so. Al-Bukhari is said to have selected 7397 traditions from out of over 600 000 (Rauf, 1974, pp. 20–1).

One wonders what the effect might have been on Christianity had a concerted attempt been made in like fashion to reconstruct every detail of the words and acts of Jesus. There was perhaps more reason to do this, seeing that for the Christians Christ was divine, while for the Muslims Mohammad, though divinely inspired, was but a man. As it turned out a vast volume of the details of the life of Christ has been lost and Christianity is deprived of the enriching effect of knowing more of the life regarded as a model by all Christians, apart from the major events and utterances captured by the four gospel writers. On the other hand conditions were different; literary ability was less and the public life of Jesus was much shorter. In the case of the Buddha, the other comparable historical figure, a not dissimilar wealth of detail has been preserved for us, but unlike the *hadith* tradition, there was not the same concerted attempt to form a scheme of rigorous historical scholarship to review the totality of the available material and sift the legend from the reality. The *hadith* enterprise of Islam is thus historically unique.

It is essential to point out that the infallibility of the Prophet and hence the compelling nature of the traditions regarding his words or conduct apply only in matters which are the subject of prophethood.

As with infallibility doctrines in the Catholic Church, the Prophet's infallibility applied within its appropriate sphere and not outside. This principle is rather charmingly illustrated in what has come to be known as the tradition of pollination.

The Prophet passed by some farmers who were pollinating some date palms when he inquired why they were acting as they did. They replied that they were thereby increasing the production of dates. The Prophet did not agree with their arguments, and they consequently gave up the practice. The yield declined, whereupon they went to the Prophet and informed him of these results. His reply was, 'I am only a man. When I bid you anything relating to the affairs of your religion, receive it, and when I give you anything as my opinion, I am only a man.' (Abul-Fazl, 1980, Saying 580).

This tradition is often invoked as indicating that in matters unconnected with the prophetic calling, e.g. science and technology, Muslims are free to make their own inquiries and follow their own lines of reasoning. The Prophet made no claims to omniscience and the interpretation of the *Sunna* must follow similar principles.

THE DEPENDENT SOURCES

(a) *Ijma* (Consensus)

If one cannot find either a passage from the *Qur'an* or a *hadith* bearing on the matter in hand, then one turns to a third source – the general consensus among Islamic scholars of a particular age in relation to the legal rule correctly applicable to the situation. The rule that had thus been unanimously decided upon became fixed and definite and part of the permanent body of Islamic jurisprudence.

The authority of *ijma* is based upon distrust of individual opinion. There is assurance of freedom from error in the communal mind. The Prophet had observed, 'My nation will not agree unanimously in error.' The theory of consensus or *ijma* offered a principle of development in Islam for after God and the Prophet there was now the Islamic community. The custody of dogma and worship and all their incidentals was in the community. If the community had a common mind (not a mere majority view) on any particular matter, and that view was not inconsistent with the *Qur'an* or the *hadith* and was in an area on which they were silent, that view had validity.

An obvious limitation upon the authority of *ijma* or consensus is that it must not be in confict with the *Qur'an* or the *Sunna*.

It is possible for those who trace the connections of ideas between different legal and philosophical traditions to see some connection between this Islamic idea of the general view of the community and Rousseau's concept of the general will which he introduced into European political philosophy and to which he attached such binding force. Rousseau was known to be a student of Islamic ideas and the similarity between his theory and the Islamic notion may have been more than merely fortuitous (see Chapter 6).

Although *ijma* was accepted by the Sunni schools as a source of law, different schools based their acceptance of it on different principles. Abu Hanifa for example based it on equity, Malik on considerations of public interest, and Shafi'i on reasoning by analogy (*qiyas*). The Hanbalis gave it the narrowest of interpretations and would abide by the *ijma* only of the companions of the Prophet, whereas the Hanafis, for example, accepted the opinions of the jurists of any age. The Malikis would abide by the *ijma* of the scholars of Medina which was sanctified by association with the Prophet. The Hanbalis rejected all *ijma* except that based upon the traditions of the Prophet.

Viewed from the standpoint of equity, human rights and legal development, *ijma* thus played a most important role, for it provided for the development of the law to meet the needs of changing times rather than freezing it into an unyielding and static mould.

(b) *Qiyas* (Reasoning by analogy)

If all the three sources enunciated above should fail to provide a rule to solve the problem in hand, jurists must strive by deep and devoted study to derive an appropriate rule by logical inferences and analogy. Such resort to reasoning, or *ijtihad* as it was called, is often traced back in the Islamic books to the conversation between the Prophet and the Governor of Yemen (Muadh Ibn Jabal) to which we have referred earlier in this chapter. Logical reasoning by analogy was known as *qiyas* and was the subject of much philosophical inquiry in sorting out the underlying principle and separating it from the particular facts of the past and present cases. There was a similarity between this process and that of the English lawyer seeking to extract

the general principle underlying a decision from the particular facts of the case and applying it to the analogous case that arises later. For a detailed study of the techniques of legal reasoning in Islamic law and a comparison of the Islamic method with the 'reasoned distinction of precedent', see Makdisi (1985) and Tyan (1959). It required special training to be able to perform this function. Only a scholar deeply learned in all the nuances of the law through many years of training was equal to the task. Such a scholar was known as a *mujtahid*, one capable of exertion or initiative in thought about the law. Such exertion or initiative was known by the name of *ijtihad*. *Ijtihad* provided Islamic law with a means of adaptation to the changing needs of a rapidly expanding and developing society.

The logical processes involved in *qiyas* have been described by the French scholar Emile Tyan as including argument by analogy, argument *a fortiori*, argument *a majore ad minus*, argument *a minore ad majus*, and argument *a contraria* (Tyan, 1959, p. 82).

The development of a vast body of Islamic jurisprudence was due to this factor. However, it so happened that by the ninth and tenth centuries, the idea of human reason being brought to bear upon the divine word became less popular. It was argued that whatever was possible through processes of interpretation and reason had now been achieved. Consequently, the view was gaining ground that as the developmental period had served its function, the time was growing near for 'closing the door of *ijtihad*'. In the tenth century the view was finally accepted that the right of independent effort to ascertain the law of God had disappeared. The door of *ijtihad* was closed and remained closed for ten centuries (see generally, Schacht, 1964, Chapter 10).

When *ijtihad* was no longer available, a new process set in – a process of *taqlid* or imitation. Not claiming the right to interpret, as their predecessors did, the jurists of the age of *taqlid* commented upon the juristic literature from the commencement up to the age of *ijtihad*, writing exhaustive treatises upon it. These treatises, written from the standpoint of different schools, consolidated the juristic advances that had been made thus far and became authoritative textbooks.

Since the law could not be developed as in the days of *ijtihad*, various other devices had to be resorted to. Methods had to be found to work out a path around *Shari'a* doctrines that were considered inconvenient or unsuited to contemporary practice. Such devices (known as *hiyal* or stratagems) were used, for example, to get over the

prohibition of interest, by devising the fiction of a double sale. If it was not possible for A, who lent B 100 dollars, to get back 110 dollars, this difficulty could be obviated by hypothesising a sale by B of an object to A for 100 dollars and a resale by A to B of the same object one year later for 110 dollars. The Maliki and Hanbali schools opposed resort to such devices but, in general, the Hanafi and Shafi schools accepted their validity. It should be noted however, for the sake of completeness, that Shafi and the first few generations of his school after him regarded the *hiyal* as forbidden and reprehensible (Schacht, 1964, p. 81), although they felt compelled to recognise it as legally valid. The success of the *hiyal* literature was really due to the work of Hanafi authors. It is interesting that the English law, originally bound to the Canon law's prohibition of usury, overcame the prohibition by interpretation.

All this is not to say that when the doors of *ijtihad* were closed, all scholars without exception accepted this position. Ibn Taymiyya for example, in the fourteenth century fought resolutely against the doctrine of closure, but by and large the process was considered as having been concluded until, in the wake of the profound changes of the nineteenth and twentieth centuries, the argument revived of the necessity for a new era of *ijtihad*. Muhammad Abduh (1849–1905), the great Egyptian jurist of the nineteenth century, argued that legal reform to suit the changed needs of the times should proceed on the basis of fresh interpretations of the *Qur'an* in the light of the vast changes that had taken place in the intervening centuries, and that the doors of *ijtihad* which had been closed should hence be reopened. It is worth noting the words in which one of the most outstanding of modern Islamic scholars, Muhammad Asad, has described Abduh:

> His importance in the context of the modern world of Islam can never be sufficiently stressed. It may be stated without exaggeration that every single trend in contemporary Islamic thought can be traced back to the influence, direct or indirect, of this most outstanding of all modern Islamic thinkers. (Asad, 1980a, p. v.)

Other thinkers such as Sir Mohammad Iqbal of India went further and postulated a duty to engage in such inquiry in order to facilitate the adaptation of the law to the new age.

Such thinking was revolutionary, for it ran counter to ten centuries of tradition and was heavily resisted. The reformists replied that more change had taken place in the century just concluded than in

the ten centuries before and that the age of technology with its radical alterations to lifestyles, communications and social concepts demanded innovative thinking.

As a result of such thinking much legal reform has in fact been inaugurated. A few examples will at this point be useful in illustrating the powerful influences exerted by the new *ijtihad* upon modern legal systems.

Muhammad Abduh viewed the Islamic rules that a husband should be financially capable of supporting a plurality of wives, and that he should be able to treat them impartially, as being far more than merely moral injunctions. He viewed them as positive legal requirements imposing conditions precedent to the exercise of the right of polygamy. Hence it was open to a modern court to hold that if these conditions, especially the second, could not be fulfilled, it could refuse to permit a second marriage. Such views have led to specific legislation in more than one Islamic country.

Pakistan, for example, by the Muslim Family Laws Ordinance of 1961, set up an arbitration council, composed of the representative of each spouse and an independent chairman, to decide whether it is satisfied that a subsequent marriage is 'just and necessary' before granting permission for it. In Iraq a law of 1959 makes the court's permission necessary for a polygamous marriage and permission may be refused 'if any failure of equal treatment is feared'. Likewise in the field of commercial activity, modern commercial codes have been legislatively introduced in numerous jurisdictions.

In Tunisia the *Qur'anic* requirement that co-wives should be treated with complete impartiality has been interpreted as being a practical impossibility in view of modern social and economic conditions, and the Tunisian Law of Personal Status 1957 merely ordains that 'polygamy is prohibited'.

The latest and possibly most influential call for reopening the door of *ijtihad* has been the call of King Fahd of Saudi Arabia in 1983 during the opening session of a congress of theologians in Mecca. What the King envisaged was not individual *ijtihad* by theologians, however learned, but a global theological body to review Islamic laws after the most searching investigation into all aspects of the problem. The King observed:

> Today, my brothers, you see a multitude of new events and many unanswered questions and accumulated problems despite the abundance of theologians (*ulema*). The problems are enormous

> and the responsibility we have before God is larger than any one man's *ijtihad* of the events of life unless that *ijtihad* is acceptable to *ulema* who have thoroughly researched and examined old and new Islamic jurisprudence. (*Asiaweek*, 1 July 1983, p. 13)

It is worthy of note in this context that Saudi Arabia is one of the few countries in the world that has no written constitution and that a comprehensive collection of the world's constitutions (Blaustein and Flanz, 1976) simply points out that the constitution of Saudi Arabia is often said to be the *Qur'an*. A commentator on this constitution has observed that 'while the *Qur'an* and the *Sunnah* are immutable, their interpretations by man are subject to change in proportion to the extent of the knowledge and experience which man acquires through the ages' (Abdul Munim Shakir in Blaustein and Flanz, 1976). In other words juristic endeavour in the form of *qiyas* and *ijtihad* builds a bridge between the immutable part of Islamic law and contemporary needs.

The demand for the right to reinterpret according to modern needs is sometimes reflected in judicial activity as well. For example, in Pakistan judges have asserted and endorsed the right of independent interpretation of the *Qur'an* (*Khurshid Bibi* v. *Muhammad Amin* (1967) 1 Pakistan Legal Decisions 97) contrasting in this respect with earlier judicial practice (*Aga Mahomed* v. *Koolsom Bee Bee* (1897) 24 Ind. App. 196) where the Privy Council had declared the incompetence of judges to place 'their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority'.

The pressures for modernisation were reflected in a resolution passed at the first gathering of Mu'tamar Ulama al-Muslimin (The Congress of Muslim Learned Men) held in Cairo in March/April 1962. Resolving to re-open the door of *ijtihad*, the Congress stressed that the interpreters should have the requisite qualifications for doing so. Other conditions laid down were that the right only existed in relation to matters on which the orthodox schools did not provide an answer, and that the right should be exercised collectively.

In the 1950s and 1960s pressures for modernisation were at such a level of intensity that they sometimes extended into areas which on later reflection were deemed to have gone too far. For example, in Tunisia the observance of the Ramazan fast was discouraged as hampering productivity and in Algeria the time taken off for daily prayers by workers was thought to impede industrialisation (*Shariah*

Law Journal, vol. 19 (November 1985)). The mood of the 1970s and 1980s was, however, one of resistance to compromising the rules of the *Shari'a*.

Yet the pressure for change within the spirit of *Shari'a* and for re-opening the doors of *ijtihad* will continue in many jurisdictions, with the accelerating rate of social change and with the new problems posed by modern technology. It is unlikely that the proved power of Islamic law to respond to such change will not manifest itself once more in our age as it has done in the past.

4 The Schools of Law

Interesting reflections on the similarities between the Islamic jurists and the jurists of Rome are to be found in the writings of outstanding European scholars. The essays of Lord Bryce (1901) contain elaborate comparisons of the two groups of jurists and Max Weber (see Rheinstein, 1954, pp. 237) has pointed out that as with the Roman jurists, the Islamic jurists' activities included both legal consultation and the teaching of students. They were thus in contact with both the practical requirements of clients and the demands of practical teaching. The latter necessitated systematic classification. However with the closing of the *ijtihad* period and the exclusion of freedom of interpretation, Weber observes that teaching became routinised, often reducing itself to fixed recitations.

A factor which increased the importance of the jurists was the absence, in Islam, of councils like the councils of the early Christian Church or of Buddhism, wherein doctrinal pronouncements were made with authority. The development of law was thus naturally steered in the direction of juristic activity rather than towards authoritative religious pronouncements. This heightened the juristic role in a manner not paralleled in Rome, where the law was not a sacred law and hence no religious authority added sanctity to the juristic interpretation.

Another important factor was the absence of a formal priesthood or clergy. The hierarchical structure of the Christian priesthood and the rigid rules of training preceding admission to its ranks had no counterpart in Islam. Hence the prestige which society reserves for an ordained priesthood in all its ranks was available in a sense to elevate the prestige and recognition of those whose work resembled the priestly function in at least one respect – their handling and interpretation of the sacred text.

As in Rome, officially licensed jurists, called *muftis*, could be called on for their opinions. These were authoritative and no reasons need be given. They were an element in adding to the complexity of the law, as opinions could vary from jurist to jurist.

Differences of opinion both as to the handling of the source material and over methods of interpretation led also to the evolution of different schools of jurists. Islam was not unique in this respect.

In all major legal systems there tend to be different schools of thought, especially in regard to legal interpretation. In Greek philosophy for example Aristotle pointed out (Nichomachean Ethics, Book V) that the general language of a statute must always be tempered by equitable interpretation to meet the particular needs of a case. In China there was a bitter debate between legalists who argued for a strict and stern interpretation of the law and the Confucians who argued for a flexible and equitable interpretation. The Romans were divided between the Proculian and Sabinian schools who differed on the question of literal and liberal interpretation. Today in modern common law we see different judges contending for different approaches to interpretation.

So it was with the Muslims. The difference was, however, that the schools were divided on perhaps a more sophisticated basis.

SUNNIS AND SHI'ITES

In the first place there was the great division between the Sunnis and the Shi'ites based upon a political dispute early in the history of Islam, relating to the succession to the Caliphate. At the earlier stages there was no significant difference as regards theology, religious practice or law, but later there grew up a difference of approach based on the doctrine of the Imamate. This was the view that the Imamate vested in a descendant of Ali, the son-in-law and cousin of the Prophet, whom the Shi'ites recognised as the first rightful Caliph thus involving the repudiation of the first three Caliphs. Abu Bakr, Omer, and Othman. The main body of Shi'ites recognised twelve successive *Imams* and after them the leading theologians called *mujtahids* exercised an extensive interpretative authority in religious and legal matters on the basis of being divinely inspired. Among the Sunnis the Caliph had no interpretative functions and was simply a political and religious leader of the community whose principal duty was to uphold the law (Gibb, 1953, Chapter 7, pp. 96–7).

It is not the purpose here to dwell upon the doctrinal and other differences between the two. The Sunnis constitute the vast majority in the Muslim world. The Shi'ites have their own collections of the *hadiths* and do not recognise the authority of the six authoritative collections already mentioned. Since the Prophet was the last recipient of divine revelation, the Sunnis believed that temporal rulership should thereafter be decided on a principle of democratic choice. If,

on the other hand, divine inspiration was transmitted to the line of the Prophet's descendants as the Shi'ites believed, these descendants become rulers by divine right. The Sunnis seek their inspiration down the centuries in the *Qur'an* and the *Hadith*. The Shi'ites believe that the indispensable media for understanding the truth proclaimed by the Prophet are the *Imams*, without whom the relevance of the divine revelation to contemporary problems cannot be understood. The Shi'ites, concentrating on the tragedies of the house of Ali, delve deep into the mysteries of martyrdom and suffering.

These attitudes carry over into the legal sphere. Thus the Sunnis, with their broader-based concept of the democratic community, recognise the concept of the extended family group, while the Shi'ites give predominance to the narrower tie of relationship between parents and their issue. The Sunnis look upon existing customary law which was not expressly rejected by the *Qur'an* as having been implicitly accepted by it. The Shi'ites look upon the *Qur'an* as instituting a new order totally displacing all existing practice. Very different legal results follow, as can be readily understood, in such areas as the law of succession. (See Khadduri and Liebesny, 1955, Chapter 5, for Shi'ite legal theories.)

There are innumerable groups among the Shi'a. Among them three of the principal schools of law were the Ithna 'Ashari, the Ismaili (who include the Borahs and the followers of the Aga Khan) and the Zeydi. These schools have a vast legal literature. Neil B. E. Baillie translated and published one of the best known of Ithna 'Ashari texts – the *Shara' u'l-Islam* – during the British administration of India. Baillie's rendering appears in the second part of his *Digest of Moohummudan Law* of 1869 and is one of the more accessible Shi'ite works for the English reader.

While the Shi'ites, like the Sunnis, accepted the *Qur'an* and the *Sunna* as sources of law, there were basic legal differences. For the Sunnis revelation was *the* source of truth. The route to truth lay, therefore, in an arduous and critical inquiry into the meaning of the *Qur'an*, the authenticity of the Traditions, textual criticism and logical interpretation. The human intellect played only a limited role within the framework of the termination of revelation with the Prophet. Human opinion was fallible and humans had no authority to pronounce upon the law with any claim to infallibility.

With the Shi'ites there was, on the other hand, a belief in the infallibility of the *Imams* or spiritual guides. Their pronouncements had the guarantee of truth in their own right. These pronouncements

were true even if they did not tally with the consensus of the Islamic community. This led also to an elevation of the role of the human intellect and of intuition in the evaluation of truth. A plurality of legal differences resulted, which there is not occasion to explore here. (See generally Weiss, 1978.) There were also fundamental differences in constitutional theory and international relations between the Sunni Caliph and the Shi'ite *Imam* such as that the Caliph is a servant of the law while the *Imam* is its interpreter; that the Caliph is elected by the people while the *Imam* is appointed by the previous *Imam*; that the Caliph is removable for misconduct while the *Imam*, being appointed by God cannot be deposed by man (see Fyzee in Khadduri and Liebesny, 1955, pp. 121–2).

THE SUNNI SCHOOLS

The Sunnis divided into four great schools of jurisprudence which grew up in the second and third centuries of Islam. It is not obligatory on every Sunni to adhere to one or other of these four schools. While some nations favour one school and others another, all four are mutually recognised and respected. In the words of Professor H. A. R. Gibb (1953, p. 82): 'They are not to be distinguished as different "sects" of Sunni Islam, but merely as distinct schools, or, in the Arabic expression, "ways".' Each of these schools had settled geographical areas of dominance, and, cumulatively, the Sunni schools commanded the allegiance of the vast majority of the Islamic world. For a brief history of the early Caliphate see Hidayatullah (1972) pp. xii–xv.

(a) The Hanafi School

The first and largest of the Sunni schools was that of Abu Hanifa (700–67) in Baghdad. This was known as the Hanafi school. Readers of the *Arabian Nights* will be familiar with the name of the theologian Abu Yusuf, who was one of Abu Hanifa's chief pupils. Abu Yusuf was Chief Justice in the court of Harun-al-Rashid and was very famous in Islamic legal history.

Abu Hanifa was a manufacturer and seller of silk, a fact which reminds us that in his day (late eighth century) the work of jurists had not grown into a full-time profession. Abu Hanifa did not, like Socrates, produce any written work, but he is remembered through

the writings of his pupils, at whose hands the first legal treatises began to appear. Malik ibn Anas was one of them and he produced a compendium of law as did Abu Yusuf. The real basis of the doctrines of the school is to be found, however, in the work of Shaybani who left behind a large number of manuscripts; he died while accompanying Harun-al-Rashid on one of his journeys.

As the reader might have inferred from the high position held in the court of the Caliph by one of Abu Hanifa's chief pupils, the Hanafi school enjoyed official recognition from the Caliph's court in Baghdad. It was later officially adopted by the Ottoman Empire in Turkey and by the Moghul Empire in India (see Rheinstein, 1954, p. 239).

Hanafi jurists acted with much authority. They developed the doctrine of *ra'y* under which learned doctrine was an independent source of law – a doctrine heavily contested by other schools such as the Shafi. They also furthered the use of analogy as a means for the development of law. Hanafi scholars strongly asserted that the law must change with changing times and that new facts require new decisions.

An outstanding work of Hanafi law is the *Hedaya* of Marghanini (d. 1197). This work was very close to the modern type of legal textbook for it states the rule, the reasons for the rule, the contrary opinions, and the reasons for the contrary opinions in a very concise and incisive fashion. Large numbers of commentaries have appeared upon the *Hedaya*, and this work is very authoritative, especially in India.

Also of interest to the modern lawyer is the remarkable collection of about a hundred legal maxims by Ibn Nujaim (d. 1563) with illustrative cases upon them. The *fatwa* collections, of opinions of jurists on actual cases, are also an interesting class of legal literature similar to the opinions of civil law jurists such as Grotius or Bynkershoek. They provide interesting information about social conditions and problems and the interaction between these factors and legal rules. So important were the *fatwa* that the Moghul Emperor Aurangzeb Alamgiri ordered the compilation of a vast number of these opinions in what has come to be called the *Fatwa Alamgiri*.

The Hanafi school of jurisprudence emphasised the importance of the public interest in a consideration of legal questions. It is the school largely prevalent in Central Asia, Turkey, Afghanistan and the Indian sub-continent. In Egypt, Iraq, Syria and Lebanon, its

presence is very strong, while in the Soviet Union and China the majority of Muslims are of this school.

(b) The Malikite School

This school took its name from Malik Ibn Anas (710–95), a jurist of Medina. His chief work *Al Muwatta* (*The Beaten Path*) was a comprehensive exposition of the current practice observed in Medina. He made extensive use of *hadiths* in his dissertations. As with the Hanafis, a group of pupils gathered themselves around the teachings of the master and gradually grew into a 'school'. In the case of the Maliki school most of its followers were practical lawyers with the result that its teachings were essentially practical rather than speculative.

The Beaten Path included a discussion of both law and ritual. It relied heavily on the traditions of the Prophet, which were often referred to in terms such as 'It has come to my knowledge that the Messenger of God said . . . ' Often no source was quoted for the sayings but the resort to this method led to development at the hands of his followers of the method of checking of the Traditions, and to the emergence of the Traditionalist movement whose development we have discussed earlier. The earliest book of traditions is *The Beaten Path of Malik*. Since a tradition of the Prophet could easily be invented by a jurist seeking support for a proposition, the methodology used by the movement came to be increasingly refined and eventually resulted, as we have seen, in the extremely scientific method of inquiry resorted to for the authoritative compilations of the *hadiths*.

Even to the present day, Malik is regarded as one of the greatest authorities on the *hadith*.

Other famous works of the Maliki school are the *Risala* of al Khairawani and the *Mukhtasar* of Khalil ibn Ishaq. The former was for centuries a legal textbook of great authority. The latter became well known to the European world because, apart from the many volumes of commentaries upon it in Arabic, the French and the Italians used it to administer Maliki law in their North African colonies. Thus French orientalists such as Perron and Seignette translated it into French and commented copiously upon it, while the Italian scholars Guidi and Santillana did the same in Italian. In French Morocco and Tunisia, as well as in the Italian colonies, this work thus became extremely authoritative and influential.

Maliki teaching spread to West Africa and Islamic Spain where it received official recognition. It also spread to Tunis, Algeria and Morocco and from there to Nigeria, West Africa and Upper Egypt.

(c) The Shafi'ite School

Muhammad Al-Shafi'i (767–820) was a voluminous writer with exceptional intellectual gifts. He founded a new discipline, the study of the 'roots of the law', which we might call the principles of jurisprudence. These roots were the *Qur'an*, the *Sunna*, the consensus of scholars (*ijma*) and the process of analogical reasoning (*qiyas*). He taught that the action of the Prophet in laying down a *Sunna* was divinely inspired and that obedience to the Prophet had been commanded by God.

The Shafi'ite school was particularly strong in logic and reason. Even where there were no known transmitters of a particular tradition, they would argue that if there was a general consensus on Islamic practice in the Muslim community, which was not laid down in the *Qur'an* or a known tradition, the community could not have been ignorant of a *Sunna* of the Prophet. Hence they could not have agreed to what was contrary to a *Sunna*, and hence the practice was obligatory. This was in line with Shafi'i's teaching in his work the *Risala*: 'On points on which there exists an express ruling of Allah or a *Sunna* of the Prophet or a consensus of all Muslims, no disagreement is allowed. On the other points scholars must exert their own judgment in search of an indication in one of the three sources . . . '

The systematic search for the *hadiths* owed much to Shafi's insistence on systematic reasoning.

Shafi'i is especially important in the history of Islamic jurisprudence as he entered the juristic scene at a time when a fierce controversy was raging as to the extent to which rational methods of deduction could be used when the *Qur'an* and the *Sunna* were silent. The controversy had become particularly acute for the following reason. The jurists of Arabia had found little need for resorting to personal opinion because the traditions and customs of Arabia were known and had not changed much since the death of the Prophet. His implied acceptance of a number of them were clear from his conduct. On the other hand in the nearby conquered territories east of Arabia, where the Arabs came in contact with different civilisations and customs, the solution of problems was not so easy. There was much

more need for juristic speculation. While the jurists of Arabia were so dependent on the traditions as to be nicknamed 'people of the *hadith*', the jurists solving problems for these other territories came to be so dependent on personal opinion as to be called 'people of personal opinion'. The Arab jurists saw in this a grave threat to the exclusive authority of the divine sources. The others saw an exclusive reliance on the divine sources as crippling the development and adaptability of the law.

Shafi'i was in a sense the mediator in this dispute. He accepted the doctrine of *qiyas* or deduction from analogy, but laid down in his *Risala* a set of rules within which this method should be used. What was a technique for the interposition of personal opinion became at his hands a strictly logical method – a method of deduction from analogy. At his hands *qiyas*, properly applied, became in effect a fourth source of law. In his language the original rule became extended to the new situation provided that there was an effective cause or factor common to both. This basic principle gave rise to an extensive literature refining the logical rules for this method of investigating the common factor between the original and the subsidiary rule.

It is not difficult to appreciate the impact which this resort to logic would have had upon the later development of philosophical reasoning in Islamic law, and in particular upon the work of Averroes whose influence upon Western juridical thought is referred to later.

Another important aspect of Shafi'i's teaching was his disapproval of what we would call teleological reasoning, i.e. reasoning by reference to the ends of a law. In his time jurists not infrequently studied the purpose which a law should serve and derived a legal principle from it. Shafi taught that the purpose of a law was a matter for God alone. Man's function was not to work out laws for himself but to discover them through the aid of jurisprudence from the roots or sources and to accept them as thus discovered. If necessary, these laws could be extended to new situations by a process of reasoning according to analogy – and not by unrestricted reasoning.

Shafi'ite teaching spread to Egypt, most of whose Muslims, especially those of Lower Egypt, belong to his school. Its adherents are also to be found in East Africa, southern Arabia, Bahrain, the west coast of India and Sri Lanka, where Arab traders settled. Also Malaysia, Indonesia and parts of Central Asia.

As French and Italian colonialists studied Maliki teaching, so the Dutch colonialists studied the great works of the Shafi'i school, and

notable Dutch scholars of Shafi'i law emerged, such as Van den Berg and the two Juynbolls.

(d) The Hanbalite School

The founder of this school, Ahmad Ibn Hanbal (780–855), was a teacher of the Traditions in Baghdad. He differed from Shafi in teaching that the only roots of the law were the *Qur'an* and the *Sunna*. The divine law was not in any way dependent on human reasoning. Ibn-Hanbal attained a great reputation as a teacher and asserted his views with such independence that he suffered imprisonment and persecution from the Caliph and his officials.

Ibn Hanbal was the author of several treatises including the *Musnad*, a collection of traditions, arranged according to the transmitters. All other collections are arranged according to subject matter.

Ibn Taymiya, a great 14th century Hanbali scholar, rejected the consensus of scholars as it was then taught and insisted on an improved quality of reasoning by analogy. His conception of consensus was extremely rigorous and purification of doctrine was one of his great endeavours. He has left a permanent and lasting impression upon Islamic jurisprudence.

The school developed the theory of jurisprudence, producing many elaborate theses on the 'roots of the law'. It is usually regarded as the strictest of the schools, for its rejection of any proposition not based on the *Qur'an* and the *Sunna*. It is the official school in Saudi Arabia and is chiefly found in the Arabian peninsula.

On the geographical distribution of the adherents of the schools, see Derrett (1968) p. 64.

INSTITUTIONS OF LEARNING

It is of interest to the modern law student to know that large seats of learning grew up in the Islamic legal world as a consequence of all this concentration on juristic scholarship. One of these that has survived to this day is Al-Azhar University founded in 969 AD. This university, which recently celebrated its one thousandth anniversary, is perhaps the oldest continually functioning university in the world. To this day teaching goes on in Al-Azhar as it has for about eight centuries. The teachers sit by the pillars in the Great Hall and teach in the same

fashion as they did several centuries ago. Lord Bryce (1901) described Al-Azhar as he saw it in the last century and his description still fits, as this author observed when passing through Cairo a few years ago. In his description Lord Bryce observes how closely the later universities of Europe in the thirteenth and fourteenth centuries resemble it. The scholars read and expound the *Qur'an*, carrying the entire text in their minds. It should be noted however that in the 1960s many changes were introduced and new faculties added – including medicine, commerce, agriculture and education (see Law No. 103/1961 of the Egyptian Government; and for a commentary on the importance of this law, see Proctor, 1965, pp. 135–45).

The foreign observer is continually surprised at the number of scholars who know the *Qur'an* by heart, from cover to cover, carrying every word in their minds, together with the principal interpretations placed upon it over the centuries. One can still observe these professors with their groups of students, correcting the student's reading but without having the text in front of them, in much the same way as Bryce describes. Whoever passes through Cairo should ask to visit Al-Azhar University, a site of much intellectual interest from the scholar's point of view.

Al-Azhar is, of course, only one of the numerous institutions that flourished in the heyday of Islamic scholarship. An acquaintance with it helps the interested scholar to recapture some of the atmosphere of intense dedication to theology and jurisprudence which lies at the heart of Islamic culture.

THE ROLE OF THE JURIST

We have observed the various techniques by which the jurist made his contribution to the development of Islamic jurisprudence. As this contribution has an important bearing on international law and human rights it becomes necessary to compare the role of the jurist in Islamic systems with the jurist's position in comparable systems.

The jurists in Islamic law never had the authority to make law in their own right. Their function was to discover the law and expound it, but all law was made by God. It is true the consensus of the Muslim community was also a source of law but this was regarded as the product of divine guidance given to the Islamic community. The Roman lawyer's *auctoritas prudentium* was a source of law in a

different sense, for the lawyers who had this privilege by special recognition from the Emperor were, within limits, law-makers in their own right.

The Roman jurist could use his knowledge, his intuition and his sense of community need to mould a new rule for a situation not covered by prior law. When he formulated the new rule it carried authority by virtue of his special standing and also by virtue of the specially privileged position of jurists and lawyers in the Roman system. The Islamic jurist, though equally respected, was more rigidly bound to the sacred texts, the leeways of choice were much more limited and he spoke as expounder of prior law, not as formulator of new law or as an oracle of the law like the common law judge.

At the same time the Islamic lawyer had a larger place in the law in the sense that there were no legislatures or courts that were engaged in the process of making law. He held centre stage and shared it with no other law-declaring entity – not even the Caliph. The law, as divinely declared, could not be altered by any legislative authority. No Roman Senate or Westminster-style Parliament or totalitarian dictator could alter one jot or tittle of it. And those who expounded it were the jurists and the jurists alone.

The skill and effort the jurists put into the development of the law though *ijtihad* and other methods of interpretation was, of course, a positive contribution of massive proportions. Yet the constant consciousness of the basic fact that jurists could not and did not make law resulted at every point in a distinction being drawn between knowledge and opinion. The results of *ijtihad* were therefore classified into *zann* or opinion and *'ilm* or knowledge. The latter was certain, the former needed to be supported by the greatest effort, learning and skill of which the jurist was capable. This aspect of painstaking endeavour is reflected in the very word *ijtihad* which means the process of endeavour to comprehend the sacred law. On the subject matter of this section see generally Weiss (1978) p. 199.

THE LEGAL PROFESSION

As already observed the successful lawyers were both teachers and consultants, as they were in ancient Rome. How the legal system operated may well be illustrated with reference to its functioning in one of the most powerful and centralised imperial administrations – that of the Ottoman Empire in its heyday.

The jurisconsults (*muftis*) were consulted by the judges (*qadis*) when confronted with a legal problem of difficulty. The legal opinions or *fetwa* of the great *muftis* were recorded and were circulated for study (R. Lewis, 1971, p. 29). The *muftis* were also consulted by private citizens. The *fetwa* generally took the form of an impersonal and hypothetical opinion, with fictitious names substituted for the names of the actual parties. Common names such as Zeyd or Amir would be used for men. A female party would be Hind or Zeyneb. This was very much after the manner of the John Doe or Richard Roe usage of the early English common law. The opinions of the *muftis*, since they could be cited to the judges, resembled the *responsa prudentium* of the more eminent Roman jurists. As with the Roman *responsa prudentium*, these opinions were not binding on the judges but were of great persuasive authority.

The opinion would generally be very terse, setting out the question. Legal authorities ranging from the *Shari'a* to the local statutes and customs might be briefly cited, though not invariably, and the *mufti*'s answer would follow, much in the following manner:

> *Question*: Zeyd and Amir are captains. Their ships collide on a dark night, due to their failure to see each other. Bekr, who is on Zeyd's ship drowns. Can his heir recover the blood-price from Amir?
> *Answer*: (With or without a discussion of the law) No.
> (R. Lewis, 1971, p. 30)

The *muftis* were persons who had usually spent some years as teachers of the law. The offices of the more successful *muftis* especially in the larger cities were organised with some of the formality we associate with the large city legal firms of today. There might be sections within that office, one of which received the questions, another cast them into abstract form, another researched the relevant authorities, another delivered the opinion and another investigated questions referred to it from the court.

A party armed with a favourable *fetwa* could go to court with this ruling, which could be cited to the court in much the same way as the *responsa* of the great Roman lawyers could be cited. It was understood, of course, that the Islamic jurist was not making law but only expounding it. A strong opinion meant often that the case would be favourably settled out of court.

The position of the jurist was an extremely distinguished one and went back to the days of the early Caliphs. So great was the honour in which they were held that it was reported to be not unusual for a Turkish minister to hold the stirrups of the horse of the *mufti* on the day of his appointment (Ion, 1907, p. 376). Jurists greatly prided themselves on their impartiality and it is related of one of them, Dzmeali, that he was so impartial in his legal opinions that he did not even allow the persons who sought his opinions to see him. He was apparently in the habit of suspending a basket from his window so that members of the public could place their questions in them and on the next day the opinions could be collected by clients in the same way (Ion, 1907, citing Hammer, the author of a multi-volume history of the Ottoman empire).

The judges or *kazis* not only decided lawsuits. They also did the notarial work and drew up contracts, administered the property of those under legal disability and gave opinions to senior administrative officials.

This pattern varied of course in different Islamic countries and what we have described occurred in the context of a highly organised and powerful Empire. Still the basic respect for those learned in the law and for their opinions naturally carried through to all systems.

5 Some Basic Islamic Legal Ideas

At this point it will be useful to outline some basic Islamic ideas in relation to law and human rights, many of which will strike the Western reader as surprisingly modern and relevant to our time.

THE NOTION OF SHARING

The notion of the sharing of wealth runs through all Islamic teaching. The *Qur'an*, like the Bible, makes it clear that the road to salvation is not through the accumulation of wealth. Woe to those who 'amass riches and sedulously hoard them, thinking that their treasures will render them immortal. By no means. They shall be flung to the destroying flame . . . It will close upon them from every side, in towering columns' (*Qur'an*, CIV: 2–9). Woe to those 'who turn away from the orphan and do not urge others to feed the poor . . . who make a show of piety and give no alms to the destitute' (*Qur'an*, CVII: 2–7).

Along with these religious warnings comes a practical measure aimed at a sharing of wealth and a resolution of the social tensions that resulted from hoarding. The law of *Zakat* required every person to give up one-fortieth of his or her substance to benefit the poor. This was compulsorily exacted in every Islamic country. The idea was that if there was too great an accumulation of wealth in the hands of one person without a sharing of that wealth, envy and resentment arise. The *Qur'an* regards all wealth as a trust from God and it must therefore be shared with fellow beings. Hoarding was discouraged and the circulation of wealth and resources should be encouraged for the greater good of the community. To enable the community to feel some sense of participation and sharing, at least a minimum of one-fortieth of a person's wealth must therefore be channelled towards the poor.

Zakat is due upon the value of all goods, chattels, profits and trade and mercantile business. The tax is not due unless the property amounts to a certain value and has been in the possession of a person

for a whole year. In addition to *zakat*, at the end of the month of *Ramazan*, each head of a household is required to give away in alms for every member of his household a measure of wheat, barley, raisins, rice or any other grain, or the value of the same.

The rightful recipients of alms are also designated. They include the poor and the indigent, debtors who cannot pay their debts and travellers and strangers. Such sharing of wealth which, in other religions is a moral obligation, becomes in Islam a definite law (see S. A. Ali, 1981, p. 170).

Interesting discussions have arisen, in the context of modern finance, concerning the forms of wealth to which *zakat* applies.Shares and securities, insurance policies, provident funds and machinery, being forms of wealth not known at the time of the foundation of Islam, have provoked much academic discussion. On such controversial issues regarding *zakat*, see Siddiqi (1981) pp. 22–5.

Zakat is universally acknowledged to be one of the main pillars of the Islamic system. Among its many roles are the counteracting of any tendency towards the concentration of wealth, the diversion of production from luxuries to necessities, the discouragement of hoarding and the encouragement of additional saving as a means of keeping the family's wealth intact (Siddiqi, 1981, pp. 61–3).

THE NOTION OF CARING

Allied to the notion of sharing was the notion that one should care not only for oneself but for those in one's social group. Man could not be an island unto himself, oblivious of the sufferings and the needs of those around him. Family, kindred and neighbours must be helped, not as a distant or supercilious act of charity, but as a free and voluntary act of participation in the welfare of those around one. This high sense of social responsibility permeates the spirit of Islamic law unlike the more distant attitude towards one's neighbours which is permissible under some other legal systems.

The concern for good-neighbourly relations with those around one has been spelt out in some detail. Al-Ghazali in his *Ihya 'Ulum ad-Din*, quoting Abd Allah Ibn Amr Ibn al-As, gives a tradition that the Prophet once said to his companions:

> Do you know what is the right due to a neighbour? You should extend to him your assistance if he seeks your help, and your

> support, whenever he needs it. Lend him whatever he may ask to borrow from you. If he should be in need, hasten to provide for his need. Visit him if he fall sick. If he should die, participate in his funeral. Extend your congratulatory greetings to him on happy occasions and your condolence on the occasion of misfortune. Do not raise your building so as to prevent the wind blowing in his house unless he grants permission to you to do so. And do not hurt him or his feeling in any manner. If you bring fruits home, send him some; otherwise let him not see it and let not your children become envious by seeing it in their hands. Let not the odour of your cooking reach his nostrils unless you let him share it.

This notion was no doubt part of the larger concept of the brotherhood of Islam.

THE NOTION OF TRUSTEESHIP OF PROPERTY

It is true the *Qur'an* recognises the right to private property. To 'knowingly devour the property of others wrongfully' (*Qur'an*, II: 188) has been condemned. Yet while Islam recognised the right to private property, this right was subject to an important limitation. Since all property belongs to God, its holders are only trustees. They must not use it selfishly without regard to the social purposes which it should serve. Thus, while legal ownership was permitted and protected by the law, it was subject to an overall social orientation. A landowner who neglected to cultivate his land for an inordinate period of time might lose his right to retain his property and his neighbours might acquire the right to purchase and cultivate it.

Such concerns become important particularly in the modern age, with its emphasis on environmental concerns. The planet was inherited not by any one generation but by mankind and all its posterity from generation to generation. 'Do you not see that God has subjected to your use all things in the heavens and on earth and has made his bounties flow to you in exceeding measure, both seen and unseen?' (*Qur'an*, XXXI: 20). Each generation is only the trustee. No one generation has the right to pollute the planet or to consume all its natural resources in a manner that leaves for posterity only a polluted planet or one seriously denuded of its resources.

The Islamic concept of ownership has been the subject of a vast literature. Writers on Islamic economics have discussed in detail such

questions as the relative scope of public and private ownership, the degree of social control on private ownership rights and the circumstances justifying abrogation or abridgement of such rights. Equal ownership of natural resources is another subject of discussion. Among the seminal writers in this field were Ibn Khaldun and Ibn Taymiyah; and see also Ahmad (1955); Abd al Kader (1939 a and b); Poliak, *American Journal of Semitic Languages and Literatures*, pp. 50–62; for a good general survey, see Siddiqi (1981) esp. pp. 6–11.

THE NOTION OF BROTHERHOOD AND SOLIDARITY

Prior to the advent of Islam, tyrants, monarchs and merchant princes held sway in Arabia without the restraining influence of any overriding legal or moral principles. In place of this regime Islam installed the principles of fraternity, equality and liberty under the law. A sense of solidarity between rulers and ruled and among all ranks of the community replaced the divisiveness and the conflicts of interest that had prevailed earlier. The stranglehold of the privileged was broken. The ascendancy of the higher divine law was established.

Caliphs, sultans and emperors were thus brothers to their subjects, members of a common group and bound by a common set of laws. Going even beyond modern concepts of the rule of law, no one, however highly placed, could claim exemption from a single line of the sacred law. The law knit all together in one vast brotherhood.

THE NOTION OF UNIVERSALISM

The Farewell Sermon of the Prophet (see apppendix A), declared that distinctions of birth, colour and race were trampled underfoot. 'The fair-skinned is not superior to the dark-skinned, nor the dark-skinned superior to the fair-skinned. The Arab is not superior to the non-Arab nor is the non-Arab superior to the Arab. They are all brothers and all descendants of Adam.' The notion of mankind as one brotherhood under God, could be the only backdrop to the application of the law.

Non-Muslims in the Islamic state had full recognition of their rights as human beings (see below).

The concept of universalism extended much futher in Islam than is commonly supposed. It recognised that even non-humans must be

treated with care and kindness. 'There is no beast on earth', says the *Qur'an* VI:38), 'nor bird which flieth with its wings, but the same is a people like unto you – unto the Lord shall they return'. (See the comment in S. A. Ali, 1981, p. 157.) There are also numerous passages in the traditions showing the Prophet's concern for the welfare of animal life e.g. 'Fear God with regard to animals. Ride them when they are fit to be ridden and get off when they are tired. Verily there are rewards for our doing good to dumb animals, and giving them water to drink' (S. A. Ali, 1981, pp. 157–8).

THE NOTION OF FAIR INDUSTRIAL RELATIONS

It followed from the preceding principle that workers were not underdogs but the holders of equal rights and equal dignity with their employers. The employer is asked to pay the wages of his worker before the sweat is dry. Servants must be fed and clothed in the same way as the employer feeds and clothes himself. 'See that ye feed them with such food as ye eat yourselves, and clothe them with the stuff that ye wear' (Farewell Sermon of the Prophet).

The sharing of profits by capital and labour is encouraged and work looked upon more as a partnership between employer and employee than as a relationship of superiority and subordination. The Muslim is required to 'worship God and be kind to kindred and servants'. The principles of labour's right to a fair wage and of the employer's obligation to implement the contract justly are deeply ingrained in Islamic doctrine. For a modern discussion, in the context of contemporary economic theories, see Siddiqi (1981) esp. pp. 39–40.

THE NOTION OF HUMAN DIGNITY

Islam placed an infinite value upon human life. The *Qur'an* (V: 35) gives expression to this principle in terms that, 'If anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people and if anyone saved a life it would be as if he saved the life of a whole people.' Life was not only of infinite value: it was sacred. 'Nor take life which Allah has made sacred – except for just cause.' (XVII: 33).

Innumerable texts likewise point to the pre-eminent position of the human being in the scheme of God's creation. 'We have honoured

the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours above a great part of Our Creation' (XVII: 70). Likewise the *Sura Al-Hijr* (XV: 28–29) expresses this pre-eminence of man's relative position even over the angels when it says, 'Behold! Your Lord said to the angels, "I am about to create man from clay, from mud moulded into shape. When I have fashioned him in due proportion and breathed into him of my spirit, fall you down in obeisance to him".'

All being brothers and all being alike the children of Adam, there could be no affront to the human dignity of any single person without there being an affront to the dignity of all – including the dignity of the perpetrator of the indignity. Man, being God's creation on whom he had showered his choicest blessings, could not be subject to a violation of that dignity by man. Dignity was intrinsic to his personality and no regime, however powerful, could take it away from him. This inherent human dignity is, of course, the underlying basis of modern doctrines of human rights. Such dignity could be offended by ridicule, defamation and sarcasm.

> O you who believe! Let not some men among you laugh at others. It may be that the latter are better than the former. Nor let some women laugh at others. It may be that the latter are better than the former. Nor defame nor be sarcastic to each other nor call each other by offensive nicknames. (XLIX: 11)

Islam recognised also the need for respecting human dignity in the giving of alms and charity. 'Make not your alms void by reproaches or injury.' 'Forgiveness and kind speech are better than favours with annoyance.'

THE DIGNITY OF LABOUR

A *Sunna* of the Prophet says, 'A man has not earned better income than that which is from his own labour.' So also: 'Verily! The best earning is the earning of man by his own hand. The Prophet of Allah, David, used to earn his livelihood through the labour of his hands.' The employer has no superior position over the employee either in society or before the law. They are equals with equal rights.

The notion of dignity of labour is promoted further by the encouragement of excellence in craftsmanship and hence to pride in

one's work. 'God loves to see that when someone does some work, he makes it as perfect as he can' (Al-Ajlouni, referred to in *Shariah Law Journal*, vol. 26 (November 1986)). The discouragement of idleness is another facet of the same concept. 'Verily! Allah loves the servant who knows and earns with some crafts and dislikes the servant who knows no craft and is idle' (Baihaqi).

THE NOTION OF THE IDEAL LAW

Successive generations of legal philosophers in all systems have been groping after the 'higher law' or the 'ideal law' or the 'natural law', which stands above all legal systems and to which all legal systems should conform. All students of jurisprudence will know how important it is that a set of principles should exist which no ruler is at liberty to ignore. From the time of Plato and Aristotle down to the most modern philosophers, this has been one of the central intellectual issues in jurispurdence.

Islam's solution to this problem is to offer the principles of this higher law in the word of the *Qur'an*. No ruler, however exalted, is at liberty to depart from any part of this law. He may resort to processes of interpretation to seek to justify some particular action, but should he violate the law, he would have the supreme book of the law cited against him and would have no answer.

Positivistic philosophers of law, such as John Austin in English jurisprudence, have taught that no law stands above the will of the sovereign. Legal positivism in its worst form underlay the rule of the Third Reich in Germany where a philosophy of undiluted positivism gave the edicts of Hitler a claim to unquestioned authority and obedience. No Islamic ruler could ever claim that degree of absoluteness. He is always subject to the higher law and always accountable to it.

THE NOTION OF FAIR CONTRACT

The notion of fairness in contract runs through the entire Islamic law of contract. Contract law is thus free of the technicalities which mar many a European system, particularly the common law system of contract with its technicalities of consideration. The honouring of one's engagements is stressed in many passages of the *Qur'an*.

Islamic thinking analyses the completion of contract by reference to the requirements of offer (*ijab*) and acceptance (*qabul*). Consideration is not essential, unlike in the common law. Fairness to both parties and reciprocity are of the utmost importance, so that, for example, a contract which involves risk or uncertainty even to a party willing to accept it can be invalidated. A buyer may return an article for defect even after he has seen the property. Interest is forbidden, as it no doubt enables the stronger party to make an unfair contract out of the weakness of the other. This rule, as we shall see, has however been circumvented to some extent by juristic interpretation. Subjects covered by the law of contract include gifts, agency, guarantee, deposit and loan.

THE NOTION OF COMMERCIAL INTEGRITY

'Woe to those who deal in fraud – those who when they have to receive by measure from men, exact full measure but when they have to give by measure or weight to men, give less than due. Do they not think that they will be called to account?' (*Qur'an*, LXXXIII: 1–4). The notion of honour in all commercial dealings and of the sanctity of the pledged word pervades Islamic trading. 'It is not righteousness that ye turn your faces to the East and the West; but righteous is he who believeth in Allah and the Last Day and the angels and the scripture and the Prophets . . . And those who keep their treaty when they make one, . . . Such are they who are sincere. Such are the God-fearing' (*Qur'an*, II: 177).

The *Qur'an* enjoins trading honesty in the severest terms, with strict prohibitions against the use of false weights and measures. 'Give full measure when you measure and weigh with a balance that is straight' (XVII: 35), 'Give just measure and cause no loss to others by fraud' (XXVI: 181). These and many other passages re-echo the general principle of fairness of commercial dealing.

THE NOTION OF FREEDOM FROM USURY

The notion of equity and fairness in commerce is reflected also in the *Qur'anic* prohibition against usury.

> O you who believe! Observe your duty to Allah and give up what remains due to you from riba, if you are in truth believers. And if

you do not, then be warned of war against you from Allah and His messenger. And if you repent then you shall have your principal (without interest). Wrong not and you shall not be wronged.' (*Qur'an*, II: 278–9)

Loans should be given to those who need them, but profit must not be made out of their misery. If the debtor finds it difficult to pay, he should be granted more time and if it is possible it is better still that it be remitted altogether as charity. The main reason why Islam abolishes interest is that it is oppression (*zulm*), involving exploitation (Siddiqi, 1981, p. 63).

Other reasons are that interest transfers wealth from the poor to the rich, thus increasing inequalities in the distribution of wealth; that it creates an idle class of people; that it produces an essential duality of interest between capitalist and entrepreneur and that it throws all the risk of the enterprise unilaterally on the entrepreneur (Siddiqi, 1981,pp. 61–3).

These important principles necessitate a special Islamic approach to commercial law and banking. The concept of modern Islamic banking first emerged in the Arab Republic of Egypt in 1963 since when there has been a rapid growth of Islamic banks in the Islamic world as a whole. The International Association of Islamic Banks formed in August 1977, prepared a 'Model Islamic Banking Act'. Along with the act was produced a 'Model Islamic Bank Operating Proposal'. The documents, prepared in consultation with leading Islamic and comparative law scholars, contain provisions dealing with issues uniquely related to Islamic banking (Articles 1–10), and provisions dealing with problems common to all banks (Articles 11–20).

Islamic banking proceeds on the basis that money is advanced by the banker not by way of an outlay in which the risk is entirely on the borrower while the lender merely receives his interest. The lender becomes a participant in the venture and the bank's shoulders are broad enough to bear a loss if the venture turns out to be a failure. If it is a success, the bank shares in the proceeds in a proportion that has been agreed upon. Thus entrepreneurs are protected against risk and the bank gets a return through the sharing of profits where the business is successful. Operating on this principle, Islamic banks have shown a return commensurate with those of ordinary commercial banks. (See further on this topic and the numerous Islamic writings upon it, Siddiqi, 1981.)

Islamic bankers cite the following among the advantages of an Islamic banking system:

1. Ordinary banking has never taken into account the bank's responsibilities towards society and social welfare. Islamic banks are linked with the social environment.
2. Ordinary banks treat money as a commodity to be bought and sold. Islamic banks treat it only as a measure of value and a means to an end.
3. Islamic banks encourage the small entrepreneur by sharing his risk.
4. The guarantee of interest to the ordinary banks separates it in spirit from its customer (see the views of Islamic bankers in *Arabia: The Islamic World Review*, vol. 5 (February 1986) pp. 58–63).
5. If the financier shares the risk on a project where the originator was not confident enough to seek the usual kind of loan, more new ideas will surface and perhaps come to fruition.

The concepts underlying Islamic banking have recently attracted attention from the International Monetary Fund and have been the subject of discussion in the quarterly staff papers of the IMF issued in June 1986. See in particular the study therein by Muhsin Khan, a division chief in the development research department of the World Bank.

THE NOTION OF THE RIGHTS OF WOMEN

Against the background of the preceding era, the teachings of Islam regarding the rights of women stood out dramatically. 'Ye people, ye have rights over your wives and your wives have rights over you. Treat your wives with kindness and love', said the Prophet in his Farewell Sermon. Testamentary law likewise protected the family against its impoverishment through the capricious alienation of wealth by testament. A last will could not dispose of more than a third of a testator's wealth through his dispositions. The rest passed according to law in shares explicitly set out in the interests of the family. The principle of sharing of wealth again comes into play, with distribution in stated shares, among all family members.

The permissibility of polygamy under the rules of Islam has been one of the bases of severe attack by its critics. The relevant *Qur'anic* passage runs, 'You may marry two, three or four wives but not more.' The passage goes on to declare, '. . . but if you cannot deal equitably and justly with all, you *shall* marry only one.' The word equitably has been explained by jurists as meaning not merely equality in lodging, clothing and necessaries, but also equity in love, affection and esteem (S. A. Ali, 1981, p. 229). On their interpretations of this verse many Islamic communities recognise monogamy as the norm (see generally S. A. Ali, 1912; and 1981, Chapter 5).

It should be noted that the clauses qualifying polygamy are reinforced also by the *Qur'anic* passage, 'you will not be able to be equitable between your wives even though you be eager to do so' (IV: 129). It is noteworthy that Tunisia adopted the rule of monogamy on the basis of this clause and that Muhammad Abduh (d. 1950) the reformer and Grand Mufti of Egypt often said that no husband can be just to more than one wife under modern living conditions (Khadduri, 1978). Majid Khadduri places this whole matter in an interesting perspective when he asks whether the *Qur'anic* law was meant to confirm the principle of polygamy or to reform it by imposing qualitative and quantitative restrictions on its practice. He suggests that the *Qur'anic* law concerning marriage, rather than intending to ratify the widely prevalent practice of polygamy, sought to reform it as far as was possible at the time. The ultimate intent of the Prophet, according to his view, was 'to transform marriage from a polygamous to a monogamous relationship'. The ultimate objective of *Qur'anic* marriage law, then, was to legitimate monogamy, rather than to endorse polygamy.

This rule needs also to be viewed against the other accomplishments of Islam regarding the rights of women, in a society where they had no rights.

One of the essential teachings of the Prophet was respect for women. Temporary or conditional marriages, such as were common at the time, were prohibited. The husband's power of divorce was restrained. Women were given the power to obtain a separation on reasonable grounds. *Talak*, the pronouncement of divorce by the husband, was condemned by the Prophet as 'the most detestable before God of all permitted things'. The *Qur'an* constantly admonishes against separation and recommends the healing of quarrels by reconciliation. Further it teaches: 'And you are permitted to marry virtuous women who are believers and virtuous women of those who

have been given the Scriptures before you, when you have provided them their marriage portions, living chastely with them without fornication, and not taking secret concubines' (*Qur'an*, v: 5).

Other rights of women were entitlement to share in the inheritance of her parents (though not in equal proportions to her brothers), entitlement to an ante-nuptial settlement by her husband as a condition to marriage, a legal right to maintenance even if she had property of her own, rights as a mother to the custody of offspring in accordance with rules which even the judges could not change, the right to management of her goods and property without dependence on her husband to give her a status in litigation. All these rights were secured by law and not by charity or courtesy (S. A. Ali, 1981, p. 257).

It must not be thought that women did not occupy positions of importance in Islamic society. According to S. A. Ali (1912, pp. 18–24) women have been jurists (Zainab Umm ul-Muwayyid 1146–1237) holding diplomas and licensed to teach law, lecturers on history and literature (Shaikha Shuhda), poetesses and preachers. Abu Hanifa, the founder of the Hanafi school, declared that a woman was entitled to hold the office of a judge or *kazi* equally with a man (S. A. Ali, 1912, p. 21).

When one considers the background against which Islam secured these rights for women and its achievement in breaking through the virtual rightlessness of women, not only in Arabia but in the world of its time, the Islamic achievement was remarkable. Attuning these concepts to the needs of the contemporary world is, as in all systems, work for contemporary societies and jurists in particular. If any of them have failed in this regard the blame needs to be laid at their door rather than on the teachings of Islam. S. A. Ali (1912, pp. 41–2) places the Islamic rules in historical perspective in the following terms:

> But the Teacher, who, . . . in a country where the birth of a daughter was considered a calamity, secured to the sex rights which are only unwillingly, and under pressure, being conceded to them in the nineteenth century . . . deserves the gratitute of humanity. If Mohammad had done nothing more, his claim to be a benefactor of mankind would have been indisputable.

THE NOTION OF PRIVACY

The *Qur'an* enjoins, 'O ye who believe, avoid suspicion . . . And spy not on each other, nor speak ill of each other behind their backs' (XLIX: 12).

Modern law is giving increasing recognition to privacy, as modern technology reveals new and powerful methods of denying this right. The common law was particularly slow to evolve a general concept of a right to privacy except in limited areas such as physical trespass and defamation.

Islamic law has some striking passages on privacy. The *Qur'an* (XXIV: 27, 28) is very specific on this matter. 'O ye who believe! Enter not houses other than your own without first announcing your presence and invoking peace upon the people therein . . . and if you find no one therein, still enter not until permission hath been given . . . ' The prohibition extends likewise to correspondence, for in the striking words of the Prophet, 'He who reads a letter of his brother without his permission will read it in hell' (Bassiouni, 1982, p. 69).

Modern technology is perfecting ways of violating privacy by external surveillance without actually committing physical trespass. Scanners, electronic surveillance, telephone tapping and other methods of eavesdropping make this a very modern problem. The Islamic texts cover these situations as well, for it is not only physical entry that is prohibited. 'A man should not look inside a house unless he receives permission. If he does so he would have entered . . . ' (For references see Bassiouni, 1982, p. 68.) There is even a *hadith* to the effect that if a person looks at one without one's permission he is deserving of condign punishment – the implication being that unauthorised non-physical intrusions upon privacy are forbidden.

Islamic criminal justice systems follow these principles in prohibiting unlawful entries and searches, even to the extent that incriminating evidence obtained by eavesdropping or other unlawful means cannot be used. This principle is illustrated by a delightful tale related of Omar Ibn al Khattab, the second Caliph of Islam. The ruler found a group of men drinking wine and burning shacks. 'I have prevented you from drinking but you have drunk.' said the Caliph, 'and I have prohibited you from burning shacks and you have burnt them.' The men said, 'Prince of the faithful, God ordered you not to spy but you spied. He ordered you not to enter without permission but you did.'

Omar is reported to have answered, 'These two to those two', and left without questioning them. (There are many references to this incident, which may be found in Bassiouni, 1982, p. 70, note 74.)

THE NOTION OF ABUSE OF RIGHTS

Western law is slowly moving to a recognition that a right, however absolute, must not be abused. The common law still permits a wide spectrum of such abuses, including, theoretically, the wanton destruction of food in time of scarcity and the spiteful interference with an underground water course running through one's land. Of the English common law in such matters a learned writer has written 'there is a kind of hinterland to our law of torts where the King's writ does not run – a veritable legal Alsatia – in which greed, envy and spitefulness are permitted to reign supreme' (Gutteridge, 1933, p. 31). The notion of good faith underlying Islamic law does not permit such an abuse of rights. All ownership lies in God and the 'legal' owner is only the trustee, committed therefore to the use of the property in a manner that does not concentrate exclusively on private profit. The impact on neighbours, on future generations, on the environment and on society in general are factors that cannot be ignored in assessing whether property is being rightly used. With increasing realisation in modern times of the social dimensions of law and legal rights, there is now a belated but very incomplete recognition of this notion in modern legal systems.

THE CONDEMNATION OF ANTI-SOCIAL CONDUCT

Anti-social conduct such as hoarding is clearly condemned by the *Qur'an*. Economic justice and neighbourliness are qualities demanded by Islam. Monopolists and cornerers-of-the-market are promised condign punishment in hell (see Cragg, 1956, p. 154). The disapproval of leaving fertile land idle is reflected in the saying of the Prophet, 'Whoever cultivates waste lands does thereby acquire the property of them.' There was some disagreement as to whether one needed the permission of the *Imam* for such cultivation as a prerequisite to obtaining property in the land but some jurists maintained that one acquired such property even in the absence of such permission.

This notion, like the notion of abuse of rights, is linked with the Islamic concept of property being a trust and not a bundle of absolute rights.

THE NOTION OF CHARITABLE TRUST

An owner of property may create a charitable trust (*waqf*) in his lifetime by deed or by will. Once he does this, the alienation of the trust becomes irrevocable. Views differ between the Hanafi and the Maliki schools on the subsequent ownership of the property. The former hold it to belong to Allah and hence no living person has any rights of ownership over it. The latter hold that the founder and his heirs remains owners but without any rights to deal with it.

An important *hadith* on this matter, as related by Bukhari, is to the effect that the owner of a very valuable piece of land asked the Prophet for advice regarding it and the Prophet said, 'If thou likest, make the property itself to remain inalienable, and give the profit from it to charity.'

The concept of the objects and purposes of the trust is wider than in Western law. Charities, mosques, hospitals, schools, the poor, the descendants of the founder may all be the beneficiaries. The institution became so important in Islamic countries that a special ministry for *waqfs* was established in most Islamic countries to deal with the administration of *waqf* properties.

There is indeed a view that the English concept of trust derives from the institution of the *waqf* or pious foundation in Islamic law – see the detailed argument to this effect by Henry Cattan, a member of the Jerusalem Bar in Khadduri and Liebesny, 1955, pp. 203–18. Among the reasons for such a conclusion are that the Islamic charitable trust antedated by several centuries the doctrine of uses and trusts in English law and that trusts or uses were first introduced in England in the thirteenth century by Franciscan friars (Pollock and Maitland, 1952, vol. II, p. 231): 'It is an old doctrine that the inventors of "the use" were "the clergy" or "the monks". We should be nearer the truth if we said that, to all seeming, the first persons who, in England, employed "the use" on a large scale were, not the clergy, nor the monks, but the friars of St Francis.'

The three main features of the *waqf* were separation of ownership and enjoyment, the vesting in the beneficiaries of the right of enjoyment and the right of the owner to vest the enjoyment in a

succession of beneficiaries – all of which were to be found in the English use. It will be remembered also that there were several points of contact between the Western world and Islam during the relevant period and that St Francis, the founder of the order which first introduced the use, went to Egypt during the Crusades in 1219 and was in fact a captive of the Arabs for a short period. Indeed, on two previous occasions St Francis had unsuccessfully set out for Egypt and for Islamic Spain, thus evincing a particular interest in the Islamic world. Moreover the English use, and the Roman *fidei commissum* to which it is sometimes attributed, are vastly different from each other, while there was a direct link between the burst of intellectual activity in Europe in the thirteenth century and the new ideas of those who had returned from the Crusades having seen another civilisation (see Passant, 1926, p. 331). Whatever view one holds on this matter, it must be admitted that the similarities are remarkable and that the developed Islamic notion long antedated the first English gropings towards such a concept – a concept which the celebrated English legal historian Professor Maitland described: 'If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea.' (Maitland, 1968, reprint, p. 129). We must note also that, as Pollock and Maitland observe (1952, vol. I, p. 520) the notion of permanent trusteeship (so well known in Islam) was, in the thirteenth century 'as yet unknown to the (English) law'. To quote Maitland (1968) again, on the originality of the concept: 'The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder.'

While noting these similarities it would be well, however, to heed an eminent Algerian judge's reminder that the *waqf*/trust similarity only indicates the *possibility* of the connection and not the *fact* of such a connection (Badr, 1978, p. 187).

THE NOTION OF JURISTIC PERSONALITY

A peculiarly Islamic idea was the notion of the independent juristic personality of the public treasury or *bait al mal*. This was the property of all Muslims. The ruler was not free to spend this money as he pleased. For example, the money resulting from *zakat* could only be

spent for purposes specified by law. A fifth of booty money going to the treasury had to be spent in the manner stipulated in the *Qur'an*.

The *waqfs*, already discussed, also shared some of the characteristics of juristic personality.

THE NOTION OF INDIVIDUAL FREEDOM

The notion of liberty (*ibahah*) lies at the foundation of law. God has created all things for the benefit of man and man is hence free to acquire and dispose of property. Everyone is presumed to be free until the contrary be proved. This freedom is given to the individual, who acquires and holds property on his own, unlike the position under the joint family systems of Hindu or Roman law. As freedom is given to the individual, so also is the individual personally responsible with regard to the use of that freedom. The freedom given to the individual is limited or circumscribed by the needs of society and by the fact that the individual is a social being and not a unit existing in isolation.

One of the modern Islamic philosophers who has expanded on this concept of freewill is the celebrated Sir Mohammed Iqbal. Iqbal argued that one cannot be good unless one enjoys the freedom to act and consciously chooses to act correctly. Freedom is thus a precondition of goodness and God knowingly endowed man with freedom. It is only in this way that it is possible to bring out the potentialities latent in man (Iqbal, 1965, p. 118. See also Lal, 1973, p. 327).

Whatever the philosophical interpretations of this concept, the legal consequences of freedom and of personal responsibility for one's actions are clear in Islamic law.

The concept of freedom extended also to minorities and non-Muslim citizens of the Islamic state. The question of tolerance is dealt with later in this chapter but under the head of freedom it is important to notice that Islamic rule preserved to these minorities their personal laws in accordance with their own religious codes, usages and customs. Moghul rulers in India for example permitted Hindus to continue to be governed by their own personal laws. Dr Said Ramadan (1961, p 135) points out that, 'There is not a single text in the *Qur'an* or the *Sunnah* that would prevent non-Muslim subjects from maintaining their languages, cultures and religious practices and traditions.'

Al-Maqrizi relates how, after the conquest of Khaybar and the surrender of its Jewish population, the Prophet ordered that all copies of the *Torah* taken as booty should be given back to the Jews (see Ramadan, 1961, p. 136). The strength of the rule requiring recognition of such freedom for non-Muslims appears also from a tradition of the Prophet containing the warning, 'Beware, whosoever is cruel and hard on a (non-Muslim subject) or curtails his rights, or burdens him with more than he can endure, or takes anything of his property against his free will, I shall myself be a plaintiff against him on the Day of Judgment' (Ramadan, 1961, p. 138).

THE NOTION OF EQUALITY BEFORE THE LAW

'The aristocracy of yore is trampled under my feet', said the Prophet in his farewell sermon. There was no room for privilege under a system which subjected all equally to the identical law. The only privilege recognised by Islam was the privilege resulting from piety, good deeds and noble character.

At various points in this text is has been pointed out that equality has been greatly stressed in the Islamic texts. One of the *hadiths* records a statement of the Prophet that all people are as equal as the teeth of a comb, and another that all alike are the children of Adam. The law applies to all alike for it proceeds from God's commands to his creatures. There were indeed some limited exceptions, as in the case of *dhimmis* (non-Muslims who lived in the Islamic state) who were subject to certain discriminations (see p. 90) but even they had rights under the law.

There could not be one law for the powerful and one for the underdog, one for the rich and one for the poor, or one for the conqueror and one for the subject. The principles of the Universal Declaration of Human Rights and the succeeding documents such as the Covenants on Civil and Political Rights and Social Economic and Cultural Rights were thus implicit in Islam. (See also Chapter 8 on the Oneness of Mankind under Islam.)

Consequently all suitors alike in the courts of law are entitled to be dealt with according to the one law. Ruler and ruled were alike the servants of the law and bound by it. Criminal justice was administered to all impartially according to the Islamic rules. The judges

were not above the law but were themselves bound by it. No special offences could be created after the event to try particular persons.

Another important feature of Islam was the absence of special privileges enjoyed by a priestly or learned class. In the eloquent language of Syed Ameer Ali:

> The Islam of Mohammed recognises no caste of priesthood, allows no monopoly of spiritual knowledge or special holiness to intervene between man and his God. Each soul rises to its Creator without the intervention of priest or hierophant. No sacrifice, no ceremonial, invented by vested interests, is needed to bring the anxious heart nearer to its Comforter. Each human being is his own priest; in the Islam of Mohammed no one man is higher than the other. (S. A. Ali, 1981, p. 165)

THE NOTION OF LEGAL REPRESENTATION

Islamic law evolved a principle of legal representation through the use of the notion of agency or mandate. A person representing another in litigation was known as a *wakil*. The *wakil* was given a power of attorney which was filed before the judge hearing the case. The earliest legal practitioners were the *muftis*, who were men learned in the law and who acquired great authority by being advisers to governors and judges.

As with other legal systems, such as the Roman and the English, advice to clients was originally given free of charge, but later on, for a fee. A legal profession in the sense of a skilled body of people appearing for litigants thus appeared quite early in the Islamic system, antedating in this regard the appearance of a legal system in any European tradition except the Roman.

A similarity with the Roman juriconsults was that specialists in the law could issue written opinions, or *fatwas*, which could be cited before the judge. A similarity with modern practice was that, in the case of persons suffering from legal incompetence such as minors and insane persons, a competent representative should be present. It was also the practice in some Muslim states for it to be recognised as the responsibility of the state to provide unrepresented persons with legal aid. (For these and other details see Mahmood, 1984.)

THE PRESUMPTION OF INNOCENCE

The Prophet has said, 'Had men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof' (transmitted from Ibn 'Abbas by al-Bukhari, Muslim and others; see Bassiouni, 1982, p. 67). Islamic criminal law consequently throws the onus of proof heavily upon the prosecution and in the absence of such proof the accused must be acquitted.

There are further dicta of the Prophet on the standard of proof. Doubt was to be resolved in favour of the accused, for the Prophet's instructions were: 'Prevent punishment in case of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing' (see Bassiouni, 1982, p. 67). The 'golden thread that runs through the English criminal law', namely that an accused is presumed innocent until proved guilty, and also the wisdom of the common law that it were better that a hundred guilty persons be acquitted than that one innocent person be wrongly convicted – ideas that have now become part of universal human rights – were thus anticipated in Islam.

THE NOTION OF NON-RETROACTIVITY

The non-retroactivity principle was well recognised in Islamic law (Bassiouni, 1982, p. 63). This principle derives strength from the *Sunna* of the Prophet showing that acts committed before Islam declared them to be criminal were not punished and that any new adherent to Islam could not be faulted for criminal acts committed before embracing the faith (Bassiouni, 1982, p. 64). In the words of the Prophet, 'the religion of Islam cuts off any conduct that preceded it'. Acts committed during 'the period of ignorance' were not punished.

From these foundations Islamic jurists over the centuries have built up the principle of non-retroactivity. The only exception permitted is that if a later statute prescribes a lesser penalty, the lesser penalty will be applied (Bassiouni, 1982, p. 63).

THE NOTION OF THE SUPREMACY OF THE LAW

This principle is described by Islamic jurists as the principle of legitimacy. 'It means that all acts, procedures, dispositions and final decisions of the public authorities at any level cannot be valid and legally binding as to the people they affect, save to the extent they are consistent with the law' (O. A. al-Saleh, 'The Right of the Individual to Personal Security in Islam', in Bassiouni, 1982, p. 85). In this respect Islam was ahead of many other legal systems for no sovereign and no official could claim to be above the law. The uniform body of private law functioned within the framework of Islamic constitutional law which limited the power of the ruler through this notion of trust.

Judges were enjoined by the *Qur'an* to follow the law and because this was a *Qur'anic* duty no ruler could interfere. 'So judge between them by that which Allah has revealed' (v: 49), and 'Whoso judgeth not by that which Allah hath revealed, such are wrongdoers' (v: 45).

There could be no punishment except for an offence under an already existing law. The judge could not discriminate on the basis of religion, race, colour, kinship or even hostility. The legislator could not legislate contrary to the legality principle (T. Kamel, 'The Principle of Legality and its Application to Islamic Criminal Justice', in Bassiouni, 1982, p. 160).

These principles meant that the concepts of substantive due process and procedural due process, as recognised in American constitutional and civil liberties law, were well entrenched in Islamic jurisprudence.

THE NOTION OF JUDICIAL INDEPENDENCE

Since in Islam law stood at the apex of social organisation, those who administered the law were likewise elevated. In the early days of the Islamic state this was reflected in the pre-eminent position of the judge, to whom even the ruler had to refer disputes to which the latter was a party. The judge was called the *hakim-ush-shara*, i.e. the ruler through law.

A caliph who had a personal dispute could not be a judge in his own cause and interesting records exist of the reference by the second Caliph, Omar, and the third Caliph, Othman, of their personal disputes to the *qadi*. A reference to Caliph Omar's case before the *qadi* will be found in the next section. Caliph Othman's sally into the

field of litigation resulted in a verdict adverse to the Caliph. The Caliph, appearing personally before the court of the *qadi* of Kufa, in an action to recover a suit of armour from a Jew, was unsuccessful. His claim was dismissed on the ground that the only witnesses he had in support of his claim were his slave and his son – persons who were not competent witnesses under Islamic law. It is said of the Jew that he was so moved by his success that he gave the armour back to the Caliph.

There was thus a strong tradition that the power of the judge was independent of that of the state. He derived his authority from a higher source and could hence stand above the secular authorities in a manner which in modern parlance could well be described as a separation of powers.

This was reflected also in the organisation of the judiciary. Under the Abbasids, for examples, the Chief Justice of the Empire was the Head of the Justice Department. He was independent of executive control and the subordinate judiciary were placed under him, thus being themselves free from executive interference (Mahmood, 1984, p. 56).

THE NOTION OF JUDICIAL IMPARTIALITY

The notion of judicial impartiality is heavily underscored in juristic literature. The extent to which impartiality was expected of the judge is well illustrated in the story concerning the Caliph Omar who once had a lawsuit against a Jew. When both parties went before the *qadi*, the latter rose in his seat out of deference to Omar. Omar is said to have looked upon this act of deference to one party as being such unpardonable judicial weakness that he dismissed him at once (Qadri, *Justice in Historical Islam*, cited in Ibrahim, 1985, p. xcv).

A saying of the Prophet which he repeated three times was the following (as narrated in Abu Daud): 'He is not of us who proclaims the cause of tribal partisanship (*asabiyyah*).' He explains *asabiyyah* as 'helping your own people in an unjust cause'. Such a clear direction, though of course applicable to all individuals, is particularly applicable to those who hold the office of judge. Even though the litigant is of one's own tribe he stands in no better position thereby than one who might even be drawn from a tribe traditionally hostile to that of the judge.

This principle echoes the *Qur'anic* passage, 'O ye who believe, stand out firmly for justice, as witnesses to God, even as against yourselves or your parents, or your kin and whether it be against rich or poor; for God can best protect both' (*Qur'an*, II: 135).

Justice is next to piety, from which virtue the believer must not swerve. 'O ye who believe, stand out firmly for God, as witnesses, to fair dealing; and let not the hatred of others make you swerve to wrong and defect from justice. Be just; that is next to piety, and fear God' (*Qur'an*, V: 9).

There is an interesting anticipation in the Islamic writings of some modern principles relating to the judicial function which have attracted much attention in twentieth-century jurisprudential literature.

The realist school in the USA has drawn pointed attention to the unseen and unarticulated factors which sometimes affect the impartiality of judges – such as illness, domestic disagreements, anger or even indigestion. The 13th century poet, Nawawi, (1914, p. 504) refers to this. 'It is blameable,' he writes, 'in a judge to deliver a judgment when he is angry or hungry or in a state of excessive satiety or in general when he has any physical state likely to trouble his mind.'

The other principle, important to the modern concept of the rule of law, is that justice should not be secret and should not be administered behind closed doors. Nawawi, in the passage just cited spells this out in these terms: 'It is to be recommended that the judge should hold the sittings of the court in some large open court, where the audience may be sheltered from heat and cold, adapted to the season and to the object of the hearing.' According to *Imam* Shafi'i the *qadi* should sit in a place accessible to the public, in the middle of the town. There should be no barrier preventing public access nor should the pomp and glory of the state official overawe the public. (Fyzee, 1964b, p. 411; and Ibrahim, 1985, p. xcvi.) Thus justice was not only required to be done but must be seen to be done.

The Islamic concept of the judicial function was thus an exalted one and impartiality was one of the pillars on which its dignity rested.

THE NOTION OF LIMITED SOVEREIGNTY

This topic is also discussed in Chapter 7. Western jurisprudence has been dominated by the concept of sovereignty. Various sovereignty theories have enunciated doctrines of absolute sovereignty, such as

that of Hobbes, or some form of limited sovereignty such as that of Locke. In more modern times the positivist school of legal philosophers, typified by John Austin, has formulated doctrines based upon the concept that no source of authority stands higher than the sovereign of a state, within the limits of the sovereign's dominions.

Islamic jurisprudence has never conceded sovereignty to a ruler in any of these senses. There have been tyrants and despots in Islamic history but, whatever their abuses of power, not one of them could controvert the central proposition that sovereignty belonged to God alone and that the law 'never conceded to any human being any greater right than that of enforcing His law and protecting and leading His people.' (Vesey-Fitzgerald, 1931, p. 26; see also Robson, 1926, pp. 183–4).

The Islamic position of subordination of the sovereign to God and his law comes through strongly in the following *Qur'anic* passage: 'Say: O God, Lord of Sovereignty! Thou gavest sovereignty to whom Thou pleasest. Thou exaltest whom Thou pleasest and abasest whom Thou pleasest. In Thy hand is all good for Thou hast power over all things.' (*Qur'an*, III: 26). For a discussion of sovereignty, see Asad (1980b) pp. 37*ff*.

A ruler invested with sovereignty in the Hobbesian or Austinian sense was unthinkable at any stage in the history of Islamic law. Locke did indeed place limitations upon the ruler but this was in consequence of a man-made social contract, not a divinely ordained trusteeship of power.

So far-reaching was this doctrine that, apart from matters pertaining to the prophetic function, even the Prophet himself as head of the first Muslim state was not entitled to monopolise power and decision-making. Sheikh Mahmoud Shaltut, a former Rector of Al-Azhar University and an eminent Islamic authority, illustrates this principle in the following passage:

> When the siege of Al-Madinah . . . became too perilous and the Prophet sought to break the unity of the enemy groups by negotiating a (secret) agreement with the Ta'if group according to which they would withdraw on the payment of one third of the Madinah agricultural product to them, Sa'd Ibn Mu'adh (the chief of the Madinese Aws tribe) came to know about it. He went up to the Prophet and politely asked: 'Was that agreement sanctioned by revelation?' The Prophet replied, 'No, but I am seeking to relieve you.' Sa'd took the document of the agreement that was about to

be signed and tore it up, saying, 'Now that Allah has strengthened us by you, how can they get from us now what they could not get before?' The Prophet was pleased. So were all the Muslims. (Shaltut, 1966, pp. 561–2)

The governance of the *ummah* (the Muslim community) thus depended upon the principle of consultation (*shura*) and no ruler was free of this obligation (see *Qur'an* XLII:38).

THE NOTION OF BIDDING UNTO GOOD: AM I MY BROTHER'S KEEPER?

Lord Atkin in the famous English case of *Donoghue* v. *Stevenson* [1932] AC 562, asked the question, 'Am I my brother's keeper?' in highlighting the general aversion of the English law for interference in another's affairs, even for the latter's advantage. The English common law looks upon persons who interfere in the affairs of others even for the latter's advantage as being officious meddlers. It is for this reason that it is possible under the English law for a healthy man to pass by an old person who is drowning in a puddle of water without coming to that person's assistance, even though such actions would have caused no injury to the helper. Such conduct may be morally reprehensible but it involves no responsibility in law.

Islamic law rejects this notion. 'Unless you do this [protect each other] there would be tumult and oppression on earth and great mischief' (VIII: 73). Furthermore, the notion of Bidding unto Good (*al-amr bi al-ma'ruf*) renders it obligatory on Muslims to require their fellow Muslims to behave rightly and to restrain them from doing wrong. This Islamic ethic (known as the *hisba*) conflicts directly with the common law's notion of the officious meddler.

This notion led to the office, in traditional Islamic societies, of the *muhtasib* – a functionary who could be described as a custodian of public morals. These *muhtasibs* concerned themselves with such diverse matters as regulations relating to safety of shipping, cruelty to animals and honesty in contracts for the sale of goods.

It is instructive to look at manuals for *muhtasibs* such as that written by the Shafi'i jurist Ibn al Ukhuwa (d. 1329) in Egypt (Ibn al-Ukhuwa, *Ma'alim al-Qurba*, R. Levy (ed.) Gibb Memorial Series, 1938, which contains both an English abstract and the Arabic text), which contains passages such as the following:

Market Regulations: The *muhtasib* must order transporters of goods if they stay long in one place to unload the pack animals, for if the animals stand with loads, it will hurt them, and that is cruelty. The Messenger of God has forbidden cruelty to animals.

Ship-Men: Owners of ships and boats shall be prevented from loading their vessels above the usual load, for fear of sinking. For the same reason the *muhtasib* must forbid them to sail during windstorms. If they carry women on the same boat with men there must be a partition set (between men and women). (See generally Williams, 1963, pp. 111–18.)

A practical reflection of this attitude of concern towards those needing assistance is perhaps the early attention in the Islamic world to the care of the mentally afflicted – a concern which moral historians such as Lecky note stands in contrast to prevailing attitudes in Christian Europe. Observing that, 'The Mahommedans, in this charity [i.e. care of the insane] were early in the field', Lecky notes that 'it is probable that the care of the insane was a general form of charity in Mahommedan countries' (Lecky, 1946, p. 38). Lecky refers to the visit of Benjamin of Tudela to Baghdad in the twelfth century and his description of a palace in that city called 'The House of Mercy' in which all mad persons found in the country were confined. They were carefully examined every month and released as soon as they recovered. The asylum in Cairo is said to have been founded in 1304 AD. Lecky mentions other institutions as well, noting that Christian establishments for the general treatment of lunatics appear to have been very rare before the fifteenth century. Spain took a leading role in this charity with the establishment of an asylum for lunatics in 1548. 'In most countries their condition was indeed truly deplorable. While many thousands were burnt as witches, those who were recognised as insane were compelled to endure all the horrors of the harshest imprisonment. Blows, bleeding and chains were their usual treatment, and horrible accounts were given of madmen who had spent decades bound in dark cells' (Lecky, 1946).

Allied to the doctrine of the Bidding unto Good, is the doctrine of the Rejecting of the Reprehensible (*al-nahi 'an al-munkar*). The *Qur'an* (III: 104) directs the community to 'invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong'. (Compare III: 110).) Of it the Prophet had said, 'Whoever sees something reprehensible, let him change it with his own hand,

and if he is unable, with his tongue, and if he is unable to do that, in his heart.' (Al Nawawi, *Hadith* 34.) The underlying notion is that just as one must affirmatively lean towards the good one must, take affirmative action to correct that which is evil in society.

THE NOTION OF TOLERANCE

'Let there be no compulsion in religion. Truth stands out clearly from error' (*Qur'an*, II: 256). This is one of many *Qur'anic* texts in the face of which religious compulsion is un-Islamic. Tolerance, not compulsion, is the teaching of Islam and neither contrary practice nor contrary popular opinion can alter this.

Islam did not assert that the only path to salvation was through Islam. The *Qur'an* is explicit on this in several passages. 'Lo! those who believe in that which is revealed unto thee Muhammad and those who are Jews and Christians and Sabaeans – whoever believes in God and the Last Day and does right – surely their reward is with Allah and there shall be no fear come upon them, neither shall they grieve' (*Qur'an*, II: 62; and see to the same effect V: 72). Indeed the notion of tolerance goes even further, as the following *Qur'anic* passage indicates: 'Say: I worship not that which you worship. Nor will you worship that which I worship. Unto you your religion and unto me my religion' (*Qur'an*, CIX: 1–6). On religious tolerance in Islam see further Ibrahim, (1984) pp. 129–30.

Another compelling passage runs as follows: 'To every one have we given a law and a way . . . And if God had pleased, He would have made you (all mankind) one people (people of one religion). But He hath done otherwise, that He might try you in that which He hath severally given unto you: wherefore press forward in good works. Unto God shall ye return, and He will tell you that concerning which ye disagree' (*Qur'an*, V: 48).

Those who belonged to other faiths could live in the territories of Islam under guarantees which date back to the time of the Prophet. Nothing could be more eloquent than the Prophet's own guarantee to the Christians of Najran:

> To the Christians of Najran and the neighbouring territories, the security of God and the pledge of his Prophet are extended for their lives, their religion and their property – to the present as well as the absent and others besides; there shall be no interference with

> [the practice of] their faith or their observances; nor any change in their rights or privileges; no bishop shall be removed from his bishopric; nor any monk from his monastery; nor any priest from his priesthood, and they shall continue to enjoy everything great and small as heretofore; no image or cross shall be destroyed; they shall not oppress or be oppressed; they shall not practise the rights of blood vengeance as in the Days of Ignorance; no tithes shall be levied from them nor shall they be required to furnish provisions for the troops' (S. A. Ali, 1981, p. 273)

A similar charter was granted by the Caliph Omar at the capitulation of Jerusalem in 638.

Traditions of the Prophet are to the same effect. 'Whoever wrongs a *zimmi* or lays on him a burden beyond his strength, I shall be his accuser on the Day of Judgment' and 'Whoever torments the *zimmis* torments me' (S. A. Ali, 1981, p. 459; see also Arnold, 1896). There is also a tradition of the Prophet that he lodged several members of the tribe of Thaqif, who were unbelievers, in his own mosque.

'People of the Book', who included Jews, Christians, Samaritans and Mandaeans, were given recognition of their own legal system even if they lived in a Muslim state. They could thus preserve their traditional laws; but in certain matters they had to yield to Muslim law especially in matters of morality. This is analogous to the claim of any state that alien residents within its jurisdiction should be subject to its own criminal law. Where, therefore, a non-Muslim offended basic rules of morality such as those relating to adultery or intoxicating liquor, they were subject to the Islamic rule even if they could argue that no such prohibition lay upon them in their own religion. Much has been done over the centuries to distort this aspect of peaceful coexistence between Muslims and those of other faiths and, to this day, books keep appearing which suggest that the only relationship between Muslims and non-Muslims living within their territory was one of war or persecution.

Such presentations ignore not only the fact that Islamic law gave express recognition to the rights of non-Islamic citizens, but also that the Islamic state gave them high office and honour. Numerous non-Muslims were physicians, secretaries and treasurers of the Caliphs, and numerous non-Muslim scholars were received into Islamic countries with the greatest deference and respect. Indeed they played an honoured part in translating the classical Greek works into Arabic and in contributing to the explosion of knowledge which

illuminated Islamic civilisation. Under the Mogul emperors of Delhi, Hindus commanded armies, administered provinces and sat in the councils of the sovereign (S. A. Ali, 1981, p. 276).

Friedrich Heer, the eminent German medievalist expressively describes the so-called 'closed society' of the Muslim world as follows:

> However, this closed society was like the filigree work characteristic of Islamic decorative art: it was full of minute holes, cracks and apertures, through which alien influences could find an entry . . . it was possible in Islamic states for Jews and Christians to rise high, sometimes right to the top, in the service of the government or the financial administration . . . they and their religious congregations enjoyed definite rights secured to them by treaty. (Heer, 1968, pp. 235–6)

During the time of the Crusades this tolerance made a deep impression on the literature of Europe. Ricoldus de Monte Crucius, a writer of the thirteenth century, praised the hospitality with which he, a Western Christian, had been received in Islamic monasteries where he also noted with admiration the fervour of their life of prayer. Their charity and magnanimity also attracted his ungrudging praise. Such reports made such an impact upon the age as to be translated even into epic poetry. For example the work of Wolfram von Eschenback, the greatest of the German courtly epic poets, was much influenced by such direct accounts of the 'noble infidel' (Heer, 1968, p. 144). The legendary friendship between Richard and the brother of Saladin, immortalised in poetry and tradition along with other similar friendships (e.g. between Fulk of Anjou and the Regent of Damascus) could not have been possible if the Islamic attitude towards the non-Islamic visitor or invader had been one of sheer intolerance, as it is commonly depicted to be. It is interesting to note also that St Francis of Assisi, the founder of the Franciscan order, went to Egypt in 1219, when the crusaders were besieging Damietta and, on being taken prisoner, was led before the Sultan to whom he preached the Gospel, after which the Sultan sent him back to the Christian camp (*Encyclopaedia Britannica*, 1947 edn, vol. 9, p. 673).

It was expressly laid down that Muslims owed neighbourly duties towards all their neighbours, be they Muslims or non-Muslims. The punishments prescribed for criminal offences such as murder, rape or theft drew no distinctions between the victims, be they Muslims or

dhimmis. For murder, the *Qur'an* (II: 179; V: 45; V: 32; VI: 152) is explicit that the punishment is death and the Prophet is recorded as having ordered the execution of a Muslim who had murdered a *dhimmi* (Gilani, 1982, p. 361, citing Shawkani, *Nayl al-Autar*, v. 7 p. 12). For a contrary view, that the murder of a *dhimmi* was more easily expiated than that of a Muslim, see C. Cardahi, 'Conflict of Law, in Khadduri and Liebesney (1955) p. 334, and the discussion in Gilani, 1982, pp. 361–2.

In the Ottoman empire, Mehmet II, the conqueror of Constantinople permitted the Greeks who came under his rulership to regulate their legal matters in many areas according to their laws and ancient customs. In doing this he was following the example of the Arabian Caliphs. An American jurist, writing at the beginning of this century notes that 'even up to the present day, the Greek ecclesistical courts in the Ottoman Empire, have exclusive jurisdiction over litigation concerning wills and testaments, marriage and divorce, alimony and the like, when the parties are of the Greek orthodox faith' (Ion, 1907, p. 48).

The fact that there have been Muslim rulers who showed no tolerance towards those of other faiths, or acted oppressively towards them, is no more a refutation of Islamic principles than the intolerance of rulers of other faiths is of the principles which they professed. One must not on that account fail to consider the several outstanding examples of tolerance among Muslim rulers which one finds in history. Some of them have been referred to already but it may be worth examining in some detail the attitudes of the Emperor Akbar of India, to set the question of Islamic tolerance towards other religions in proper perspective.

A Hindu historian writes of Akbar:

> His toleration was more comprehensive than that of his contemporary, the English Queen Elizabeth. Indeed it was not till the latter half of the nineteenth century that England was able to establish religious toleration and freedom from civic disabilities to the extent to which Akbar had done in the sixteenth century . . . It is worth remembering that at a time when Europe was plunged into strife of warring sects, when Roman Catholics were burning Protestants at the stake and Protestants were executing Roman Catholics, Akbar guaranteed peace not only to warring sects but to different religions. (Sharma, 1952, p. 67)

He used to hold debates at his court with the learned of all faiths (Nehru, 1961, p. 53), and, as the *Cambridge History of Islam* observes, his court was a meeting place for people of all religious beliefs – Muslims, Hindus, Jains, Zoroastrians and Catholics (Holt *et al.*, 1970, pp. 60, 62, 63). He encouraged the translation into Persian of the great Hindu epics the *Ramayana* and the *Mahabharata* and other Hindu books (Burn, 1957, p. 133), permitted the open celebration of Christian and Hindu festivals and had a greater proportion of Hindu officers in his army than there were Indian officers in the British army prior to the Second World War (Sharma, 1952, pp. 39–40; see also Srivastava, 1982, pp. 30–4). Akbar was not the only Muslim ruler in India to follow such policies. Jehangir is said to have given a gold coin to a celebrated Hindu poet for every verse he wrote (Sharma, 1952, p. 95) and the Muslim emperors relied greatly on Hindu administrators in ruling their vast empire.

Turning now to another area of the vast domains of Islam, attention is drawn to some of these aspects of toleration in a work by Bernard Lewis, formerly Director of the University of London's School of Oriental and African Studies and one of the world's most eminent Arabists (Lewis, 1984). The author points out that barely a generation ago large and important Jewish communities existed in the Islamic world from Morocco to Afghanistan. These communities, which have largely disappeared as a result of mass migration, had lived in those countries throughout their periods of Islamic rule and in fact the creative centres of Jewish thought for many centuries were found in the Muslim lands rather than the Christian. Just as we speak often in Western jurisprudence of the Judaeo-Christian tradition, there was an even more real Judaeo-Islamic tradition resulting from the cross-fertilisation of the two cultures. Lewis deprecates the myth created by the historian Gibbon of the Arab warrior coming out of the desert to spread Islam with a sword in one hand and the *Qur'an* in the other.

In the history of law and philosophy an outstanding example of Jewish culture and scholarship flourishing the midst of Islam was the case of Moses Maimonides, the outstanding Jewish philosopher of the Middle Ages, who was born in Cordova, Spain in 1135 and died in Egypt in 1204. He was educated by Arabic scholars in secular fields of knowledge and was much influenced in his philosophical writings by Averroes the Islamic theologian and philosopher. A change of regime in Cordova brought about a period of intolerance, which took Maimonides eventually to Cairo, where he assumed leadership of the

Jewish congregation. He spent nearly the last 40 years of his life in Egypt writing some of his greatest works – *The Mishna Torah*, a systematisation of Jewish law, and the *Guide to the Perplexed*, an attempt parallel to that of Islamic writers such as Averroes and Avicenna, to reconcile faith and reason. His works, an important part of the Jewish heritage, were written largely in Arabic.

Islamic society, like many others, recognised the need to permit and protect the existence within its fold of those who were aliens in allegiance or in faith. The concept of *dhimmis* or protected peoples was well recognised. Particularly in regard to adherents of the older scriptural faiths, there was warrant for this both in the *Qur'an* and in canonical tradition.

Professor Lewis points out that under the *dhimmi* system these non-Muslims were entitled to the protection of the Muslim state. They were guaranteed the safety of their lives and property and given a considerable degree of freedom of economic enterprise and the right to worship unmolested. This contrasts sharply with their position in many Christian states where the Jews, often the object of bitter persecution, did not have any laws to protect them. Indeed it would have been contrary to Islam and to Islamic law to attack a Jew because he was of the Jewish faith.

This is not to say that there were not certain disadvantages. Special taxes, tokens of social inferiority and even distinguishing clothes were among these. The poll tax (*jizya*) imposed upon *dhimmis* was for protective purposes and was often less than the *zakat* or alms tax imposed upon Muslims, which *dhimmis* were not obliged to pay. It was a tax levied on able-bodied males in lieu of the military service they would have been called upon to perform if they were Muslims. The *dhimmis* had the following rights:

(a) As soon as the state accepted *jizya* from them, it became the obligation of the state and of every Muslim to protect their lands and properties and their life and honour.
(b) The amount of the *jizya* was fixed with reference to their financial position, the least being charged from the poor.
(c) Their heirs had full rights of inheritance, and full powers of sale, transfer, grant and mortgage.

Places of worship were to remain intact. It is reported that in all the countries conquered by Caliph Omar not a single place of worship

was ever desecrated or interfered with (Maududi, 1967, p. 303). Indeed the story is recorded that a small Christian community in Damascus had a little church that stood in the way of a grand mosque built by the Umayyads. The Christians refused compensation for the church and refused an alternative site. The church was demolished and the Mosque expanded. When Omar assumed office he ordered the demolition of that portion of the mosque and the rebuilding of the church, whereupon the Christian community expressed their willingness to take an alternative site (Madvi, 1978, pp. vii*ff*, cited in *Shariah Law Journal* (November 1985) p. 35).

Women, minors, indigents, lunatics, the blind, the sick and the aged were exempt from the tax but nevertheless had the protection of the Islamic state. Indeed the indigent among the *dhimmis* were in fact entitled to maintenance. Abu Yusuf in *Kitab ul Kharaj* relates that when the Caliph Omar saw an old and indigent Jew he ordered the cashier of the state treasury to remit the tax and give him an allowance, observing, 'By God, we shall not be doing justice if we . . . leave him deserted in old age. They are one of the beneficiaries of *zakat*.' (See also Hassan, 1974, pp. 160–1.)

These principles assume even more significance when one notes that in the climate of the age egalitarianism was not expected. Dominance and subordination rather than egalitarianism were the prevailing standards, as indeed was illustrated by the position of the Jews throughtout Christian Europe. There were indeed instances of calculated forms of degradation in certain Islamic countries, as there were in Christian Europe. Yet the little-recognised fact is that tolerance was enjoined by Islam and practised as state policy in such powerful empires as the Moghul and the Ottoman. Upon the expulsion of the Jews from Spain and Portugal, when Christian rulership succeeded the long period of Islamic domination, a number of them were accepted as part of Turkish imperial policy. Those accepted were settled in various areas of the Sultan's dominions extending from Cyprus to Istanbul. In those territories the resettled Shephardi Jews played an important part in the life of the Empire in the professional, political, economic and cultural spheres. As merchants, manufacturers, officials, doctors, gunnery experts and navigators, they distinguished themselves and earned a respected position in society.

It would perhaps assist towards better international relations if this aspect of Islamic jurisprudence is better known. Unawareness of it is a powerful barrier to the cause of mutual respect and peace.

THE NOTION OF DEMOCRATIC PARTICIPATION

The Islamic theory of government and the state sets out clearly that power to rule has not been given to any one individual or class but to the people. 'Everyone of you is a ruler and everyone is answerable to his subjects', said the Prophet (Maududi, 1967, p. 158).

In consonance with this philosophy every adult citizen is entitled to express an opinion on matters of government. The *Qur'an* speaks of rulership in terms that 'Allah has promised to those among you who believe and work righteous deeds that he will surely make them His vicegerent in the earth even as He had made people before them His vicegerent' (XXIV: 55). In other words the community of believers collectively are rulers and accountable for their rulership to the community. This is an anticipation of doctrines such as Rousseau's, of sovereignty lying in the people, but with this difference – that in Islam there is no concept of absolute sovereignty but of vicegerency under God who alone is sovereign.

Participation is further specified through the *Qur'anic* indications of how the affairs of the state are to be conducted. 'They manage their affairs by mutual consultation' (*Qur'an*, XLII: 38). It is noteworthy that the Prophet himself as head of the Islamic state adopted the method of consultation extensively in reaching his decisions.

This is confirmed further by the tradition (related in the Khatib al-Baghdadi, quoting from the Caliph Ali – see Maududi, 1967, p. 279; and Hassan, 1974, p. 106): 'I said, "O Messenger of Allah! What should we do if, after your demise, we are confronted with a problem about which we neither find anything in the *Qur'an* nor have anything from you?" He replied: "Get together amongst my followers and place the matter before them for consultation. Do not make decisions on the opinions of any single person".'

The various legal notions discussed in this chapter should be viewed against the general background of the Islamic classification of all human actions into five categories which are differently viewed by God. These activities are as follows:

(a) First degree (*fard*): that which is *commanded*.
(b) Second degree (*Masnum, Mandub* and *Mustahab*): that which is *recommended*.
(c) Third degree (*Jaiz* or *Mubah*): that which is permissible, or to which religion is indifferent.
(d) Fourth degree (*Makruh*): that which is unworthy.

(e) Fifth degree (*Haram*): that which is forbidden.
(See Hidayatullah, 1972, p. xxi.)

There is a range of flexibility in the categories lying between the extremes of command and prohibition, but the various sources of law indicate quite clearly which is the preferred course of action. Although many human rights matters could fall within categories (b), (c) and (d), there can be little doubt as to how the Muslim is expected to act.

The ideal result of the new legal regime was set out by the Prophet himself when he once said that he hoped for a time when a rich man could walk through the length and breadth of a country with intent to bestow charity and yet not find any one to accept it. The spreading of wealth and happiness, rather than its concentration in the hands of a few, was a dominant ideal of Islam. Islamic law, properly practised, was a system capable of bringing closer to reality the attainment of the Prophet's ideal in an imperfect world.

6 Islamic Influences on European Legal Philosophy and Law

REVEALED LAW AND HUMAN REASON

It will have appeared from the foregoing discussions that a matter of constant concern to Islamic jurists was the exact relationship between divine revelation and human reason. To what extent was there scope for the latter when the divine will had been both declared by God and interpreted by his Prophet?

In this respect there was a marked similarity to a theological problem that troubled the early Christian Church as well. There was the word of God in the Old and New Testaments. It was a revealed law. What, in this scheme, was the scope for human reason? God's knowledge, reason and will were supreme and human knowledge or reason could not match the divine. Theology and law in particular were clearly areas where man could not pit his puny intelligence against that of God. As late as the thirteenth century, Christian scholars such as the Franciscan Duns Scotus (1265–1308), who taught at Oxford, argued that it would be impudent for humans to seek to understand the reasons for a rule laid down by God or to attempt to give it a meaning in the light of their own reason. If God had approved or ordained a principle or course of conduct, it should be accepted without further inquiry. This denial of a due place for reason, which gave the followers of Duns Scotus the nickname 'dunces' and a new word to the English language, was an idea too well entrenched to be easily displaced. (On the relationship between natural law and the philosophy of Duns Scotus, see Stone, 1965, pp. 55–60.)

The resulting containment of free speculation within the bounds permitted by Church doctrine weighed heavily in favour of unquestioning acceptance of dogma, ritual and ecclesiastical rules, and powerfully buttressed the existing political and ecclesiastical structure. Had this rigid framework continued unassailed, the old order in Europe would perhaps have stood unshaken for some centuries

more. However, an intellectual movement was astir in the world of Islam which was to have far-reaching effects not only upon the intellectual life of Europe but, through its stimulation, upon the European political order that had held sway for a thousand years.

THE DOCTRINE OF DOUBLE TRUTH

Two Islamic philosophers known to the Western world as Avicenna (Ali Abu ibn Sina, 980–1027) and Averroes (Ahmed ibn Ruschd, 1126–98) paved the way for the release of reason from its strict confinement by pointing out that God did not give man reason without a purpose: it was meant to be used. While fully accepting the word of God in the *Qur'an*, they taught also that there was room for the coexistence of human reason and the word of God. We must use our human reason to try to understand the word of God. This was known as the doctrine of double truth – there is truth which comes from divine revelation and there is truth which comes from human reason. Of course, human reason will not always enable us to understand God's reason, but there are some divine rules which we can attempt to understand. Averroes, in particular, advanced this teaching, at Cordova in Spain.

The works of Averroes included treatises on jurisprudence, medicine, philosophy, astronomy and grammar. By the end of the twelfth century the most important of his works were translated into Latin and thus entered the mainstream of European thought. One of his works which made a special impact on the West was the *De Substantia Orbis*. This consisted of two treatises dealing with the relationship between the active intellect and man, and with commentaries on Aristotle.

The more orthodox Muslim theologians were inclined to take the view that reliance on reason alone was harmful. One of them, Al-Ghazali, (d. 1111) the philosopher-theologian *par excellence* of Islam, wrote a treatise to this effect known as *The Refutation of the Philosophers*. To this treatise Averroes replied in his *Refutation of the Refutation*. Indeed, he asserted that the existence of God could be established by human reason, quite apart from divine revelation. This was a bold stand and brought him into disfavour with his patron the Caliph, who pronounced that hell-fire was assuredly the fate reserved for humans who were so befuddled as to believe that truth could be found by their unaided reason. Still, Averroes had lit a torch which

was of supreme importance in the global history of free thought. The impact of Averroism on scholastic philosophy is more fully examined later in this chapter.

THE KINDLING OF THE SCIENTIFIC SPIRIT

The beginnings of scientific inquiry and method in European philosophy have been shown in an earlier chapter to be attributable in no small measure to Islamic influences.

The Islamic influence did not cease with its first impact upon pioneers like Adelard of Bath. An even more important phase occurred when Roger Bacon (d. 1294), a Franciscan friar teaching at Oxford, used the method of scientific inquiry and experimentation to study such phenomena as refraction, astronomy, mechanics, the rainbow and plants and animals (Lucas, 1960, p. 180). In his studies of optics, for example, he carried forward the research of Alkindi and Alhazen in relation to parabolic mirrors. Bacon foresaw the possibility of flying machines, of mechanically propelled boats and of circumnavigating the globe. He spoke of the power inherent in gunpowder, the Arabs' use of which antedated Bacon's experimentation. It is said of him that his crowning glory was his concern for mathematics and for experiment. Indeed experimental method was so highly valued by him that he spoke of it as the lord of all the sciences, the door to knowledge and the criterion of truth.

Experimentation was not in accordance with traditional European methods of inquiry which had tended to centre on the interpretation and unquestioning acceptance of sacred or authoritative writings such as the scriptures or the writings of the Greek philosophers. The Arab tradition was different and was a principal influence in leading Bacon towards this new method which was to blaze a trail for scientific knowledge in general.

At least some of the many inventions and discoveries credited to him 'were undoubtedly derived from the study of the Arabian scientists' (Carroll *et al.*, 1961, p. 341). Bertrand Russell notes that while Bacon respected Aristotle, he looked upon Avicenna as being, after him 'the prince and leader' of philosophy and quotes Avicenna with great admiration (Russell, 1961, p. 456). Bacon had observed that 'there was no objection to getting knowledge from the heathen'

and very often quoted Islamic philosophers and scientists such as Avicenna, Averroes, Alfarabi and others (Russell, 1961, p. 456).

Roger Bacon's name looms large for these reasons in any history of Western science. He was indeed one of the great original thinkers of the medieval world; but in experimental science, as well as in Aristotelian philosophy in which he excelled, his debt to the Arab thinkers was immense. He was therefore also an important transmitter of Arab learning into the mainstream of European thought.

It is to be remembered also that towards the end of the eleventh century Latin translations of Arabic works on science began to enter Europe in a stream that lasted for the next few centuries. These came principally from Islamic Spain but also from Sicily and Syria. (Carroll *et al.*, 1961, p. 340). Some of the most famous medieval men of science who have passed into legend as having almost magical powers, such as Pope Sylvester II (Gerbut) who had an enormous reputation as the most distinguished scholar of the age (indeed his knowledge was so far in advance of his age that his powers were believed to verge on the infernal and magical – hence his associations with the Faust legend), had spent some of their time in Arabic centres of learning (Burns, 1947, p. 621). Likewise in the sphere of medicine the experimental methods used by the Averroists of Padua, much criticised by Christians who considered it godless to dissect the human body, led to many advances in medical knowledge. (Dissecting a man was likened to dissecting God, see Heer, 1968, p. 304.)

The scientific spirit, thus stimulated by Islamic influences, was an important ingredient in the new intellectualism of Europe, and was in its turn an important factor in stimulating the thinking of the great political philosophers. Francis Bacon, for example, made rich use of the spirit of scientific method (he is reputed to have come by his death through a chill contracted by attempting the experiment of freezing a chicken in the snow); and Hobbes and Locke were both men of science who brought this scientific method into their philosophical inquiries. In fact the very *Leviathan* of Hobbes was at every point likened to a mechanical contraption working on strings and pulleys. Grotius himself discarded the *a priori* method of reasoning from prior accepted maxims, as had been customary before, in favour of the *ex posteriori* method of examining the evidence first and drawing from it the conclusions which he advanced. This was the foundation on which he built his international law – drawing his general principles from the experience of mankind rather than

formulating them theoretically separate from an examination of the practical facts of international relations. This was indeed a reversal of traditional methods and was due in no small measure to the scientific spirit of the age.

THE ISLAMIC ENCYCLOPAEDISTS

European philosophy is in debt to the French encyclopaedists for assembling at various times the sum total of human knowledge in a manner easily accessible to all. Students of European history and political science will be familiar with the enormous impact in the eighteenth century of the French encyclopaedia edited by Diderot.

The Islamic resurgence of learning produced such a work around 980 when the Ikhwan El Safa (Faithful Friends) published an encyclopaedia from Basra in 52 volumes. Their aim was to cover every field of knowledge including philosophy, religion, mathematics, physics, chemistry, astronomy and law. Their influence on Islamic learning was significant and outstanding philosophers such as Al-Ghazali openly acknowledged their debt to this work. Both the learned and the not-so-learned thus had ready access, in the midst of the thousands of volumes then appearing, to a handy source of reference.

The knowledge of these encyclopaedists, who were probably Sufis, was carried into Europe. Among those who transmitted such knowledge were El Majriti the astronomer of Madrid, his disciple El Karmani of Cordova and the famous philosopher Averroes (Shah, 1977, p. 341). El Majriti or El Karmani brought the encyclopaedia to Spain some time before 1066. Adelard of Bath, Britain's first Arabist, translated Majriti's scientific work into English. He was England's greatest scientist before Roger Bacon.

Among the centres of European learning from which Islamic knowledge was diffused throughout the European world, was the Arabist school at Montpellier, in southern France. This was geographically close enough to Andalusia in Spain, as well as to Sicily, to attract scholars who had absorbed the Arabian learning concentrated at those places. From Montpellier these scholars spread in all directions throughout Europe. Its school of law was founded in 1160 and the university was founded by Pope Nicholas IV towards the end of the thirteenth century. Its alumni were one of the main fertilising influences in many fields of European learning, especially

in medicine and literature. The dominant influence of these alumni over medical literature on the Continent and in England has been described as 'one of the outstanding historical facts of the middle ages' (Campbell, 1926, pp. 196–7). The impact upon philosophical speculation and political and legal thought resulting from the new concentrations of knowledge available cannot be discounted.

THE REACTION OF ORTHODOXY

We have already referred to Al-Ghazali's *Refutation of the Philosophers*. Known as Algazel by the Western world, Ghazali was of profound importance not only in Islam but also in the Christian world.

> In under fifty years after their composition, his books were exerting a tremendous influence upon Jewish and Christian scholasticism. He not only anticipated in remarkable fashion John Bunyan's *Holy War* and *Pilgrim's Progress*, but influenced Ramon Marti, Thomas Aquinas and Pascal, as well as numerous more modern thinkers. (Shah, 1977, p. 148)

The Franciscans, through his influence on St Francis of Assisi, and the Dominicans, through his influence on Thomas Aquinas, are influenced by Algazel to this day, for the intuitiveness of the former order and the intellectualism of the latter have each felt the impact of the thought of Algazel.

Al-Ghazali was an outstanding intellectual, investigating every dogma and doctrine with intense zeal, even from the days of his youth. As a professor at the Nizamiyya Academy at Baghdad at the age of thirty-three, he was reputed to have 300 000 traditions of the Prophet by heart. Yet he distrusted the value of the intellect by itself, believing that the object of education was not merely the providing of information but the stimulation of the inner consciousness. A master of 'outer religion' he sought diligently after an appreciation of 'inner religion' and he was attracted to the inner perceptions of the Sufis.

Ghazali's work brings together, and indeed takes further, the work of the Greek philosophers regarding the application of the method of logic to interpretation as well as their view of happiness as the ultimate end of man. Aristotelian ideals are visible in his work, but the happiness which is the goal of man is a gift of God, from

whom all things proceed, and is one which transcends the span of man's life on earth (see Peters, 1973, pp. 690–716).

Aristotelian logic was harnessed into the service of law and theology in a manner which left is imprint upon Islamic thought for all future time. The framework within which it was employed was the basic position that Islam has an infallible *Imam*, the Prophet, who left his teaching in the *Qur'an* and the *Sunna* (Peters, 1973, p. 703). From these basic positions onwards man must be guided by his own reason. Although this was standard Shafi'i learning, at this point Ghazali parted company with those who relied on analogy and dialectical argument, for he felt deeply sceptical of methodologies that could conceivably lead to opposite results, depending on how one perceived the analogy. He insisted on a more rigorous logic, and required a strict syllogistic demonstration.

It is easy to see why Ghazali's philosophical contributions were influential far beyond the confines of Islam, for their intellectual rigour within the boundaries of the major premises of a given religion were equally applicable to Christian theology. His dual emphasis upon the intellectual and the spiritual, upon externals and internals, likewise influenced all theologians in theistic systems. For Islam he was the greatest of the theologians, the 'Renewer of Islam'. For other religions his stress on man's duty to seek to know God and love Him and to apply the intellect to this end while at the same time realising its limitations in this important task, had messages for Aquinas, St Francis and the later European philosophers. Indeed the later European philosophers of the Age of Reason had likewise many lessons to learn from the intellectual rigour which he brought to bear upon matters of interpretation.

Ghazali wrote treatises upon jurisprudence, upon distortions in Islamic ideals, upon errors in philosophers' methods, upon the ultimate happiness of man, upon the just course in matters of belief and upon the revitalisation of the sciences of religion. These treatises were only a selection from an array of works which made him one of the foremost thinkers of his age.

ISLAMIC ARISTOTELIANISM

In their philosophic enquiries, these Islamic philosophers made use of the work of Aristotle which the Christian world was at that time

rejecting. Aristotle, the philosopher of reason and individualism, had been neglected by the Christian Church which had preferred the philosophy of Plato. Plato had taught that those best able by reason of their knowledge and wisdom, to guide the state should be in control of it, while citizens should subordinate their reason to that of these philosopher-kings. For Aristotle, the individual and reason were more important. The intellectual attraction of Aristotle for these Arab philosophers was very great and Aristotle's work was translated into Arabic.

The Arab scholars performed a signal service in 'dredging up the treasures of antiquity' (Heer, 1968, p. 238), of which the most precious were the works of Aristotle, because they lay 'buried in a waste of "Platonic" and "Aristotelian" literature in which the "original" matter had become thoroughly enmeshed in a mass of very different material' (Heer, 1968, p. 238). An army of scholars addressed themselves to this work, among them al-Kindi (*c.* 873), al-Farabi (*c.* 950), Avicenna (*c.* 1037), Avenpace (Ibn Bajja, 1138/39) and Averroes (Ibn Ruschd, *c.* 1198). This work was all the more commendable because it was performed under the watchful eyes of orthodox scholars always concerned lest the free-thinking methods thus unearthed from the classical debris could undermine the authority of faith.

The Arabic scholars who thus translated and commented upon the work of the Greeks were people of immense erudition and versatility.

Al-Kindi (Abu Yusuf Ya'kub ibn Ishak), 813–42, who wrote on philosophy, politics, astronomy, mathematics and medicine, was selected by the Abbasid Caliph al-Mamun (813–33) for the work of translating Aristotle and other Greek writers into Arabic. Al-Kindi, described by a European writer as 'among the twelve geniuses of the first order who had appeared in the world up to the sixteenth century' (see S. A. Ali, 1981, p. 426) was versed not only in Greek but in the languages of Persia and India as well. From this beginning other Islamic philosophers continued a study of the Greek philosophers. Al-Farabi (Abu Nasr Mohammed bin Mohammed Turkhan al-Farabi) a distinguished physician, mathematician and philosopher, was a commentator on Aristotle whose commentary on Aristotle's *Novum Organon* was utilised by the English philosopher, Roger Bacon the pioneer of scientific method in England, and by his contemporary Albertus Magnus (1206?–80), the *doctor universalis* of his time – 'the most noted of Christian scholars' according to Roger Bacon and the mentor of Thomas Aquinas himself. Among his other

books were his *Tendency of the Philosophies of Plato and Aristotle* and also several treatises of medicine, mathematics and music.

The Arabic commentaries on Aristotle were often translated into Latin, along with Aristotle's work itself. For example, Averroes' commentaries on Aristotle are found in early printed Latin editions of the works of Aristotle.

AVERROISM AND THOMISTIC PHILOSOPHY

Betrand Russell, who discounted the originality of Arab thought (Russell, 1961, p. 420) has written of Averroes (p. 419) that he gave a fresh beginning to Christian philosophy. His works were translated into Latin in the early thirteenth century, which itself, Russell notes, is surprising seeing that he wrote as recently as the latter half of the twelfth century:

> His influence in Europe was very great, not only on the Scholastics but also on a large body of unprofessional free-thinkers who denied immortality and were called Averroists. Among professional philosophers his admirers were at first especially among the Franciscans and at the University of Paris.

Averroes developed Aristotelian thought and his work attracted continuing attention in the universities of the West. At the University of Paris a group of students known as the Averroists began to study his works and to teach in the Western world the importance of reason as an aid to the understanding of the Christian scriptures. They were inspired by an 'intoxicating enthusiasm for Aristotle and the Arab commentators, above all Avicenna and Averroes' (Heer, 1968, p. 263). This newly discovered habit of free thinking 'touched off a series of chain reactions at the University of Paris' (Heer, 1968, p. 263) and no less than six decrees were issued between 1213 and 1241 forbidding clerks to engage in these studies. Despite such official opposition this mode of thought and the Aristolelian and Arab works on which they were based continued to gain ground.

The University of Paris was indeed one of the foremost centres of intellectual ferment in Europe: 'the battlefield of all the most significant intellectual conflicts of the age' (Heer, 1968, p. 245). These new intellectual flames were not easily snuffed out.

Among those who became exposed to the new learning was Thomas Aquinas, the intellectual giant of the Church.

> Avid for knowledge, Aquinas immersed himself in the newly discovered texts; he read Averroes and Avicenna early in his career (though at first without appreciating the tremendous implications of what he read) and steeped himself in the growing number of classical Arab and Jewish texts daily becoming available in translation. (Heer, 1968, p. 267).

> Aquinas' tireless intellectual endeavours, his two great *Summae*, his university lectures, had their roots in his personal experience and conviction: he had seen the young intelligentsia of Paris, indeed of all Europe, reeling under the intoxicating influence of the new thought from the Near East (not to mention the oriental gnosticism which originated yet further east, coming from Baghdad and Persia). (Heer, 1968, p. 208)

The Averroistic doctrine of double truth – revelation and reason – became one of the principal bases for his own intellectual system, as he went on to produce an elaborate theology harmonising the truth of reason with the truth of revelation, thus carrying forward the work of the Arab philosophers despite his profound disagreement with them on matters of faith. In his monumental *Summa Theologica* he analysed almost every rule of law and theology from the standpoint of double truth, seeking to justify it through the truth of revelation and, where possible, through the truth of human reason. It is indeed said that when Aquinas was composing the *Summa Theologica* he had the works of Averroes constantly by his side.

Naturally Aquinas did not meet with much favour initially. The conservatives in the Church were suspicious of Aquinas as an Aristotelian and a rationalist while the 'left' criticised 'his attempt to house Aristotle, the Arabs and all rationalist philosophies under the protective roof of a wholly unnecessary theological structure' (Heer, 1968, p. 267). However he came eventually to be accepted as the prince of scholastic philosophers and the Doctor Angelicus of the Church. Through the work of Aquinas, reason gathered momentum in the Western world, for as soon as it was admitted that reason could be used to support a rule of the Church, the door was opened to the use of reason to attack a rule. Aquinas was no doubt responsible for much of the spirit of enquiry which in the subsequent centuries swept

through the Western world and resulted in intellectual and political upheavals of vast proportions such as the Reformation. Against the background of a European legal system dominated by Church law and churchmen it is difficult to overestimate the impact such thinking had on the future of European law.

The direct thread of connection between Islamic thought and the age of reason in Europe can thus be traced. Avicenna and Averroes could be described as men of the Renaissance in the Muslim world. They were typical of the spirit of intellectual enquiry of their age.

Islamic thought was very much in Aquinas' mind for another reason, for he had an Islamic audience in view when he wrote his earlier work *Summa contra Gentiles*. Itself a very comprehensive work, which was developed to its fullest dimensions by the later *Summa Theologica*, the *Summa contra Gentiles* was composed as a handbook for the conversion especially of the Islamic Moors who were then in control of most of the Iberian peninsula (Flew, 1971, p. 175) – a world which was intellectually formidable and which in fact had provided him with some of his intellectual inspiration. As Professor Copleston observes in his work on Aquinas (Copleston, 1955, p. 11): 'The "Gentiles" whom Aquinas had in mind were not so much the ordinary devout Mohammedans as those whose outlook was imbued with a naturalistic philosophy.' Because he was dealing with those who themselves relied on the philosophy of reason, Aquinas had to use the philosophy of reason: 'My purpose is to declare the truth which the Catholic Faith proposes. But here I must have recourse to natural reason, since the Gentiles do not accept the authority of scripture.' Hence the first three books of the *Summa contra Gentiles*, addressed to this intellectual Islamic audience, use the philosophy of reason which they themselves had elevated, and makes no appeal to revelation. (See also Russell, 1961, pp. 445–6.)

Islamic philosophy in this way played a significant part in stimulating that emphasis on reason which was to lead eventually to the Renaissance and Reformation and the resulting transformation of European legal systems. It helped in unleashing European reason from its long period of confinement. Although Aquinas had reconciled revelation and reason in his philosophy there was no means of keeping these two forces in permanent harness. Reason, free of its former shackles, soon reached out on a career of its own. It is interesting to speculate how long the entire Renaissance in European thought, on which many Western human rights concepts are based, might have been delayed, or what different course it might have

taken, had not Arab thought and, through it, Aristotelian thought, been thus introduced into Europe.

THE INFLUENCE OF ISLAMIC CONCEPTS ON EUROPEAN PHILOSOPHERS OF LIBERTY

It is interesting to note that there is evidence – admittedly inconclusive but nevertheless significant – that both Locke's and Rousseau's thinking, especially their theories of sovereignty, could well have been influenced by Islamic thinking on the relationship between subjects and the state. Locke while at Oxford showed a keen interest in the lectures of Edward Pococke, the first Professor of Arabic Studies (see introduction to Locke (1960)). We do not know what exactly was the content of Pococke's courses but if they were on Arabic studies it is unlikely that they were confined to the Arabic language alone. There would necessarily have been in them a content of Arabic literature, history and civilisation. In that event it is inescapable that the theories of government current in the Arabic world and embodied in its basic legal and political literature would have received some mention at the hands of Pococke.

We also know that during his Oxford days Locke was deeply discontented with the subject matter of conventional studies. He was 'impatient with the "verbal exercises" of the scholastic philosopher, which Puritan control of the University had not abolished' (Morris, 1930, p. 15). He thought little of his tutors and was so deeply discouraged that he was not a hard working student (Morris, 1930). If, by way of contrast, he showed a keenness in attending Pococke's lectures it is not unreasonable to conclude that he derived some intellectual stimulation from them.

Locke was, moreover, intellectually concerned with the problems of government, power and individual liberty. His enquiring mind could not have failed to be receptive, in those early and impressionable years, to the Arab concepts of sovereignty and law. We know also that though Locke is a pioneer in Western thought of such concepts as trusteeship of power for the benefit of the governed, inalienable rights of the individual which no government can take away, and the removability of the ruler if he failed to keep his trust, those thoughts were not new to the Arabs but basic propositions of their political philosophy. It is not too far-fetched to imagine that

some of these foundations of Lockean philosophy owe at least some inspiration to Islamic thought.

We have noted in another context (see Chapter 5) the claim to originality made by English lawyers regarding the trust concept, which is described as a remarkable and unique achievement of English jurisprudence. Professor Maitland, one of the best known formulators of this claim, goes further and takes the trust concept into the realm of government through the notion of trusteeship of political power (Maitland, 1968, p. 221). He sees much originality and political value in the notion of 'trusteeship' as applied to the Crown or the East India Company or any entity to whom powers of rulership are committed. These ideas were, however, basic ideas of Islamic law for centuries, in relation to the duties of rulers.

As with Locke, so also with Rousseau, who came under strong Islamic influences, especially in the later phases of his life when he even adopted the Armenian form of dress. Rousseau wrote of the Prophet in his *Social Contract* (1968, Book IV, p. 179): 'Mahomet had very sound opinions, taking care to give unity to his political system, and for as long as the form of his government endured under the caliphs who succeeded him, the government was undivided and, to that extent, good.'

The Islamic idea of consensus is parallel to Rousseau's notion of each individual being subject to all and receiving back his civil liberties from the community. The Islamic idea that the community, through the means of consensus, determines the law in cases of doubt is parallel to Rousseau's idea of the general will determining what is just and unjust. As with Islam, Rousseau was against the separation of the moral code of a nation from its political institutions – one of his grievances against the political structure of Christian Europe. Hence the community formed the body politic and 'the body politic is a moral being possessed of a will'.

Rousseau gave eloquent testimony to his regard for Islam and its founder when he wrote (1968, pp. 87–8):

> But it is not for every man to make the gods speak, or to gain credence if he pretends to be an interpreter of the divine word. The law-giver's great soul is the true miracle which must vindicate his mission. Any man can carve tablets of stone, or bribe an oracle, claim a secret intercourse with some divinity, train a bird to whisper in his ear, or discover some other vulgar means of imposing himself on the people. A man who can do such things

> may conceivably bring together a company of fools, but he will never establish an empire, and his bizarre creation will perish with him. Worthless authority may set up transitory bonds, but only wisdom makes lasting ones. The Law of the Hebrews, which still lives, and that of the child of Ishmael which has ruled half the world for ten centuries, still proclaim today the greatness of the men who first enunciated them; and even though proud philosophy and the blind spirit of faction may regard them as nothing but lucky imposters, the true statesman sees, and admires in their institutions, the hand of that great and powerful genius which lies behind all lasting things.

See generally on this topic Hassan (1974) pp. 99–103.

It is worthy of note that Rousseau's concept of the general will formed the basis for the ethical theory of Kant and provided Hegel with the starting point for his theory of the state. It also became the inspiration of nineteenth-century theories of sovereignty.

Another philosopher who no doubt felt the impact of Islamic concepts was Montesquieu. In his *Persian Letters* of 1721, two Persians, Rica and Usbeck, are supposedly visiting Paris and exchanging impressions of contemporary customs and social institutions in France, with their friends at home and with each other. Amidst some trivialities contained in these letters are very substantial reflections on the nature of social institutions and their interrelationships with each other. Ibn Khaldun and other Islamic philosophers had anticipated the sociological approach to forms and concepts of government. These foreshadowed Montesquieu's views on such matters as the influences of climate on social institutions. To what extent these letters embodied actual observations of Islamic thinkers we do not know. The Persian travellers may well have been merely a device for voicing Montesquieu's own views. On the other hand, the intellectuals of Montsequieu's era, including Montesquieu himself, were profoundly conscious of Islamic institutions and the contribution of Islamic thought to European thinking. The extent of Islamic thinking in the midst of the Persians' observations is therefore a matter for conjecture but there is a reasonable possibility of its presence in some measure. Indeed the choice of Islamic persons for this device may not have been entirely fortuitous. (There is a reference in Letters 10 and 18 to the *Qur'an*, as there is a reference to the Christian scriptures in Letters 29, 46 and 57, but in the sense that the holy texts of the various religions have become subjects of arid

argument among grammarians, casuists and commentators; see Letters, 36, 75, 135.)

Montesquieu's *The Spirit of the Laws*, of 1748, was a work which immensely influenced all subsequent European political and legal thought. In it are contained, not only the principles of the separation of powers, but a use of the historical and comparative method in dealing with the underlying reasons for laws and their interrelationship with historical and climatic reasons peculiar to a particular nation. This work foreshadowed the work of subsequent schools of jurisprudence which were of the utmost importance to later European thought – including the work of Savigny and the German historical school. *The Spirit of the Laws* carried forward to fuller development many of the ideas first revealed in the *Persian Letters*.

The sociological and historical element in Savigny was, as we know, of immense significance to the later political history of Europe, for he gave expression to the concept that a people's laws are one of the outward manifestations of the inner spirit of a nation which itself is a result of a combination of historical, geographical and cultural factors. This gave the German people a theoretical basis for their strongly nationalist sentiment. For those interested in tracing the history of ideas, an interesting field for research and enquiry would be the extent of the influence of Ibn Khaldun on Montesquieu and the influence of the latter on Savigny. It is certain, however, that in the seamless fabric of political thought there are prominent Islamic strands which have contributed to the fabric in ways not often perceived or acknowledged.

It is useful to note also that Montesquieu in his earlier years travelled extensively in Eastern Europe and that he spent some time in Austria studying the constitutions of other countries. We also know that at this time he was interested in visiting Turkey but was unable to keep to his proposed plan of undertaking this trip (*Encyclopaedia Britannica*, 1947 edn, vol. 15, p. 760). The laws of the powerful Islamic empire so close to him could not have escaped his attention.

Indeed there are many specific references to the *Qur'an* and to the Islamic law in the writings of Montesquieu. Some of these references are pertinent to international law and are indeed appreciative, as for example his reference in Book XXIV section 16 (How the Laws of Religion Correct the Inconveniences of a Political Constitution) to the cessation every year of all hostility between the Arabian tribes for a period of four months, during which any hostility would be looked

upon as an impiety. His authority for this is Prideaux's *Life of Mahomet*. He goes on in the next section (The Same Subject Continued) to refer to a *Qur'anic* law (*Qur'an* Book 1, Chapter of the Cow) to the effect that 'he who shall injure a wrongdoer after having received satisfaction shall in the day of judgement receive the most grievous torments'. He gives this information under the comment that religion ought to produce many ways of reconciliation for the hatreds that occur in a state.

What is important to note here is that Montesquieu had access to and indeed quoted not only from the *Qur'an* itself but from biographies of the Prophet. Indeed, he went further afield and has quoted also from books of travellers in Islamic countries (e.g. *Shaw's Travels* in relation to customs of the Arabs in Barbary concerning succession to the chieftainship, and the *Collection of Voyages*, that contributed to the establishment of the East India Company – both quoted in Book XXVI section 6. He refers also to the rule of Islamic law prohibiting the drinking of wine as one fitted to the climate of Arabia (Book XIV para 10).

The Spirit of the Laws, which went into 22 editions in two years, is one of the most original and influential works in the history of jurisprudence. It was clearly not written in isolation from the Islamic texts or Islamic experience.

THE INFLUENCE OF ISLAMIC LAW ON MODERN INTERNATIONAL LAW

This was a very extensive area of influence, the full value of which has yet to be researched. It will be seen from Chapter 8 on Islamic International Law, that many of the most modern concepts of contemporary public international law, such as the principles of humanitarian treatment of prisoners of war, had been anticipated by Islamic law. Its treatises on this specific subject had anticipated by several centuries the first emergence of organised writing in the West on the subject of Public International Law. In fact the eighth-century treatise of Shaybani had been the subject of a four-volume commentary by Shamsal-Aimma Sarakhsi long before the topic became the subject of Western juristic writing.

However the question remains whether there was a nexus between the two bodies of learning. Did the Spanish theologians such as Victoria or the Dutch jurist, Grotius, commonly credited with the

first formulations of International Law as a body of doctrine, have any knowledge of or derive inspiration from the prior work in Islam? Some indications suggestive of such a knowledge by the Europeans need to be considered.

It is not proposed to enter here into the disputed question whether the Spaniards or the Dutch were the inventors of Western international law. It is sufficient to note that the Spaniards such as Victoria (1483–1548) who antedated Grotius' *De Jure Belli ac Pacis* of 1625 by nearly a century were too close in time and space to the recent Islamic civilisation in Spain to have been totally unaware of the relevant portion of Islamic learning. The impact of Islamic thinkers upon international law is examined in greater detail in Chapter 8.

THE INFLUENCE OF ISLAMIC LAW ON MODERN COMMERCIAL LAW

Any study of the golden age of Islamic civilisation, which comprised the period from the eighth to the thirteenth centuries, brings out not only the intellectual achievements of the age but also its commercial prosperity. As with the Roman Empire at its height, when Rome was the world's intellectual and commercial centre, so it was with the Islamic world. Immense warehouses stocked produce brought from all corners of the world and the produce of the Islamic world likewise reached the most distant countries. Cordova, Baghdad, Damascus, Cairo and other flourishing cities housed trading enterprises of a magnitude unknown before.

The development of commercial law has always followed on the heels of trade. Foreign traders needed protection, trading agreements needed to be honoured, credit arrangements needed to be worked out in elaborate detail. When the Islamic world led the world's trade and commerce these arrangements naturally received much elaboration at the hands of the Islamic jurists. Indeed, this became a natural extension of one of the basic principles of Islamic law that contracts should be honoured and performed in good faith.

In a study of the influence of Islam upon law and society by D. De Santillana, the eminent Italian jurist has this to say (De Santillana, 1931, p. 310):

> Among our positive acquisitions from Arab law, there are legal institutions such as limited partnership (*girad*), and certain techni-

calities of commercial law. But even omitting these, there is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts, and therein lies its enduring merit.

In the sphere of international trade, the Arabic word *tariff* survives as a reminder of the influence of Arab concepts on European commercial law.

There is scope for much research on the influences of Islamic law on European law in general. Research along these lines has commenced and a substantial work in four volumes (Abdullah, 1947) compares and contrasts the Islamic and French Civil Codes, highlighting some striking similarities. It is to be hoped that more research along these lines will continue.

THE BIRTH OF SOCIOLOGICAL THOUGHT

Islamic scholarship contributed to world literature some of its pioneering writings on sociology. The reference here is principally to the work of Ibn Khaldun (1332–1406) who was born in Tunis and wrote and completed in 1377 an 'Introduction' to world history known as the *al-Muqaddimah*.

Before Khaldun, history consisted largely of a recital of facts and problems, the way they were solved and the attitudes of rulers and groups towards these problems. Even philosophers writing history expounded the theological and philosophical problems of the age. Khaldun on the other hand thought deeply on the reasons for the rise and fall of regimes and dynasties, the reasons for the appearance and disappearance of nations, the factors that cause the emergence of civil societies and their eventual decay. He identified several factors which later philosophers, such as Montesquieu, emphasised such as the influence of climate on civilisation. Khaldun identified group consciousness, social solidarity (cf. Leon Duguit in the twentieth century), and the concept of civilisation (i.e. 'the sum total of a society's life-style, history and culture'). He saw social solidarity as the foundation of power in an organised society.

He examined various forms of social organisation, contrasting the 'tribal' and the 'urban'. Consciousness of belonging to and supporting one's own group gradually developed into consciousness of belonging to an elite group. This becomes the nucleus for the formation of a

state, with various sections within it developing an *esprit de corps*. There is a growing affluence among members of the dominant group leading to a demand for luxury goods and a division of labour and skills. Other groups develop within the society and rise to a position of ascendancy. The earlier group loses cohesion and power, often relying on professional defenders and eventually gives up its superiority to the new group.

Khaldun subjects even such concepts as prophethood to critical analysis. Profoundly original in its conception, the *Muqaddimah* was, as Ilse Lichtenstadter (1976, p. 64) observes, full of brilliant and novel ideas. In the words of Franz Rosenthal, a translator of the *Muqaddimah*, it:

> re-evaluates, in an altogether unprecedented way, practically every single manifestation of a great and highly developed civilization. It accomplishes this both comprehensively and in detail in the light of one fundamental and sound insight, namely by considering everything as a function of man and human social organization. (Rosenthal, 1958, p. lxxxvii)

Khaldun was a world pioneer in sociological thought, anticipating in many ways the work of the modern sociologists, whose impact on legal philosophy has been significant and is increasing.

In the disciplines related to law – logic (through the Aristotelian tradition), the role and scope of reason in human knowledge (through Averroism and its impact on Thomistic philosophy), scientific method (the Islamic scientific tradition), sociology (Ibn Khaldun), politics and government (through its influence on European philosophers of liberty) and internationalism (Al Shaybani and the other pioneering Islamic studies) – the Islamic impact has been significant in the formative days of European thought. The extent of this impact has not been the subject of much research and it is certain that with more scholarship in this field many more threads of connection will be revealed. It is certainly inadequate to consider that a philosophical tradition of the magnitude of the European could have grown up in isolation especially when, in its formative days, there stood at its frontiers a developed cultural heritage which was among the most intellectually stimulating the world has seen.

7 Islam and Human Rights

The foregoing discussions lead naturally to a consideration of Islam and human rights. The topic is specially important having regard to the great importance of human rights doctrine in the contemporary world, and to the growing importance of Islam.

Human rights doctrine in Islam was a logical development from its basic postulates, namely the sovereignty of God and the revelation to the Prophet. From these postulates the basic principles of human rights such as are now enshrined in international documents followed logically as a necessary part of Islamic law. The literature of Islamic law taken by itself even without the aid of modern documents was therefore sufficient to yield the principles necessary to work out a Universal Islamic Declaration of Human Rights (see Appendix B). It is remarkable that every one of the principles set out therein, with its great similarity to the most modern formulations, can be supported on the basis of specific Islamic texts.

This aspect, not often readily perceived by the human rights scholar, was the subject of percipient comment by a Western scholar, Count Leon Ostrorog, 60 years ago, long before the advent of modern human rights doctrine. In a series of three lectures delivered at the University of London he observed:

> Considered from the point of view of its logical structure, the system (Islamic law) is one of rare perfection, and to this day it commands the admiration of the student. Once the dogma of the revelation to the Prophet is admitted as postulate, it is difficult to find a flaw in the long series of deductions, so unimpeachable do they appear from the point of view of Formal Logic and of the rules of Arabic Grammar. If the contents of that logical fabric are examined, some theories command not only admiration but surprise. Those Eastern thinkers of the ninth century laid down, on the basis of their theology, the principle of the Rights of Man, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property; described the supreme power in Islam, or Califate, as based on a contract, implying

> conditions of capacity and performance, and subject to cancellation if the conditions under the contract were not fulfilled; elaborated a Law of War of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted (Ostrorog, 1927, pp. 30–1; also Fyzee, 1964a, pp. 51–2)

An important aspect of modern human rights development is that in the post-war years it has broken through the old concept of international law which regarded a nation state's treatment of its subjects as exclusively a matter for the nation state. The true subjects of international law according to that concept were states, and individuals were merely its objects (Henkin *et al.*, 1980, pp. 804–5). Today the treatment of individuals by a state is not the concern of that state alone but is viewed as penetrating the barriers of the nation state inasmuch as it relates to the inherent dignity of every human being. Islamic attitudes to human rights were always in accordance with this most modern trend, recognising the individual as the subject rather than the object of international law, as pointed out by the current President of the International Court of Justice, Judge Nagendra Singh, in his treatise on international law in medieval India (Singh, 1973, p. 91).

INDIVIDUAL DIGNITY

Individual dignity ranks high in Islamic law and the concept of human rights fits naturally within this framework. The *Qur'an* warns repeatedly against persecution, denounces aggression, warns against violations of human dignity and reminds believers of the need to observe justice in all their dealings. The warning against persecution occurs 299 times in the *Qur'an* (Moussa, 1966, cited in Rhyne, 1971, p. 409). The *Qur'anic* verse 'Lo, Allah enjoineth justice and kindness . . . ' (XVI: 90) makes just standards of behaviour mandatory on all and towards all.

Every member of the community has the right to share public responsibility with the ruler, every individual has the right to correct the ruler and attack his decisions if he commits an error. Life, liberty, property and honour are inviolable. Indeed, 'The individual is

regarded in Islam as the most important unit of the Cosmos' (Abdel-Wahab, 1962) functioning under God and God's law.

Since this elevated positon of the individual is preordained and eternal, human freedom cannot be transitory or dependent upon a ruler. It inheres in the human condition and is immutable. 'The maintenance of freedom, therefore, cannot be temporary or for that matter discriminatory' (Rhyne, 1971, p. 409). Human freedom and dignity do not depend upon whether one belongs to the fold of Islam. Being part of the human condition these attributes belong to all humans and must be respected by every Muslim.

The tolerance enjoined by Islamic law towards non-believers is discussed elsewhere. It needs to be noted that, unlike the *jus civile* of the Roman law which only protected those who were within the jurisdiction of the Roman state, the Islamic concept of human dignity applied to all humans, irrespective of whether they were Muslims or not (Ion, 1907). Non-Muslim minorities had rights under *Qur'anic* law and directives, which no ruling majority could interfere with (Ahmad, 1956). The juristic problem which vexed the Spanish theologians of the sixteenth century – whether the infidel had rights of person or property – could not thus arise in the jurisprudence of Islam.

Islamic writers, basing their views upon the mandatory nature of the *Qur'anic* injunctions of justice and kindness and the specific passages in Islamic texts on various aspects of human rights, argue that Islamic law indeed is ahead of modern human rights doctrine. In the expressive words of one (Azzam, 1964, p. 102): 'Freedom in Islam is one of the most sacred rights; political freedom, freedom of thought, religious freedom and civil freedom are all guaranteed by Islam and carried forward to a point in the distance that has left modern civilisation behind.'

JUSTICE IN RULERSHIP

'When you rule over a people, you should rule with justice' (*Qur'an*, IV: 58). Time and time again the notion of the ruler's responsibility in this regard is emphasised both in the *Qur'an* and the *Sunna*. There was thus an obligation firmly binding on the ruler to rule justly, and never a licence to govern free of the imperative dictates of justice.

The elements in the concept of justice which pertain to human rights are spelt out both specifically and in general terms in numerous

passages, some of which will be mentioned in this chapter. All this is set against the background of punishment to the unjust ruler and warnings to him against oppression in any of its forms. 'Stay clear of oppression, for oppression is darkness on the Day of Judgment' warned the Prophet (*Mishkat al-Masabih*, vol. 1, p. 586. For this and other references, see Ibrahim, 1985, p. xciii). Conversely, 'One day in the office of a just ruler is better than sixty years of worship' and 'The most beloved in the eyes of Allah is the just ruler and the most hateful in his eyes is the unjust ruler'. (For the sources of both these *hadiths* see Ibrahim, 1985, referring to Ibn Taymiya on public and private law in Islam.)

The contents of this chapter must be read in the context of the principles set out in Chapter 5, many of which themselves embody basic human rights concepts. The reader will note in particular the notions of the supremacy of the law, of judicial impartiality and of limited sovereignty.

THE THEOCENTRIC APPROACH

A point that must be made at the outset is that the concept of human rights in Islam rests upon a foundation theoretically different from the traditional Western one in at least two fundamental ways.

In the West, human rights were fought for and extracted from those in authority through a bitter series of tussles by man against man. Rulers stubbornly withheld privileges. Subjects stubbornly fought for them. Revolutions took place and with each revolution fresh concessions were made. Further struggles built further concessions upon those initial hard-won concessions, and in this way a growing body of rights evolved through the ordeal of bloodshed and struggle.

These were hard-won secular rights and are naturally greatly prized. They represent a remarkable advance upon the pre-existing situation where even such fundamental rights as the right to life were denied.

In Islam, however, one does not view the problem against such a secular setting. The problem is not how man asserts his rights against man but how man discharges his duties towards God. It is not preoccupied with the horizontal relationship of man with his fellow man but with the vertical relationship that subsists between each man

and his Maker. If the vertical relationship is properly tended, all human rights problems fall automatically into place.

These are thus two very different relationships. Islamic human rights doctrine deals primarily with God and man and is theocentric rather than anthropocentric. Secondly, it emphasises the concept of duty rather than that of rights. These make for fundamentally different approaches to what is otherwise in the main a commonly agreed body of accepted principles. The result may now be very much the same but the route by which it is reached is different. However, the Islamic stress on relationship with the divine, and on the concept of duty, could well lead to a more dedicated and purposive commitment to human rights than might be possible in a system which depends on concessions grudgingly granted under compulsive pressures.

THE ISLAMIC THEORY OF THE STATE

It follows from the theocentric approach of Islamic law that no social contract entered into between man and man can be the sole or principal foundation on which to rest a ruler's duties towards his people. The social contract theories of the West depend upon man's covenant with man. In Islam every individual is 'in individual contract, reflecting the Covenant his soul has sealed with God; for the Covenant is in reality made for each and every individual soul' (Al-Attas, 1978, p. 70).

The Islamic citizen does not therefore seek his rights in a contract with his ruler but in a higher source which binds ruler and subject alike. The *Qur'anic* precepts 'enjoining what is right and forbidding what is wrong' (*Qur'an*, VII: 157) bind both alike. Both alike are subjects of a common sovereign. The earthly ruler is no more, at best, than a vice-regent or *Khalifa*, discharging on trust for his sovereign the duties imposed upon him from above.

Those duties are formulated in terms which unquestionably rule out capricious or arbitrary rule. 'Allah commands you to render back your trusts to those to whom they are due and when you judge between men and men that you judge with justice' (*Qur'an*, IV: 58). Rulership, one of the greatest of all trusts, is a pre-eminent field for the operation of this rule.

European philosophy, notably at the hands of St Augustine, drew a sharp distinction between the City of God and the City of Man. All

citizens are subjects of both cities, one ruled by God and his laws, the other by man and the laws of man's making. Although the principle was recognised that in the event of conflict, God's law prevailed, there were two distinct jurisdictions in this conception.

Islam viewed the problem differently. It viewed the social order of Islam as God's Kingdom on earth. In the words of a modern scholar who examines the role of the Islamic state in the light of the Islamic Covenant:

> Islam emulates the pattern or form according to which God governs His kingdom; it is an imitation of the cosmic order manifested here in this worldly life as a social as well as political order. The social order of Islam encompasses all aspects of man's physical and material and spiritual existence in a way which here and now does justice to the individual as well as to society. (Al-Attas, 1978)

The Islamic Research Academy of Al-Azhar appointed, in 1981, a committee of scholars to work on the Islamic theory of the state and its application in modern times. The committee was directed to draft an Islamic Constitutional Model in accordance with *Shari'a* principles. The Draft Constitution (published in the *Muslim World League Journal* vol. 9, no. 6 (April 1982) pp. 31–4) proclaims individual rights and civil liberties, contains principles relating to the administration of justice and incorporates provisions from the relevant international conventions and covenants. For a discussion of basic provisions with special reference to the first Islamic community, see Asad, 1980b.

THE LACK OF FORMALISM

Against such a history of deep commitment to justice in rulership it is strange to find some Western writers suggesting that Islam did not have a concept of human rights. The formalism associated with Western legal systems has contributed to this inaccurate view. Thus it has been suggested, for example, that 'Islamic legal doctrine . . . does not proceed on the basis of a purpose to protect the individual against the State' (Coulson, 1957, p. 56). The reason given for such an assertion is the absence in the Islamic system of a *droit administratif* to provide a legal remedy against the abuse of individual

rights by governmental administrative bodies and the absence of a powerful and independent judiciary 'which is the only real guarantee of individual liberty in any system'.

This assumption of a lack of relief against administrative abuse of power is questionable, for the exalted position of a judge administering Islamic law proceeded not merely from the traditional respect attaching to the office but also from the certainty that the law he administered stood above the sovereign himself.

It is a mistake, also, to look upon the formalisation of procedures as a hallmark of the availability of legal redress. When a system like the Islamic is permeated with the concepts of equality, equity and justice under the law, it is wrong to search for formalities of judicial procedure or structure as necessary prerequisites to the availability of redress. As a recent writer observes, 'The religion of Islam establishes a social order designed to enlarge freedom, justice and opportunity for the perfectibility of human beings. It also defines political, economic and cultural processes designed to promote these goals' (A. Said, 1979a). It seems unquestionable that the Islamic system did recognise a doctrine of human rights (see Nawaz, 1965) well before its Western formulations, if one makes the two distinctions earlier mentioned of the theocentric approach and the emphasis on duties.

Much misunderstanding in the field of human rights has been caused by the narrowness of some Western human rights theorists who, far from conceding that the concept received recognition in non-Western traditions at a very early stage, deny that it ever existed except in the West. Thus a political scientist (Donnelly, 1982) contends that 'most non-Western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artifact of modern Western civilization.' This writer goes on to observe that human rights are 'quite foreign' to the approaches of other systems to human dignity. He sees the claim of Islamic writers that human rights are associated with duties towards God as being inconsistent with the notion of human rights. However, other Western writers have pointed out the untenability of such an approach. With special reference to the passage cited, A. D. Renteln (1985, p. 527) observes, 'These are odd criticisms since human rights are often perceived as deriving moral authority from religious sources and have been denied to various groups in the history of the Western world as well. In short, Donnelly's objections appear to stem from his

peculiarly narrow concept of human rights, one which reflects his cultural biases.' Further authority for the proposition that human rights norms often derive moral authority from religious sources will be found in Arlene Swidler (1982).

ALTERNATIVE ROUTES TO HUMAN RIGHTS DOCTRINE

One can reach the result of the existence of human rights in Islam by alternative routes. One is through an analysis of the *Shari'a* doctrine of government or administration (*Syasa*) which according to the commentators, e.g. Ibn Farhun (see Coulson, 1957, p. 51 n. 4), aimed at the performance of six functions: the protection of life, lineage, mind, character and property and the elimination of corruption.

The second is to search the materials – the *Qur'an*, the *hadith* and the *jitihad* – for the principles underlying Islamic law. Among these will be found, as Abdul Aziz Said points out (1979a, pp. 63–8), the principles of human dignity, the unity of mankind, the protection of minorities, collective obligation for the public welfare, the sanctity of life, the promotion of knowledge and responsibility towards future generations.

A recent author (see R. Hassan, 1982) groups these rights as follows:

1. General Rights:
   - (a) Right to Life (*Sura* VI.151; V.35)
   - (b) Right to Respect (*Sura* XVII.70)
   - (c) Right to Justice (*Sura* V.9; XVI.91; LIII.38; LIII.39)
   - (d) Right to Freedom (*Sura* IV.36; XXIV.33; IV.92; XLII.21; XII.40; II.256)
   - (e) Right to Privacy (*Sura* XXIV.27–28; XXXIII.53; XXIV.58)
   - (f) Right to Protection from Slander and Ridicule (*Sura* XLIX.11–12; XXIV.16–19)
   - (g) Right to 'The Good Life'
   - (h) Other Rights,
     e.g. Right to a place of residence (*Sura* II. 85)
     Right to a means of living (*Sura* XI.6, VI.156)
     Right to seek knowledge (greatly emphasised in the *Qur'an*)

Right to enjoy the bounties created by God (*Sura* VII.32)
Right to asylum (*Sura* IV.97–100)
Right to freedom of movement (*Sura* LXVII.15)
and many others.

2. Rights of Men, Women and Children, e.g. the special protections of women and children.

It is an interesting reflection that the secular nature of human rights in the West may have been the result of reliance by Church and state on Platonic rather than Aristotelian philosophy, which gave those in authority many prerogatives over the individual. A philosophical basis had therefore to be evolved, through the work of such philosophers as Locke, Rousseau and Paine, to prevail over the philosophical basis on which those in authority sought to preserve their supremacy and keep the average citizen in his place as an object of rulership rather than a participant in the process. In Islam there was accommodation for these rights within the original religious system itself and in the main sources of law, as expounded from the very commencement of Islamic jurisprudence. There was hence no need for a new ideological framework, nor for a purely secular struggle to win them on a purely secular basis.

Either route points to the existence of what can only be described as a well developed set of protections of a sort which we today call human rights.

Many an Islamic monarch strove hard to live up to these guarantees, though, as with every system, there were others who did not. The Moghul Emperor Akbar typifies the first approach and it is well known that due process of law, fair trial and an independent judiciary were all guaranteed by him. It is well known also that all faiths were respected and that Jains, Parsees, Hindus and Christians all took their share in the administration of Akbar's empire.

All this ties in with a view of Islamic law as being modern in its formulation of concepts and goals. It fits into the aspirations of the twentieth century as it did into the age of its formulation.

THE UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS

Islamic jurists did not therefore have to grapple with any of the fundamentals of their faith or of its teaching over the centuries when

they felt impelled by the forces of the contemporary world scene to formulate the Islamic position in relation to human rights. They addressed themselves to this task at the International Islamic Conference held in Paris on 15 September 1981 to mark the beginning of the fifteenth century of the Islamic era. The document that emerged (Appendix B) the *Universal Islamic Declaration of Human Rights* (see *European Human Rights Reports* vol. 4 (1981) pp. 433–41) was proclaimed by the Islamic Council of Europe. Framed by eminent Islamic scholars and representatives of Islamic movements across the world, the document proclaimed in its preamble that the human rights decreed by the divine law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice. It stresses further that by virtue of their divine source and sanction these rights can neither be curtailed, abrogated nor disregarded by authorities or other institutions, nor can they be surrendered or alienated.

The Lockean idea of inalienable rights fits easily within the *Qur'anic* framework, as does the idea of constraint upon the authorities. Article 12(c) declares that it is not only the right but also the duty of every Muslim to protect and strive against oppression even if it involves challenging the highest authority in the state. Article 6 gives every person protection against official abuse of power.

Among other articles of the Declaration are those guaranteeing the Right to Life (Article 1), the Right to Freedom (Article 2), the Right to Equality and the Prohibition of Discrimination (Article 3), the Right to Justice (Article 4) and the Right to Fair Trial (Article 5). Article 11 formulates the principle that it is the right and obligation of Muslims to participate in the conduct and management of public affairs.

In a Muslim country religious minorities are declared by Article 10 to have the choice to be governed in respect of their civil and personal matters by their own laws, and the *Qur'anic* principle, 'There is no compulsion in religion', governs the rights of non-Muslim minorities.

Economic and social rights, deriving, as we have seen already, from Islamic principles (Article 16) include rights relating to the status and dignity of workers, rights in relation to *zakat* or the share of the poor in the wealth of the rich (Article 15(d)) and the right that all means of production should be used in the interest of the community (*ummah*) as a whole and may not be neglected or misused (Article 15(e)). The right to food, shelter, clothing, education and

medical care consistent with the resources of the community is also laid down (Article 18).

The entire scheme of rights is placed in context by explanatory note 2 which states that each one of the human rights enunciated in the Declaration carries a corresponding duty.

Islamic jurisprudence is thus much in tune with current international jurisprudential and human rights thinking. There is no doubt that a new era of Islamic jurisprudence lies ahead, as full of vitality as any of the ages past and as full of determination to make of the Islamic law an instrument relevant to the solution of the most complex and modern problems conjured up by the present technological age.

Indeed, some of the inadequacies of current human rights doctrine result from overemphasis on unbridled individualism, which Islamic law has sought to avoid. All values are set in the context of the community. An individual pursuing his individual rights of contract, property, free speech or trade to the point of conflict with community interests may find little in individualistically oriented legal systems to restrain him. However, in the Islamic legal system he would find the law coming down hard on the side of the communal interest when such excessive claims are made. This necessary qualification of modern human rights doctrine is deeply embedded in Islamic law. It bears many similarities to Rousseau's concept of the general will and probably provided him with his conceptual model.

THE CONDUCT OF STATE BUSINESS

We have already referred to the notion of democratic participation when discussing basic Islamic legal ideas in Chapter 5. Many traditions of the Prophet show that when he was the ruler of the first Islamic state in Medina he consulted the people in their affairs. He did this despite the unique position of authority he enjoyed. Thus Aishah is reported as saying, 'I have not seen a person consulting the people more than the Prophet. He said that if Abu Bakr and Umar go together on an opinion he would not go against that' (Qazi Thanaulla, *Commentary on the Qur'an*, cited by S. R. Hassan, 1974, p. 105).

Numerous historical instances are recorded of such consultation. The Prophet would accept the decision of the majority even when it

went contrary to his own, as when he was of the opinion, before the battle of Uhad, that the Muslims should stay within the city of Medina to meet the enemy while the majority decided that the battle should be fought outside the city. The majority view was honoured. However if the majority view was in conflict with divine revelation the former would not be followed.

This epitomises the approach of Islam to the question of government. The ruler's power is held on trust from God. Apart from that relationship and compliance with God's law, he has no right to rule. But even within this framework he has a duty to consult and draw his subjects into a democratic participation in the processes of government.

'I asked the Prophet,' runs a passage from one of the texts, (*Ruhul Ma'ani*, vol. xxv, p. 42, cited in S. R. Hassan, 1974, p. 106), 'how to settle the affairs left without the guidance of the *Qur'an* and the *Sunnah*. He replied that we should convene meetings of the *Shurah* [Assembly] comprising of the pious persons of the *Ummah* [Community] and decide it thereby. He prohibited them from following the opinion of a single person.'

Democratic participation also dovetailed into the egalitarianism of Islam for no one was superior to any other except on the basis of piety and virtue. Official position gave no superiority.

The history of Islam provides numerous precedents for democratic consultation. An interesting illustration arose after the battle of Hunain. The spoils of war had been distributed among the members of the Muslim state. Thereafter a deputation of the defeated people of Taif waited on the Prophet and stated that they had embraced Islam. They asked for the return of their property, whereupon the Prophet asked that a vote be taken on whether the people were prepared to return the property they had received. If they were not, there would be no compulsion but the state would pay compensation to the people of Taif.

The usual machinery for consultation was the *Majlis*, consisting of representatives of the people.

The *Shura* consisted of two houses – the *Majlis i Aam* and the *Majlis i Khas* – corresponding very much in principle to the two houses of modern legislatures. The first house consisted of general representatives of the people and the second was an assembly of the learned. A ruler was bound by the opinion of the *Shura* and had no right of veto (*Tabari*, vol. III, p. 450; S. R. Hassan, 1974, pp. 106, 108).

Another aspect of democratic principle, very much along the lines later elaborated by Locke, was that the people could impeach the caliph if he failed to perform his functions according to his trust. Indeed, some of the commentaries place this procedure at the level of an obligation, making it obligatory on the community to impeach a head of state who runs the government without consulting the learned and the people's representatives (S. R. Hassan, 1974, p. 108).

Among grounds for impeachment are a flagrant violation of the provisions of the *Shari'a* and failure to fulfil the duty to implement what is lawful and prohibit what is unlawful.

SOME ISLAMIC CONTRIBUTIONS TO CONTEMPORARY HUMAN RIGHTS

Modern applications of much unbridled individualism take many forms such as anti-social land use, pollution, multinational corporate exploitation, cornerings of markets and communications monopolies. This last has been the subject of new formulations of human rights in the context of the New World Information Order formulated in 1978 by M. Mahmoudi, Tunisian Secretary of State for Information. The document, placed before the International Commission for the Study of Communication Problems, highlighted the monopolist position of the world's largest transnational news agencies. Western individualistic approaches to human rights are not equipped for dealing with this vital human rights problem of today, for control over the flow of information between the developed and developing nations disregards cultural, moral and political values of the weaker states. Problems such as this, which will be vital for the future and on which UNESCO and other international organisations have worked intensively, require Western countries to modify their individualistic approaches and accept some of the broader values available in other views, such as the Islamic.

This difference in ideological approach to human rights as between the Western world and Islamic jurisprudence was expressed well by the representative of Saudi Arabia in the debates on the Universal Declaration in the Third Committee of the UN (The Committee on Social, Humanitarian and Cultural Affairs). He drew attention to the fact that the Declaration was based largely on Western patterns of culture, which were frequently at variance with the patterns of the

culture of the Eastern States (see *Yearbook of the United Nations 1948–49*, p. 528). However he added 'that did not mean . . . that the Declaration went counter to the latter, even if it did not conform to them'.

This difference in approach appears also in the debates preceding the adoption of draft articles on economic, social and cultural rights. At the fifth session of the General Assembly, when it was suggested that such rights be included immediately in the draft articles, the USA, the UK, Canada, Israel, The Netherlands and New Zealand were among the countries opposed to such inclusion. Afghanistan, Egypt and Lebanon were among the countries that considered that such provisions were an essential part of human rights and should be incorporated in the Covenant. As the later history of human rights has shown, this is now considered so integral a part of human rights that no current discussion of human rights is complete without them.

Of even greater importance was the right to self-determination which is today considered by many to be the most important of human rights for, without it, all the rest lack meaning.

On the eve of the fifth session of the General Assembly, in November 1950, a proposal was brought before the Third Committee by the representatives of Afghanistan and Saudi Arabia that the Human Rights Commission study in depth the problem of the right of peoples and nations to self-determination. The Saudi Arabian delegate drew pointed attention to the fact, which Western proponents of human rights chose simply to ignore, that in the absence of an article containing the right to self-determination, colonial and mandatory powers would be merely encouraged to postpone indefinitely the establishment of equal rights among all nations.

With the accumulated wisdom of the many years that have passed since then, we see how important this view has been to the future development of human rights. The ability to pinpoint this feature at that early stage and to have stressed its importance was no doubt attributable in the delegates mentioned to the more rounded view of human rights in their totality, which had been inculcated in them by the perspectives of Islamic jurisprudence. When eventually the right to self-determination came to be included in both Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights) and became axiomatic, the countries of the Third World had taken human rights far beyond their traditional Western formulation.

The contribution of the Islamic nations to this result was considerable and it is indeed the reverse of the truth for Western jurists to

suggest that there was no doctrine of human rights in Islamic jurisprudence. In fact the Islamic concepts took the doctrine of human rights well beyond their Western formulation by reason of the more rounded and community-oriented attitudes of Islamic law (see generally Tyagi, 1981, pp. 122*ff*).

The emphasis on rights needs to be tempered with a corresponding emphasis on duties. The emphasis upon purely material values needs to be tempered by an emphasis on the social, cultural and humanistic values which tend to be obscured by a discussion of purely civil and political rights. On all of these problems of the future Islamic jurisprudence has many insights to offer. It is not without reason that the Islamic world, conscious of the contribution it can make in these fields, has sprung into revitalised human rights activity in recent years. Conferences on Islam and Human Rights are now a regular feature of the international human rights scene. Some idea of the extent of the literature in this field may be gathered from the brief bibliography appended to this volume.

8 Islamic International Law

This book has continually stressed the importance to world peace of a better understanding and appreciation of Islamic law. Given the vastness of the world's Islamic population, this by itself is a conclusive argument for a wider familiarity with some of its basic perspectives of international law.

PAST AND CURRENT MISCONCEPTIONS

Islamic international law constitutes a vital part of the Islamic legal heritage. This is a discipline which was well developed in Islam, contrary to views which generations of prejudiced writing have instilled in the non-Islamic mind, and requires close attention in any study emphasising the international importance of Islamic law.

The reference in the preceding paragraph to 'generations of prejudiced writing' is not a sweeping generalisation. It records a hard historical fact, the reasons for which are not difficult to understand. The confrontation between Islam and Christianity was history's outstanding illustration of the confrontation of rival power blocs. A modern analogy is that between the Western world and the Communist world. During the comparatively brief period that has elapsed since the end of the Second World War, we have seen the extent of the prejudiced writing and propaganda by each of these power blocs against the other. In the Western world the very word 'communist' came to have the same wicked overtones as, in the Communist world, were attracted by the words 'capitalist' and 'reactionary'.

Against this background, when we reflect that for ten centuries the world of Christendom had only one major ideological and military opponent – the world of Islam – the comparison becomes meaningful. The worlds of Buddhism, of Hinduism and of Confucian culture were too far away to be threats either ideologically or militarily. For ten centuries, however, Islam stood at the doorstep of the world of Christendom, sometimes knocking for entry, sometimes forcing open the door, but always an apparent threat to its religious ideology and power structure.

It was no wonder therefore that in these ten centuries Islam was misrepresented as a force for evil by whatever media lay at the command of the age. Scholarly writing and religious preaching were the principal media available and the distortion and indoctrination continued for centuries through these media. Islam was represented as being wicked, blasphemous and opposed to all that civilisation stood for – although it stood for moral values, intellectual advancement and the rule of law. When the direct military threat ceased, around the sixteenth century, the same attitudes of prejudice continued, for Islam was still the world force which was a counterpoise to the world of Chistianity.

There have indeed been many sympathetic and truly appreciative works by Westerners and Christian researchers into Islam and its ideals. Among works of this sort in the last century were T. W. Arnold's, *The Preaching of Islam* (1896) which embodied a large amount of patient research; R. Bosworth-Smith's, *Mohammed and Mohammedanism* (1889); and the Rev. W. R. W. Gardner's many books including the *Qur'anic Doctrine of Sin* and the *Qur'anic Doctrine of Salvation* (1913–14): all of which sought with great earnestness and scholarship to present Islam's elevating doctrines without prejudice to a world emotionally unprepared to receive them. These works were, however, few and far between and minuscule in volume compared to the overpowering weight of Western writing openly antagonistic to Islam and not prepared, therefore, to examine it in detached and scholarly fashion.

As the *Cambridge History of Islam* observes (Holt *et al.*, 1970, p. 30), in discussing the difficulties of occidental readers in attaining a balanced understanding of Islam and its Prophet:

> Another difficulty is that some occidental readers are still not completely free of the prejudices inherited from their medieval ancestors. In the bitterness of the Crusades and the other wars against the Saracens, they came to regard the Muslims, and in particular Muhammad, as the incarnation of all that is evil, and the continuing effect of the propaganda of that period has not yet been completely removed from occidental thinking about Islam.

In the Islamic world, likewise, an attitude of opposition and intolerance to the Christian world appeared in its literature and to this day there is, unfortunately, some traditional academic writing which exhorts Muslims to adopt an attitude of intolerance towards

non-Muslims. Many writings in the English language emanating from the Islamic world exhibit a sharpness of criticism and an attitude of hostility to the Western world which can only generate ill-will in return, and it can well be understood how bitter the attitude may be which is reflected in some of the writings which have not been translated from their originals. Such extremist writing is to be deplored, for it breaks down possibilities of harmonious coexistence so essential for a peaceful world order.

Part of the Western misrepresentation of Islam was that Islam had no system of international law, no respect for treaties, no concept of human rights and no regard for the rights of neighbouring states.

The exponents of Western international law indeed adopted so supercilious an attitude towards non-Christian nations that it was only in 1856 that Turkey was permitted, by Article 7 of the Treaty of Paris, to participate in sharing the advantages of European public law. This concession was made in view of Turkey's acceptance of European international law as governing its foreign relations. The rest of the Islamic countries were still considered beyond the pale so far as international law was concerned.

The Islamic jurists developed a special branch of the *Shari'a*, known as the *siyar*, to deal with questions of international law. The sources of the *siyar* were the same as the sources of the *Shari'a*, the former being only a sub-division of the latter. Like early Christianity, Islam cherished the hope of being a universal religion and the early law relating to dealings with non-Islamic states was thought of as being a passing phase. Yet even in the earliest days of Islam, obligations such as treaty obligations towards non-Islamic states were accorded full recognition. At a later stage it became clear that even the world of Islam was not one nation state but several and that the world of Islam must necessarily coexist on peaceful terms with the non-Islamic world. Islamic international law kept pace with these changing concepts and needs and the *siyar* became, in the words of Majid Khadduri, a foremost modern authority on the subject, 'an elaborate and permanent part of Islamic law' (Khadduri and Liebesny, 1955, p. 349).

The world's earliest treatise on international law as a separate topic was by Mohammed bin Hasan Shaybani who wrote an *Introduction to the Law of Nations* at the end of the eighth century. This work, recently translated into English, by Majid Khadduri, is available under the title, *The Islamic Law of Nations* (Khadduri, 1966). A second, more advanced treatise was also written by Shaybani. Nor

was Shaybani the only writer, as we shall see. Western accounts of the origins of international law (e.g. Oppenheim, 1955, vol. 1, Chapter 1) tend to omit this phase in their consideration of the history of the subject.

THE NATURE OF ISLAMIC INTERNATIONAL LAW

Western discussions of international law focus sharply on the question whether international law is a system apart from natural law (the dualist view) or whether the two form part of a single fabric of law (the monist view). If one is a natural lawyer, basing all law upon a set of higher norms or standards, one sees all law, municipal as well as international, as part of a single fabric. If, on the other hand, one takes the view that law owes its validity to state authority, the international legal system rests upon a very different basis from the national.

Islamic international law clearly falls into the former, or monist, category. It depends upon the same sources as national or municipal law – the *Qur'an* and the *Sunna*.

Verses XVI: 91, 92 of the *Qur'an* read:

> Fulfil the covenant of Allah when ye have convenanted, and break not your oaths after the assertion of them, and after ye have made Allah surety over you. Lo! Allah knoweth what ye do. And be not like unto her who unravelleth the thread, after she hath made it strong, to thin filaments, making your oaths a deceit between you because of a nation being more numerous than (another) nation.

This verse indeed singles out one of the most sensitive issues in international law – the ability of the more powerful nations to flout their contractual and other obligations towards the weaker.

This accords with the view of the Islamic state itself as being only a trustee of power and not a central consolidated repository of sovereign and absolute power. All power issues from God; and the absolute theories of sovereignty of the Western world, such as those of Austin, are inapplicable to Islam. The dualism many Western theories see between national and international law has thus no place in Islam, for the source of all national authority is one (rather than a multitude of nation states) and the legal and moral base on which the national and international systems rest is also one.

Sura II: 177 deals with the sanctity of treaties in terms that, 'It is not righteousness that ye turn your faces towards East or West, but it is righteousness . . . to fulfil the contracts which ye have made.'

Searching for the religious base of Islamic international law one turns also to the *Sunna*, the tradition of the Prophet. The Prophet, as ruler of the first Islamic state in Medina, received delegations from other states, and sent delegations abroad. Abyssinia, whose ruler allowed Meccans to trade in his country, was one such foreign power. The many international documents recognised by the Prophet have in fact been compiled and analysed (see Hamidullah, 1956). Indeed, even before the commencement of the Islamic state in Medina, the Prophet concluded a treaty in 622 known as the Second Pledge of al-Aqaba with a delegation of Medinan tribes.

In addition to these acts there are also many sayings of the Prophet in relation to the binding effect of treaties, the recognition of foreign powers and duties of safety and protection.

A third source of Islamic international law which, as with the other sources is common to Islamic law in general, is *ijtihad*, whose operation we have noted on pp. 40–5 and a fourth source was *ijma* or consensus (see pp. 39–40). All of these sources fed the mainstream of Islamic international law and within two centuries of the foundation of Islam there were already commentators and lecturers on Islamic international law.

Among them were Abu Hanifa, the founder of the Hanafi School (699–767), Al Shaybani (749–805), commonly regarded as the father of Islamic international law, and Al-Shafi'i (767–820) the celebrated founder of the Shafi'ite school.

Al Shaybani's extensive treatise is perhaps the most detailed early work, while Shafi'i's *Kitab al-Umm* contains an exposition of numerous principles of international law. It is worthy of note that these detailed works on international law anticipated by over eight centuries the commencement of Western international law. It was only in 1625 that the *De Jure Belli ac Pacis* of Grotius, the father of modern international law, appeared. One of the sheet anchors of Grotius' formulation of international law principles was the proposition that treaties should be honoured. This had long been a principal foundation of Islamic international law. The Prophet himself had set forth the principle *pacta sunt servanda*. He called upon Muslims to perform their treaties in good faith. In fact the Muslim state, founded in 622 continued to observe a trade agreement between Mecca and the

Negus of Abyssinia which had been entered into earlier, thus recognising a form of state succession principle (Rhyne, 1971, p. 24).

THE ONENESS OF MANKIND UNDER ISLAMIC LAW

Islam has consistently emphasised the universal brotherhood of mankind. We have referred in Chapter 5 to the notion of universalism which regarded mankind as a single race, with no divisions based on nationality, race or colour. The Farewell Sermon of the Prophet proclaimed that the Arab was not superior to the non-Arab nor the non-Arab to the Arab. The fair-skinned was not superior to the dark-skinned nor the dark-skinned to the fair-skinned. All alike were the children of Adam.

Humankind is thus one community. 'Lo! This your community is a single community and I am your Lord and Cherisher: so worship me', teaches the *Qur'an* (IV: 1); and also 'Mankind was one community' (XXI: 92).

Many other passages are to the same effect. 'O Mankind! We created you from a single pair of a male and a female and made you into nations and tribes, that you may know each other, not that you may despise one another' (XLIX: 13). Likewise there is a *hadith* of the Prophet which says, 'The whole universe is the family of Allah . . . '

No priority is accorded to the needs of any one tribe, thus giving no one group licence to commit aggression upon any other. A tradition of the Prophet explicitly deals with this, for he is reported to have said, 'He is not one of us who sides with his tribe in aggression, and he is not one of us who calls others to help him in tyranny and he is not one of us who dies while assisting his tribe in injustice.' (For these and other references, see Ibrahim, 1984, pp. 129–30).

Humans are as 'alike as the teeth of a comb' and Islam thinks not in terms of any tribe or nation but of the community of mankind. Allied to this idea is that of the total sovereignty of God over all nations. The rulers of nations are at best His vicegerents and cannot hence insulate or compartmentalise their nations as though they are totally sovereign entities free to act contrary to or independently of the interests of mankind as a whole.

THE CONTENT OF ISLAMIC INTERNATIONAL LAW

The topics covered by Islamic international law range over many of the topics of the law of war and peace and of human rights and humanitarian law which are the subject of modern treatises. It will be possible in this section only to draw attention to a few of the more important aspects.

Among the most important contributions of Islamic international law were its definite rules on prisoners of war, protection of civilian populations, limitations of belligerent activities and reprisals, asylum, pardon, safe conduct, diplomatic immunity, negotiations and peace missions (Rhyne, 1971, pp. 23–4).

(a) The Law of War

Modern humanitarian law is seeking to build increasing protections for civilians, non-combatants and prisoners of war. In European international law a strong trend in this direction manifested itself in the nineteenth century when various international agreements sought to outlaw weapons of such destructiveness as to cause harm indiscriminately to civilians and combatants. In the years succeeding the Second World War this tendency has been accentuated.

Many centuries earlier Islamic international law worked out a set of principles in relation to the treatment of enemies in war. In doing this Islamic international law was breaking new ground, for although the notion of fairness towards one's enemies was an old one in many cultures, a mature elaboration of these rules in the context of a system of international law was worked out by the Islamic jurists for the first time in legal history (Al-Ghunaimi, 1968, p. 85; the author is indebted to this work for much information contained in this chapter).

Among the acts forbidden in war were:

(a) cruel ways of killing;
(b) killing of non-combatants;
(c) killing of prisoners of war;
(d) mutilation of human beings as well as beasts;
(e) unnecessary destruction of harvests and cutting of trees;
(f) adultery and fornication with captive women;
(g) killing of envoys even in retaliation;

(h) massacre in the vanquished territory;
(i) the use of poisonous weapons. (S. R. Hassan, 1974, p. 173)

Along with principles now incorporated in the Geneva Conventions, the Islamic law books contained other principles not yet incorporated in modern conventions. These principles have been collected from numerous works of authority, and from the *Qur'an* itself.

(i) Prisoners of war

In relation to prisoners of war the *Qur'an* states that after they have been subdued and captured 'thereafter is the time for either generosity or ransom until the war lays down its burdens' (XLVII: 4). A prisoner, *qua* prisoner, cannot be killed. On the contrary he must be mercifully treated. At the battle of Badr the Prophet ordered, 'Take heed of the recommendation to treat the prisoners fairly.' Clothing must be provided for prisoners, as the Prophet ordered, when at the battle of Badr a prisoner Al-Abbas was brought before him, who had no clothes (Sahih Al-Bukkari 52:142). Prisoners must be fed in accordance with the *Qur'anic* injunction 'Feed for the love of Allah, the indigent, the orphan *and the captive*, saying, "We feed you for the sake of Allah; no reward do we seek from you nor thanks"'. (*Qur'an*, LXXVI: 8).

A prisoner could be tried and punished for crimes beyond the rights of belligerency (S. R. Hassan, 1974, p. 177; Ibrahim, 1984, p. 134), but not for mere belligerency.

Concern for prisoners went further. They could not be charged for their maintenance and this was solely the responsibility of the capturing state. Their dignity was to be respected, near relatives were not to be separated and they were to be permitted to draw up their last wills, which were to be transmitted to the enemy through some appropriate channel (S. R. Hassan, 1974, p. 177). The Caliph Abu Bakr, the Prophet's immediate successor (d. 634) demanded from his victorious soldiers, in a proclamation to them, that prisoners of war be treated with pity (Nussbaum, 1954, p. 52).

At the termination of hostilities it was recommended that prisoners be released either gratuitiously or on ransom. Traditions of the Prophet indicate that he sometimes freed prisoners gratuitously and sometimes on terms such as that they should teach Muslim boys reading and writing or pay a ransom (Ibrahim, 1984, p. 135). There is

no verse in the *Qur'an* directly permitting enslavement. (On slavery see the section below.)

Ransoming of prisoners was in fact widely practised (Nussbaum, 1954, p. 52) and was the subject of important treaties, as between Harun-al-Rashid and the Emperor Nikophorus. Indeed Arabian ransoming practices influenced Christian practices in Spain (Nussbaum, 1954, p. 318 n. 25).

(ii) Non-combatants

The Prophet forbade the killing of women and children. 'Do not kill any old person, any child or any woman' runs one tradition (Sunan Abu Daud; see also A. H. Siddiqui, 1976, p. 946; M. M. Khan, p. 159). 'Do not kill the monks in the monasteries' runs another, and 'Do not kill the people who are sitting in places of worship' (Ibn Hanbal, Musnad) states a third.

Others who were protected were traders, merchants, contractors and the like who did not take part in actual fighting.

The proclamation of the Caliph Abu Bakr, already mentioned, warned his soldiers to spare women, children and old men, and required them not to take from the provisions of the enemy more than they needed (Nussbaum, 1954, p.52). In relation to booty, it is interesting that the strict rule of Islamic law, that it should be delivered to the authorities for distribution and that the treasury should keep one-fifth of it, found its way into Christian writing and was adopted by King Alfonso X in his celebrated *Sieta Partidas* to which we refer later (Nussbaum, 1954, p. 52).

(iii) Conduct on the field of battle

Unnecessarily cruel ways of killing were expressly forbidden. So was mutilation and also the mutilation of dead bodies. The Prophet's instructions to Abdur Rahman Ibn Auf prior to a campaign were, 'Do not commit breach of trust nor treachery nor mutilate anybody nor kill any minor or child' (Ibrahim, 1984, p. 133).

Honourable conduct in battle was often part of the instructions of caliphs to their commanders. Caliph Abu Bakr wrote to the commander Usamah, 'I enjoin upon you ten commandments. Remember them. Do not embezzle, do not cheat, do not break trust . . . ' (Ibrahim, 1984, p. 133).

European literature at the time of the Crusades records its surprise at the translation of some of these principles into actual practice on the field of battle. One writer, Oliverus Scholasticus, relates how the

Sultan al-Malik-al-Kamil supplied a defeated Frankish army with food.

> Who could doubt that such goodness, friendship and charity come from God? Men whose parents, sons and daughters, brothers and sisters had died in agony at our hands, whose lands we took, whom we drove naked from their homes, revived us with their own food when we were dying of hunger and showered us with kindness even when we were in their power. (Heer, 1968, p. 144)

It has also been recorded that even in the thick of battle Christian monasteries and hermitages were well known as sanctuaries for people of both religions (Heer, 1968, p. 145).

A noted historian of public international law, Professor Arthur Nussbaum, comments, regarding the observance of the principle of good faith by the opposing parties in the Crusades:

> On the whole, however, the record of Islam is definitely good on this score. The crusaders, although aggressors, proceeded on the principle that no faith need be kept with infidels. Says the noted English historian Lane-Poole, with an eye to the crusaders, 'The virtues of civilization were all on the side of the Saracens.' (Nussbaum, 1954, p. 54, citing Lane-Poole, *Saladin and the Fall of the Kingdom of Jerusalem*, 1926, p. 307)

(iv) Enemy territory and property

Time and again the Islamic literature relating to the rules of war expresses a concern for the preservation of natural vegetation, crops and livestock. The *Qur'an* itself condemns the man who 'when he holds authority makes efforts in the land to cause mischief in it and destroy crops and cattle' (II: 205). The instructions of Caliph Abu Bakr to Usamah expressly state, after forbidding the killing of women, children and the aged: 'Do not hew down a date palm nor burn it, do not cut down a fruit tree, do not slaughter goat or cow or camel except for food.'

The laws of war, as stated by Malik in the *Muwatta*, prohibit the slaying of flocks and the destruction of beehives. Shafi'i was of the view that animals were to be destroyed only if they would strengthen the enemy. There were other jurists who thought otherwise such as Abu Hanifa, but overall there were rules restricting the destruction that was permissible in war (Singh, 1973, p. 217).

(v) Weapons of war

There is a strong juristic writing in Islamic law restricting the use of poison. Poisoned arrows and the application of poison on weapons such as swords and spears were prohibited. While the Maliki jurist Khalil advised against the use of poisoned arrows, Hilli prohibited the use of poison in any form during warfare (Singh, 1973, p. 216).

However there seem to have been no restrictions on the degree of force that could be used and when the Emperor Babur used artillery for the first time it does not seem to have been the subject of juristic discussion (Singh, 1973, p. 217).

(vi) Quarter

Wanton slaughter of the enemy was prohibited. The *Qur'an* requires that enemies seeking protection must be protected: 'And if any one of the associators (non-Muslims) seek your protection, then protect him so that he may hear the word of Allah and afterwards convey him to his place of safety' (IX: 6).

Quarter may be given on solicitation or without solicitation. A well-known example of a general proclamation offering quarter dates back to the conquest of Mecca when the Prophet announced that there would be protection for all those who entered the courtyard of the Ka'ba or the house of their chief Abu Sufyan, or who shut the door of their houses or laid down their arms.

The right to request quarter extends beyond the ranks of combatants to women, the sick, the blind and slaves (see generally Ibrahim, 1984).

In the context of nuclear weapons, chemical warfare and defoliation of the countryside which are concerns of importance to contemporary international law, the Islamic tradition is of vital significance as contributing an important strand with which to strengthen current norms of humanitarian law.

(vii) Treaties

The law of treaties, in so far as they concern war, are dealt with under the general head of treaties later in this discussion.

(b) The Law of Peace

(i) Slavery

We read of slaves in the Islamic books; and narrations of the abuse of human dignity under certain regimes in the Islamic countries have

created a picture of total rightlessness among slaves. It is to be noted, however, that slavery as practised in Greece, Rome or modern America was a condition of rightlessness which had no parallel in Islamic law. In the latter, by express command of the Prophet himself, slaves were to have equality with their masters in food, clothing and dwelling. In the Farewell Sermon of the Prophet, he exhorted Muslims in these terms: 'And your slaves! See that ye feed them with such food as ye eat yourselves and clothe them with the stuff that ye wear. If they commit a fault which ye are not inclined to forgive, then part with them, for they are the servants of the Lord and are not to be harshly treated.'

In days when there were no conventions regarding the exchange of prisoners of war, Islam recognised the concept of their subjection or *istirqaq* to their master consequent on capture. This was not an obligatory or recommended condition but was permitted and was far from being a condition of rightlessness.

Slaves could thus seek manumission or release in a court of law on grounds of cruelty, harsh treatment or failure to provide maintenance. They could hold property. Only reasonable and humane service could be exacted of them, and not forced labour (S. R. Hassan, 1974, p. 179). The master's authority was not unlimited or free of the control of the state as it was under the Greeks, the Romans or indeed in America. Further, the slave had equal rights before the criminal law and anybody who committed his murder suffered capital punishment (Razi, p. 158).

It was only through becoming prisoners of war that one could be reduced to this condition of slavery. Hence slaves came also under the rules of Islamic international law in regard to the treatment of prisoners of war. So much was Islam opposed to slavery that the Prophet declared that the man who dealt in slaves was the outcast of humanity (S. A. Ali, 1917, pp. 30–1).

(ii) The law of international trade

Reference has been made elsewhere (see p. 110) to the enormous expansion of trade in the Islamic world and to the growth of fresh principles of commercial law against the background of the fundamental principle of good faith. Among matters involved in such trade were international trading treaties between states, international trading agreements between individuals, and safe conduct of traders in foreign territory.

The prevalence of a state of war did not necessarily mean the suspension of trade. It was for the state to decide what trade would or would not be permitted. In this context a tradition of the Prophet is often cited to the effect that he once sent dates from Medina to Mecca, and received hides in return, at a time when hostilities prevailed between Mecca and Medina. Nor did the outbreak of war release a debtor from liability to pay his debts. A tradition on this matter is that Muslims who owed debts to enemy aliens who were expelled from the Islamic state were ordered to pay them, the Prophet observing, 'The debts cannot be obliterated on account of war.' (See the references to these two traditions in S. R. Hassan, 1974, p. 172.)

(iii) The law of treaties

On the basis of the fundamental Islamic concept of the honouring of contracts and of good faith in their observance, the Islamic international lawyers built up principles on the observance of treaties. These were elaborated in the light of the many agreements entered into by the first Islamic state under the guidance of the Prophet and hence constituted a body of *Sunna* principles in addition to those set out in the *Qur'an*.

Al Shaybani in his treatise on international law discusses rules relating to the interpretation of treaties, examining among other matters rules regarding implied and express terms. Amendment of treaties by mutual agreement, impracticability due to fundamental change of circumstances and renunciation – basic aspects of the modern law of treaties – are discussed in the light of the *Qur'an* and the *Sunna*. Indeed the very terms of the treaty with the Quraish (The Treaty of Hudaibia) entered into by the Prophet show the way in which treaties are to be honoured even in regard to clauses that may operate against the more powerful party. Thus the clause by which the Muslims who entered Mecca were to vacate in accordance with the treaty stipulations was honoured by the Muslims even when they were strong enough to remain in the city without vacating it.

Apart from the strictly legal material, there is a vast amount of information regarding treaty practice in Islamic states. The treaties entered into between the Ottoman Empire and Christian powers (such as that between Suleiman the Magnificent and King Francis I of France in 1535), those between Islamic states *inter se*, trading agreements between Islamic sultans and European rulers or trading companies, and treaties between Moghul emperors and non-Muslim

Indian rulers are some examples. A well-known early example of a treaty in relation to the large-scale exchange and ransoming of prisoners was the treaty of 804 between the Caliph Harun-al-Rashid of Baghdad and the Emperor Nicephorus (Nussbaum, 1954, p. 47).

The correspondence has been preserved between the Emperor Humayun of India and Sultan Bahadur Shah of Gujerat, both Islamic sovereigns of the sixteenth century. Humayun writes to Bahadur Shah: 'It never occurred to me that you would transgress the limits of the meanings of [the *Qur'anic* verse] "Oh ye true believers perform your promises" and set at naught the behest of the Prophet (on whom be peace): "Verily the fulfilment of a promise is the best form of faith".' (Singh, 1973, p. 176).

The utmost good faith was required in the performance of a treaty, irrespective of formalities. Muslims were obliged to honour their treaties even with non-believers 'to the end of their term' (*Qur'an*, IX: 4) and 'not to break oaths after making them' (*Qur'an*, XVI: 93). *Pacta sunt servanda* was the underlying doctrine. The Caliph Abu Bakr, in a proclamation to his soldiers, exhorted them as follows: 'Let there be no perfidy, no falsehood in your treaties with the enemy; be faithful in all things, proving yourselves upright and noble and maintaining your word and promises truly' (Nussbaum, 1954, p. 53). As Nussbaum observes, no dispensation from treaty obligations on religious or other grounds is provided by Islamic doctrine.

Where a treaty was not made by a head of state but by one of his representatives, it needed ratification. A sixteenth-century example is that between the Shah of Persia and Emperor Babur of India in relation to military assistance to the latter for obtaining Samarkand. The treaty was negotiated for Babur by his emissary Waiz Mirza and upon ratification by Babur he requested 'speedy and effective support' from the Shah (Singh, 1973, pp. 188–9). Multilateral agreements signed by more than two or three states were also known, especially for accomplishing military objectives or acting in close collaboration and friendship (Singh, 1973, p. 199).

Various kinds of treaties known in Islamic treaty practice included treaties concerning exchange of territories, treaties settling political relations, treaties concerning safe conduct, performance treaties, non-aggression pacts and military alliances (Singh, 1973, pp. 178–87).

(iv) The law of diplomatic protection

Safe conduct of envoys and foreigners was a well-known Islamic institution called *aman*. It was known also to earlier systems such as

the Roman but was worked into the fabric of Islamic international law as an important principle.

It was also a part of the Islamic tradition to show honour and regard to foreign envoys. The envoys of Abyssinia were ceremoniously received by the Prophet and he afforded them complete immunity. Indeed there was a Master of Ceremonies who received envoys prior to their presentation to the Prophet. Envoys were received with much honour by the Prophet and the Caliphs, who wore special robes for such occasions. The Prophet received foreign envoys in the Mosque at a spot still commemorated by the Pillar of Embassies. Foreign envoys were also presented with gifts. The importance of the subject is shown also by the existence of a classical treatise on diplomacy by Ibn al Farra. (For this and other references see S. R. Hassan, 1974, p. 164.) Students of history will no doubt recall the many embassies and gifts exchanged between the splendid imperial courts of Charlemagne and Harun-al-Rashid – contemporary emperors each of whom captured the imagination for several centuries of the civilisation to which they belonged.

From the foundation of the Islamic state, diplomatic relations were entered into with other states. In the time of the Prophet these were chiefly religious in character but in later times the political aspect increased in importance. The Umayyad and Abbasid Caliphates, for example, were in almost continuous diplomatic negotiation with the Byzantine emperors on peace treaties, payments of tribute, exchanges of prisoners and payment of ransoms (Khadduri and Liebesny, 1955, p. 370).

In all this diplomatic activity the model to be followed was that of the Prophet and rules of diplomatic immunity in Islam go back to such episodes as the security given by the Prophet to the two envoys sent to him by Musaylima, who was called the 'false Prophet'. Although it was not always observed by Muslim rulers, the strong tradition in Islamic law was one of careful respect for the immunity of envoys and diplomatic missions (Khadduri and Liebesny, 1955, p. 371).

(v) The treatment of aliens and non-Muslims

This has been discussed in Chapter 5.

(vi) Asylum

The right of granting shelter to a political refugee who surrendered and asked for protection was long recognised in Islamic international

theory and practice. Such a procedure no doubt caused resentment to the country from which refuge was sought.

A well-known example of such grant of asylum occurred when King Bahadur Shah of Gujarat gave asylum to Muhammad Zaman Mirza, Governor of Bihar under Emperor Humayun. Zaman, who had been placed in confinement, effected his escape into the king's territory, whereupon the emperor demanded his return. The king refused this request and relations between the two sovereigns, friendly hitherto, deteriorated. An acrimonious correspondence ensued (see Haig, 1928, vol. IV, p. 22) leading to a permanent rupture between the two monarchs (for further details see Singh, 1973, pp. 200–6). The king's letter referred *inter alia* to 'the evils' he (Mirza) had had to suffer at the hands of 'promise-breakers' and 'the aid of a Muslim in distress (in the words of the Prophet, on whom be peace, "Help thy brother in distress") incumbent on me' (Singh, 1973, p. 204).

(vii) Recognition

Contrary to the theory that there was a perpetual state of war between the Islamic state and the non-Islamic world (*Dar-al-harb*), the doctrine of recognition of states was much practised by Islamic sovereigns.

In the first place when the idea of a single Islamic state was no longer feasible, the caliph gave recognition to other Islamic states within the domain of *Dar-al-Islam*. Thus the caliphs recognised several Islamic rulers in Central Asia and India. The Moghul emperors likewise recognised Islamic sovereigns both in India and outside.

More significantly the caliphs, the Moghul emperors and other Islamic sovereigns recognised and exchanged diplomatic envoys with numerous European, Central Asian and Indian non-Muslim states. State practice in the Islamic world thus elevated the principle of recognition to a definite place in Islamic international law (Singh, 1973, pp. 121–30). One of the better-known examples of express recognition of a non-Islamic state was the treaty, already mentioned, between Suleiman the Magnificent, ruler of the Ottoman Empire, and King Francis I of France. Article 1 of the treaty set at rest any notion that Islamic states would not grant recognition to non-Islamic, for it asserted that a 'valid and sure peace would be established between the two states and reciprocal rights granted to the subjects of each nation in the territory of the other'.

PRIVATE INTERNATIONAL LAW

Various aspects of private international law were the subjects of commentary and practical application in the Islamic world from the earliest centuries of Islam. This was the natural consequence of the fact that, with the vast expansion of Islam, innumerable non-Islamic peoples came within its sway.

Problems of conflicts of laws could arise between Muslims and non-Muslims, between non-Muslims of one religion and non-Muslims of another, and between Muslims themselves who belonged to different schools. All of these were subjects of juristic discussion and numerous interesting examples could arise. For example, questions of intestate succession would normally be decided according to the deceased's religious rules, but if there was a violation of the Islamic rule that a person could not bequeath more than a third of his estate to strangers, the Muslim judge would reduce the bequests to the established quota (Khadduri and Liebesny, 1955, p. 339). If the object of the will was illegal according to Muslim law it would be null and void. If it was legal under Islamic law but illegal under the testator's law, it would be invalid.

So, also, in regard to contracts and property, family relations and custody of children, procedure and jurisdiction, change of religion and the return of aliens to an enemy country from the world of Islam, elaborate rules were worked out. All of these put together made up a considerable corpus of private international law.

Islamic rule in territories such as Turkey or India invariably preserved to people of other faiths their traditional courts and laws. Hindus in India, members of the Greek Orthodox Church in the Ottoman Empire and Christians in Egypt, all enjoyed the continuance of their own personal laws. Arthur Nussbaum, the well-known historian of public international law, observes that one of the most impressive applications of this doctrine occurred after the fall of Constantinople, when the conqueror Mehemet II convoked representatives of the Greek Orthodox Church, of the Armenian Church and of the Jews to tell them that they might stay in Constantinople under their own laws and under the leadership of their religious superiors. In fact the sultan took active steps, in view of the death shortly before the conquest of the Orthodox Patriarch, to cause the Greeks in Constantinople to elect a new patriarch and the sultan treated the newly appointed dignitary with high honours (Nussbaum,

1954, p. 52). All this is a far cry from the commonly presented version of the conquest of Constantinople.

There is much work still to be done in examining the corpus of private international law as it prevailed in the early centuries of Islam. Important pioneering studies in this field have been done by Choucri Cardahi (1937). The reader interested in an overall modern survey would profit from consulting the same author's chapter on 'Conflict of Law' in Khadduri and Liebesny (1955) p. 334.

ISLAMIC LAW AND INTERNATIONALISM: THE NOTION OF *JIHAD*

A great deal of misunderstanding regarding the attitude of Islamic law to international relationships has been induced through confusion regarding the Islamic concept of the *jihad* or holy war. Some explanation of this concept is therefore necessary.

The term *Dar-al-Islam* was used to describe Islamic countries as well as non-Islamic territories held under Islamic sovereignty. The rest of the world fell within the *Dar-al-Harb*. The *pax Romana* and the *pax Britannica* were terms expressive of the prevalence of a certain legal system and its protection over vast areas of the globe, in the same way as the *pax Islamica* prevailed over the territories falling within the *Dar-al-Islam*.

What then was the attitude of the world of *Dar-al-Islam* to the world of *Dar-al-Harb*? Much has been written on this, with a strong tendency to suggest that attitudes prevalent in the early days of Islam are the attitudes that prevail even today.

It is clear that the proselytising spirit of the early days of Islam led to an attitude of war towards the *Dar-al-Harb*, for the ultimate objective was an Islamic world order. This attitude was not unique to Islam, *cf.* Deuteronomy 20:10–18:

> When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it: And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword: But the women, and the little

> ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. Thus shalt thou do unto all the cities which are very far off from thee, which are not of the cities of these nations. But of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth: But thou shalt utterly destroy them; namely, the Hittites, and the Amorites, the Canaanites, and the Perizzites, and the Jebusites; as the Lord thy God hath commanded thee: That they teach you not to do after all their abominations, which they have done unto their gods; so should ye sin against the Lord your God.

But in Islam such war was subject to many qualifications.

In the first place the Islamic laws of war required respect for the rights of non-Muslims during the course of hostilities. This applied to both combatants and civilians.

Secondly, during periods of peace or truce, which were both recognised in law, recognition was accorded to the authorities of the non-Muslim state.

A third qualification was that if a Muslim entered such territory or if he were domiciled therein, he should respect the authority of the rulers of that territory and obey its laws. If, of course, there was a conflict between those laws and his own, his obligation was to the latter.

Fourthly, the theoretical state of war did not always need to take the form of actual hostilities. It could amount to mere non-recognition or even less, for regimes within the *Dar-al-Harb* could conclude treaties with Islamic countries and enter into various forms of negotiation. The position was perhaps analogous to the *de facto* recognition accorded in modern international law to a regime which is not fully recognised *de jure* but is sufficiently established for its existence to be regarded as a fact.

Fifthly, the concept of *jihad* – the war by means of which the *pax Islamica* could spread to territories of the *Dar-al-Harb* – did not necessarily mean war. It could be a war of words, an effort to make the doctrines of Islam accepted and acceptable. The *jihad* could therefore take place by persuasion. The *Qur'an* enjoins: 'Invite (all) to the Way of the Lord with widsom and beautiful preaching; and argue with them in ways that are best and most gracious" (XVI:125).

Sixthly, there is strong support by some jurists for the view that the Prophet's practice and policy on matters of war was an attitude of defence and not offence. A *jihad* of aggression such as some of the classical writers argue for, is not, according to this view, supported by the precedents of the Prophet. For the detailed argument to this effect, see Al-Ghunaimi, (1968) pp. 180–3. According to this view the Prophet and his followers were furiously persecuted for years by the Meccans and other Arab non-believers and the Prophet's consistent practice, as evidenced even by his written orders, was to fight in defence of the Islamic state, and in response to aggression. Indeed 'it is well known that he [the Prophet] never fought foreign wars except on two occasions – once when he was compelled to do so consequent on the assassination of his envoy to the court of Busra and the second when he invaded Tabuk, which as a defensive measure undertaken to counter an overwhelming and immediate danger of an attack by the Byzantine Emperor' (Singh, 1973, pp. 90–1, citing Mohammad Ali, *The Religion of Islam*).

Seventhly, some Shafi'i jurists did not confine their world view to a two-fold divison between the *Dar-al-Islam* and the *Dar-al-Harb*, They recognised a third and intermediate situation, that of the *Dar-al-Sulh* (territory of peaceful arrangement) or *Dar-al-'ahd* (territory of covenant) (See Majid Khadduri, 'The Islamic Theory of International Relations and Its Contemporary Relevance', in Proctor, 1965, p. 27. The author is indebted to this chapter for much of the information in this section.) This theory gave qualified recognition to non-Islamic territories which had entered into treaty relations with the Islamic state.

Eighthly, it is important to view the concept in historical context. There is often, in the early days of a movement or of an idea, the concept of limitless expansion. Islam went through this phase especially between 750 and 900. Continuous expansion in a cohesive and uniting context encouraged the notion that this process could go on without limitation. Dents in this way of thinking came first from within Islam itself when the process of decentralization set in – a phase which lasted from 900 to 1500. The notion of one central authority had broken down and in its place there was an Islam which consisted of more than one political entity. As with the Roman Empire before it, two or more Islamic empires emerged, to be succeeded later by the further fragmentation of these empires into nations. The Islamic ideal of one 'nation' of Islam was politcally not practicable, though it remained an ideal in much the same way

as many Christian denominations still retain the ideal of one world under Christ.

In this context, and in the context of the geo-political realities of the need for coexistence with non-Islamic nations, the classical concept of the perpetual *jihad* or state of war became anachronistic. Treaties had necessarily to be established, regimes had to be recognised *de jure* as well as *de facto*. The impact upon Islam of the non-Islamic world as well as the fragmentation of the Islamic world itself, produced a new theory of international relations – no longer a relationship of hostility but one of enduring peace. Relationships between one Islamic nation and another came to be governed by general principles of international law no different from those between an Islamic nation and a non-Islamic one. The possibility of coexistence had been demonstrated for centuries since the treaty of 1535 between Suleiman the Magnificent and the King of France. The Islamic world's membership of the global community of nations, its acceptance of a common set of principles of international law and the proclamation of peace as an ideal of all nations has cemented this attitude.

When, therefore, the concept of *jihad* is referred to in the modern world, the many limitations discussed above must not fail to be considered. The concept, like the application of the *justum bellum* concept to the Crusades, is outdated and anachronistic if it is considered to indicate a war of Islam against the rest of the world. The current situation is indeed the opposite – a dedication to the concept of peace and the moral values of equity and fairness of dealing which Islam stresses and which are applicable to Islamic nations on the international scene.

The concept of *jihad* has contemporary relevance however as a defensive principle working for human freedom. *Jihad* can legitimately be employed for throwing off a foreign yoke – the principle of self-determination which modern international law endorses. Thus in modern Afghanistan the *jihad* concept is invoked by the liberation movement. The term *mujahideen* incorporates the *jihad* concept.

Jihad as a cornerstone of general policy in the Islamic world has, however, not survived into the modern world. Perhaps the best illustration of this was the failure of the call of the Turkish sultan in 1914 for a *jihad* under his leadership. The Muslims of French Africa, Asiatic Russia and British India did not respond to the call, nor did even the Arabs and other Muslim subjects of the Ottoman Empire.

Rather, they allied themselves with non-Islamic powers and rose in revolt against their sovereign.

THE IMPACT OF ISLAMIC INTERNATIONAL LAW ON WESTERN INTERNATIONAL LAW

The preceding sections set out some of the many areas in which Islamic international law had worked out a set of mature juristic principles. This raises the question whether this was a legal phenomenon separate from and unrelated to the resurgence of international law that occurred in the West from the seventeenth century onwards. In other words was this Western development an independent take-off or did it draw upon the pre-existing body of Islamic knowledge?

(a) Some General Observations

Any study of Western international law proceeds upon the tacit assumption that it was the West which triggered off the development of international law and that international law as we know it was a Western creation. It is submitted that such a conclusion is untenable for the following reasons: first, the prior existence of a mature body of international law worked out by accomplished Islamic jurists in textbooks upon the subject is an incontrovertible fact.

Secondly, the flow of knowledge in all departments of science and philosophy from the Islamic to the Western world, commencing from the eleventh century, is likewise an indisputable fact.

Thirdly, the fundamental rule of Western international law, *pacta sunt servanda*, worked out by Grotius in the seventeenth century is also the fundamental rule of Islamic international law, where it is based upon *Qur'anic* injunctions and the *Sunna* of the Prophet.

Fourthly, there had been contact between Christian and Islamic civilisations both in war and peace for many centuries dating back to the Crusades. The crusaders, encountering such monarchs as Saladin, saw the observance by them of principles of international law, including truces between the warring parties during which the rival leaders even met at convivial social gatherings. Peaceful contact through trade likewise exposed the West to Islamic concepts of international trade, and influenced Western commercial law. Against

this background it seems unrealistic to suggest that the West remained unaware of the body of international law worked out by the Islamic jurists.

Fifthly, although there is no doubt that a great deal of original Western thought went into the elaboration of the current principles of international law, some at least of the original impetus both in regard to the general concept and in regard to a number of specific ideas must clearly have come from the world of Islam – the only power and cultural bloc comparable to that of the world of Christianity. The philosopher looking for universals in the realm of international relations could not possibly neglect this source.

Sixthly, Western scholars were not insular in their attitudes when they set off the brilliant cultural and intellectual resurgence which led Europe to world supremacy. They built their humanistic, literary and legal traditions on whatever foundations they could draw from the ancient classical civilisations of Greece and Rome. In relation to the vital discipline of international law there was no literature from Greece and Rome comparable to their literature in private law. We do not have treatises dealing with such questions as the binding force and interpretation of treaties, the duties of combatants, the rights of non-combatants or the disposal of enemy property. The only body of literature in this discipline was the Islamic.

Seventhly, a knowledge of Arabic was part of the literary equipment of the accomplished fifteenth- and sixteenth-century scholar, particularly in Spain and Italy. Arabic literature was hence not a great unknown in the days when the first seeds were being sown of what was to become Western international law.

This brief survey will be seen in a practical context when we note that Article 38(1)(b) of the Statute of the International Court of Justice, requires the International Court of Justice to apply 'the general principles of law recognised by civilised nations'. Having regard to the large number of Islamic nations now members of the United Nations, the international law of Islam is a body of knowledge which the world court cannot afford to ignore. Indeed it must necessarily make an impact upon the content of contemporary international law.

(b) The Possible Impact upon Grotius

Since Grotius is often regarded as the focal point for the commencement of the discipline of international law, the following observations

will be of interest. No one of them is conclusive or even persuasive by itself but together they may present a thesis deserving of more systematic scholarly examination.

(i)
Grotius' mission, as perceived by himself, was to study the totality of human history, as far as was available, and to extract from it a set of practical rules which mankind must necessarily follow if the nations were to live together. For this purpose he made a monumental study of world history and could not have failed to consider Islamic history. Indeed one of his observations was that the Christian nations behaved in war in a manner which compared very unfavourably with that of pagan nations.

(ii)
The Spanish jurists who immediately preceded Grotius would necessarily have affected the thinking of Grotius, but to what extent we cannot say. If indeed the Spaniards themselves had been influenced by Islamic learning on this matter there is here an unresearched area of possible indirect influence on Grotius by the Islamic jurists.

(iii)
Grotius was not entirely unaware of the existence of some at any rate of the rules of Islamic public international law. In Chapter X, article 3 he mentions *postliminium* – the principle of international law restoring to their former state persons and things taken in war, when they revert into the power of the nation to which they belonged.

(iv)
Grotius was searching for a secular basis for the world order of the future now that the spiritual authority of the Church had broken down. He was reaching out towards a new universalism. The thought and learning of a major world culture which had produced a developed jurisprudence of its own is scarcely likely to have been ignored.

(v)
When one considers that neither the Greeks nor the Romans had produced a coherent theory of international law and that the medieval Christian Church was only groping towards this concept, it is unlikely that Grotius, who was probing universal knowledge and

experience to evolve his system, would have failed to notice the only systematic writings ever produced thus far upon the topic.

(vi)
It is true the language barrier could have stood in the way of such cross-fertilisation. Yet we must bear in mind that Grotius was far closer in history than we are to the period when Arabic learning had diffused through Europe. Arabic scholarship was strong in Spain, and The Netherlands were historically closely linked in a European system which had for long accepted The Netherlands as a sphere of Spanish influence and dominion. Since the time of Grotius the cultures have moved much further apart and it would be wrong to assess Grotius' access to these materials in the light of their modern remoteness.

(vii)
Grotius finalised his *De Jure Belli ac Pacis* in France, where he had fled after his escape from imprisonment in the fortress of Louvestein. In France he worked on his book in the chateau of Henri de Meme, where another friend, de Thou, 'gave him facilities to borrow books from the superb library formed by his father' (*Encyclopaedia Britannica*, 1947 edn, vol. 10, p.908). A 'superb library' in France in the early 1600s could not have been without a stock of Arabic books and other materials on Islamic civilisation. Moreover, if Grotius had no Arabic himself it is highly unlikely that he could not have found a translator in France.

(viii)
Grotius was also a writer on Christian apologetics, in which sphere he needed to defend the principles of Christianity against all rivals. His book, *De veritate religionis Christianae*, of 1627 (two years after *De Jure Belli ac Pacis*), was indeed used as the standard manual on this subject in Protestant colleges until the eighteenth century. It was a book, moreover, which was intended for missionary purposes and one of its target audiences was the Arab world – as is evidenced by its translation into Arabic in 1660 by Pococke, the Oxford Arabist who taught Locke. The Arab world was not therefore a world too far removed from Grotius.

(ix)
The Arab world was also close to the Low Countries in another sense. Dutch vessels were beginning to ply in eastern waters where Arab seamen had hitherto held sway, challenged only by the Portu-

guese. They were sailing as far afield as the Islamic islands of the East Indies. Indeed Grotius was retained by the Dutch East India Company as their advocate. The case which in fact drew him to a study of international law, for which he was retained by the Dutch East India Company, concerned a Portuguese galleon captured by one of the Dutch captains in the Straits of Malacca; the company sought to keep it as a prize. Grotius needed to demonstrate the untenability of the Portuguese claim that eastern waters were their private property. In demolishing this theory of *mare clausum* and making the high seas free to all nations, rival theories to *mare clausum*, especially rival theories pertinent to the area could not have escaped his attention. The well-developed maritime law of the Arabs must necessarily have been one of his areas of enquiry.

(x)

Nor was contact with Islamic rulers confined to the East. In the days of sail, when vessels hugged the coast, Dutch vessels sailing east had necessarily to deal with Arab settlements on the African coast. Portugal, Holland's rival in eastern waters, had indeed had diplomatic dealings with them as well as with black Africal rulers, e.g. the kings of Benin and Bakongo (Sanders, 1979, p. 57). Grotius, the adviser to the East India Company, could not afford to be uninformed of the best diplomatic means of advancing Dutch influence in the interplay of African, Arab, Portuguese and Dutch interests.

(xi)

We know as a matter of history that diplomatic intercourse between Muslims and Christians had been maintained for many centuries, going back in fact to the days of the First Exile of the Prophet's followers, when, under persecution, they sought refuge in the territory of the Christian king of Ethiopia. This was even before the foundation of the Islamic state. Later the classical principle of *jihad* held sway, i.e. the principle of a permanent state of war between Islamic and non-Islamic nations (see, on this, the discussion on *jihad*, pp. 145–9). This was, however, only an interlude (see Khadduri in Proctor, 1965, p. 33), and the principle of peaceful relationships among nations of different religions replaced the classical principle of *jihad*. *Jihad* was no longer adequate as the basis of the relationship between Islamic and other states and Muslim rulers made treaties establishing peace with non-Muslim states extending beyond the ten-year period provided under the sacred law. Islamic and Christian states passed through a long period of coexistence – a period which

began as a *guerra fria* (cold war) to use the words of the thirteenth-century Spaniard, Don Manuel, and ripened into a relationship conducted on the basis of equality and mutual interests. In 1535 there occurred a landmark event – the treaty of 1535 between Suleiman the Magnificent and the King of France laying down the principles of peace and mutual respect – terms offered also by articles 1 and 15 to other Christian princes willing to accept them (Khadduri, in Proctor, 1965, p. 34). This was a clear acceptance of international relationships based on peace and on the very principle *pacta sunt servanda* which Grotius was seeking to universalise. Islamic learning on this very matter, which was one of the basic teachings of Islam, was close indeed to the heart of Grotius' doctrine. With his vast erudition could he have failed to perceive it?

(xii)

Grotius was considered by the Dutch authorities of the time to be 'a high authority on Indian affairs' (Clark, 1935, p. 60) and had written a masterly survey of Dutch progress in the East Indies which had appeared in the *Annales*. He had also written his *De Jure Praedae* arising from his interest in the prize matter mentioned above. For his expertise in these matters he was selected by the States-General to represent the Dutch East India Company in the negotiations that took place in London in 1613 on the respective trading rights in eastern waters of the British and Dutch East India companies – a negotiation which the Dutch based largely upon the rights accruing to them from trading treaties with the Muslim sultans who ruled in the Malay archipelago, Grotius, as the recognised expert on these rights, must have dipped into such Islamic international and treaty law as he could find, e.g. in regard to treaty rights with the Sultan Ternate, about which there was much discussion at the London negotiations. Indeed it was Grotius who presented the Dutch case in a long speech at an audience before King James who at that stage was attempting to handle British foreign affairs personally. See generally Clarke (1935) on Grotius' mission to London on behalf of the Dutch East India Company.

Islamic international law became relevant to such negotiations in another way as well, for the more powerful Islamic sovereigns such as the Moghul emperors were averse to binding themselves by treaty to foreigners in respect of trading matters, for treaties involved compliance under Islamic law and they preferred to preserve their freedom of action by issuing imperial *firmans* or grants of trading rights

unilaterally. The significance of such settled diplomatic practice could not have been lost on Grotius, or indeed on any of the major negotiators or jurists involved in eastern affairs.

(xiii)

It is known that Grotius was in regular correspondence with Admiral Cornelis Matelief de Jonge on the policy that should be pursued by the Dutch in eastern waters (Clark, 1935, p. 61). To advise the admiral on the course he should pursue, especially in relation to the Muslim sultans and treaties with them, it would have been necessary for Grotius to dip into some sources of Islamic legal knowledge.

(xiv)

The documents prepared by Grotius for the London negotiations argued that the treaties with the Muslim sultans about spices were fully in accord with natural equity and the law of nations (Clarke, 1935, p. 77). He argued that the natural law gave peoples liberty to make their own treaties and that the 'Indians' were bound by the fact of their consent to give the Dutch a trading monopoly. The fact that honouring of contracts is a fundamental tenet in Islamic law is not likely to have been overlooked. The fundamental questions involved in the London discussions were the rights of extra-European states and of European states in relation to trade and treaties with them (Clarke, 1935, p. 81). The British reply to the Dutch case of treaty rights was that such treaties were not legally effective (Rubin, 1968, p. 120).

(xv)

It is to be noted that the question of the validity of treaties and trading arrangements between Christian and non-Christian nations was the subject of contemporary and even later juristic debate. Gentili, for example, (1933, p. 31A), was of the view that such treaties were valid and so was Vattel (1916, p. 122). Robert Ward (1973, p. 332) was critical of these treaties on the basis that they 'had the effect of amending the law of nations'. For a reference to this controversy see Singh, (1973) pp. 115–16. In arguing for the validity of such arrangements Grotius would necessarily have consulted the Spanish authorities as well as such literature he could lay his hands on, regarding the attitude to treaties of the legal system of the other contracting parties, namely the Islamic law.

Negotiation by European rulers with Islamic sovereigns had been taking place for some time. For example, we have records of the letter of Queen Elizabeth to the Emperor Akbar of India – 'the most invincible and mighty prince Lord Echebar (Akbar)' – requesting him to receive her subjects favourably and grant their request for trading privileges (Singh, 1973, p. 115). A similar letter was addressed by King James to Akbar after Akbar's death (which was as yet unknown in London) (Dodwell, 1929, p. 77). The Islamic law background to such negotiations could scarcely be described as irrelevant to all this activity which was taking place in Grotius' time and in the midst of which he was one of the chief counsellors.

(xvi)

One of Grotius' predecessors, whose influence Grotius acknowledges, was the Spanish Dominican, de Victoria. The preface to a recent reprint of de Victoria's work (Nys, 1964) examines the various Spanish writers on international law who wrote before Victoria and must necessarily have influenced him. Among them was King Alfonso X of Castile, whose *Las Siete Partidas* of 1263 has been described as 'A monument of legal science, curious alike for the number of topics treated, and for what one might call the precocity of a great number of its provisions which really are far in advance of the time when they were put forth' (Nys, 1964, Introduction, p. 62). Nys continues:

> The *Siete Partidas* deals with ecclesiastical law, politics, legislation, procedure and penal law; the law of war is the subject of extremely detailed regulations. In the second *Partida* some chapters are given to military organization and to war. As regards war, much is borrowed from the Etymologiae of St. Isidore of Seville . . . and *in many respects the influence of Mussulman law is very apparent.* Maritime law is also dealt with.

It is known, for example, that the rules in the *Sieta Partidas* that booty should be delivered to the authorities for distribution and that the treasury keep one-fifth of it were adopted from the Islamic law (Nussbaum, 1954, p. 52).

(xvii)

Reference must be made to St Thomas Aquinas, himself a Dominican who wrote on the law of war and gave form to the rather inchoate

views held till then in the Christian world in relation to war. His views on lawful conduct in war have made a lasting impact upon Western international law and must, of course, have heavily influenced Victoria. We have pointed out elsewhere that Aquinas was very familiar with the Arabic writings, especially of Averroes, from whom he drew heavily in composing his *Summa Theologica*. The Islamic principles relating to the laws of war were certainly not a closed book to him in forming his views on just conduct in war and must have had their impact on Victoria and in turn, even indirectly, on Grotius. Indeed there is direct reference in Grotius' work to the writings of Aquinas (e.g. Chapter 7.33 of *De Jure Praedae*).

(xviii)

We must note also that Grotius was preceded not merely by one Spanish theologian who wrote on the laws of war, but by many, such as Suarez and Ayala and others going all the way back to King Alfonso and beyond. All those writers wrote against the background of a dominant Islamic culture and could not have been unaware of or uninfluenced by it. For example, Suarez was born in Granada in 1548, barely half a century from the time when it was the last stronghold of the Moorish kings in Spain. Suarez' *De Legibus* appeared in 1612 and there is reason to believe that Grotius read it with interest and was influenced by its seminal ideas. On the influence of Suarez on Grotius, see Scott (1939) pp. 17a–21a. 'In any event, whatever his motives might have been', says Scott, the distinguished former President of the American Institute of International Law, 'the fact remains that the great Dutch jurist was acquainted with the *De Legibus* or he would not have cited it. And in view of this fact and the marked similarity between certain of his own concepts and those of the Spaniard, it is difficult to believe that in preparing his treatise *On the Law of War and Peace*, Grotius failed to avail himself fully (though without due acknowledgement) of Suarez' masterly treatment of natural law and the law of nations.' (Scott, 1939, pp. 20a, 21a).

(xix)

It must be noted, finally, that medieval European libraries carried the Arabic treatises on law. Charles S. Rhyne, President of World Peace Through Law, in his treatise on international law (1971, p. 23) notes this fact in observing that Islamic Law made substantial contributions to international law and theory. He notes also that Western scholars

such as Victoria, Ayala and Gentili came from parts of Spain and Italy where the influence of Islamic law was great; that great jurists and theologians like Martin Luther studied Arabic; and that Grotius recognised the humanitarian laws of war of the so-called 'barbarians'. It is to be noted also that Suarez makes free use of a range of prior Spanish writers and that there are frequent references to King Alfonso's *Las Siete Partidas*, which as pointed out earlier, reflected very clearly the influence of Islamic law (for numerous references to *Las Siete Partidas* see Scott, 1939).

The question, of course, remains: why in the extensive writings of these various publicists are the direct references to Islamic law so scant? There are copious references to the Old and New Testaments, to Roman and Greek wars and episodes and to the classical writings of Greece, Rome and Judaism, but scarcely any to the Islamic sources.

It is submitted that the answer is not far to seek. In the intensely Catholic and Christian atmosphere in the midst of which those writers – all deeply committed Christians – wrote, Islamic works could not possibly be cited as authority. It would have been not merely lacking in authority but counter-productive as being heretical and a source which Christians ought not to accept. Seeking legitimacy for these views in a Christian world which was drifting further away from Islamic and Arab culture, it was not surprising that they distanced themselves both consciously and unconsciously from these sources.

Although the specific sources came to be more and more remote, the juristic principles, the classifications and the range of concepts contained in the Islamic texts were becoming integrated into the corpus of later writing. It is submitted that there is sufficient intrinsic evidence of this linkage to make out a case worthy of further investigation.

ISLAM AND THE CONTEMPORARY WORLD ORDER

The purpose of this final section is to correct current misunderstandings regarding the position and attitude of the Islamic world in the contemporary world order. It seeks to show that, contrary to popular belief, especially in the Western world, Islam is not committed iedologically to a hostile attitude towards the rest of the world but

that coexistence in peace and harmony with the non-Islamic world is part of the message of Islam. In support of this view the author draws a number of arguments from the excellent thesis of Dr Mohammed Talaat Al-Ghunaimi, UN Legal Adviser and Professor of Public International Law at the University of Alexandria (Al-Ghunaimi, 1968). This thesis refutes many contrary positions taken up in some other works. In the present author's submission the view advanced by Professor Al-Ghunaimi is clearly to be preferred to views in some treatises to the effect that: (a) peace and order based upon the independent sovereignty of a multitude of states is incompatible with Islam; and (b) Islam's objective is a single Islamic world state (see S. R. Hassan, 1974, pp. 186–8).

The following considerations are relevant to an examination of this question.

(i) Islam recognises a diversity of nations within the world community
In more than one *Qur'anic* passage there is a reference to the division of mankind into a multiplicity of nations, as being within God's plan. 'And if thy Lord had willed, he verily would have made mankind one nation, yet they cease not differing' (*Qur'an*, XI: 118). 'Had Allah willed he could have made them one community' (*Qur'an*, XLII: 8). On the strength of these and other passages, Professor Al-Ghunaimi points out that 'the *Qur'an* stresses the fact that it is the wish of God that the world continue to be divided among different political groups' (Al-Ghunaimi, 1968, p. 195).

(ii) The emergence of Islamic International law
Islamic international law would not have grown up as a discipline in its own right if Islam's attitude to the external world was one of hostility and non-recognition. We have seen in this chapter the extent to which it made detailed provision safeguarding the rights, even in war, of those who were outside the fold of Islam. The practice of the Prophet, too, showed recognition of other states and the duty of friendliness towards them, e.g. Abyssinia. Likewise the practice of entering into treaties and the duty of honouring them are also indicative of such recognition.

(iii) The notion of equality among people and nations
The message of equality runs through all Islamic teachings. 'The Arab is not superior to the non-Arab nor the fair-skinned to the dark-skinned', said the Prophet in his Farewell Sermon. The *Qur'an*

repeatedly stresses the equality of all mankind. It is conduct, not birth or nationhood, that give superiority. 'O mankind Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you in the sight of Allah is the best in conduct' (*Qur'an*, XLIX: 13).

An even more pointed reference to equality is the verse containing the words, ' . . . that none of us shall take others for lords beside Allah . . . ' (III. 64).

(iv) Peace is the basic norm for international relations

Islam constantly stresses right and fair and just conduct. A *Qur'anic* verse already mentioned speaks of God's division of mankind into nations and tribes 'so that ye may know one another'. This is a relationship of equality, not one of dominance and subjection. Indeed Islam directly opposes such subjugation of one nation to another, condemning both political (see the *Qur'an*'s condemnation of the Pharaoh's treatment of the people of Israel – X: 91–3) and economic domination (see the references on p. 59 to Islam's insistence on the social obligations attaching to wealth). Such desires for dominance are among the root causes of war. 'Knowing one another' is a concept far from conquering or dominating one another. It is a concept of harmony with the UN's objectives set out in the UN Charter, of maintaining international peace, developing friendly relations among nations and maintaining international cooperation.

(v) The injunction that there shall be no compulsion in religion

The *Qur'an* ordains (II: 256) that 'there is no compulsion in religion'. We have already seen in some detail the extent to which tolerance was extended to non-believers under the *dhimmi* system. They had rights in the Islamic state even to the extent of entitlement to *zakat* when indigent.

The method recommended for the advancement of Islam is to 'call unto the way of thy Lord with wisdom and fair exhortation and reason' (XVI: 125), for man's free will is also one of the cardinal tenets of Islam, as it is with Christianity. It is for the individual to choose the proper way of his own free will. In both systems one finds the zealot over-anxious to win others to what he sees as the true faith and resorting therefore even to cruel compulsion as occurred under the Inquisition or under some Islamic regimes. It is submitted that such conduct runs contrary to the basic tenets of both religions.

(vi) Recognition of the dignity of other religions

It is necessary also to note that Islam does not stand in an attitude of hostility towards other religions – a matter more fully elaborated elsewhere in this work. On the contrary, its scriptures preach, as noted in the preceding paragraph, that there shall be no compulsion in religion (II: 256). Nor is it generally understood, especially in the Jewish and the Christian world, that respect for these religions is obligatory on every Muslim. The *Qur'an* states this at many points in no uncertain terms and the following passage (V: 46) is an illustration.

> . . . and We caused Jesus, son of Mary, to follow in their footsteps, confirming that which was (revealed) before him, and We bestowed on him the Gospel wherein is guidance and a light, confirming that which was revealed before it in the Torah – a guidance and an admonition unto those who ward off (evil).

See also *Qur'an*, II: 136.

The Prophet received with honour 60 delegates of the Christians of Najran (a Byzantine Christian sect). They were received in the Prophet's mosque in Medina and he allowed them to conduct their service in the mosque. By the ensuing treaty (which has been preserved) the Christians were to have the full protection of the Islamic state for themselves and their churches and other possessions, in return for the payment of taxes (Ling, 1983, pp. 324–5). This treaty, which also specifically provided for the protection of bishops and priests, served as the model for subsequent treaties with Christians in the Islamic empires. Other indications of this tolerance from the earliest days of Islam are that the Prophet had a Christian slave in his house while Islam spread throughout the Arabian peninsula and that the great Caliph Omar had a Christian slave who maintained his faith 'despite Umar's occasional preachings' (A. Iqbal, 1981, p. 71).

(vii) The attitude to war

We have already discussed popular misunderstandings in relation to the concept of *jihad* (see pp. 145–9). With this is linked the question, vital to the modern world order, of peace and aggression. *Sura* XXII: 39–40 of the *Qur'an* reads as follows:

> To those against whom war is made, permission is given (to fight) because they are wronged – and verily God is most powerful for their aid.

> (They are) those who have been expelled from their houses in defiance of right – (for no cause) except that they say 'Our Lord is God'. Did not God check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues and mosques, in which the name of God is commemorated in abundant measure. God will certainly aid those who aid His (cause) – for verily God is full of strength, exalted in might, able to enforce his will.

These passages show that war is permissible in defence – especially defence of religion. It is not permissible for personal glory or power or extension of territory. Defence of religion against persecution becomes almost a duty, for God will aid those who do so. Very significant in these verses is the reference to the places of worship of other religions – Judaism and Christianity. Even more significant is the fact that in this enumeration of places of worship, mosques come last.

Aggressive war, whatever individual Islamic rulers might have done, was thus contrary to the teachings of Islam.

Aggression, a term not defined in the UN Charter, is a comparatively new term in international law. The UN's Resolution on the Definition of Aggression, passed on 14 December 1974, was a very belated attempt at defining a concept which had long eluded definition. The UN adopted a definition of aggression as being the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations (Article 1). Article 5 pronounced that no consideration of whatever nature justified aggression and condemned aggression as a crime against international peace. Islamic theory went beyond this, including in the concept the notion of ideological aggression. Numerous verses in the *Qur'an* condemn aggression in all its forms. Ideological aggression as a result of state activity made it the duty of the Islamic state to defend its ideology, if need be by the use of force.

Modern international law is now beginning to recognise that aggression can take place even without the direct use of force. There can be an onslaught upon a nation's security through indirect means – economic wars and propaganda wars, for example – which may entitle a nation to react in self-defence. This is a new doctrine in international law and can be both very useful and very dangerous. It needs to be developed in the light of all the experience available. The

Islamic writings can make a valuable contribution (see Al-Ghunaimi, 1968, p. 209).

These factors will show that Islam is, by its traditions, ideologically committed to peaceful coexistence in the community of nations. Indeed its traditions enable it to make a specially rich contribution towards these concepts. The fact that so many Islamic nations have of their own free will subscribed to the objectives of the United Nations is also testimony to this desire for coexitence on a footing of equality rather than any desire for the imposition of its ideology upon others.

9 The Value of Islamic Jurisprudence to the Non-Islamic World

An important purpose of this study is to reveal to those outside the world of Islam some of the facets of Islamic jurisprudence which may not otherwise be readily accessible to them. We have already noted that Islam has often had an unfair press in non-Islamic countries, and the same observation applies, unfortunately, even to the world of scholarship. The treatment of matters Islamic even among scholars is often distorted by the same attitudes of cultural and national bias to which the popular media are subject.

Thomas Carlyle in his *Heroes and Hero Worship* of 1841, attempted, though with limited materials, to initiate a new approach in Western literature to the work and mission of the Prophet Mohammad. Carlyle was moved to do this by the background of animosity towards Islam then prevalent in English literature. The hostility dating back to the Crusades and more recently to the Ottoman Empire was, of course, distinctly noticeable in Carlyle's day. Sadly, this misappraisal has continued for a further century after Carlyle wrote and to this day the literature of the Western world continues to display this bias. A professor of English literature at Columbia University, Edward W. Said, has described in some detail the systematic distortion of Islam by scholars (Said, 1978) and the media (Said, 1981). Another professor, Norman Daniel (1966), describes this distortion expressively when he speaks of the 'deformed image' of Islam and the Prophet as the legacy of the Crusades in the West.

What are the values to the non-Islamic lawyer or layman of the sort of information set out in these pages? Without any attempt at being comprehensive, the following are suggested as being among the more important.

KNOWLEDGE OF THE HISTORY OF IDEAS

All great cultural, philosophical and religious systems have made their contributions to all the others. There is no system that stands as

the unique creation of its own genius. Especially as we move towards the concept of a common humanity and as our globe shrinks through modern technology, we are becoming increasingly aware of being members of a common global village.

In this setting it is shortsightedness indeed for any one system to look inwards upon itself as though it were the repository of all wisdom and the source of all ideas. The history of Islamic thought is rich in ideas. The Western world is rich likewise. The flow of thought and ideas between the two is inhibited by an invisible barrier – the barrier of ignorance and prejudice. It operates on both sides. It is hoped that a little glimpse of the richness of Islamic thought in just one department – the department of jurisprudence – will help in showing what is missed.

As the barriers break down, there will be more willingness on either side to acknowledge the riches of the other. Ideas thought to be exclusively of one group will be shown to have originated in or been influenced by the other. In law and philosophy illustrations are particularly plentiful.

And with ideas will come understanding; with understanding will come an easing of tensions; and with easing of tensions a greater prospect of global peace. Having regard to the importance of the Islamic world in the current world order, this is of vital importance.

COMPARATIVE LAW

Comparative law studies are important not merely for the different content of legal rules in each system but for differences of methodology. The method of approach to a legal problem tends to become stereotyped if one confines oneself to any one system. A view of the dramatically different approach to the same problem that results from a different historical and cultural background provides continually fresh insights, leading to continually revitalised solutions. The method of precedent in the common law can be enriched by a knowledge of the methods of analogy and of logical deduction extensively explored by the Islamic jurists. Philosophy regarding the ends of law can benefit from insights from the writings of major Islamic philosophers. Jurisprudential analysis of concepts can likewise become sharper and questions of conflict between individual and social interest more meaningfully resolved.

PRACTICAL DIPLOMACY

There will be in the future an increasing need for non-Islamic countries all over the world to negotiate with Islamic countries on a multitude of matters ranging from questions of war and peace to mercantile contracts. Such negotiation will require more understanding of Islamic attitudes, history and culture.

An excellent recent example of an opportunity lost through lack of such understanding was the hostage crisis in Iran. The USA, asserting the well-accepted principle of diplomatic immunity and right to protection, kept referring continually to the formulations of this rule in the Western law books. Islamic law is also rich in principles relating to the treatment of foreign embassies and personnel. These were not cited, as far as the author is aware, nor was the slightest understanding shown of the existence of this body of learning. Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.

It is not often sufficiently appreciated, especially in the Western world, that many of the current rules of international law are regarded by a large segment of the world's population as being principles from the rule-book of the elite club of world powers which held sway in the nineteenth century. In the midst of this general attitude of mistrust the worthy rules are tarred with the same brush as the self-serving. World cultural traditions need to be involved, where available, to bolster up and reinforce these rules.

Indeed, at the time of the hostage crisis, the author drew the attention of the US authorities to the need to research the Islamic material on this point and although this suggestion was referred to the Task Force in Washington handling the crisis, the author is not aware of any steps taken in this direction. He was never informed of any consequent action following from this proposal and can only presume that it lapsed through lack of understanding or lack of expertise in the US office handling the matter.

The same considerations apply at many other levels. The non-Islamic world neglects them at its own cost.

THE GROWING INFLUENCE OF THE ISLAMIC WORLD

There are several independent Islamic states in the world – a substantial proportion of the membership of the United Nations. They contain a population of over 700 millions. In addition, 300 million Muslims live in non-Muslim states, making a total of a billion, or nearly a quarter of the world's population. In 28 countries Muslims constitute more than 85 per cent of the population, while in 69 countries there is a significant permanent Islamic population.

Their influence in world affairs is growing and their economic strength is immense. No world order of the future is possible in which the Islamic segment of the world's population – and hence Islamic ideas – do not play a major role.

If better world understanding is to be genuinely and urgently sought, there is no road to it which does not take in, somewhere along the way, an understanding of the basic attitudes of Islam – just as there is no road to it which does not take in the attitudes of Christianity or of Buddhism. Of the major religions the greatest distortion in presentation has always been in regard to Islam, and hence the compelling nature of the need for better understanding.

The general lack of understanding of the Islamic world's strength is illustrated by the Suez Canal crisis in 1956 when an Islamic nation asserted itself against the combined might of the powerful nations of the Western world. The shock reaction to this event in the Western world was eloquent testimony to its lack of appreciation of the forces powerfully building up at the time. The reaction was similar to the shock waves that spread through Europe when Japan defeated Russia at the turn of the century, showing that Asia was no longer content to accept the hegemony of the West. The second revelation of the strength of Islam, equally shattering in its effects, was the overthrow of the Shah of Iran despite his backing by one of the most powerful armies in the world. Islam, at the grassroots level, convincingly demonstrated a strength it had not been suspected to possess.

Within Islamic states the strength of Islam is on the increase. President Zia ul-Haq of Pakistan in his recent election campaign observed that, 'without Islam Pakistan will crumble like a house of sand' and when asked for his election manifesto, replied, 'The Koran is my manifesto' (*Time Magazine*, 31 December, 1984, p. 11). One cannot do business with or understand modern Pakistan, or indeed

maintain intelligent diplomatic relations with that country, without some knowledge of the fundamentals of Islamic law. This is only one illustration. The same applies across the vast spectrum of Islamic nations.

Today, in a sector of the globe stretching from the western Sahara and Mauritania to Indonesia and Brunei, Islamic regimes take various forms – Revolutionary Islamic, Traditional Islamic, Military Islamic, Nationalist Islamic and Socialist Islamic – attesting to the power of a force which is resurgent and revitalised. It cannot be ignored and it needs to be understood.

PREVENTING THE BREAKDOWN OF A GLOBAL CONCEPT OF HUMAN RIGHTS

While the UN Universal Declaration of Human Rights and succeeding documents built up an important body of universal doctrine, there has been a mounting volume of criticism of these norms on the basis that they incorporate Western-oriented ideas and that, especially at the time of the Universal Declaration, sufficient note was not taken of other traditions, especially the Islamic. In the contemporary world, when the Islamic influence is so powerful, there is a danger that if sufficient heed be not paid to Islamic attitudes and modes of thought, the Universal Declaration and human rights doctrine in general may run into rough weather. If these are to be preserved and built upon, more understanding of Islamic legal tradition is important.

GENERATING MUTUAL APPRECIATION AND UNDERSTANDING

There is another value, somewhat more oblique, of a wider diffusion of knowledge regarding Islamic law. The current tendency to denigrate Islamic law from a distance and from a position of ignorance would then yield to an attitude of greater appreciation. This would eventually cause a reciprocal attitude of greater appreciation by the Islamic systems for the non-Islamic. There will be a greater readiness to take over the ideas from the latter which can suitably be adapted into an Islamic setting. There will also be a

greater readiness to incorporate norms of punishment whose acceptance is now nearly universal. The harsher forms of punishment of the Islamic law, such as dismemberment, still practised in a few parts of the Islamic world, are falling increasingly out of line with current world practice. There is today a school of thought which considers tempering this punishment by a greater willingness to resort to a dynamic spirit of interpretation consonant with contemporary norms – a willingness which will follow from greater mutual understanding. (See *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia,* Proceedings of the symposium held in Riyadh, 9–13 October 1976, and published by the Ministry of Interior, Kingdom of Saudi Arabia, in collaboration with the United Nations Social Defence Research Institute.)

While the all-embracing nature of the *Shari'a* is universally conceded by Islamic jurists, other, secular, codes of various sorts have thus appeared in Islamic countries, and constitutions and administrative law have been borrowed from other legal systems. Especially in the law of punishment this process has often been resorted to (Williams, 1963, p. 79).

The attitude of unwillingness to consider alternative attitudes is, in a sense, a direct reaction to attitudes of insensitive and uninformed criticism. Hopefully, this will change.

POTENTIAL CONTRIBUTIONS TO HUMAN RIGHTS

On the human rights plane we are moving towards one world as never before in the history of mankind. The Universal Declaration of Human Rights, achieved in 1948, was the greatest step in history towards the evolution of a common set of standards regarding the right to dignity of every human being. Since then a growing volume of human rights doctrine has added to mankind's common stock in this field.

It is of vital importance that this stock of human rights principles and knowledge should continue to grow. Sufficient has been indicated in these pages of the human rights tradition in Islam to show that it can be a fertile source of fresh ideas. A system which long anticipated the recent universal recognition of social economic and cultural rights has much to contribute.

Malaysian Prime Minister Mahathir Muhammad drew attention to this aspect in a speech to the Second General Assembly of the Regional Islamic Dawah Council of South East Asia and the Pacific in June 1983, when he observed, 'Indeed the richness of the Muslim world lies in its religious, cultural and ideological heritage. It can bring fresh approaches in solving the problems faced by modern man, based on its ideals of justice and the brotherhood of man, ideals which are vital to the realisation of an equitable world order.' (*Arabia: The Islamic World Review*, August 1983, p. 29.)

Islamic jurisprudence, like the book on which is is founded, straddles all human activity from the cradle to the grave. The *Qur'an* goes further and ranges from the biological cell which is man's humble origin to the Day of Judgment which is man's solemn destiny. The first verse in chronological order commences:

> Read in the name of thy Sustainer, who has created – created man out of a germ cell
> Read – for thy Sustainer is the Most Bountiful One
> who has taught man the use of the pen –
> taught man what he did not know. (*Sura* XCVI)

The last verse in chronological order (II: 281) appropriately reminds man:

> And be conscious of the Day on which you shall be
> brought back unto God, whereupon every human being
> shall be repaid in full what he has earned and
> none shall be wronged.

The span covered is the entire gamut of life. The measure used to evaluate that life is perfect justice. The standard set for human attainment in all the varied facets of its life is contained in the divine law – a law which has for innumerable millions of people provided for several centuries their supreme code of conduct.

No lawyer anywhere can afford to be unaware of its rudiments, for it is a vital part of the international juristic heritage. No concerned statesman can claim, without this irreducible minimum of knowledge, to comprehend the current international scene.

Appendix A Documents

A few documents, gathered from representative categories of the wide literature of Islamic law, are reproduced here to give the reader the flavour of Islamic legal literature. The samples chosen are necessarily brief and the selection is by no means comprehensive of every genre of legal literature.

THE BEDROCK OF ISLAM: THE *QUR'AN*

The *Qur'an*, the sacred book of Islam and the bedrock of its legal system was the subject of endless juristic interpretation.

The *Qur'an* consists of 114 chapters or *Suras* of varying lengths. Subdivisions known as *ayats* or verses number 6360. (Quotations are by *sura* and *ayat*, e.g. II: 185.) The passages repeated by the Prophet were contemporaneously memorised in their entirety, and thousands of Muslims from the time of the Prophet to this day continue the practice.

According to the *Qur'an* it is a 'Guidance for man and clear proofs of that guidance: it is also the standard between right and wrong' (II:185).

Sura II The Cow
Medina 286 verses
In the Name of God, the Compassionate, the Merciful

They who give away their substance in alms, by night and day, in private and in public, shall have their reward with their Lord: no fear shall come on them, neither shall they be put to grief . . .

O believers! fear God and abandon your remaining usury, if ye are indeed believers . . .

Wrong not, and ye shall not be wronged.

If any one find difficulty in discharging a debt, then let there be a delay until it be easy for him; but if ye remit it as alms it will be better for you, if ye knew it.

Fear the day wherein ye shall return to God: then shall every soul be rewarded according to its desert, and none shall have injustice done to them.

O ye who believe! when ye contract a debt (payable) at a fixed date, write it down, and let the notary faithfully note between you: and let not the notary refuse to note, even as God hath taught him; but let him note it down, and let him who oweth the debt dictate, and let him fear God his Lord, and not diminish aught thereof. But if he who oweth the debt be foolish or weak, or be not able to dictate himself, let his friend dictate for him with fairness; and call to witness two witnesses of your people . . . And the witnesses shall not refuse, whenever they shall be summoned. (Rodwell, 1943, pp. 51, 369–70).

THE FAREWELL SERMON OF THE PROPHET MOHAMMAD AT ARAFAT

This sermon of the Prophet Mohammad, of which slightly variant versions exist, encapsulates his lifetime's teaching and eliminates all distinctions of class and race and colour. It is one of the world's outstanding human rights documents.

Ye people! listen unto my words, for I know not whether another year will be vouchsafed to me after this year to find myself amongst you in this place.

Your lives and property are sacred and inviolable among one another even as this day and this month are sacred to all, until ye appear before the Lord and (remember) ye shall appear before your Lord Who shall demand from you an account of your actions.

Ye people! ye have rights over your wives and your wives have rights over you. Treat your wives with kindness and love; verily we have taken them on the security of Allah.

Usury is forbidden. The debtor will return the principal; and the beginning will be made with the loans of my uncle Abbas, son of Abdul Muttalib.

The aristocracy of yore is trampled under my feet. The Arab has no superiority over the non-Arab and the non-Arab has no superiority over the Arab. All are children of Adam and Adam was made of earth.*

Ye people! listen unto my words and understand me. Know that all Muslims are brothers unto one another. Ye are one brotherhood. Nothing which belongs to another is lawful unto his brother, unless freely given out of goodwill. Guard yourselves against committing injustice.

And your slaves! See that ye feed them with such food as ye eat yourselves and clothe them with the stuff that ye wear. If they commit a fault which ye are not inclined to forgive, then part with them, for they are the servants of the Lord and are not to be harshly treated.

I am leaving unto you two noble things: so long as ye will cling unto them, ye will not go astray: one of them is the Book of Allah and the other is the Tradition of His Apostle. Let him that is present tell unto him that is absent. Haply he that shall be told may remember better than he who hath heard it.

O ye that are assembled here! Have I delivered my message and fulfilled my word?

The assembled congregation cried out in one voice:

'Yea, verily thou hast.'

A sudden glow flashed upon the face of the Prophet and with eyes filled with grateful tears, he raised his trembling hands towards heaven and said thrice:

O Lord! I beseech Thee, bear Thou witness unto it.'

According to the *Shorter Encyclopaedia of Islam* there are slightly variant versions of this sermon. This translation is from S. A. Kahn (1960).

* A variant version of this paragraph in Akbar (1966) runs:

All of you come from Adam, and Adam is of dust. Indeed, the Arab is not superior to the non-Arab, and the non-Arab is not superior to the Arab. Nor is the fair-skinned superior to the dark-skinned nor the dark-skinned superior to the fair-skinned: superiority comes from piety and the noblest among you is the most pious. Have I spoken clear?

THE HADITHS OR TRADITIONS

Al Bukhari: Wills

Traditions regarding the Prophet's conduct were second only to the *Qur'an*, as a source of Islamic law. Collections of these traditions were made by scholars, especially from the second to the third centuries after his death. The statements of over 13 000 persons were recorded and the links in the chains of evidence necessitated the examination of the lives of thousands of narrators. Six collections of traditions were considered to be the most reliable, of which that of Al Bukhari was pre-eminent.

(Al Bukhari, 'Wills', Ch. III, Sect. 2) Sahad tells: I was ill. The Prophet came to visit me. 'O Messenger of God, pray God that I get home before I die.' The Prohet said: 'Mayhap God will cure thee, to be useful among men.' I said: 'I would make a will and I have only a daughter. I would will away half my estate.' Said the Prophet, 'The half is too much.' 'Then a third?' I asked, 'Yes, a third, but even a third is much.' Since then people have willed away as much as a third; for it is allowed.

(Al Bukhari, Ch. X) In the passage of Holy Writ 'if one declares a trust or makes a legacy in favour of one's kindred,' what is to be understood by 'kindred'? Tsabit, as recorded by Anas, relates that the Prophet said to Abu Talha: 'Make that land an alms for the benefit of the poor among thy kindred', and Abu Talha did so in favour of Hasan and of Obayi ben Kab. El-Ansari said: 'My father told me that he heard from Tsumama, who heard it from Anas, a saying similar to that of Tsabit; the Prophet said, 'Make the alms in favour of the poor of thy family.'

(Al Bukhari, Ch. XXII) Ibn Omar relates that Omar, in the lifetime of the Messenger of God, made an alms of one of his properties called Tsamgh, which consisted of a palm grove. Omar said: 'O Messenger of God, I possess a property which is precious to me, and I would make alms with it.' The Prophet replied: 'Give it in alms, but provide that it shall never be sold nor given away nor divided among heirs, but the fruits of it shall be used.' So Omar made alms with the property . . . It was provided that the trustee might not unlawfully draw therefrom a moderate subsistence either for himself or for a friend, but that he should not enrich himself. (Nice, 1964, pp. 47–8, translated from the French, in Frederic Peltier, *Le Livre des Testaments du Sahih d' El-Bokhari* (Algiers: Jourdan, 1909)).

DIRECTIONS OF A CALIPH TO A JUDGE

The Islamic concept of the judicial function was to a large extent free of the rigidity resulting from strict dependence on prior decisions.

Henceforth, the right to adjudication is an absolute duty and a followed *Sunna* (before Islam disputes between persons of different tribes were the basis of war, revenge, or settled by negotiations and payment of compensation irrespective of right and wrong. As between members of the same tribe the Chief decided and revenge or compensation was the rule. There was arbitration and mediation but not adjudication and no same law for all. Islam established a unified system of law which required adjudication).

Investigate any case you suspect (to bring about Right), for Right without execution (remedy) is futile.

Equalize (be equal) between the parties before you (and let equality be manifest) in your expression (demeanor) and in your judgement.

Your judgement (meaning also your attitude and disposition) should not be the basis for the noble (meaning powerful) to hope for your favor, and for the poor (meaning the weak) to despair from your justice. The burden of proof is on the accuser, and he who negates should be asked to take the oath. Reconciliation is desirable (meaning that is a preferred alternative to litigation) among Muslims except where there is agreement on something which legitimizes that which is prohibited or prohibits that which is legitimate. He who claims even a doubtful right and proves it, accord him the right (meaning that even if you doubt the merits of the claim which has been proven), but if he cannot prove it then rule against him (meaning the possibility of punishing false claimants), for (in both cases) it is the best that you can do (meaning that a judge must rule in favor of a proven claim no matter what his personal doubts are, but must scrutinize false claims to protect innocents from abuse and to insure the integrity of the judicial process, but in any event and whatever the outcome, the judge's best efforts is the best he can do, and he should seek not more of himself).

If you render a judgement and after a period of time you find it to be unjust, do not hesitate to revise it, unless it is so old that no one can change it (meaning that there is a finality in revision of judgements specially after new conditions become so established that they cannot be changed, and by implication that their revision would cause greater harm to others, which is a basic principle of equity justice). The revision of (wrong) judgements is better than preserving injustice.

Muslims are witnesses unto one another (meaning that any Muslim is a competent witness) except those who are well known for being liars and those who have been condemend for a *Had* (one of seven crimes prescribed by the *Qur'an*), or those who are close to authority (meaning the excludability of those in authority). Only Almightly God knows the intention of each one of us, and we therefore can only judge (and condemn) on the basis of proof.

If a case is presented to you and you cannot find an applicable rule clearly stated in the Holy *Qur'an* or the *Sunna*, you can reason the

solution, contemplate (deliberate judiciously), try to find an analogy (to a rule in the *Qur'an* or *Sunna*), and study the work of the wise and then render your judgement accordingly. Beware of anger, anxiety, monotony, disgust, and do not be biased against or for anyone even if he be your ally (friend).

Just judgement is rewarded by God, and rendering good judgement is appreciated by the people. If one is devoted (pious) to God and adheres to the Right, even when it is against one's own interest then God will save him (meaning save him from hell and thus reward him with heaven). He who pretends, God will punish him (meaning an admonition against hypocrisy and pretending to fulfill the duties enunciated above). God accepts from the believers only the Good (meaning that the Good is what counts, and the Good cannot be pretended, but done, though the doing is in the best efforts and not necessarily in the result).

Remember God rewards in riches (meaning both material and spiritual) and compassion (meaning also forgiveness).

Peace and blessing be on you. (Bassiouni, 1982, pp. 31–2)

Appendix B Universal Islamic Declaration of Human Rights

Islamic Council
19 September 1981

PREAMBLE

Whereas the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear, oppression, exploitation and deprivation, remains largely unfulfilled;

Whereas the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted, or unfairly or unjustly withheld from the inhabitants of the earth;

Whereas Allah has given mankind through His revelations in the Holy Qur'an and the *Sunnah* of His Blessed Prophet Mohammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

Whereas the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

Whereas by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated nor disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated;

Therefore we, as Muslims, who believe

(a) in God, the Beneficent and Merciful, the Creator, the Sustainer, the Sovereign, the sole Guide of mankind and the Source of all Law;
(b) in the Vicegerency (*Khilafah*) of man who has been created to fulfil the Will of God on earth;
(c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;
(d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and, knowing that the teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound to remind man of the high status and dignity bestowed on him by God;
(e) in inviting all mankind to the message of Islam;
(f) that by the terms of our primeval covenant with God, our duties and obligations have priority over our rights, and that each one of us is

under a bounden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;

(g) in our obligation to establish an Islamic order;

(i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language;

(ii) wherein all human beings are born free;

(iii) wherein slavery and forced labour are abhorred;

(iv) wherein conditions shall be established such that the institution of family shall be preserved, protected and honoured as the basis of all social life;

(v) wherein the rulers and the ruled alike are subject to, and equal before, the Law;

(vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;

(vii) wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the Law and in a manner approved by it, and with due regard for the priorities fixed by it;

(viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the Qur'an and the *Sunnah*;

(ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation (*Shura*) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;

(x) wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;

(xi) wherein everyone shall, in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;

(xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;

(xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

(xiv) wherein every effort shall be made to

(a) secure unto mankind deliverance from every type of exploitation, injustice and oppression.

(b) ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the Law;

Do hereby, as servants of Allah and as members of the Universal Brotherhood of Islam, at the beginning of the Fifteenth Century of the Islamic Era, affirm our commitment to uphold the following inviolable and

inalienable human rights that we consider are enjoined by Islam.

I Right to Life

(a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.

(b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II Right to Freedom

(a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.

(b) Every individual and every people has the inalienable right to freedom in all its forms – physical, cultural, economic and political – and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III Right to Equality and Prohibition Against Impermissible Discrimination

(a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

(b) All persons shall be entitled to equal wages for equal work.

(c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV Right to Justice

(a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.

(b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.

(c) It is the right and duty of every person to defend the rights of any other person and the community in general (*Hisbah*).

(d) No person shall be discriminated against while seeking to defend private and public rights.

(e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V Right to Fair Trial

(a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.

(b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him.
(c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.
(d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.
(e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI Right to Protection Against Abuse of Power
Every person has the right to protection against harassment by official agencies. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be *reasonably* raised.

VII Right to Protection Against Torture
No person shall be subject to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

VIII Right to Protection of Honour and Reputation
Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX Right to Asylum
(a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective or race, religion, colour and sex.
(b) *Al Masjid Al Haram* (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X Rights of Minorities
(a) The Qur'anic principle 'There is no compulsion in religion' shall govern the religious rights of non-Muslim minorities.
(b) In a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law or by their own laws.

XI Right and Obligation to Participate in the Conduct and Management of Public Affairs
(a) Subject to the Law, every individual in the community (*Ummah*) is entitled to assume public office.

(b) Process of free consultation (*Shura*) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII Right to Freedom of Belief, Thought and Speech

(a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.
(b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
(c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State.
(d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the State and is confined within the limits imposed by the Law.
(e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV Right to Free Association

(a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (*ma'roof*) and to prevent what is wrong (*munkar*).
(b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV The Economic Order and the Rights Evolving Therefrom

(a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.
(b) All human beings are entitled to earn their living according to the Law.
(c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.
(d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by *Zakat*, levied and collected in accordance with the Law.
(e) All means of production shall be utilised in the interest of the community (*Ummah*) as a whole, and may not be neglected or misused.

(f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.

(g) All economic activities are permitted provided they are not detrimental to the interests of the community (*Ummah*) and do not violate Islamic laws and values.

XVI Right to Protection of Property

No property may be expropriated except in the public interest and on payment of fair and adequate compensation.

XVII Status and Dignity of Workers

Islam honours work and the workers and enjoins Muslims not only to treat the worker justly but also generously. He is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure.

XVIII Right to Social Security

Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves owing to some temporary or permanent disability.

XIX Right to Found a Family and Related Matters

(a) Every person is entitled to marry, to found a family and to bring up children in comformity with his religion, traditions and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.

(b) Each of the partners in a marriage is entitled to respect and consideration from the other.

(c) Every husband is obliged to maintain his wife and children according to his means.

(d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.

(e) If parents are for some reason unable to discharge their obligations towards a child, it becomes the responsibility of the community to fulfil these obligations at public expense.

(f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age or incapacity. Parents are entitled to material support as well as care and protection from their children.

(g) Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community (*Ummah*).

(h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments,

talents and inclinations, bearing in mind their common responsibilities toward their progeny and their relatives.

(i) No person may be married against his or her will, or lose or suffer diminution of legal personality on account of marriage.

XX Rights of Married Women

Every married woman is entitled to:

(a) live in the house in which her husband lives;

(b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (*Iddah*) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own right;

(c) seek and obtain dissolution of marriage (*Khul'a*) in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts;

(d) inherit from her husband, her parents, her children and other relatives according to the Law;

(e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI Right to Education

(a) Every person is entitled to receive education in accordance with his natural capabilities.

(b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.

XXII Rights of Privacy

Every person is entitled to the protection of his privacy.

XXIII Right to Freedom of Movement and Residence

(a) In view of the fact that the World of Islam is veritably *Ummah Islamia*, every Muslim shall have the right to move freely in and out of any Muslim country.

(b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom, without recourse to due process of law.

Explanatory Notes

1. In the above formulation of Human Rights, unless the context provides otherwise:

(a) the term 'person' refers to both the male and female sexes.

(b) the term 'Law' denotes the *Shari'ah*, i.e. the totality of ordinances derived from the Qur'an and the *Sunnah* and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.

2. Each one of the Human Rights enunciated in this Declaration carries a corresponding duty.
3. In the exercise and enjoyment of the rights referred to above, every person shall be subject only to such limitations as are enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the general welfare of the Community (*Ummah*).
4. The Arabic text of this Declaration is the original.

Glossary of Arabic Terms

Sunnah	The example or way of the Prophet (peace be upon him), embracing what he said, did or agreed to.
Khilafah	The vicegerency of man on earth or succession to the Prophet, transliterated into English as the Caliphate.
Hisbah	Public vigilance, an institution of the Islamic State enjoined to observe and facilitate the fulfilment of right norms of public behaviour. The *Hisbah* consists in public vigilance as well as an opportunity to private individuals to seek redress through it.
Ma'roof	Good act.
Munkar	Reprehensible deed.
Zakat	The 'purifying' tax on wealth, one of the five pillars of Islam obligatory on Muslims.
Iddah	The waiting period of a widowed or divorced woman during which she is not to re-marry.
Khul'a	Divorce a woman obtains at her own request.
Ummah Islamia	World Muslim community.
Shari'ah	Islamic law.

Appendix C Protection of Human Rights in the Islamic Criminal Justice System

RESOLUTION*

WHEREAS the First International Conference on the Protection of Human Rights in the Islamic Criminal Justic System has been held in Siracusa, Italy, at the International Institute of Higher Studies in Criminal Sciences, May 28–31, 1979;

WHEREAS it has been established to the satisfaction of all participants from both Islamic and non-Islamic nations that the letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in complete harmony with the fundamental principles of human rights under international law as well as in complete harmony with the respect accorded to the equality and dignity of all persons under the constitutions and laws of Muslim and non-Muslim nations of the world;

WHEREAS the basic human rights embodied in the principles of Islamic Law include the following rights of the criminally accused, inter alia:

(1) the right of freedom from arbitrary arrest, detention, torture, or physical annihilation;
(2) the right to be presumed innocent until proven guilty by a fair and impartial tribunal in accordance with the Rule of Law;
(3) the application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qur'an or other crimes whose clear and well-established meaning and content are determined by Shariah Law (Islamic law) or by a criminal code in conformity therewith;
(4) the right to appear before an appropriate tribunal previously established by law;

* The First International Conference on 'The Protection of Human Rights in Islamic Criminal Justice' took place at the International Institute of Advanced Criminal Sciences in Siracusa, Italy, May 28–31, 1979 under the chairmanship of Professors M. Cherif Bassiouni and Ahmad Fathi Sorour. In attendance were 55 jurists, mostly penalists, from 18 countries. At the conclusion of the conference the participants voted unanimously (with one abstention) in support of this resolution.

(5) the right to a public trial;
(6) the right not to be compelled to testify against oneself;
(7) the right to present evidence and to call witnesses in one's defence;
(8) the right to counsel of one's own choosing;
(9) the right to a decision on the merits based upon legally admissible evidence;
(10) the right to have the decision in the case rendered in public;
(11) the right to benefit from the spirit of Mercy and the goals of rehabilitation and resocialization in the consideration of the penalty to be imposed; and
(12) the right of appeal;

WHEREAS the aforementioned rights of due process of law contained in Islamic Law are in complete harmony with the prescriptions of the International Covenant on Civil and Political Rights which has been signed or ratified by many nations including a significant number of Muslim and Islamic nations and which reflects generally accepted principles of international law contained in the Universal Declaration of Human rights of 1948, and the U.N. Declaration on the Standard Minimum Rules for the Treatment of Offenders;

NOW THEREFORE the participants of the Conference in their individual capacities, desirous of upholding the aforementioned principles and the values they embody, and desirous of ensuring that the practices and procedures of Islamic and Muslim nations conform thereto, solemnly declare that:

Any departure from the aforementioned principles would constitute a serious and grave violation of Shariah Law, international human rights law, and the generally accepted principles of international law reflected in the constitutions and laws of most nations of the world.

Siracusa
May 31, 1979

Appendix D Key Words in Islamic Law

Adhan	the *muezzin*'s call to worship.
Allah	God, the Creator.
Aman	pledge of security or safe conduct.
Asabiyyah	partisanship in judgment.
Ayat	verse of the *Qur'an*.
Bayt-al-mal	Public Treasury.
Caliph	see *Khalifa*.
Dar al-harb	territory at war with Islam.
Dar al-Islam	territory of Islam.
Dar al-Sulh	territory at peace with Islam.
Dhimmi (or *Zhimmi*)	a member of one of the peoples of the Book (Christians, Zoroastrians, Sabians, Jews).
Fatwah	formal opinion of a jurisconsult.
Faqih	jurist.
Fiqh	the science of law, jursiprudence.
Firman	imperial decree.
Hadd	a crime against the law of God, for which there is a fixed penalty – wine drinking, fornication, theft, slander, highway robbery, apostasy.
Hadith	tradition, i.e. a tradition regarding the Prophet.
Hajj	pilgrimage (to Mecca).
Hanafi	one of the four Sunni schools of jurisprudence.
Hanbali	one of the four Sunni schools of jurisprudence.
Haram	prohibited.
Hegira (or *Hijra*)	migration of the Prophet to Medina in AD 622.
Hisba	the Islamic ethic of Bidding unto Good.
Hiyal	legal devices (to get over the effect of an insupportable rule, e.g. prohibition of interest).
Ibadat	man's duties towards God, set out in the five pillars of Islam.
Ijma	the consensus of qualified legal scholars in a given generation; considered incontrovertible and infallible.
Ijtihad	general process of endeavour to comprehend the divine law.
Ikhtilaf	disagreement, difference of opinion among Muslims, which was viewed as a sign of divine indulgence.
'Ilm	knowledge, as opposed to opinion or conjecture (*Zann*).

Imam	the leader – applies to the leader of the Muslims, the leader of a school of jurisprudence, head of state.
Islam	obedience to the will of Allah; this is the preferred name of the religion.
Istihsan	equity, juristic preference.
Istishab	presumption of continuity (in juristic reasoning).
Istislah	opinion based on public interest.
Ithna-Ashari	one of the most important of the Shi'ite schools.
Jahiliyya	the pre-Islamic period when man was under man rather than under God.
Jihad	a holy or just war.
Jizya	poll tax.
Kazi	see *Qadi*
Khalifa	the descendant or successor of the Prophet – the elected ruler of the Islamic nation.
Majlis	the representatives of the people; parliament.
Maliki	one of the four Sunni schools of jurisprudence.
Mu'amalat	laws governing human relations, e.g. marriage, divorce, succession.
Muezzin	the crier who proclaims hours of prayer from the minaret.
Mufti	counsellor.
Muhtasib	administrative supervisor; custodian of public morals.
Mujtahid	the scholar exercising *ijtihad*.
Nass	text of scripture or the *Shari'a*.
Qadi (or *Kazi*)	an Islamic judge.
Qiyas	the method of deduction by analogy.
Quesas	crimes against the person, e.g. murder, homicide, maiming.
Qur'an	the holy book; the principal source of Islamic law.
Quraysh	tribe to which the Prophet belonged.
Ra'y	the opinions of jurisconsults.
Riba	usury.
Shafi	one of the four Sunni schools of jurisprudence.
Shari'a	the track or the road; a term used to describe the sacred law.
Shi'a	followers of the Shi'ite school (comprising approximately 10% of all Muslims).
Shura	the principle of democratic participation, consultation; the assembly.
Siyar	branch of the *Shari'a* dealing with the conduct of state, and international relations.
Sufis	mystics who reacted against legal formalism.
Sunna	a way of life and, more precisely in classical theory, the practice and example of the Prophet.
Sunni	followers of the Sunni school (to which the vast majority of Muslims belong).

Sura	chapter of the *Qur'an*
Tafsi	interpretation.
Taqlid	imitation, following the opinion of an acknowledged jurist.
Ulema	theologians.
Ummah	community (of Muslims).
Usul	roots or sources of the law.
Waqf	pious endowment.
Zahir	literal meaning of the *Qur'an* (hence the Zahiri school of jurisprudence).
Zakat	alms.
Zann	conjecture or opinion, as distinguished from knowledge (*'ilm*).
Zhimmi	see *Dhimmi*.
Zulm	oppression, exploitation.

Bibliography and References

Abd al Kader, A., 'Land Property and Land Tenure in Islam', *Islamic Quarterly*, vol. 5 (1939a) pp. 4–11.

Abd al Kader, A., *Islamic Review*, vol. 47 (1939) pp. 20–3.

Abdel-Wahab, S. E., 'Meaning and Structure of Law in Islam', *Vanderbilt Law Review*, vol. 16 (1962) p. 115.

Abdul Hakim, Khalifa, *Fundamental Human Rights* (Lahore: Muhammad Ashrof, 1952).

Abdul Hakim, Khalifa, 'The Natural Law in the Moslem Tradition', *Natural Law Institute Proceedings*, vol. 5 (1951) p. 29.

Abdullah, Muhammad, *Al Muqaranath al Tashri'yah* (Cairo: 1947).

Abul-Fazl, M., *Sayings of the Prophet Muhammad* (New Delhi: Award Publishing House, 1980).

Aghnides, N. P., *Mohammedan Theories of Finance, with an Introduction to Mohammedan Law and a Bibliography* (New York: Columbia University Press, 1916).

Ahmad, F., *The Principle of Equality in Islam from the Constitutional Viewpoint and Comparison with Modern Democracy* (in Arabic) (Cairo: Muassasat al-Thsqafah al-Jami iyah, 1972).

Ahmad, Muhammed Khalafalla, 'Islamic Law, Civilization and Human Rights', *Egyptian Review of International Law*, vol. 12 (1956).

Ahmad, S. M., *The Problem of Land and Islam* (Lahore: Institute of Islamic Culture, 1955).

Akbar, M. U., *The Orations of Mohammed*, revised edn (Lahore: Muhammed Ashrof, 1966).

al Alusi, Mahmud 'Abd Allah, *Ruh Al-Ma'ani* ('The First of Intentions') (Cairo: Idarat at-Taba'ah al-Muniriyyah, 1345/1926).

al Arabi, Muhammad ibn'Abd Allah ibn, *Ahkam al-Quran* ('Rules of the Koran') (Cairo: Matba'at al Sa'adah, 1331/1912).

Al-Attas, S. M., *Islam and Secularism* (Angkatan Belia Islam Malaysia, 1978).

Al-Ghunaimi, M. J., *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968).

al-Guzzali, Muhammad, *Human Rights in the Teaching of Islam* (in Arabic) (Cairo: al Makhtabat al-Tjariyah, 1962).

Ali, A. Y., *The Meaning of the Glorious Qur'an*, (Cairo: Dar Al-Kitab al-Masri, 1934).

Ali, S. A., *Mohammedan Law*, 4th edn (Calcutta: Thacker Spink, 1917).

Ali, S. A., *The Legal Position of Women in Islam* (University of London Press, 1912).

Ali, S. A., *The Spirit of Islam* (London: Allen, 1896; re-published Delhi:

Islamic Book Trust, 1981).
Ali, S. A., *The Ethics of Islam* (Calcutta: Thacker, 1893).
Al-Nawawi, *Forty Hadith*, trans. Ezzedin Ibrahim and Denys Johnson-Davies (Beirut: Holy Koran Publishing, 1976).
Al-Sayed, Abdul Malik, *Social Ethics of Islam: Classical Islamic-Arabic Political Theory and Practice* (New York: 1982).
Anderson, J. N. D., *Law Reform in the Muslim World* (London: Athlone Press, 1976).
Anderson, J. N. D., *Islamic Law in the Modern World* (New York: University Press, 1959).
Anderson, J. N. D., 'Law as a Social Force in Islamic Culture and History' *Bulletin of the School of Oriental and African Studies*, vol. xx (1957).
Andrae, Tor, *Mohammed, The Man and his Faith* (New York: Harper and Row, 1960).
Arberry, Arthur J., *The Doctrine of the Sufis* (Cambridge: 1935; revised, Lahore: Muhammad Ashrof, 1966).
Arberry, Arthur J., *Revelation and Reason in Islam* (London: Allen and Unwin, 1957).
Arberry, Arthur J., *The Koran Interpreted* (London: George Allen and Unwin, 1955).
Arberry, Arthur J., *Avicenṇa on Theology* (John Murray, 1951).
Armanazi, Najib, *L'Islam et le Droit International* (Paris: Picart, 1929).
Armanazi, Najib, *Les Principles Islamiques et les Rapports Internationaux en Temps de Paix et de Guerre* (Paris: 1929).
Arnold, T. W., *The Preaching of Islam* (London: Constable, 1896).
Asad, Muhammad (trans.), *The Message of the Qur'an* (Gibraltar: Dar Al-Andalus, 1980a).
Asad, Muhammad, *The Principles of State and Government in Islam* (University of California Press, 1961; new edition, Dar-el-Andalus, 1980b).
Azzam, A., *The Eternal Message of Mohammed* (Harmondsworth: Penguin, 1964).
Badr, G. M., 'Islamic Law: Its Relation to Other Legal Systems', *American Journal of Comparative Law*, vol. 26 (1978) p. 185.
Baidawi, 'Abd Allah ibn 'Uman, *Anwar al-Tanzil* ('The Lights of Revelation') (Cairo: Mustafa al-Babi Hatabi, 1330/1912).
Baroody, G., 'Shari'ah, Law of Islam: An American Lawyer in the Courts of Saudi Arabia', *Aramco World* (1966) p. 17.
Bassiouni, M. C. (ed. and trans.) *The Islamic Criminal Justice System* (New York, Oceana Publications, 1982).
Bassiouni, M. C., 'Islam: Concept, Law and World Habeas Corpus', *Rutgers Camden Law Journal*, vol. 2 (1970), p. 160.
Beek, Lois and Nikki Keddi (eds) *Women in the Muslim World* (Harvard University Press, 1978).
Bell, Richard, *Introduction to the Qur'an* (Edinburgh University Press, 1953).
Blaustein, A. P. and Flanz, G. H. (eds) *Constitutions of the Countries of the World*, vol. 13 (New York: Oceana Publications, 1976).
Bosworth-Smith, R., *Mohammed and Mohammedanism* (London: Murray, 1889).

Brockelmann, Carl, *History of the Islamic Peoples* (London: Routledge and Kegan Paul, 1959).
Brohi, A. K., 'Human Rights and Duties in Islam: A Philosophic Approach', in Salem Azzam (ed.) *Islam and Contemporary Society* (Harlow: Longman, 1982).
Browne, Lawrence E., *The Eclipse of Christianity in Asia* (Cambridge University Press, 1933).
Bryce, J., *Studies in History and Jurisprudence*, vol. 2 (Oxford: 1901).
Burn, R. (ed.) *The Cambridge History of India* (Delhi: Chand, 1957).
Burns, C. D., *The First Europe: A Study of the Establishment of Medieval Christendom, AD 400–800* (London: George Allen and Unwin, 1947).
Bury, J. B. (ed.) *Gibbon's Decline and Fall of the Roman Empire* (London: Methuen, 1900–02).
Cambridge History of India, vol. III (see under Haig).
Cambridge History of Islam (see under Holt *et al.*).
Campbell, D., *Arabian Medicine*, vol. 1 (London: 1926).
Cardahi, Choukri, 'The Concept and Practice of Private International Law in Islam', in *Recueil des Cours de L'Academie de Droit International de la Haye* vol. II (1937) pp. 511–646.
Carroll, H. J., *et al.*, *The Development of Civilisation*, vol. I (Chicago: Scott Foreman, 1961).
Clark, G. N., 'Grotius' East India Mission to England', *Transactions of the Grotius Society*, vol. 20 (1935).
Copleston, F. C., *Aquinas* (Harmondsworth: Penguin, 1955).
Coulson, N. J., *Conflict and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969).
Coulson, N. J., 'Islamic Law', in J. D. M. Derrett (ed.) *An Introduction to Legal Systems* (London: Sweet and Maxwell, 1968).
Coulson, N. J., *Islamic Surveys: A History of Islamic Law* (Edinburgh University Press, 1964).
Coulson, N. J., 'The State and the Individual in Islamic Law', *International and Comparative Law Quarterly*, vol. 6 (1957) p. 49.
Cragg, Kenneth, *The Call of the Minaret* (Oxford University Press, 1956) esp. Chs. 5, 8 and 11.
Daniel, Norman, *Islam, Europe and Empire* (Edinburgh University Press, 1966).
De Santillana, D., *The Legacy of Islam* (Oxford: 1931).
Derrett, J. D. M. (ed.) *An Introduction to Legal Systems* (London: Sweet and Maxwell, 1968).
Diwan, Paras, *Muslim Law in Modern India* (Allahabad Law Agency, 1977).
Dodwell, H. H. (ed.) *Cambridge History of India*, vol. V (Cambridge University Press, 1929).
Donnelly, J., 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *American Political Science Review*, vol. 76 (1982).
Dunlap, L. W., *Readings in Library History* (New York: Bowker, 1972).
Dunlop, D. M., *Arab Civilization to A.D. 1500* (New York: Praeger, 1971).
Enayat, Hamid, *Modern Islamic Political Thought* (London: Macmillan, 1982).

Encyclopaedia of Islam, 1st edn (Leiden: 1913–1942); 2nd edn, H. A. R. Gibb *et al.* (Leiden and London: 1960) continuing *The Encyclopaedia of Islam*, M. Th. Houtsma and H. J. Wensinck (Leiden and London: 1934); *Shorter Encyclopaedia of Islam*, H. A. R. Gibb and J. H. Kramers, (Leiden: 1953).

Engineer, A. A., *The Origin and Development of Islam* (New Delhi: Orient Longman, 1980).

Esposito, John L. (ed.) *Voices of Resurgent Islam* (Oxford University Press, 1983).

Faris, Nabih (ed.) *The Arab Heritage* (New York: Russell and Russell, 1963).

Faruki, K. A., *Islamic Jurisprudence* (Karachi: National Book Foundation, 1975).

Fitzgerald, S. V., 'The Alleged Debt of Islamic to Roman Law', *Law Quarterly Review*, vol. 67 (1951) p. 81.

Flew, A., *An Introduction to Western Philosophy* (London: Thames and Hudson, 1971).

Fyzee, A. A. A., *Outlines of Muhammadan Law*, 3rd edn (Oxford University Press, 1964a).

Fyzee, A. A. A., 'The Adab Al-Qadi in Islamic Law', *Malaya Law Review*, vol. 6 (1964b).

Fyzee, A. A. A., *A Modern Approach to Islam* (Bombay: 1963).

Fyzee, A. A. A., *Studies on the Civilization of Islam* (Bombay: 1963).

Gabrieli, Francesco, *The Arabs: A Compact History* (New York: Hawthorne Books, 1963).

Gardner, W. R. W., *Qur'anic Doctrine of Sin* and *Qur'anic Doctrine of Salvation* (Madras: Christian Literature Society, 1913–14).

Gentili, A., *De Jure Belli Libri Tres*, Classics of International Law, vol. II (New York: Oceana, 1933).

Gibb, H. A., 'The Heritage of Islam in the Modern World', *International Journal of Middle East Studies*, vol I (January 1970) pp. 3–17.

Gibb, H. A., *Mohammedanism: An Historical Survey*, 2nd edn (Oxford University Press, 1953).

Gibb, H. A., *Modern Trends in Islam*, The Haskell Lectures (University of Chicago Press, 1945).

Gibbon, *Decline and Fall of the Roman Empire* (see under Bury).

Gilani, *The Reconstruction of Legal Thought in Islam* (Lahore: Idara Tarjuman al Qur'an, ICHHRA, 1982).

Goldziher, Ignaz, *Islam*, trans. by C. R. Barber and S. M. Stein (London: George Allen and Unwin, 1967).

Guillaume, Alfred, *The Traditions of Islam* (Oxford University Press, 1924; revised Beirut: Khayatz, 1966).

Guillaume, Alfred, *The Life of Muhammed: A Translation of Is'haq's 'Sirat rasul allah'* (Oxford University Press, 1955) (This is a translation of one of the chief Arabic biographies of the Prophet)

Gulick, John and Margaret E., *An Annotated Bibliography of Sources Concerned with Women in the Modern Muslim Middle East*, Princeton Near East Paper No. 17 (Princeton Universty Press, 1974).

Gutteridge, H. C., 'Abuse of Rights', *Cambridge Law Journal*, vol. 6 (1933).

Habachy, Saba, 'Property, Right and Contract in Muslim Law', *Columbia Law Review*, vol. 62 (1962) p. 450.
Habachy, Saba, 'Community Security vs. Man's Right to Knowledge. Islam – Factors of Stability and Change', *Columbia Law Review*, vol. 54 (1954) p. 710.
Haig, W. (ed.) *Cambridge History of India*, vol. III (Cambridge University Press, 1928).
Hamidullah, Mohammad, *The First Written Constitution in the World*, 2nd edn (Lahore: Mohammad Ashrof, 1968).
Hamidullah, Mohammad, *The Muslim Conduct of State*, 4th edn (Lahore: Mohammed Ashrof, 1961).
Hamidullah, Mohammad, *Le Prophete de l'Islam* (Paris: 1959).
Hamidullah, Mohammad, *Majmu'at al Watha'iq* (Cairo: 1956).
Hanagi, M. Jamil, *Islam and the Transformation of Culture* (New York: Asia Publishing House, 1974).
Hassan, R., 'On Human Rights in Qur'anic Perspective', in A. Swidler (ed.) *Human Rights in Religious Traditions* (New York: Prilgrim Press, 1982).
Hassan, S. R., *The Reconstruction of Legal Thought in Islam* (Lahore: Law Publishing, 1974).
Heer, F., *The Medieval World: Europe 1100–1350*, trans. J. Sondheimer (Mentor Books, 1968).
Heggoy, A. A., 'Algerian Women and the Right to Vote: Some Colonial Anomalies', *Muslim World*, vol. 64 (1973) p. 228.
Henkin, L., Pugh, R. C., Schachter, O., and Smit, H., *International Law* (St. Paul, Minn.: West Publishing, 1980).
Hidayatullah, M. (ed.) *Mulla's Principles of Mohammedan Law* (Bombay: N. M. Tripathi, 1972).
Hitti, Philip K., *History of the Arabs from the Earliest Times to the Present* (London: Macmillan, 1967).
Hitti, Philip K. (ed.) *The Origins of the Islamic State* (Beirut: Khayats, 1966).
Hitti, Philip K., *The Near East in History* (Princeton: Van Nostrand, 1961).
Holt, P. N., Lambton, K. S., and Lewis, B. (eds) *The Cambridge History of Islam*, 2 vols (Cambridge University Press, 1970).
Homoud, S., *Islamic Banking* (Graham and Trotman, 1985).
Hooker, M. B., *Islam in South-East Asia* (British Institute in South-East Asia, 1983).
Hooker, M. B., *Adat Laws in Modern Malaya* (Oxford University Press, 1972).
Hottinger, A., *The Arabs: Their History, Culture and Place in the Modern World* (Berkeley: University of California Press, 1963).
Hourani, A. H., *Arabic Thought in the Liberal Age: 1798–1939* (Oxford University Press, 1962).
Hughes, T. P., *A Dictionary of Islam* (New Jersey: Reference Book Publishers, 1965).
Husain, Arthar, *The Message of Muhammad* (Lahore: Islamic Book Foundation, 1980).
Hussain, H., '"Due Process" in Modern Constitutions and the Process of Sharia', *Karachi Law Journal*, vol. 7 (1971) p. 57.

Ibrahim, Ahmad, 'The Concept of Justice in Islam', *Malayan Law Journal*, vol. 2 (1985).

Ibrahim, Ahmad, 'Religious Beliefs and Humanitarian Law with Special Reference to Islam', *Journal of Malaysian and Comparative Law*, vol. 11 (1984) p. 125.

Ibrahim, Ahmad, *Islamic Law in Malaya* (Singapore: Malaysian Sociological Research Institute, 1965).

Ion, T. P., 'Roman Law and Mohammedan Jurisprudence' *Michegan Law Review*, vol. 6, (1907).

Iqbal, Afzal, *The Culture of Islam: The Classical Period*, 3rd edn (Lahore: Institute of Islamic Culture, 1981).

Iqbal, Muhammad, *The Reconstruction of Religious Thought in Islam* (Lahore: Muhammad Ashrof, 1965).

Ishaque, Khalid M., 'Human Rights in Islamic Law', *Review of the International Commission of Jurists*, vol. 30 (1974).

Juynboll, Th. W., 'Law' (Muhammadan), in J. Hastings (ed.) *Encyclopaedia of Religion and Ethics*, vol. VII, 2nd edn (Edinburgh: T. and T. Clark, 1914) pp. 858–83.

Kabir, 'Abd-al-Aziz-al Qadire, *Islam and the Race Question* (Paris: UNESCO, 1970).

Karpat, Kemal H. (ed.) *Political and Social Thought in the Contemporary Middle East* (New York: Praeger, 1968).

ibn Kathir, Ima'il ibn 'Umar, *Interpretation of the Great Quran* (in Arabic) (Cairo: Matba'at Mustafa Muhammad, 1947).

Kerr, Malcolm, H., *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (University of California Press, 1966).

Khadduri, Majid, 'Marriage in Islamic Law: The Modernist Viewpoints' *American Journal of Comparative Law*, vol. 26 (1978) p. 213.

Khadduri, Majid, (trans.) *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: Johns Hopkins Press, 1966).

Khadduri, Majid, *Islamic Jurisprudence: Shafei's Risala* (Baltimore: 1961).

Khadduri, Majid, 'The Islamic System: Its Competition and Co-existence with Western Systems', *Proceedings of the American Society of International Law* (1959) pp. 49–52.

Khadduri, Majid, 'Islam and the Modern Law of Nations', *American Journal of International Law*, vol. 50 (1956). p. 358.

Khadduri, Majid, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955).

Khadduri Majid, 'Human Rights in Islam', *Annals*, vol. 243 (1946) p. 77.

Khadduri, Majid, and Leibesny, H. J. (eds) *Law in the Middle East*, vol. 1 (Washington DC: Middle East Institute, 1955).

Khan, Majid Ali, *The Pious Caliphs*, 2nd edn (Kuwait: Islamic Book Publishers, 1982).

Khan, M. M. (trans.) *Sahih al-Bukhari*, vol. 4.

Khan, Sir Muhammad Zafrulla, *Islam and Human Rights* (London: The London Mosque, 1970).

Khan, Sir Muhammad Zafrulla, *Islam: Its Meaning for Modern Man* (New York: Harper and Row, 1962).

Khan, S. A., *Anecdotes from Islam*, revised edn (Lahore: Muhammed Ashrof, 1960).
Lal, Basant Kumar, *Contemporary Indian Philosophy* (Motilal Banarsidas, 1973).
Landau, Rom, *Arab Contribution to Civilization* (San Francisco: American Academy of Asian Studies, 1958).
Lecky, W. E. H., *History of European Morals*, Part 1 (London: Watts, 1946).
Leonard, A. G., *Islam: Her Moral and Spiritual Value* (Luzac, 1909).
Lev, Daniel S., *Islamic Economics: Theory and Practice* (Lahore: Mohammad Ashrof, 1980).
Levy, R., *The Social Structure of Islam* (Cambridge University Press, 1957).
Lewis, Bernard, *The Jews of Islam* (Princeton University Press, 1984).
Lewis, Bernard, *The Arabs in History* (London: Arrow Books, 1958; New York: Harper, 1960).
Lewis, R., *Everyday Life in Ottoman Turkey* (London: Batsford, 1971).
Lichtenstadter, Ilse, *Introduction to Classical Arab Literature* (New York: Schocken Books, 1976).
Lings, Martin, *Muhammad: His Life Based on the Earliest Sources* (New York: Inner Traditions International, 1983).
Locke, J., *Two Treatises of Civil Government* (ed. W. S. Carpenter) (London: Dent, 1960).
Lucas, H. S., *The Renaissance and the Reformation*, 2nd edn (London: Harper, 1960).
MacDonald, D. B., *Development of Muslim Theology, Jurisprudence and Constitutional Theory* (New York: Orientalia, 1964).
Madvi, Abd al-Salam, *Umar Bin 'Abd al-Aziz* (trans. M. H. Hussainy) (Lahore: Institute of Islamic Culture, 1978).
Mahmood, M. S., 'The Role of the Mufti in the Administration of the Court System', *Shariah Law Journal* (November 1984) pp. 55–6.
Mahmud, I., *Muslim Law of Succession and Administration* (Karachi: 1958).
Makdisi, John, 'Legal Logic and Equity in Islamic Law', *American Journal of Comparative Law*, vol. 33 (1985) p. 63.
Makkari, A. L., *The History of the Mohammedan Dynasties in Spain*, vol. 2 (London: 1843).
Maitland, F.W. *Selected Essays* (Books for Libraries Press, 1968 reprint).
Mannam, M. A., *Islamic Economics: Theory and Practice* (Lahore: Mohammad Ashrof, 1980).
Marks, S. P., 'Commission permanente arabe des droits de l'homme',D60 3:101, (1970).
Mastura, M. S. H., 'Islamic Concept of Human Rights', *Islamic Studies*, vol. 11 (1972) p. 211.
Maududi, Abul A'la, *Human Rights in Islam* (Leicester: The Islam Foundation, 1976).
Maududi, Abul A'la, *Islamic Law and Constitution* (Karachi: Islamic Publications, 1967).
Morris, C. R., *Locke, Berkeley, Hume* (Oxford University Press, 1930).
Moussa, *Islam and Humanity's Need of It* (Cairo: 1966).
Muir, William, *The Life of Mohammad* (Edinburgh: 1912; revised edition,

Edinburgh: J. Grant, 1923).
Mulla, D. F., *Principles of Mohamedan Law* (Bombay: N. M. Tripathi, 1972).
Nadir, Muzaffar-ud-din, *Human Rights and Obligations: In the Light of the Koran and Hadith* (Lahore: Muhammad Ashrof, 1966).
Nasr, Seyyed H., *Islam and the Plight of Modern Man* (Harlow: Longman, 1976).
Nawawi, Al-, *Minhaj-et-Talibin* (London: 1914).
Nawaz, M. K., 'The Concept of Human Rights in Islamic Law', *Howard Law Journal*, vol. 11 (1965) pp. 325–32.
Nehru, J., *The Discovery of India* (Bombay: Asia Publishing House, 1961).
Nice, R. W. (ed.) *Treasury of Law* (New York: Philosophical Library, 1964).
Nussbaum, A., *A Concise History of the Law of Nations* (New York: Macmillan, 1954).
Nys, Ernest (ed.) *Francisco de Victoria, De Indis et de Jure Belli Reflectiones* (New York: Oceana Publications, 1964).
Oppenheim, L., *International Law*, 8th edn, vol. 1 (London: Longman Green, 1955).
Ostrorog, Count Leon, *The Angora Reform* (London University Press, 1927).
Passant, E. J., 'The Effects of the Crusades upon Western Europe', *Cambridge Medieval History*, vol. V (Cambridge University Press, 1926).
Pearl, D., *A Textbook on Muslim Law* (London: Croom Helm, 1979).
Pearl, D., 'Non-Muslims in the Islamic State', *Karachi Law Journal*, vol. 6 (1970) p. 75.
Pearson, J. D., *Index Islamicus, 1906–55* (Cambridge: Heffer, 1958).
Peters, F. E., *Allah's Commonwealth: A History of Islam in the Near East, 600–1100 AD* (New York: Simon and Schuster, 1973).
Pickthall, M. M., *The Cultural Side of Islam* (Delhi: Islamic Book Trust, 1982).
Pickthall, M. M., *The Glorious Koran* (London: George Allen and Unwin, 1930).
Poliak, A. N., 'Classification of Land in Islamic Law and its Technical Terms', *American Journal of Semitic Languages and Literatures*, vol. 57, pp. 50–62.
Pollock, F., and Maitland, F. W., *History of English Law*, 2nd edn (Cambridge University Press, 1952).
Proctor, J. Harris (ed.) *Islam and International Relations* (New York: Praeger 1965).
Qadri, *Islamic Jurisprudence in the Modern World*, 2nd edn (Lahore: Muhammad Ashrof, 1973).
Qotb, Muhammad, *Islam: The Misunderstood Religion* (Kuwait, Ministry of AWQAF and Islamic Affairs, 1967).
Qutb, S., *Social Justice in Islam*, trans. Sayed Kotb (New York: Octogon Books, 1953).
Rahim, Abdur, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Westport: Hyperion, 1981).
Rahman, Fazlur, 'Revival and Reform in Islam', in *Cambridge History of*

Islam (Cambridge University Press, 1970).
Rahman, Fazlur, 'Islamic Modernism: Its Scope, Method and Alternatives', *International Journal of Middle East Studies*, vol. I (October 1970) pp. 317–33.
Rahman, Fazlur, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press, 1928).
Ramadan, Said, *Islamic Law: Its Scope and Equity* (London: Macmillan, 1961).
Rashdall, H., *The Universities of Europe in the Middle Ages*, vol. 1, ed. F.M. Powicke and A.B. Emden (Oxford: 1936).
Rauf, M. A., 'Shariah and Social Order', *Shariah Law Journal*, November 1985, pp. 23–8.
Rauf, M. A., *Al-Hadith* (Washington: The Islamic Center, 1974).
Razi, Jassas, *Ahkamal Qur'an*, vol. 1.
Rechid, A., 'L'Islam et le Droit des Gens', *Recueils des Cours*, vol. 60 (1937) p. 375.
Renteln, A. D., 'The Unanswered Challenge of Relativism and the Consequences of Human Rights', *Human Rights Quarterly*, vol. 7 (1985).
Rheinstein, M. (ed.) *Max Weber on Law in Economy and Society* (New York: Simon and Schuster, 1954).
Rhyne, C. S., *International Law* (Washington: CLB, 1971).
Ribena y Tarrago, J., *Discertaciones y opusculos* (Madrid, 1928).
Roberts, R., *The Social Laws of the Koran* (London: 1925).
Robson, W. A., *Civilisation and the Growth of Law* (London: Macmillan, 1926).
Rodinson, Maxime, *Mohammad*, trans. Anne Carter (Harmondsworth: Penguin, 1971).
Rodwell, J. M. (trans.) *The Koran*, Everyman Library (London: J. M. Dent, 1943).
Ronart, Stephen and Ronart, Nandy, *Concise Encyclopaedia of Arabic Civilization* (New York: Praeger, 1966).
Rosen, L., 'Equity and Discretion in a Modern Islamic Legal System', *Law and Society Review*, vol. 15 (1980–1) p. 217.
Rosenthal, E. K. J., *Islam in the Modern Nation State* (Cambridge: 1965).
Rosenthal, Franz, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (Leiden: Brill, 1960).
Rosenthal, Franz (trans.) *Ibn Khaldun, The Muqaddimah: An Introduction to History*, Bollingen Series XLIII (New York: Pantheon Books, 1958).
Rosenthal, Franz, 'The Technique and Approach of Muslim Scholarship', in *Annalecter Orientalia*, vol. XXIV (1947).
Rousseau, J.-J., *The Social Contract*, trans. M. Cranston (Harmondsworth: Penguin, 1968).
Rubin, A. P., 'The Use of Piracy in Malayan Waters', *Grotian Society Papers* (1968).
Russell, B., *History of Western Philosophy*, 2nd edn (London: George Allen and Unwin, 1961).
Sabra, A. I., 'A New Perspective on Islamic Science', *Arabia*, August 1983, p. 69.
ibn Said, *Kitab al-Tabaqat al-Kabir*, part II, vol. II (Leiden: 1917).

Said, Abdul Aziz, 'Precept and Practice of Human Rights is Islam', *Universal Human Rights*, vol. 1 (1979a).
Said, Abdul Aziz, 'Human Rights in Islamic Perspective', in Adamantia Pollis and Peter Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979b) pp. 86–110.
Said, Edward W., *Covering Islam* (New York: Pantheon Books, 1981).
Said, Edward W., *Orientalism* (New York: Pantheon Books, 1978).
Saksena, K. P., *Muslim Law as Administered in India and Pakistan* (Lucknow: Eastern Book, 1937).
Sanders, E.G.M. *International Jurisprudence in African Context* (Durban: Butterworths, 1979).
Sardar, Ziauddin, *The Future of Muslim Civilisation* (London: Croom Helm, 1979).
Saudi Arabian Government, 'Concept of Man in Islam and Yearning for Peace', *Conferences on Moslem Doctrine and Human Rights in Islam* Conference at Geneva, 30 October 1974 (Riyadh: Ministry of Justice).
Saudi Arabian Government, *On Moslem Doctrine and Islamic Law*, from the Conference at Riyadh, March 1972.
Schacht, Joseph, *An Introduction to Islamic Law* (Oxford: 1964).
Schacht, Joseph, 'Islamic Law in Contemporary States', *American Journal of Comparative Law*, vol. 8 (1959) p. 133.
Schacht, Joseph, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950).
Schacht, Joseph, 'Islamic Law', in *Encyclopaedia of Social Sciences*, vol. VIII (New York: Macmillan, 1932–7) pp. 344–9.
Scott, J. B., *Introduction to Vol. 2 of Suarez*, Classics of International Law (New York: Oceana Publications, 1939).
Shah, Idries, *The Sufis* (London: W. H. Allen, 1977).
Shaltut, M., *Min Towjat Al-Islam* ('From the Guidance of Islam') (Dar-al-Qalam, 1966); reproduced in *Shariah Law Journal*, vol. 34 (November 1986).
Shamma, S., 'Law and Lawyers in Saudi Arabia', *International and Comparative Law Quarterly*, vol. 14 (1959) p. 133.
Sharif, M. M. (ed.) *A History of Muslim Philosophy* (Wiesbaden: Harrassowitz, 1963).
Sharma, S. R., *The Religious Policy of Mughal Emperors*, 2nd edn (Bombay: Asia Publishing House, 1952).
Shihata, Ibrahim, 'Islamic Law and the World Community', *Harvard International Law Club Journal*, vol. 4, no. 1 (1962) p. 101.
Siddiqi, M. N., *Women in Islam* (Delhi: Islamic Book Trust, 1982).
Siddiqi, M. N., *Muslim Economic Thinking: A Survey of Contemporary Literature* (Islamic Foundation UK, 1981).
Siddiqui, A. H. (trans) *Sahih Muslim*, vol. 3 (Lahore: Ashrof, 1976).
Singh, Nagendra, *India and International Law*, vol. 1 (New Delhi: S. Chand, 1973).
Srivastava, D., *Religious Freedom in India: An Historical and Constitutional Study* (New Delhi: Deep and Deep, 1982).
Stone, J., *Human Law and Human Justice* (Stanford University Press, 1965).

Swidler, A. (ed.) *Human Rights in Religious Traditions* (New York: Pilgrim Press, 1982).
Tabandeh, Sultan H., *A Muslim Commentary on the Universal Declaration of Human Rights*, trans. F. J. Gouldins (Paris: Guillard, 1970).
Taperell, K., 'Islam and Human Rights', *Australian Foreign Affairs Record*, vol. 56 (1985) p. 1177.
Thompson, J. W., *The Medieval Library* (University of Chicago Press, 1939).
Tritton, A. S., *The Caliphs and their Non-Muslim Subjects* (Oxford: 1930).
Tyabji, F. B., *Muslim Law* (Bombay: N. M. Tripathi, 1966).
Tyagi, Yogesh K., 'Third World Response to Human Rights', *Indian Journal of International Law*, vol. 21 (1981).
Tyan, Emile, 'Methodologie et Sources due droit en Islam', *Studia Islamica*, vol. 10 (1959) p. 79.
UNESCO, *Islam, Philosophy and Science* (Paris: UNESCO, 1981).
Van Dusen, Roxanna, 'The Study of Women in the Middle East: Some Thoughts', *Middle East Studies Assoc. Bulletin*, vol. 10, no. 2 (1976) p. 1.
Vattel, E. de, *Le Droit des Gens*, Classics of International Law, vol. III (New York: Oceana, 1916).
Vesey-Fitzgerald, S., *Muhammadan Law in Abridgement* (Oxford University Press, 1931).
Von Grunebaum, Gustave, E., *Classical Islam, a History 699–1258* (London: George Allen and Unwin, 1970).
Von Grunebaum, Gustave E., *Islam: Essays in the Nature and Growth of a Cultural Tradition* (London: Routledge and Kegan Paul, 1955).
Von Grunebaum, Gustave E., *Medieval Islam*, 2nd edn (University of Chicago Press, 1953).
Wafi, Ali, 'Abd al-Wahid, *Civil Liberty in Islam* (in Arabic) (Cairo: 1967).
Ward, R., *An Inquiry into the Foundation and History of the Law of Nations in Europe* (New York: Garland, 1973).
Watt, W. Montgomery, *The Majesty That Was Islam* (New York: Praeger, 1974).
Watt, W. Montgomery, *The Formative Period of Islamic Thought* (Edinburgh University Press, 1973).
Watt, W. Montgomery, *The Influence of Islam on Medieval Europe* (Edinburgh University Press, 1972).
Watt, W. Montgomery, *Islamic Political Thought, The Basic Concepts* (Edinburgh University Press, 1968).
Watt, W. Montgomery, *Islamic Spain* (Edinburgh University Press, 1965).
Watt, W. Montgomery, *Muslim Intellectual: A Study of Al Ghazzali* (Edinburgh University Press, 1963).
Watt, W. Montgomery, *Islamic Philosophy and Theology* (Edinburgh University Press, 1962).
Watt, W. Montgomery, *Muhammad, Prophet and Statesman* (Oxford University Press, 1961).
Watt, W. Montgomery, *Muhammad at Medina* (Oxford: Clarendon Press, 1956).
Watt, W. Montgomery, *Muhammad at Mecca* (Oxford: Clarendon Press, 1953).
Weiss, Bernard, 'Interpretation in Islamic Law: The Theory of *Ijtihad*',

American Journal of Comparative Law, vol. 26 (1978) p. 199.
Wells, H. G., *The Outline of History, Being a Plain History of Life and Mankind*, 8th edn (London: Cassell, 1925).
Wensinck, A. J., *The Muslim Creed* (Cambridge University Press, 1932).
Wickens, G. M. (ed.) *Avicenna: Scientist and Philosopher* (London: Luzac, 1952).
Williams, J. A. (ed.) *Islam*, Great Religions of Modern Man Series (New York: Washington Square Press, 1963).
Yamani, A. Z., 'Islamic Law and Contemporary Issues', lecture delivered at the 100th Anniversary of the American University, Beirut, 1967.

Index

Abbasids, 10, 11, 18, 80, 142
Abduh, Muhammad, 33, 43, 69
Abu Bakr, Caliph, 135, 136, 141
Abu Hanifa, 40, 49–51, 132, 137
abuse of power, 179
abuse of rights, 72; *see also*: communal interest
Abyssinia, Christian Kingdom, 4, 132, 133, 142, 153, 159
acceptance, in contract, 66
actions, classification of, 92–3
Adelard of Bath, 20, 96, 98
adhan, 9
advertisements, misleading, 181
Afghanistan, 148
aged, protection of, in war, 136
agency, 77
Age of Reason, 100
aggression, 114, 133, 162–3
Akbar, Moghul Emperor, 88, 121, 156
al-Aqaba, Second Pledge of, 132
Al-Azhar University, 23–4, 54–5
Alfarabi, 97
Alfonso X, 136, 156, 157, 158
Algazel, *see*: Ghazali, Al-
Al Hakim, 16
Al-Ghunaimi, M.T., 159
alms, 60, 64, 171
aman, 141
Ameer Ali, Syed, 77
analogy, methods, 165; *see also qiyas*
Anas, Malik ibn, 37
animals, concern for, 63, 83–4; *see also*: livestock
Anjou, Fulk of, 87
ante-nuptial settlement, 70
anthropocentric approaches, 116–17
anti-social conduct, 72
apologetics, Christian, 152
Aquinas, Thomas, 21, 25, 99, 100, 101, 102–105, 156–7
Aristotle, 22, 24, 25, 95, 96, 97, 99, 100, 101, 102–5, 112, 121
Armenian Church, 144
arrest, 184
asabiyyah, 80
association, freedom of, 180
asylum, right to, 121, 142–3, 179
Atkin, Lord, 83
auctoritas prudentium, 55
Austin, John, 65, 82, 131
Avenpace (Ibn Bajja), 101
Averroes, 18, 22, 53, 95, 97–8, 101, 102–5, 112, 157
Averroists, *see*: Averroes
Avicenna, 15, 18, 19, 21, 95, 96, 97
Ayala, 157, 158

Bacon, Francis, 97
Bacon, Roger, 21, 96, 97, 98, 101
Badr, battle of, 135
Babur, Emperor, 141
Bahadur Shah, 141, 143
bait-al-mal, 74
banking, 67–8
Bayt al Hakma, 18
Benjamin of Tudela, 84
bidding unto good, 83, 84
blackmail, 179
booty, 75, 136
British East India Company, 154
brotherhood, notion of, 61, 172, 177
Bryce, Lord, 23, 55
Buddha, 5, 38
Buddhism, 128, 167
Bunyan, John, 99
Byzantine emperors, 142, 147

Canon Law, 42
caring, notion of, 60–1
Carlyle, Thomas, 164
Catholics, 89
charitable trust, 73–4
charity, 64; *see also*: alms
Charlemagne, 142
children, rights of, 121; *see also*: minors
China, 10, 26
Christ, 5, 38, 161
Christian apologetics, 152
City of God, 117
City of Man, 117
coexistence, peaceful, 158–63
colonialists
  French, 53
  Dutch, 53
  Italian, 53

commerce
  commercial integrity, 32, 66, 68
  commercial law, modern, 110,–11
  interest, 66–7
  international trade, 139–40
  market regulations, 84
  monopolies, 72
  spread of Arab trade, 53
  see also: usury
communal interest, 123; *see also*: abuse of rights
comparative law, 165
compulsion, in religion, 160, 161; *see also*: *dhimmis*, non-Muslims, religion, freedom of
concubinage, 69–70
conduct, 72
conflict of laws, *see*: private international law
Confucianism, 128
consensus, in government, 106
Constantinople, 10, 88, 144–5
consultation, in government, 92
contemporary human rights, Islamic contribution to, 125–7
contract, 65–6
Crucius, Ricoldus de Monte, 87
cruelty, on battlefield, 136
Crusades, 12, 20, 74, 87, 136–7, 148, 149, 164
cultivation, duty of, 72
cultural rights, 126

Damascus, Regent of, 87
Damietta, 87
Dar-al-'ahd, 147
Dar-al-Harb, 143, 145, 146, 147
Dar-al-Islam, 143, 145, 147
Dar-al-Sulh, 147
Day of Judgment, 170
defamation, 179
Definition of Aggression, UN Resolution, 162
de Losinga, Robert, 20
democratic participation, 92–3, 123–5, 179–80
de Victoria, *see*: Victoria
dhimmis, 76, 86–8, 90–1
Diderot, 98
differences of opinion, 26
dignity
  human, 63–4, 114–15
  of other religions, 161, 180
diplomacy, 166
diplomatic immunity, 166
diplomatic protection, 141–2
discrimination, prohibition of, 122, 178; *see also*: equality, minorities, non-Muslims.
divorce, 69
Dominicans, 99, 156; *see also*: Aquinas
double truth, doctrine of, 22, 95–6, 106
dualism, 131
due process, 79
Duguit, Leon, 111
Duns Scotus, 94
Dutch East India Company, 153, 154
duties, emphasis on, 116, 127
Dzmeali, 58

East Africa, 53
East India Company
  British, 153
  Dutch, 153, 154
eavesdropping, 71
economic justice, 72
economic order, rights evolving from, 180
economic resources, as divine blessings, 179
economic rights, 122, 126
education, right to, 182
Egypt, 53
electronic surveillance, 71
Elizabeth I, 156
employees, 63, 64
encyclopaedists, 98–9
entry, unlawful, 71
equality
  before law, 76–7, 178
  of nations, 159–60
equity, 40, 60
erroneous judgments, revision of, 174
Eschenback, Wolfram von, 87
Ethiopia, *see*: Abyssinia
exploitation, 67, 177, 181
expropriation, 181; *see also*: property

fairness in contract, 65–6
fair trial, right to, 122, 178, 184–5; *see also*: judicial independence, judicial impartiality, justice
family
  joint, 75
  law, 181
  right to found, 181
Farabi, al-, 101

Farewell Sermon of the Prophet, 52, 62, 68, 76, 135, 139, 159, 172–3
Farhun, Ibn, 120
Faust legend, 97
fetwa, 57, 58, 77
Fibonacci, Leonardo, 20
fiqh, 30, 31
firmans, 154
First Exile, 4, 153
formalism, lack of, 118–20
Francis I, 140, 143, 154
Franciscans, 73–4, 102; *see also*: St Francis of Assisi
fraud, 66
freedom
  of association, 180
  individual, 75
  in Islam, 115
  of movement,182
  as precondition of goodness, 75
  right to, 178
future generations, rights of, 120

general will, *see*: Rousseau, *ummah*
Geneva Conventions, 135
Gentili, 155, 158
Gerard of Cremona, 21
Gibb, Hamilton, 9
Gibbon, Edward, 17, 89
Ghazali, Al-, 18, 98, 99, 100
God
  nature of, 27
  see also: sovereign, submission to God
'golden chain' of narrators, 37
good faith, duty of, 72, 141; *see also*: honesty
goodness, 75
Gorze, John of, 20
government, participation in, 92–3
Greek Orthodox Church, 88, 144
Grotius, 97, 109, 110, 132, 149, 150–8
guardianship, 33

hadith, 34–8, 120, 173
Hakim, Al, 16
Hanafi school, 49–51, 132
Hanbal, Ahmed Ibn, 54
Hanbalite school, 40, 42, 54
Harun-al-Rashid, 49, 136, 141, 142
Heer, Friedrich, 23, 87, 101
Hegira, 4, 10, 26
Hereford, Arabic studies in, 20
Hindu law, 28, 75
Hindus, 89, 121, 128
hisba, 83, 178
hiyal literature, 41, 42
Hobbes, 82, 97
Holy War, *see*: *jihad*
honesty, in trade, 66, 83
hostage crisis, 166
House of Mercy, Baghdad, 84
House of Wisdom, Cordova, 16
Hudaibia, Treaty of, 140
humanitarian law,134–8, 158
human rights, 113–27; *see also*: dignity, rights
Humayun, Emperor, 141, 143
Hunain, battle of, 124

ideal law, notion of, 65
idleness, 65
ignorance
  Days of Ignorance, 86
  of Islamic tradition, 168
  period of, 78
ijma, 39–40
ijtihad, 31, 40–5, 56, 120
illegal orders, duty to refuse to obey, 178
'ilm, 56
Imam, 100
impartiality, judicial, 80–1
impeachment of ruler, 125
inalienability of rights, 105, 122, 178
incompetents, legal, 77
India, 53
individual freedom, 75
individualism, unbridled, 123
Indonesia, 53
industrial relations, 63
infidel, rights of, 115; *see also*: *dhimmi*
inheritance, laws of, 68, 70
innocence, presumption of, 78, 184
insane persons, 77, 84, 91; *see also*: lunatics, mentally afflicted
integrity, commercial, 66
intellects, differing opinions of, 26
interest, 66–7
International Court of Justice, 150
International Covenants
  Civil and Political Rights, 76, 126, 185
  Social, Economic and Cultural Rights, 76, 126
international law, 109–10, 128–63
International Monetary Fund, 68
international trade, 139–40
interpreter, role of, 33, 34

intestate succession, *see*: testamentary law
Iqbal, Sir Mohammed, 75
Ishaq, Khalil Ibn, 51
Islam, misrepresentations of, 128–31
Islamic Constitutional Model, 118
Islamic Council of Europe, 122
Islamic Declaration of Human Rights, Universal, 113, 122, 176–83
Islamic world, influence of, 167–8
Israel, 160
istihsan, 28
istirqaq, 139
istishab, 28
istislah, 28

Jains, 89, 121
James I, 154, 156
Jews, 22, 76, 80, 86, 87, 89, 91
jihad, 145–9, 154, 156
jizya, 90
John of Gorze, 20
joint family, 75
Judaeo-Christian tradition, 89
Judaeo-Islamic tradition, 89
judicial function, 174
judiciary
  function of, 174
  impartiality of, 80–1, 174
  independence of, 79–80, 174
  judges, 76–7, 79–81, 119
jurisconsults, 77
jurisprudence, place of, 27–9
juristic personality, notion of, 74–5
jurists, role of, 55–6
jus civile, 115
justice, 114, 120, 122
  economic, 72
  openness of, 81
  in rulership, 115–16
  see also: judiciary
justum bellum, 148

Kant, 107
Karmani, El-, 98
Khadija, 3, 4
Khaldun, ibn, 62, 107, 108, 111, 112
Khalifa, 117
knowledge, right to, 120, 180
Kindi, al-, 101

labour, dignity of, 64
law
  commercial, 110–11
  comparative, 165
  Hindu, 28, 75
  humanitarian, 134–8, 158
  ideal, notion of, 65
  of inheritance, 68–70
  international, 109–110, 128–63
  judicial impartiality, 80–1
  maritime, 153
  natural, 131, 155
  of peace, 138–43
  personal laws of minorities, 75, 179
  precedent, in common law, 41, 165
  private international, 144–5
  property, trusteeship of, 61–2
  Roman, 9–10, 28, 30, 115
  supremacy of, 79
  testamentary law, 32, 68, 70, 144, 173
  tort, principle of *Donoghue* v. *Stevenson*, 83
  of war, 114
  see also: presumption of innocence, treaties, trust, trusteeship
Lecky, W.E.H., 84
legal profession, 77
legality, principle of, 79, 184
leisure, right to, 181
letters, privacy of, 71
Lewis, Bernard, 89–90
libraries, Arabic, 15–17
life, right to, 120, 178
livestock, protection of, 137
Locke, John, 82, 97, 105–6, 121, 122
logic, 40–5, 52, 113, 165; *see also*: *qiyas*
Lullus, Raymundus, 20
lunatics, 77, 84, 91
Luther, Martin, 158

Magnus, Albertus, 21, 101
Maimonides, 22, 89
Majlis, 124
Majriti, El, 98
Malaysia, 53
Malik Ibn Anas, 40, 51, 137
Malikite school, 40, 43, 51–2
Mandaeans, 86
mandate, 77
manumission, 139
mare clausum, 153
maritime law, 153
market regulations, 84
marriage, 69
Martel, Charles, 10

Mecca, 3–5, 15, 32, 132, 138, 140
Medina, 4, 5, 10, 32, 124, 132
Mehmet II, 88, 144
mentally afflicted, 77, 84
minorities
  personal laws of, 75, 179
  protection of, 120
  see also: non-Muslims
minors, 77, 91, 121
misrepresentations of Islam, 128–31
Moghul Empire, 12, 75, 140
Moghuls, 75, 87, 91, 143, 154
monasteries, protection of in war, 137
Mongols, 12
monism, 131
monks, protection of, in war, 136
monogamy, 69
monopolies, 72, 181
Montesquieu, 107, 108, 109, 111
Montpellier, Arabist school, 98
Moors, *see*: Spanish Moors
motherhood, rights of, 181
movement, freedom of,182
muftis, 57, 77
muhtasib, 83
mujahideen, 148
mujtahid ,41
Mukhtasar of Khalil ibn Ishaq, 51
multilateral treaties, 141
Musaylima, 142
Musnad of Ibn Hanbal, 54
mutilation in battle, 136

Najran, Christians of, 85, 161
natural law, 131, 155
nature of God, 27
Nawawi, 81
neighbourliness, 72
New World Information Order, 125
Nicephorus, Emperor, 136
non-combatants, 136
non-Muslims
  rights of, 62, 75, 115, 141
  states of, 143
  see also: *dhimmis*
non-retroactivity, principle of, 78

offer, in contract, 66
officious intermeddling, 83
Omar, Second Caliph,71–2, 79, 80, 86, 90–1, 161
opinion
  differences of, 26
  personal, 53
Oppenheim, L. 131
oppression, 116, 122, 176, 180; *see also*: persecution
orders, duty to refuse illegal orders, 178
Ostrorog, Count Leo, 113
Othman, Third Caliph, 79, 80
Ottoman Empire, 12, 56, 88, 91, 140, 143, 144, 148
'oven theory' of Islamic learning, 17

pacta sunt servanda, 132, 141, 149, 154
Paine, Thomas, 121
parents, right of support of, 181
Paris, University of, 102
Parsees, 121
participation, democratic, 92–3, 123–5
Pascal, 99
pax Britannica, 145
pax Islamica, 145, 146
pax Romana, 10, 145
peace
  as basic norm, 159
  law of, 138–43
People of the Book, 86
persecution, 114
Persian Islamic culture, 12
personal opinion, 53
Pickthall, Marmaduke, 6
piety, 81
pilgrimage, 15
Pillar of Embassies, 142
pious foundation, 73
Pococke, Edward, 105, 152
Poitiers, Battle of, 10
political refugees, 142–3
pollination, tradition of, 39
poll tax, *see*: *jizya*
positivists, 65, 82
postliminium, 151
power, abuse of, 179
precedent in common law, 41, 165
presumption of innocence, 78
priestly class, 77
prisoners of war, 135–6, 142
privacy, 71–2, 120, 182
private international law, 144–5
privilege, 76–7
property
  of enemy, during war, 137
  protection of, 181
  trusteeship of, 61–2
Prophet Muhammad, 3–5
  leadership roles of, 5
  see also: *hadith*
punishment, forms of, 169

qadi, 57, 79, 80, 81
qiyas, 28, 40, 53
quarter, 138
Quraish, 140
Qur'an, 5–8, 26, 32–4, 171

Ramazan, month of, 60
ransom, *see*: prisoners
ratification, 141
realist school, 81
reason
  use of, 103, 104
  see also: Aquinas, Averroes, logic
rebellion, right of, 15, 114
reciprocity in contract, 66
recognition, 143, 146, 148
Reformation, 104
refugees, political, 142–3
Refutation of the Philosophers, 95
Refutation of the Refutation, 95
Rejecting of the Reprehensible, 84
religion
  dignity of other religions, 161, 180
  freedom of, 180
  Greek Orthodox Church, 88, 144
  see also: compulsion in religion, *dhimmis*, worship
Renaissance, 104
representation, 77
residence, right to place of, 120
respect, right to, 120
responsa prudentium, 57
respublica Christiana, 30
restrictive trade practices, 181
Rhyne, Charles S., 157
Richard the Lion Heart, 12, 87
ridicule, 120
rights
  abuse of, 72
  of children, 77, 121
  cultural, 126
  economic, 122, 126
  to education, 182
  to found family, 181
  to freedom, 178
  of future generations, 120
  inalienability of, 105, 122, 178
  of infidels, 115
  to knowledge, 120, 180
  to leisure, 181
  to life, 120, 178
  of man, 113
  of motherhood, 181
  of non-Muslims 62, 75, 115, 141
  to privacy, 71
  of rebellion, 15, 144
  to respect, 120
  to self-determination, 126
  social, 122, 126, 165
  to social security, 181
  of support of parents, 181
  see also: economic order, equality before law, fair trial, International Covenants, residence, women, rights of, Universal Declaration of Human Rights, Universal Declaration of Islamic Human Rights
Risala of al Khairawani, 51
Risala of Shafi'i, 52, 53
Rodwell, Rev. J.M., 6
Roman Empire, 9–10, 11, 110, 147
Roman law, 9–10, 28, 30, 115
Rousseau, J.-J., 40, 92, 106–7, 121, 123
Russell, Bertrand, 14, 22, 96, 97, 102

Saint Augustine, 117
Saint Francis of Assisi, 73–4, 87, 99, 100; *see also*: Franciscans
Saint Isidore of Seville, 156
Saladin, 12, 16, 87, 149
Samaritans, 86
Saracens, 129; *see also*: Saladin
Sarakhsi, Shamsal-Aimma, 109
Savigny, 108
scientific spirit, 96–8
Schacht, Joseph, 27
scholars, differences of opinion of, 26
scholasticism, *see*: Schoolmen
scholasticus, Oliverus, 136
Schoolmen, Christian, 22, 105
schools of Islamic law, 46–58
Scotus, Duns, 94
search, unlawful, 71
self-determination, right to, 126
separation
  in marriage, 69
  of moral and political institutions, 106
Sermon, the Prophet's Farewell, 62
Shafi'i, *Imam*, 81
Shafi'i, Muhammad Al-, 40, 52–4, 132, 137
Shafi'ite School, 52–4, 100, 132
Shari'a, 30, 31, 118, 125, 169, 183, 185
sharing, notion of, 60
Shaybani, Al, 109, 112, 130, 131, 132, 140
Shephardi Jews, 91

shipping, safety of, 83, 84
shura, 83, 124, 177
Sicily, 19
Siete Partidas, 136, 156, 158
siyar, 130
slander, 120
slavery, 138–9,172
social contract theories, 117–18
social rights, 122, 126, 165
social security, right to, 181
social solidarity, 111
sovereign, subordination of to God, 82
sovereignty theories, 81–3, 105–6, 131
Spain, Islamic, 22, 25, 97
Spanish Moors, 22
Spanish theologians, 115; *see also*: Victoria
spying, 71
Sri Lanka, 53
Standard Minimum Rules for Treatment of Offenders, 185
Stone, Julius, 22
Suarez, 157
submission to God, 8–9
succession, *see*: testamentary law
Suez crisis, 167
Sufis, 98, 99
Suleiman the Magnificent, 140, 143, 148, 154
sunna, 34–9, 54, 149, 176, 177
supremacy of law, 79
suras, 171
surveillance, 71
Sylvester II, Pope, 21, 97
syasa, 120
synagogues, 162

talak, 69
Talas, Battle of, 10
taqlid, 41
tax, poll, *see*: *jizya*
Taymiya, Ibn, 54, 62
technology and privacy, 71
teleological reasoning, 53
telephone tapping, 71
territorial expansion of Islam, 9–13
territory, enemy, 137
testamentary law, 32, 68, 70, 144, 173
Thabit, Zayd Ibn, 6
theocentric approach,116–17
Theodosius III, 10
Timbuktu, University of, 11
Toledo, 21
tolerance, 75, 85–93
torture, 179, 184
Traditionalist movement, 51
treachery, prohibition of in battle, 136
treaties, 33, 130, 132, 140–1, 143, 155
Treaty of Paris (1856), 130
trespass, 71
trust, 73, 79, 106, 173
trust, charitable,73–4
trusteeship, notion of, 33, 61, 82, 105, 106, 131, 173; *see also*: trust

Uhad, Battle of, 124
umayyads, 10, 91, 142
ummah, 83, 122, 124, 179, 180, 181
UN Charter, 162
Universal Declaration of Human Rights, 76, 125, 168, 169, 185
Universal Islamic Declaration of Human Rights, 113, 122, 176–83
universalism, 62, 133
universities, 54, 55
unlawful search, 71
uses, 73–4
usury, 42, 66–8, 171, 172, 181

Vattel, E. de, 155
vegetation, protection of, 137
vicegerency, notion of, 92, 133, 176
Victoria, de, 109, 110, 156, 158
von Eschenback, Wolfram, 87

wakil, 77
waqf, 73–4
war
  Islamic attitude to, 161–3
  law of, 134–8
  mutilation in battle, 136
  prisoners of, 135–6, 142
  property of enemy during, 137
  protection during, 136–7
  see also: *jihad*, treaties, weapons
weapons of war, 138
weights and measures, false, 66
Wells, H.G., 10, 18, 23
wives, treatment of, 172
women
  protection of, in war, 136
  rights of, 68–70, 91, 121, 172, 182
workers, dignity of, 181
worship, places of, 136, 137

zakat, 59–60, 74, 122, 180
zann, 56
Zayd Ibn Thabit, 6
zimmis, see: *dhimmis*
Zoroastrians, 89