CHAPTER 18

Islamic Jurisprudence

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I INTRODUCTION TO ISLAMIC JURISPRUDENCE

What is the meaning of the word 'jurisprudence'? The etymology of the word 'jurisprudence' hails form two Latin words; first, 'ius' meaning 'law' and 'iuris' meaning 'of law' and, secondly, 'prudens' meaning 'knowledge' or 'science' or 'philosophy'. 'Jurisprudence' therefore means 'knowledge of the law' or 'philosophy of the law'. In the Western world 'jurisprudence' has been variously described. Julius Stone, for example, describes 'jurisprudence' as a 'chaos of approaches to a chaos of topics, chaotically delimited'.[1] While Dias writes that books that bear the title 'jurisprudence' vary widely in subject-matter and treatment because the 'nature of the subject is such that no distinction of its scope and content can be clearly determined'.[2]

Islamic jurisprudence (interchangeably called Islamic law or Shari'a), in contrast, has a fairly well-defined structure; textbooks on it invariably deal with a range of familiar topics and their contents are fairly predictable.[3] Why is this so? Is it simply because Islamic jurisprudence is primarily concerned with the manner in which laws are derived from the Qur'an and the Sunnah (the precedent of the Prophet Muhammad)? Kamali explains in this regard that revelation, which is given to the human being to restore unity and help him/her achieve a just and devout order in society as well as in the soul, must be interpreted so as to render it practicable in every culture, while not betraying its spirit and immutable provisions. Islamic jurisprudence, therefore, deals with the sources of the law as well as their interpretation.

However, Islamic jurisprudence could also refer, as in Western jurisprudence, to legal philosophy or philosophy of the law. It is for this reason — and since this is a textbook on jurisprudence or legal philosophy — that we have

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[1] See L B Curzon *Jurisprudence* 13 (1979).

[2] See RWM Dias *Jurisprudence* 1 (1976).

[3] See M H Kamali *Principles of Islamic Jurisprudence* (1991) Preface xv.

decided to include a section on Islamic law as well as a section on Islamic legal philosophy.

Is Islamic law related in any way to Islamic legal philosophy? The greatest Muslim legal thinkers, such as Ibn Sina, Ibn Rushd and Al-Ghazali, wrote treatises, not only on Islamic legal philosophy, but also on substantive law issues such as Islamic family law. Understanding their philosophical foundations would therefore greatly enhance one's understanding of their views and opinions on questions of Shari'a (Islamic law).

The most profound difference, perhaps, between Western jurisprudence and Islamic jurisprudence is the fact that morality and religion acquire much greater prominence in Islamic jurisprudence. Kamali explains:

> The values that must be upheld and defended by law and society in Islam are not always validated on rationalist grounds alone. Notwithstanding the fact that human reason always played an important role in the development of Shari'ah through the medium of ijtihad [personal reasoning], the Shari'ah itself is primarily founded on divine revelation.[4]

The idea of revelation and reason is thus central and forms the core of Islamic legal philosophy. It is for this reason that Ibn Rushd's treatment of the idea of revelation and reason is discussed in some detail in the section on Islamic legal philosophy.

II ISLAMIC JURISPRUDENCE

(a) Introduction

Chronologically, Islamic law unfolded when Roman law had already reached the peak of its development while the Common law is a much later development which only started to take shape when Islamic law had already become a mature system.[5] The history of Islam and its spread across the world spanned several centuries. It started with the prophethood of Muhammad (PBUH)[6] in 610 AD[7] and has ultimately shaped the nature of Islamic law as we understand it today. Islamic law is the product of centuries of juristic development and interpretation and has furthermore been formed by a

[4] Ibid.

[5] N Moosa 'A Comparative Study of the South African and Islamic law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman' Unpublished LLM Thesis (UWC) (1991) 12.

[6] Peace Be Upon Him (PBUH). This salutation to the Prophet Muhammad will, for the sake of convenience, be implied but not repeated every time his name is used in the text.

[7] AD (Anno Domini) refers to the Gregorian Christian calendar. This can also be cited as Common Era (CE) which is numerically equivalent to the Christian AD. AH (Anno Hegirae) refers to the Islamic (lunar) calendar. Whenever two dates are given, the first will be of that of the Islamic calendar (AH) and the second will be AD, e g 40 AH/660 AD.

variety of processes. Apart from a period of pre-Islamic Arabia, it is convenient to divide the development of Islam and Islamic law into seven periods. The first five periods cover the developments during the classical period or early centuries of Islam up to and including the Abbasid period which ended in 1258. Period six covers developments during the post-Abbasid period to 1900 and period seven from 1900 to the present.[8]

The section on Islamic jurisprudence provides a brief historicized understanding of the genesis of law. This will highlight that an alternative normative Islamic vision which has the (ethical) spirit[9] of equality as its central organizing principle is possible. The relevance of Islamic jurisprudence in South Africa will also briefly be looked at.

(b) Sources of Islamic law

We want the readers to picture Islam as a tree which has at its base two main roots (primary sources), namely the Qur'an,[10] (the holy book of Islam) and Sunna[11] (the traditions of Prophet Muhammad), and as its fruits, the Shari'a[12] (Islamic law or jurisprudence). The Qur'an is considered by Muslims to be the ipsissima verba or actual and literal word of God. It was

[8] The first (Meccan) period dates from 610–622 AD. The second (Medinan) period dates from 1–11AH/622–632 AD. The third (Caliphate) period dates from 11–40 AH/632–661 AD. The fourth period (Umayyad rule) dates from 41–132 AH/661–750 AD. The fifth period (Abbasid rule) lasted from 132–300 AH/750–900 AD. The sixth period (1400–1800 AD) is referred to as the period of medieval Islam. The seventh period (of reform and modernity) dates from 1800 to today. For detail see N Moosa Forthcoming book entitled: *Unveiling the Mind: A Herstory of the Historical Evolution of the Legal Position of Women In Islam* (2003).

[9] Or Islam viewed in an ahistorical and decontextualized context and as generally contained in its fundamental sources, namely the Qur'an and Sunna. From the point of view of normative Islam (relevant and meant for all times to come), men and women are essentially equal, despite biological and other differences.

[10] Qur'anic references in both the text and footnotes of this chapter are given between parenthesis, for example, (Q1:2). The first figure is the number of the chapter or surah. The number following the separating colon indicates the verse or ayat. The Qur'anic references referred to in this chapter normally refer to the translation by Yusuf Ali (1946), unless otherwise indicated.

[11] Literally, sunna means the 'trodden path'. It is also regarded as being a body of precedent or normative custom. The term was thus used to describe the customary law or tradition existing in Arabia before the birth of Islam. The Islamic legal system has as its basis these pre-Islamic customs and usages. To distinguish the Sunna of the Prophet as a formal source of Islam from this sunna, the former is written with a capital 'S'. Sunna is received custom associated with Prophet Muhammad, embodied after his death in a body of texts compiled as books called Hadith.

[12] The word shari'a, literally translated means 'straight path/way', 'path to watering hole'(ARI Doi *Shariah: The Islamic law* (1984) 2). Interestingly, the connotation attached to water is not one of sterility or stagnation but one of life, movement and therefore change. Sadly, and as will be highlighted in this chapter, this has historically not been the case with shari'a. Shari'a is also mentioned in various other places in the Qur'an (Q1:6; Q4:26–8 ; Q5:48 ; Q42:13 and Q45:19–21. AY Ali *The Holy Qur'an (Text, Translation and Commentary)* (1946) 1359 n 4756 by translating it in the verse Q45:18 as a 'right [w]ay of [r]eligion', ascribes to it a meaning wider than mere provisions of a legal nature. While, on the one hand, shari'a should therefore not just simply be equated with law, law has always been understood by Muslims to be a part of the shari'a and will therefore be used as such in this chapter.

revealed to Muhammad piecemeal over a period of approximately 23 years — partly in Mecca and partly in Medina. It is the foundation stone of Islam and therefore the most important and primary source of Islam. The Qur'an is not, however, a law-book in the main with clear-cut answers to all legal questions. Approximately 80 of the 6000 odd verses are legal in nature. The Qur'an is by its own definition a 'huda' or source of guidance. Its broad ethical injunctions emphasizing justice and fairness clearly predominate over (but do not replace) its legal formulations. Yet, today these legal verses are given more weight, which often overshadows the egalitarianism which is a fundamental part of the spiritual message of Islam.

The Sunna is the other important source. With the passing of time, this tree of Islam grew stronger as two new roots (secondary sources) were added by human endeavour, namely ijma (consensus)[13] and qiyas (analogical deductions).[14] They are really instruments or subsidiary sources or legal techniques for resolving specific legal issues. They were designed and introduced by human endeavour to provide legislative guidance and solutions to new problems which are not directly available from the Qur'an and Sunna. The two sources of ijma and qiyas, therefore, developed out of the two primary sources. While it has been argued that these sources were developed by two centuries of experience, the classical exposition of Islamic law believes that these sources existed from the very beginning of Muslim exegesis. The fruits (Shari'a) as the by-products of the tree obviously only grew and ripened once the tree itself was firmly rooted. The tree only bears fruits because of strong and healthy roots. Yet fruits may have latent (unseen) defects and even patent (clear) defects. The apple may, for example, contain a worm. Furthermore, fruits are seasonal and different varieties/strains can also be found. Different countries have different families of the same fruit and fruits unique to their region. The same is true for Islam and Islamic law. It is clear from the illustration in our mind that the tree came before the fruit. Yet certain Muslims have confused the two and have given the Islamic law (Shari'a) more importance than the sources of Islam.

(c) Primary sources versus Shari'a and Fiqh

Shari'a (Islamic law or jurisprudence) is essentially the interpretation and application of the primary sources (Qur'an and Sunna) by early Muslim male

[13] The consensus of opinion of either legal scholars or the community (ummah) in a/any particular age on any matter of Islamic law or juridical rule based on the Qur'an and Sunna.

[14] Or logical reasoning based on the Qur'an, Sunna and Ijma. Prior to qiyas, ra'y (considered opinion/individual reasoning) was representative of a variety of modes of ijtihad (independent reasoning) which was used in the Prophet's time as well as after him by his Companions. It later developed into the concept of qiyas. Qiyas (literally, to compare) can be seen as a special form of ijtihad. See note 25 below. His Companions are known as al-Khulafa-ur-Rashidun or the four 'orthodox' or 'rightly guided' caliphs, Abu Bakr, Umar, Uthman and Ali who were the companions and immediate 'successors' of the Prophet Muhammad (PBUH).

jurists like Imams Abu Hanifa and Shafi'i.[15] These interpretations have often been given precedence over the divine Islamic injunctions themselves. In this section, the primary sources of Islam per se are distinguished from, and must not be confused with, Islamic law or Shari'a, which in our context is the 'common law' of Islam. Often these terms are used interchangeably by various writers. This gives the impression that Islam is Shar'ia and vice versa. The primary sources of Islam do, however, form the basis of Shari'a. It is very important to highlight this distinction as it becomes fundamental when dealing with the question of reform. Fiqh is the science of Muslim jurisprudence. Very often scholars use the term Shari'a (Islamic law) in a technical sense to describe the law as expounded in the primary sources of Islam itself, namely the Qur'an and Sunna. They (scholars) then use the term fiqh to describe the Islamic jurisprudence as developed from these primary sources. There are also scholars who use the terms shar'ia and fiqh synonymously. There are also other scholars who reserve the term fiqh for Islamic law and usul ul-fiqh (principles of the science of Islamic jurisprudence) to denote Islamic jurisprudence.

However, in this chapter for the sake of simplicity and regardless of whether or not Western colonialists may have been responsible for the usage of this term, Shari'a refers to the actual practice of Islamic law or jurisprudence per se, whilst fiqh is used to denote the theory or reasons for the theoretical formulation and framework of these rules of law. Although the basis of both these concepts (Shari'a and fiqh) can be traced back to the primary sources of Islam, it must be distinguished from these sources. Shari'a (Islamic law) is essentially the work of early Muslim male jurists some two centuries after Islam came into existence. Islamic law is still very much alive both in spirit and in fact, and it is part of the present as it was of the past. This is clearly evident in Muslim countries following an Islamic legal system. As detailed below, the jurists of the four main schools of law have constructed their jurisprudence with the Qur'an and Sunna as their foundation and for this reason we should not disregard their work. However, by the same token we should not be limited by their understanding of the primary sources. The (divine) sources remain immutable but their (human) interpretations do not. While the fruits of Islam were themselves the products of men, these men pointed people back to the main sources if they could be proved wrong.

(d) Schools of law

While the development of Islamic law can be traced back to the Prophet, it was in the eighth century AD and second century of Islam (AH) and due to

[15] See sections III(e) below.

political dissatisfaction, that four orthodox Sunni[16] schools (madhhabs or versions) of Islamic law (jurisprudence) were established and named in order of precedence after their founders, namely Hanafi, Maliki, Shafi'i and Hanbali. The founding fathers or jurists of these schools, namely Imams Abu Hanifa, Malik, Shafi'i and Hanbal, who were nearly contemporaries, were also the first to formulate the principles of the science of Islamic jurisprudence (usul ul-fiqh). These four schools, discussed below, together comprise the Sunni school as opposed to the Shi'ite sect.[17] These schools were geographically spread all over the Muslim world. In time they established themselves in various parts of the world so that today they are found mainly in the following areas: the Maliki in North, West and Central Africa; the Hanafi in the Near and Middle East and India and Pakistan, the Shafi'i in East Africa and Southeast Asia and the Hanbali in Saudi Arabia. South African Muslims in general belong to the Sunni (traditionalist) school and are more or less

[16] The Sunnites (traditionalists) represent the orthodox (majority) Muslim population who do not align themselves with any particular school. They hold the al-Khulafa-ur-Rashidun (note 14 above) in high esteem and confirm the existing Islamic political order.

[17] In contrast to the Sunnites, the heterodox Shi'ites (partisans) or the followers of the party of Ali (the Prophet Muhammad's cousin and son-in-law and fourth caliph) became a school of Islam calling for restricting the leadership in the Islamic world to the household of Ali on the basis of consanguinity (his blood ties with the Prophet). Shi'ites revere Ali and his sons Hasan and Husain as the First, Second and Third Imams of the Islamic community in that order (and the subsequent nine imams who were the descendants of Husain). The differences and disagreement between these two schools of law have more to do with past politics than jurisprudential principles. The ideological split between the Sunnites and Shi'ites became solidified or permanent during the Umayyad or fourth period (661–750AD) of Islamic history. The split between them still continues to divide the Muslim world today, although the main dispute and objective of the Shi'ites (to restore the caliphate to the family of the Prophet) is no longer justified today. There are, however, other differences over matters concerning imamah (leadership) of Muslims, interpretation, sources of religious authority and matters of religious observances etcetera. The question of leadership caused Shi'ites to split amongst themselves and form rival sects, for example, al-Imamiyah (or al-Ithna 'Ashariyah (the Twelvers)); al-Zaydiyah and al-Isma'iliyah. The Imamiyah school is the largest of the Shi'ite sects with large followings in countries like Iran, Iraq, Bahrain, Kuwait and Pakistan. The Zaydis (along with Twelver Shi'ism) are the two schools closest to Sunni orthodoxy with followers in Yemen. The Isma'ili have followers in countries like India, Iran, Central Asia, South Arabia and Syria (S Mahmassani *Falsafat Al-Tashri Fi Al-Islam (The Philosophy of Jurisprudence in Islam)* (trans FJ Ziadeh, 1961) 35–39). Shi'ites constitute approximately one-eighth of the world's Muslims and are concentrated in Iran where Imami Shi'ism is the official school and state religion (M Ayoub 'The Islamic Tradition' in WG Oxtoby (ed) *World Religions: Western Traditions* (1996) 404). (See note 16). The Islamic Revolution in Iran in 1979 was a catalyst for the spread of Shi'ism into Africa, Europe, USA and the Far East (where Muslims are predominantly Sunni). (Indian Khoja) Shi'ite communities are found in East Africa, namely Uganda, Tanzania and Kenya. Many were expelled from Uganda and sought refuge in Britian, Australia, Canada and the United States. Although it was approximately a decade later that the active propagation of Shi'ism took off in South Africa, the Iranian Revolution also resulted in increasing the existing but small Shi'i community, the majority of whom were actively engaged in the struggle against Apartheid and therefore found inspiration in the Revolution and its leadership. Many of the original members were also members of local political parties. The migration of Shi'is from Pakistan, India, Lebanon, Syria to the 'West' has also resulted in the presence of Shi'ite communities in these countries. In addition, many Iraqis also sought asylum and resettled in these countries. This information has been gleaned from various sources available at the Shi'ite 'Ahlul Bait' Foundation in Cape Town.

equally divided between the Hanafi and Shafi'i schools.[18] For this reason and the fact that Sunni jurists do not consider the adoption of legal principles from a heterodox (Shi'ite) sect as an acceptable basis for legal reform, Shi'ite legal principles will therefore not be focused on in this section. While their already existing but small numbers have increased since the Iranian Revolution of 1979, there are no figures available on the exact number of Shi'ites in South Africa.

Today these four schools of law are universally accepted by Sunni Muslims as equally valid interpretations of the primary sources of Islam. This is due primarily to the integrity of their founders and authenticity of the method that they followed. Furthermore, each of the four schools recognizes the conclusions of the others as valid. Changing schools is traditionally frowned upon. However, not only is any Muslim free in principle to chose her own school of law, but s/he is also permitted to change from one school to another (talfiq), when doing so would genuinely provide a better solution to a legal matter and is not done merely for opportunistic reasons. Even legislation, especially pertaining to Muslim Personal Law (MPL),[19] in certain Muslim and other countries (for example, India) has allowed for such a change in schools of law to allow for a more liberal application of the law, especially as concerns the rights of women.[20]

Although the jurists differ mainly in their emphasis on the four primary sources, these differences are not deemed fundamental — they are not doctrinally different.[21] It is true that we find minor variations regarding certain issues in the four schools. For example, the Qur'an[22] states that before praying one must perform an ablution. One of the requirements of this ablution is to wash the arm up to the elbow. The schools might differ on

[18] Muslims are estimated to constitute 18.7% of the world population (of which one-eighth are Shi'ites) (N Moosa (note 5 above) 41; (note 17 above)). The 1996 South African Population Census estimates that there are just over a half a million Muslims (553 585) out of a total population of 40.5 million. Muslims therefore constitute an estimated 1.4% of the total population compared to the nearly 80% Christians.

[19] Muslim Personal Law is a religiously-based private law deriving from the Qur'an and pertaining to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship. All laws affecting the status of Muslim women have historically been relegated to this private sphere. Henceforth the abbreviation MPL will be used (see N Moosa (note 5 above) 76).

[20] This is evident in the laws of marriage and divorce. For example, as far as divorce is concerned, the Hanafi school of law (in comparison to the other Sunni schools) is the most restrictive towards women. In terms of the Hanafi school of law, a wife is denied the right to obtain a judicial dissolution of an unhappy marriage. To resolve this problem in countries where the Hanafi school prevails, '. . . many reforms were effected by the substitution by legislation of the doctrine of the locally prevailing school for that of another of the four schools [Maliki, Shafi'i and Hanbali]'. (DS El Alami & D Hinchcliffe *Islamic Marriage and Divorce Laws of the Arab World* (1996) 3). The Project Committee of the South African Law Commission (2002) in developing its proposals have also taken these factors into consideration (see note 66 above).

[21] As indicated in this section (schools of law), the differences between the schools of Islamic law are more of a geographical nature than doctrinal.

[22] Q5:7.

whether this is meant to include the washing of the elbow as well. However, this does not detract from the fundamental fact that Muslims must pray and cleanse themselves before doing so.

As will now be briefly illustrated, it is also true that, while the four schools of Islamic jurisprudence differ in both subtle and overt ways with respect to women's legal rights, they have more in common in this respect than differences. Abortion is one such example. Notwithstanding that both the Qur'an and Sunna do not provide a clear directive on abortion and that Islam generally permits preventing pregnancy for valid reasons, abortion is prohibited on the basis of various Qur'anic verses relating to infanticide.[23] There are views for and against abortion. In some Muslim countries (eg Tunisia) abortion is legal, whereas in others (eg Pakistan and Sudan) it is criminalized. The four schools of law all make some form of abortion illegal. While different positions on abortion are proposed by the four schools as to the time when an abortion may be permitted, they are unanimous that abortion is generally unlawful and forbidden.[24] It is also true that there are cases where these seemingly minor differences in interpretation result in laws which vary greatly in their consequences for women. The laws of marriage (eg polygyny) and divorce (eg grounds of divorce) contain many examples illustrating this.

(e) Jurists of the four schools

(i) *'Abu Hanifa*

Imam Abu Hanifa was the founder of the first and most liberal of the Sunni schools — the Hanafite school. He was born in 80 AH/699 AD in Kufa (Iraq) during the Umayyad dynasty and died in Baghdad in 150 AH/767 AD, 18 years after the Abbasids came to power. Abu Hanifa formulated a theory called istihsan or juristic preferences, which has come to signify breach of strict analogy for reasons of public interest. In general, individual reasoning is called ra'y (opinion). When used by a qualified lawyer (mujtahid), it is called ijtihad[25] (striving to deduce rules of law). When used to achieve consistency and under the guidance of a parallel decision, it is called qiyas

[23] The Qur'an talks of the sanctity of life (Q5:32), that children not be killed on the basis of existing (Q6:151) as well as anticipated poverty (Q17:31) and that 'lost' (gone astray) are they who have killed their children (Q6:140 and Q81:8–9). See also Q6:137 (report of pagan practice of killing their children as human sacrifices to their gods) and Q37:99–113 (in testing Prophet Ibrahim to offer his son as a sacrifice to Him, God ultimately discourages the killing of children). The Qur'an also specifically says that women shall not kill their children (Q60:12).

[24] For a detailed analysis see N Moosa 'A Descriptive Analysis of South African and Islamic Abortion Legislation and Local Community Responses' (2002) 21 *Medicine & L* 257–279.

[25] This means 'independent reasoning' used by a jurist (mujtahid) to apply Shari'a to contemporary (modern) circumstances. In section II(g), it will be highlighted that during the thirteenth (fourteenth) century Sunni Muslims closed the gates of ijtihad and declared that scholars

(analogy/analogical deduction). Although it was already in practice before his time, he is said to have been the first to give prominence to the doctrine of qiyas. Jurists al-Shaybani[26] and Abu Yusuf [27] (pupils of Abu Hanifa) formulated the theory called istihsan or istihbab (approval or preference/ juristic equity) — modifying theory to suit practice. When individual reasoning (ra'y) reflects the personal choice and discretionary opinion of the lawyer as to what is deemed appropriate, it is called istihsan or istihbab. Abu Hanifa developed the doctrine of legal fiction (tahayyul).[28] This doctrine is not foreign to other legal systems. It is very much like our notions of equity in which a jurist can set aside an applicable rule if an alternative solution is more just or equitable, for example, if custom, public welfare, necessity or undue hardship require it. Roman law developed the theory of equity and good conscience which is described as akin to hiyal. There are, however, subtle differences between the notion as it exists in Islamic law and Roman law. The doctrine was furthermore not accepted by all jurists.

In Abu Hanifa's time (before the establishment of the Hanafite school) jurists were geographically divided into two classes or ancient schools of law: 1) those of hijaz or Arabia, the upholder of traditions, and 2) those of Iraq, the upholders of private opinion.[29] He was an upholder of private opinion/ judgment, but this did not detract from his respect for and knowledge of Prophetic tradition. However, he is purported to have only made use of 17–18 traditions of the great mass of traditions during his time.[30] Imam Abu Hanifa is also reported to have said that: 'This knowledge of ours is opinion; it is the best we have been able to achieve. He who is able to arrive at different conclusions is entitled to his opinion as we are entitled to our own.'[31] This reinforces the fact that he was a human being with a mind of his own. He, like the other three Imams after him, recognized the limitations of their 'ijtihad'. It was never their intention that their opinions be accepted uncritically or even to have 'eternal' validity.[32] Abu Hanifa was further of the opinion that ijma (consensus of opinion) was not confined to the four 'successors' of the Prophet but was valid for all times and that local customs and usages (urf)

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must rely on the legal decisions of past authorities instead of their own academic exertion (see note 14 above).

[26] 132–189 AH/749-c.805 AD.

[27] 113–182 AH/731–798 AD.

[28] This may be described as the use of legal means for achieving extra-legal ends which could not have been achieved by the law. The doctrine closely resembles the doctrine of 'dharurah' or necessity (see K Masud *Islamic Legal Philosophy* (1977) 284).

[29] As J Schacht *The Origins of Muhammadan Jurisprudence* (1950) 7 points out, the ancient schools of law are essentially geographically different. The ancient schools of law which were geographically designated were succeeded by (eponymous) schools named after persons — personal schools — four of which survived.

[30] S Mahmassani (note 17 above) 20 illustrates otherwise.

[31] Ibid 19–20.

[32] See discussion on Imam Malik below.

also played a role in guiding the law. For him, as for the other jurists, the Qur'an and Sunna were the primary sources, the rest being secondary sources. With the assistance of his able scholars, he managed after about thirty years to codify his work. However, the entire code has been lost/ destroyed and what we are ultimately left with is what had remained of his teachings in the memory of his disciples, among others, al-Shaybani and Abu Yusuf. Furthermore, these jurists did not always agree with the views of Abu Hanifa. It was therefore not unlikely that in their reconstruction of his philosophy they could have endorsed traditions which Abu Hanifa had not accepted. It is thus not surprising that today we see his jurisprudence as contradictory to his character. Yet Hanafis, or followers of this school, refuse to overlook this to look for answers in the primary sources.

(ii) *Malik*

Imam Malik was born in 95 AH/713 AD in Medina, where he died in 179 AH/795 AD. The Malikite school was also known as the school of the Medinan people and its origin can be traced to, amoung others, the second caliph Umar and Ayesha, youngest wife of the Prophet. Imam Malik was both traditionalist and jurist and was held in high esteem by Imam Shafi'i, who was also his pupil. Imam Malik's well known collection of traditions is called the Muwatta. Northern Nigeria in West Africa has a predominantly Maliki following.

He died about twenty-nine years after Abu Hanifa and was influenced by him to a certain degree. Imam Malik, like Abu Hanifa before him, aware of his fallibility, also warned that Muslims must guard against upholding his interpretations, which should be considered wrong if the primary sources indicate otherwise. He did not want his views to be followed blindly the way certain ulama seemed to advocate. This is evident from the following quote: 'I am but a human being who is capable of right and error. Consider my views carefully; whatever is compatible with the Koran and the sunnah, accept it; whatever is in conflict with [it], set it aside.'[33]

Maliki jurists, however, categorically denounced the Hanafi doctrine of hiyal, referred to above, as nothing but a subterfuge. Maliki lawyers, with their focus on internal intentions rather than on external behavior, denounced the Hanafi inventions of hiyal and istihsan because they believed they contradicted the interests that the law of God was meant to serve. Masud explains that 'tahayyul strives to transfer the value of one legal act to another legal act externally, i e merely on the basis of apparent similarity between the two acts. It disregards the inner meaning of the acts on the basis of which the

[33] S Mahmassani (note 17 above) 96. The same logic was followed by Imams Shafi'i and Hanbal.

acts were originally intended by the shari'a.'[34] Imam Malik developed a further 'source' of law called istadlal (juristic deduction outside the scope of analogy) in addition to the recognised four sources and recognised a principle called maslaha (public welfare/utility/interest) unique to his school and which he based on certain grounds. The Maliki's pioneered the doctrine of maslaha (public welfare) as an independent source of law. This source allowed a jurist to articulate a new rule, not by direct analogy, but by extracting the public welfare principle (maslaha) that lay behind the first rule and then apply it to the new case.

(iii) *Shafi'i*

Imam Shafi'i was born in 150 AH/767 AD in Palestine and died in Egypt in 204 AH/819 AD. Imam Shafi'i stood midway between Abu Hanifa (opinion) and Malik (tradition) in the use of traditions and analogy. He was a pupil of Malik, but gained more prominence than his teacher. He was more critical in his examination of traditions and made more use of analogy than his teacher. He gave more scope to ijma (consensus of opinion) than Malik to give greater effect to the Prophetic dictum that 'My people will never agree in an error'. On the other hand, still a central theme of his doctrine is discouraging free use of personal opinion (ijtihad). He only allowed it in the form of qiyas. He agreed with Malik in adopting istadlal as an additional 'source' and rejected Abu Hanifa's equity of the jurist. He is famous for his treatise on principles (usul) of jurisprudence called 'Risala'. This school has a large following in Egypt. He regards the Qur'an as primary source and places the Sunna of the Prophet (as distinguished from other sunna) next in line. He based his own system on a collection of hadith called 'Kitab al-Umm', which he compiled for that purpose. He argues that a Qur'anic verse cannot be abrogated by another Quranic verse and further that the Qur'an cannot abrogate the Sunna nor can Sunna abrogate the Qur'an. He maintains that Sunna can be superseded by Qur'an, but not until the Sunna is first abrogated by another Sunna. He gives ijma (consensus) a wider meaning to include consensus of the whole community and confines qiyas (analogy) to matters of detail. Qiyas thus come last in his scheme of legal theory. The process of development in this regard is briefly detailed in the next paragraph and the end result was the formulation by Imam Shafi'i of the classical theory based on four principles or roots, namely the Qur'an, Sunna, ijma and qiyas. It was apparently through his work that the science of jurisprudence was formulated into a coherent whole.

In a nutshell, the divergent jurisprudential approaches between the traditionalists and upholders of independent reasoning needed to be

[34] K Masud (note 28 above) 284.

addressed. The various schools of law spent a lot of time and energy in defending their own concepts of Islamic law and in argument with the traditionalists. Thus it was not surprising that about fifty years went by with little progress being made in formulating a code of Islamic law as was intended by the Abbasid caliphs. Imam Shafi'i, however, brought some order to this chaos and is therefore called the 'father' of Islamic jurisprudence. He was thus the first to compile the sources of law (as Abu Hanifa's code was lost). From 810 we have the systematization of sources of law. His contributions resulted in the implementation of a coherent legal system based on the Qur'an at the beginning of the ninth century. The traditionalists had won at the end. Imam Shafi'i's promulgation of a theory of the sources of law (usul-ul-Fiqh) was accepted by most jurists and also resulted in Sunni jurists accepting and aligning themselves around the four main schools of law.[35] To sum up, because no traditional consensus prevailed, Imam Shafi'i affected a compromise to the problem as to which sources of law are relevant and the weight to be attached to them. He put a stronger emphasis on the Qur'an and Sunna as eternal and immutable sources of law. This now left Muslim countries with very little space for differences in substantive law as the law existed and was already available and could therefore not be applied as an instrument of change. He therefore restricted opportunities for the development of new law.

(iv) *Hanbal*

Imam Hanbal, a teacher of hadith and authority of the law school of the Hanbalites, was born in 164 AH/780 AD in Baghdad and died in the same city in 341 AH/855 AD. He gained widespread respect and notoriety for refusing to denounce his non-rationalist (Ash'ari) philosophy under Abbasid caliphs.

He was a pupil of Shafi'i and had a reputation of being more of a traditionalist and theologian than a jurist. He was very literal in his approach to traditions — so much so that he, for example, never ate watermelon because he could not find any hadith in this regard. He put little emphasis on ijma and qiyas as sources of law and did not give any scope to human reasoning. His famous work on traditions is called 'Musnad'. It is interesting to note that whilst the Hanbali school (existing mainly in Saudi Arabia), with its conservative ideology, has the smallest following, it has a disproportionately great influence in modern times. The Saudi Ulama are of the

[35] J Schacht *An Introduction to Islamic Law* (1964, reprint 1984) 48. W Hallaq however, questions the validity of Schacht's assumptions with regard to Imam Shafii (see section II(g) and W Hallaq 'Was Al-Shafi'I the Master Architect of Islamic Jurisprudence?' (1993) 25 *Int J of Middle East Studies* 587-588).

puritanical and conservative Wahabi school of law, which, in effect, is a branch of Hanbali thought. Human reasoning is viewed with suspicion by this school.

Apart from the four Sunni schools (and the ancient schools of law before them), there were other less prominent schools which followed during this period, but which are now either extinct[36] or still exist in small, isolated communities.[37] Thus since about 700 AH/1300 AD, only four schools of law survived in orthodox (Sunni) Islam. The fact that there were four or more schools highlights again that instead of uniformity there was a diversity of juristic thought. With Imam Hanbal, therefore, the age of independent jurists came to an end and any subsequent work done in the field of law and jurisprudence is considered supplementary.

(f) Traditionalists, other interpretations and commentaries

There were, however, some exceptional traditionalists called ahl al-hadith or imams specializing in hadith who succeeded Imam Hanbal. Before dealing with them, it is interesting to note that, apart from that of orthodoxy, other more egalitarian interpretations of the Islamic vision developed and existed — interpretations which followed a more radical and extra-textual sense of how to 'read' the primary sources. These interpretations were thus not simply the results of different understandings of particular words. For example, the Sufis,[38] Kharijites and Qarmatians[39] were groups which put a greater emphasis on the egalitarian aspects of Islam. Their different understanding of the social aspects of religion was directly relevant to women.

Another significant contribution of the Abbasid period (latter half of third until earlier part of fourth century AH) was the six collections of Hadith (into book form) by these Imams of traditions (hadith) (as distinguished from the four Imams of jurisprudence above). Again (like the various schools), six and not one authoritative collection represents a diversity that allows room for growth. They saw their task as merely collecting and not analyzing narrative material on the Prophet (hadith) and did not allow their personal opinions

[36] For example, the Awza'i, Zahiri and Tabari schools. The Zahiri school, for example, was established early by literalist jurist Dawud Khalaf (d 884) and ceased with end of Muslim rule in Spain.

[37] For example, the Ibadi school established during the first century of Islam by Kharijite leader and jurist Abd Allah Ibad, is still represented in small communities in North Africa and Oman (M Ayoub (note 17 above) 413 and S Mahmassani (note 17 above) 33–35).

[38] Sufism is the name given to the mystical movement within Islam. Even Imam Hanbal, the strictest of traditionalists, was a Sufi supporter. This, however, should come as no surprise as the mystical experiences of Prophet Muhammad, especially during his early stages of Prophethood, is deemed to have made him a perfect example of mystical life (N Moosa (note 8 above)).

[39] The Kharijites were one of the rebel (Shi'ite) sects that broke away from mainstream Islam in the seventh century due to political reasons. Little is known about the Qarmatians except that they were a dissent movement (N Moosa (note 8 above)).

and judgments to play any role in doing so. In this way, their work differed from that of the jurists which preceded them. Sunni Muslims regard the collections of (first) Imam Bukhari (and pupil of Imam Hanbal)[40] and (then) Imam Muslim[41] as being the two most authentic collections out of the six. Their two (codified) collections achieved canonical status, second in authority to the Qur'an. In other words they are, after the Qur'an, the only authoritative representation of the Sunna of the Prophet. However, unlike the Qur'an with its moderate or small number of legal provisions, the hadith was not only voluminous but contains substantially more legal material. The other four collections, produced within less than half a century after Muslim and Bukhari, are by Tirmidhi,[42] Abu Da'ud,[43] Ibn Majah[44] and Nisa'i.[45]

Despite the fastidious and painstaking process of compilation, due to the possibility of fabrication, the Hadith has always remained an ambiguous source for Islamic legislation. However, Sunni Muslims do therefore reserve the right to hold conflicting opinions in the matter of whether or not a particular tradition may be authentic regardless of whether its authority may have been vouched for by one or more of these writers, including that of Bukhari and Muslim. Hadith criticism was an important branch of Islamic learning up to the tenth century. The Abbasid period also saw the study of the Qur'an and the science of its interpretation (tafsir). This is also translated as commentary or exegesis of the Qur'an. Numerous well-known commentaries that were written include those by al-Tabari,[46] Zamakhshari,[47] Baidawi,[48] al-Ghazali,[49] the two Jalalu'd-dins[50] and Fakhru'd-dini'r-Razi. Through tafsir by these scholars, innovation and change was accommodated — often to the detriment of women. However, the above commentators, like traditionalists, do not have a recognised place among the ranks of jurists which ended with Imam Hanbal. It is true that any subsequent work done in this field after the end of the third century of the Hijra (AH) by jurists attempting to complete the work done by the four founding fathers is considered supplementary.

[40] 194 AH/810 AD — 256 AH/870 AD.
[41] 204 AH/817 (826) AD — 261 AH/875 AD.
[42] 204 AH/831 AD — 279 AH/892 AD. Tirmidhi formulated rules for assessing the reliability of isnads (chains of transmission).
[43] 202 AH/824 AD — 275 AH/888 AD.
[44] 209 AH/831 AD-273 AH/886 AD.
[45] Born? — died 309 AH/916 AD.
[46] Born 224 AH/838 AD and died 310 AH/922 AD. He was a founder of one of the now extinct Sunni schools — the Tabari school. He was also a lawyer and historian.
[47] Died 538 AH/1143 AD.
[48] Died 685 AH/1286 AD.
[49] 1058 AD — 504 AH/1111 AD.
[50] One of whom died in 1459 AD.

(g) The closure of the doors of ijtihad and ending of the classical period of Islam

This section will highlight that the Western 'orientalist'[51] view of Islamic law is unfounded. This view has it that from about 700 AH/1300 AD, no further exposition of Islamic law was necessary as the founding fathers had not only asked all the questions but had provided the answers as well. It would be more correct to say that, if the principles that have been established by the founder jurists are properly applied, we can find a solution to most problems. In other words, while no new legal systems would be introduced, this did not mean that Islamic legal thinking ended as well. The solution to new problems faced by Muslims today will not be to invent another Shari'a. We can still make use of the existing Shari'a, but this must not mean that we should be precluded from going to the original sources to try and find new solutions. While the Qur'an and Sunna will remain immutable, ijma (consensus) and (qiyas) analogy do not. Notwithstanding the problems of translating the Qur'an from Arabic into other languages, as far as interpreting the Qur'anic text (exegesis) is concerned, Muslims should not be afraid to look directly at the Qur'an for solutions to modern-day problems.

As indicated,[52] the founding fathers of the schools of Islamic law differed in the degree of support that they gave to each of the two sources (ijma and qiyas). Ijma — the consensus of the community (ummah) as represented by the scholars/jurists — acted as the unifying factor which brought the substantive Islamic law and the differences between the four schools closer together. This is perceived as the final expression of Islam. The well-known saying of the Prophet that the ummah could not agree on an error was solidified. Ayoub[53] sums up the position thus: '. . . while [ijma] preserved the integrity of the shari'ah [in this context, the Qur'an and Sunna], [it] has arrested the development of Islamic law . . . [so much so] . . . that no change after the establishment of the major Sunni legal schools was possible. The result has been that Islamic jurisprudence became a thick wall protecting the shari'ah, but largely depriving it of an adaptive and dynamic moral and spiritual role in Muslim society.' The orientalist view of what happened to

[51] Any survey of Islam necessitates that reference will be made to primary and secondary sources in English. That many of these secondary sources were written by 'orientalists' (Western scholars who study oriental subjects) and who are accused of writing on Islam from a negative viewpoint, does not detract from their contribution in this regard nor from the fact that they are scholars of repute whose sources the readers can easily consult. Orientalists have further been subdivided into categories namely, Christians (Sir William Muir), Jews (Joseph Schacht (also mentor of Noel Coulson)) and secularists (Arnold Toynbee). Muslim writers like Abdur Rahim and Mahmassani, both cited in this section, have also been accused as being heavily influenced by orientalists. Mahmassani calls for a reinterpretation and adaptation of Islamic law to the modern world.

[52] See section II(e).

[53] M Ayoub (note 17 above) 410.

Islamic law is that thereafter juristic thought took a downward turn and all other contributions in this regard were considered supplementary.

The door of ijtihad (or interpretation) was apparently closed by Sunni jurists in the tenth century already and thereafter taqlid (blind imitation) — that is, following the opinion of any of above four schools without investigating its source — set in. The practice of taqlid lasted virtually unchallenged until about 150 years ago (the time of Ottoman reform), although it still theoretically dominates conservative legal thought until today. Some Muslim scholars concur with the orientalist view expounded from the late nineteenth century to date that ijtihad was allowed for four centuries after Prophet Muhammad's death (around 632 AD) until around 950 AD. It is historically accepted that the 'door of ijtihad' was formally closed hereafter in about the fourth century (AH)/tenth century (AD). This is essentially an orientalist view. Recent studies[54] highlight that for an additional three centuries after this 'closure', the Hanafi school, for example, continued to exercise ijtihad in their development of the law. It appears that it was only in the seventh century (AH)/thirteenth century (AD) that the practice of ijtihad began to be seriously affected and this decline was attributed not to the jurists but to the governing power.[55]

Nonetheless, the majority of Muslims agree with the 'orientalist' view and believe that these gates have remained closed ever since the tenth century up to the present time. In light of this consensus, one cannot really still call this an 'orientalist' view. Jurists of all the schools apparently felt that solutions to all essential questions had been provided. Succeeding generations of scholars belonging to any one of these schools had to be content with working within this framework of the past without modifying or developing it in any way. They could 'imitate' but not 'create' doctrine. The interpretation and application of the primary sources was considered complete. It was no longer considered necessary to seek solutions directly from the primary sources. Instead it was considered sufficient to consult the authoritative textbooks of the schools (dating from the medieval period). As already indicated, it is very important to be aware of the fact that ultimately these texts do not necessarily represent the real original opinions of the founding jurists. Schacht[56] explains it thus: 'Again, the official doctrine of each school is contained not in the works of the old masters . . . but in those handbooks,

[54] See WB Hallaq 'Was the Gate of ijtihad Closed?' (1984) 16 *Int J of Middle East Studies* 3–41; see also B Jokisch 'Ijtihad in Ibn Taymiyya's fatawa' in R Gleave & E Kermali (eds) *Islamic Law Theory and Practice* (1997) 119 n 4.

[55] See also TJ Al 'Alwânî 'The Crisis in Fiqhand the Methodology of Ijtihad' (1991) 8(2) *The American J of Islamic Social Sciences* 317, 332–35 for various viewpoints with regard to whether or not the door of ijtihad is in fact closed.

[56] J Schacht 'The Schools of Law and Later Developments of Jurisprudence' in M Khadduri & HJ Liebsny (eds) *Law in the Middle East. Vol I: Origin and Development of Islamic Law* (1955) 73.

usually of a late period . . . The final doctrine of a school sometimes differs from, and in any case goes far beyond, the opinions held by its founders.' This then ended the classical period of Islam.

This closure allowed for the 'codification' of Islamic (jurists) law. Some writers[57] deny that this closure (both in theory and practice) took place and, as indicated in the previous paragraphs, there are varying opinions on this matter. The fact is that an inability to exercise ijtihad is considered to be a very serious limitation impeding a judge's administration of justice. It appears that modern legal scholars are moving away from the classical position. This is, for example, evident from Pakistani case law.[58] In a nutshell, in these cases the courts asserted their power to exercise independent reasoning (ijtihad) — to interpret the primary sources for themselves and also to differ from the views of earlier jurists and Imams — subject to satisfying certain criteria. After the Abbasid period, Islamic law never regained its vigour.

(h) Reform and modernity[59]

In brief, the seventh and final period in the development of Islamic law is the period of social and intellectual change, reform or modernization. This period extends from the early nineteenth-century (1800s) Middle East society to date. Notwithstanding an overlap between historical developments, this period can be subdivided into four sections dealing with the influence of colonialism and intellectualism/reform movements (1800–1945); independence (1945-); codification of personal laws (1950-) and reform to personal laws in the Muslim world.

To summarize, the social transformation of early nineteenth-century Middle Eastern societies was followed by economic encroachment by the West, the emergence of 'modern' states and domination by European colonial powers in the late nineteenth and early twentieth centuries. Governments, intellectuals and religious leaders responded to the challenge of European colonialism and the impact of the modern West on all levels, including the religious level. Approaches ranged from those of more conservative ulama to those of Islamic modernists. Women themselves became a subject for national debate and the subject of women's rights were a topic in the writings of Muslim male intellectuals in Egypt and Turkey. Internally, there was an awakening within the Muslim World as reformers in

[57] W Hallaq (note 54 above).

[58] *Kurshid Jan v Fazal Dad* PLD (1964) 558, 612; *Zohra Begum v Latif Ahmad Munawwar* PLD (1965) 695, 695; see also *Begum v Din* (1960) High Court Decision in Pakistan Legal Decisions, 1153 — 1154.

[59] This section has been extracted from my forthcoming book. For a detailed discussion and analysis see N Moosa (note 8 above).

various countries began advocating a new look at women's rights. The Egyptian intellectuals viewed their reform from within an Islamic context by calling for a reinterpretation of the original sources of Islamic law, while the Turks used non-Islamic sources as their basis. Thus Islam's exposure to Western influence led to fundamental social change and the emergence of a new discourse on women. Reform, while not always achieving actual results, revolutionized thinking about women's rights. While initially it was the men who led the way as far as religious, educational and social reforms for women were concerned, Muslim women soon followed suit in both their individual capacity and through newly created women's organizations.

In the Middle East, early reformers like Jamal al-Din al-Afghani (1839–1897) and modernist Muhammad Abduh (1849–1905) (student of al-Afghani) and Rashid Rida (1865–1935) (student of Abduh) in Egypt and in South Asia Sayyid Ahmed Khan (1817–1898) (Aligarh, India) and later Muhammad Iqbal (1876–1938) (India) and Mumtaz Ali (1860–1935) (Lahore, Pakistan) tried, in the name of Islamic modernism, to bridge the gap between conservative Ulama and more Western secular Muslim modernists.

In recent years, many Muslim modernists and some (fundamentalists) Islamists[60] have struggled more fiercely with the Qur'an's eternal nature and historical and cultural specificity. Islamists like Abul A'la Maudoodi (1903–1979) of Pakistan and Sayyid Qutb (1906–1966) of Egypt both called for a return to a pure Islam (Qur'an and Sunna). Modernists like the Pakistani scholar Fazlur Rahman (1919–1988) and Ismail Faruqi distinguish between the normative and contextual verses of the Qur'an to allow them to find new solutions in Islam.

Further examples of radical gender-egalitarian reinterpretations of the Shari'a in modern times are found in the cases of the renowned Sudanese Muslim thinker, Mahmoud Muhammad Taha and his student, Professor Abdullahi an-Na'im, himself a prominent spokesperson for human rights and the view that Islam, properly understood, calls for equal rights for men and women. An-Na'im is a modernist who works from a Muslim perspective. He calls for the re-evaluation and transformation of historical Shari'a in ways that are appropriate to our times.

Just as there are different types or perceptions of Islam, for example Hanafi, Shafi'i, and variations in the conditions of Muslim women's lives in different societies, there are different types of Muslim women or gender

[60] The phrase Islamic revivalism or activism/resurgence is commonly referred to as 'Islamic fundamentalism'. The latter term, however, has derogatory and negative accusatory connotations associated with it. Hence the use of the term 'Islamism' seems more appropriate since Islamists perceive Islam to be a world-view and total ideology for action guided in everyday life by the primary sources.

activists. These women work within an Islamic framework using mainly religious-based arguments to support their respective views. Much of the discourse in this regard takes place at an academic and intellectual level and includes not only those trained in religion but also historians and anthropologists. However, while women study religious doctrine as a means of emancipating women, they do so from both an Islamist and modernist point of view. The main aim of the more liberal authors like Riffat Hassan is to study formal doctrine from a sociological rather than a theological point of view in order to secure the emancipation of women. This is not necessarily a goal which the Islamist authors aspire to, and often they support practices, like polygyny, which are detrimental to women. Authors like Moroccon sociologist Fatima Mernissi (born 1940), in her feminist interpretation of the Islamic sources, even go so far as to denounce Islamic jurisprudence as 'man-made' instead of 'God-made'. The Egyptian writer and physician Nawal El-Saadawi does not share this enthusiasm and interest. She maintains that women stand no chance in winning hair-splitting theological arguments as those in power will always rationalise their interpretations as more valid.

Mernissi follows a 'safe' and strategic route by locating early feminism in the Islamic past. Mernissi is one of a small number of women in the twentieth century who have been active in interpreting Islamic theology in their own right to reveal the real status of women. Like many gender activists, Mernissi does not wish to break ties with her religion and wants to avoid being labelled as 'Westernised'. In contrast to Mernissi, El-Saadawi followed a different course — she moved from Qur'anic interpretation to an essentially secular approach based on human rights.

Other examples of feminists in Arab countries include Professor Leila Ahmed (1992) and Aziza al-Hibri. Other well-known gender activists include Riffat Hassan (referred to above), a Pakistani feminist theologian, and the African-American scholar Amina Wadud-Muhsin. Hassan finds her basis for women's rights in religion. Although her ideas would certainly identify her as feminist, Wadud-Muhsin makes it clear that she does not espouse a feminist viewpoint. She acknowledges that the historical Shari'a is unable to accommodate modern understandings of gender relations and the status of women because of its male bias. She is of the opinion that a new interpretation of Shari'a can be achieved through a new methodology of Qur'anic interpretation. She therefore espouses a reinterpretation of the Qur'anic perception of women.

(i) Relevance of Islamic jurisprudence in South Africa

At times the contribution on Islamic jurisprudence seems to be written primarily for Muslims — about how they should approach the Qur'an.[61] This

[61] For example, section II(g) dealing with 'closure of doors and ending of classical period'.

raises the following questions: How should the majority of readers view this? What, if anything, is the relevance of Islamic jurisprudence for them? Does it provide clues into the working of law? Would it enrich their understanding of law? How does it interact with South African law? We illustrate with a simple example and brief explanation.

Islam is regarded as the last of the revealed religions and the fulfilment of monotheism following Judaism and Christianity and starting from Adam going through Abraham and Jesus and ending with Muhammad who had to spread the message of belief in one God to a polytheistic community. The Qur'anic term for people, such as Christians or Jews who followed an earlier holy scripture (Bible and Torah), is 'Ahl al-kitab' or 'People of the Book'. By virtue of this connection, Islam, for example, allows a Muslim man to marry a Christian woman without her having to change her faith. Should this marriage dissolve, there will, for example, be implications for custody/guardianship and maintenance of children born of such a marriage. Any South African legislation recognising Muslim marriages and related matters will therefore no doubt affect the rights of non-Muslims as well. Hence, general knowledge of Islamic jurisprudence is vital in safeguarding and protecting their interests.

South African Muslims are heterogeneous and comprised of cosmopolitan groups consisting of various cultural, ethnic, language and social backgrounds. From as early as 1658, they came to South Africa from different parts of the world, either involuntarily or voluntarily, during periods of Dutch and British colonial rule and apartheid.[62] Recently African indigenous people have also converted to Islam. As indicated,[63] Islam is a minority religion in South Africa. Despite their small numbers, Muslims have come a long way since their first arrival in South Africa. They are largely urbanised, highly visible, vociferous and professionally, economically and politically active in the public life of contemporary South Africa.

While there is no formal priesthood in Islam,[64] in South Africa there are various conservative institutive bodies of experts on Islamic law, namely Ulama (religious) bodies which presently regulate and administer MPL. These bodies represent a variety of religious backgrounds and orientations — influenced by institutions in Saudi Arabia, Egypt, India and Pakistan — and include ordinary people with no formal legal or theological qualifications. They view Islamic law as underlying the unequal treatment of women and therefore uphold the general status quo.

[62] See N Moosa 'An Analysis of the Human Rights and Gender Consequences of the new South African Constitution and Bill of Rights with regard to the Recognition and Implementation of Muslim Personal Law (MPL)' Unpublished LLD dissertation (UWC) (1996) 35.

[63] See note 17 above.

[64] Islam allows each knowledgeable and conscientious Muslim to be an authority on Muslim law.

Various Muslim countries in the world are influenced by different legal systems ranging from Islamic law, civil law, common law, Roman-Dutch law and mixed and socialist legal systems. However, Islamic law and its influence in almost all of these countries is confined to the realm of MPL. In secular South Africa, a multi-cultural and multi-faith society where the final (1996)[65] Constitution guarantees religious freedom and equality, the position is intended to be no different.

After more than 300 years of Islam in South Africa, S 15 (3)[66] of the Constitution made provision that legislation can be provided by the State for a change to the status quo referred to above. It must, however, be stressed that the right to have MPL or any other system of family law recognized by the State is not constitutionalised. Religious and other groups still have to lobby the legislature to pass the constitutionally authorized legislation which recognizes their respective personal/family and customary laws.

Suffice it to say that in South Africa no two Islamic communities have identical cultural systems because of the difference between traditionally Arabian and (hybridised) local cultures. This is one of the reasons why Muslim scholars should be reviewing the traditional corpus of Islamic law in line with the current transformation in South Africa. Women should furthermore be effective participants in this process of transformation together with educating, conscientising and reconstructing South African Muslim society as a whole. No legal system can ignore the social context when framing a law and in today's context it appears that the Qur'anic laws are indeed normative.

(j) Conclusion

Both the Qur'an and Sunna remained 'uncodified' during the lifetime of the Prophet. Classical Islamic law (in accordance with the different schools of jurisprudence) is, in reality, common law and not canonical, since it was only codified some two centuries after Islam came into existence in the seventh century AD. During this time, and as a study of the substantive rules of MPL will confirm, Qur'anic norms underwent considerable dilution, often to the detriment of women. It is this classical Shari'a or Islamic law which also forms the principle 'source' of modern legislation. What is therefore known as the

[65] Act 108 of 1996.

[66] S 15 (3) makes provision for the recognition of MPL and Muslim marriages. See N Moosa (note 62 above) 355–358. Eight prominent clerics, academics, politicians and jurists were appointed as members on a Project Committee of the South African Law Commission (SALC) with the terms of reference to investigate Islamic marriages and related matters (Project 59) with effect from 1 March 1999 for the duration of the investigation. Three of the eight members are women. An Issue Paper and Discussion Paper containing a proposed draft bill on the recognition of Islamic marriages has since been completed and the project is nearing completion (for details see *http://www.law.wits.ac.za/salc/salc.html*).

Shari'a or the Islamic legal system per se was constructed by jurist-theologians about 1100 years ago, yet it is common for Islamic law to be mistaken for Islam itself. That there were a variety of schools of Islamic jurisprudence is reflective of the needs of Muslims at different times, places and circumstances.

Today most religious authorities (Ulama) give these juristic interpretations precedence over the primary sources themselves. They generally also frown upon the re-sanctioning of independent reasoning (ijtihad) as a subsidiary 'source' (it is more of a tool than a source) of Islamic law to add any new interpretations or to give any direct consideration to the original and primary sources and interpret them for oneself. They prefer to uphold the centuries-old juristic interpretations.

The many different schools of jurisprudence which evolved in different geographical and cultural regions of the Muslim world are indicative of the fact that Islam is not monolithic. It further demonstrates that it was possible to Islamise societies without making them uniform and denying their pluralism and cultural diversity. That different interpretations and evaluations even among these jurists who were each other's contemporaries existed was indicative of freedom of religion in practice. The respect of these jurists for diversity of opinion is evident from the fact that four Sunni schools (and not one) have survived to date. Furthermore, Muslims are free to align themselves to any of these schools. However, given the differences between schools, Muslims often have to resort to changing from one school to another (talfiq) to solve problems, but this is generally not encouraged. One might accept what is reasonable from the four schools. Out of a wealth of Islamic law and tradition which govern the relationship between the sexes and the roles of women in the Muslim community, classical jurists often disagree and offer different views. Muslims are thus left to face the personal dilemma of having to deal with real freedom of religion — the right to choose to be bound by the authority of the primary sources over and above interpretations of them. In effect they exercise a moral and spiritual responsibility in making these choices. As indicated, Islam allows each knowledgeable and conscientious Muslim to be an authority on Muslim law as there is no formal priesthood. Ultimately equality of all before the law boils down to equality of all before God.

We have examined the history of Islamic law. What is the lesson to be learnt from all this history? Should Muslims go back to the point where classical Islamic law stopped and use the work of the classical jurists as a starting point to achieve an understanding of the legal injunctions and norms as contained in the primary sources of Islam? The solution to problems of inequality lies not in rejecting or even for that matter reformulating the Shari'a. History teaches Muslims important lessons and they should therefore not discard

centuries of Islamic law development. This history allows them to go back to the primary sources with an insight gained from past experience. They can take the flexible views of the Sunni jurists (for example, in relation to monogamy and grounds of divorce) most appropriate to their context and needs and build on them to find solutions to problems unique only to them.

There are several periods of development of Islam and Islamic law. Each period made a contribution to the Islam as we know it today. History surely holds many lessons for us and the future can certainly be shaped by its lessons. The branches of the tree of Islam provide shade. The good fruits are eaten and the rotten ones can be thrown out. However, while we can reform the law this has proved only partly effective. While it is maintained that only certain people (mujtahids) are qualified to do this, various scholars have nonetheless formulated their own methodologies for reform which range from one extreme to the other. Some of these methodologies have not been exploited to their full potential, while others are too advanced for their time. Careful of not re-inventing the wheel, Muslims need to go back to the primary sources with a fresh approach in order to resolve contemporary problems faced by Muslims (including non-Muslims) in South Africa and elsewhere.

QUESTIONS

(1) List the four schools of Islamic jurisprudence. Should the four schools actually be treated as distinct entities, or should they simply fall under Islamic jurisprudence more generally?
(2) Discuss the similarities and differences between the four schools. How different are the schools in reality? Would using the ideology of one school over another really yield a different result?
(3) What are the implications, if any, of allowing free movement from one school of Islamic jurisprudence to another?
(4) Explain the tree and fruit metaphor. Does this fit your view of how Islamic jurisprudence works? Does this fit your view of jurisprudential thought, generally?
(5) How do the different schools allow for change and progression in Islamic jurisprudence? Do the four schools really allow for flexibility?
(6) What factors gave rise to the four schools of Islamic jurisprudence? Should these factors be considered when applying the approach of the school? Should the factors be considered when critically evaluating the ideology of the school?
(7) How should women and/or feminists approach Islamic jurisprudence? Should they be given more freedom to move between the four traditional schools?
(8) Should there be one view, and not potentially four views, on issues such as polygyny or the treatment of women?

(9) In what ways is Islamic jurisprudence important in South Africa? Does it, or should it, play a different role in South Africa than it does in other countries with a larger Muslim population?

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III INTRODUCTION TO ISLAMIC LEGAL PHILOSOPHY

While Judaeo-Christian legal philosophy or legal thinking has always been taught at South African law schools, Islamic legal philosophy has been ignored. When I studied Jurisprudence at the University of Cape Town in 1984, reference was made to the thinking of Thomas Aquinas, St. Augustine and to Mosaic law as well. However, no regard was had to the third of the three great religions in the Abraham tradition, namely Islam. There is an urgent need to fill this lacuna. Two reasons may be advanced on this regard. First, it is imperative to understand that when the great Greek philosophical texts of Plato and Aristotle reappeared in the Western and Christian world in the twelfth century, it was through Latin translations of the Arabic texts. And,

secondly, by expanding the enquiry to include non-Western legal thought, the higher ideal of the equality of civilisations, of civilisational equality, is being propounded. Furthermore, the need to fill this gap in knowledge and to dispel the many misconceptions currently prevalent vis-a-vis Islam and Islamic law has become even more urgent since the occurrences of September 11 2001.

All great cultural, philosophical and religious systems have made their contribution to all the others. No one system stands as the unique creation of its own genius and no one system can or should look inward upon itself as though it were the repository of all wisdom and source of ideas. The history of both the Islamic world and the Western world is rich in ideas. However, the flow of thought and ideas between the two has been inhibited by barriers of ignorance and prejudice. Now, more than ever before, is the time to tear down these invisible barriers. This section aims to afford to you a brief glimpse of the richness of Islamic legal philosophy.[67]

In order to understand the impact which Islamic legal thinking had on the Western world, it is important to briefly trace the history and development of Islamic thought. This is done in section III(a). In section III(b), we have selected one of the leading Islamic philosophers, Ibn Rushd (Averroes), for more detailed analysis. As stated earlier in the Introduction, the idea of 'revelation and reason' forms the core of Islamic legal thinking and his views on this are discussed in some detail in section III(a). Since the idea of 'revelation and reason' lays the foundation of Islamic natural law thinking and since the Qur'an repeatedly 'enjoins what is right and forbids what is wrong', it is important to understand Ibn Rushd's views on the nature of the human being. Section III(c) looks at Islamic influences on European legal philosophy. This is an area which has been totally ignored by South African legal academics — most Western-trained, of course — and it is hoped that this section will serve as a catalyst to further enquiry. In order to understand Islam's impact on European legal thinking, one must be aware of the transmission of knowledge from the Islamic world to Europe (this is briefly discussed in section III(c)(ii)). Finally, in section III(c)(iii), the impact of IbnRushd on St Thomas is discussed.

(a) The history and development of Islamic legal thought

In order to understand this richness, it is important to trace briefly the history and development of Islamic legal thought. In the 8th and 9th centuries AD, however, the Muslim khalifas (caliphs) desired to have translations of the great Greek texts on philosophy in Arabic. And so Muslim thinkers accessed

[67] See further CG Weeramantry *Islamic Jurisprudence An International Perspective* (1998), in particular chap 9 entitled 'The Value of Islamic Jurisprudence to the Non-Islamic World'.

the works of Plato and Aristotle at a time when Christian thinkers in Europe did not. When these works did finally reappear in Western Christendom in the twelfth century, it was through Latin translations of the Arabic texts. Geographically speaking, the Islamic philosophers fall into two groups, an earlier group in Baghdad (Persia then, Iraq today) and a later group in Spain. The Baghdad group included Al-Kindi, Al-Razi, Al-Farabi, Ibn Sina and Al-Ghazali. The Spanish group included Ibn Masarrah, Ibn Bajjah, Ibn Tufayl and Ibn Rushd.

Al-Kindi, who died around 873 AD, is generally considered to be the first Arab philosopher of note.[68] His main contribution lies in his exposition of Aristotle's theory of the intellect. Al-Kindi's treatise, On the Intellect,[69] contains a general classification of the types of intellect and is adapted from Alexander of Aphrodisias.

In the 10th century, Al-Farabi (875–950 AD) wrote commentaries on Aristotle as well as on Plato's Republic and The Laws. He also composed a treatise on intellect, translated into Latin as De Intellectu et Intellecto. Ibn Sina (980–1037) is regarded as the leading Islamic thinker of the Middle Ages. His greatest philosophical work, the Kitab Al-Shifa (Book of Healing), translated into Latin as Liber Sufficientiae, exercised an important influence on metaphysics and had a strong impact on the thinking of Christian thinkers in the 13th century.[70] The Latin translation of his chief medical treatise, The Canon of Medicine, was a standard reference in Europe until the 17th century. The last great Islamic scholar of the Baghdad group was Al-Ghazali (1058–1111).

The most famous of the Spanish Islamic philosophers is undoubtedly Ibn Rushd (Averroes to the West) (1126–1198 AD). He expounded Aristotle's works in great detail. His commentaries were of several types; there were the 'small' and 'middle' commentaries which were paraphrases of the texts and the 'great' commentaries, in which the Aristotelian text was presented separately and accompanied by a detailed exegesis. In all, Ibn Rushd composed 38 commentaries on Aristotle, of which 15 were translated into Latin in the 13th century.[71]

(b) A brief look at Ibn Rushd (Averoes)

The great historian Copleston writes:

> There is a natural tendency to think of medieval philosophy as coterminous with the philosophical thought of medieval western Christendom. To put the matter in

[68] M Haren *Medieval Thought* (1985) 122.
[69] There are two Latin translations, of which one is by Gerard of Cremona.
[70] JN Jordan *Western Philosophy from Antiquity to the Middle Ages* (1987) 343.
[71] See M Haren (note 68 above) 127.

another way, the term 'medieval philosophy' brings to mind, in the first instance at least, names such as Anselm, Abelard, Aquinas, Duns Scotus and William of Ockham. We cannot, however, make a close study of the thought of Aquinas or of the philosophical situation in the university of Paris in the thirteenth century without becoming aware of the existence of Islamic philosophers such as Avicenna and Averroes and of Jewish thinkers such as Maimonides.[72]

Abu al-Walid Muhammad Ibn Ahmad Ibn Rushd was born 1126 AD (520 in the Islamic era) in Cordoba. He came from a family of prominent judges and was for many years himself a judge, first in Seville and later in Cordoba. He followed the traditional Muslim curriculum, learning *hadith* (the sayings of the Prophet Muhammad, on whom be peace). He was also well-known in the science of juristic disagreement (*ikhtilaf*).

Ibn Rushd devoted much time and energy to the study, understanding and explanation of Aristotle's writings, regarding his work as the culmination of human intellectual activity.[73] This, of course, struck the authorities as inconsistent with a proper regard for the Holy Qur'an and the Prophet Muhammad (*pbuh*), as inconsistent with the primacy of faith. But, as a result of Aristotelian influence, Ibn Rushd believed in the primacy of reason. However, he denied that the findings of philosophy could ever be in conflict with Qur'anic revelation or with any theological doctrines derived there from.[74] The harmony of religion and philosophy, alternatively of faith and reason, notwithstanding their apparent disagreement, was the thesis he set out to prove in his famous work, *The Decisive Treatise on the Harmony of Religion and Philosophy (Kitab fasl almaqal)*. Ibn Rushd opens his discussion of the problem by observing that, far from condemning the use of philosophical speculation, the Qur'an itself prescribes it.[75] He writes:

That the Law summons to reflection on beings, and the pursuit of knowledge about them, by the intellect is clear from several verses of the Book of God, Blessed and Exalted, such as the saying of the Exalted, 'Reflect, you have vision:'[76] this is textual authority for the obligation to use intellectual reasoning, or a combination of intellectual and legal reasoning. Another example is his saying, 'Have they not studied the kingdom of the heavens and the earth, and whatever things God has created?'[77] this is a text urging the study of the totality of beings. He, the Exalted, also said, 'Do they not observe the camels, how they have been created, and the sky, how it has been raised up?'[78] and He said, 'and they [contemplate] the creation of the heavens and the earth,'[79] and so on in countless other verses.[80]

[72] FC Copleston *A History of Medieval Philosophy* (1972) 104.
[73] Ibid 118.
[74] See JN Jordan (note 70 above) 352.
[75] E Gilson *Reason and Revelation in the Middle Ages* (1966) 41.
[76] Q 59: 2.
[77] Q 8: 185.
[78] Q 88: 17.
[79] Q 3: 191.

Ibn Rushd thus argues that philosophical speculation is not only fully supported by these Qur'anic verses, but it is an imperative injunction that human beings should study the nature of things, He adds that Divine Law expressly makes mandatory the observation and interpretation of nature by reason, so that we may infer God from His creation.

Ibn Rushd claims that whoever forbids the study of philosophy to anyone who is fit to study it, that is anyone who unites the qualities of first, natural intelligence (*aql*) and secondly, religious integrity and moral virtue (*akhlaq*), would be blocking people from the door by which the law summons them to the knowledge of God, the door of theoretical study which leads to the truest knowledge of Him.[81] Of course, not all people are capable of theoretical study, as Jordan explains:

> Those capable of theoretical study constitute 'the best class of people', Averroes believes, but their number is small. Most people, he thinks, are incapable of forming abstract conceptions or of understanding philosophical demonstrations: they think in pictures, and they are persuaded by rhetorical arguments that appeal to their emotions and imagination . . . [I]t is only to be expected that philosophical reasoning will lead 'the elite' (as Averroes calls them) to conclusions at odds with the 'apparent meaning' of the Koran — only with the 'apparent meaning' however, because in every such case allegorical interpretation will uncover in the Koran an 'inner meaning' consistent with the philosophical conclusion. If the Koran contains nothing but the truth, and if it summons 'the elite' to demonstrate the truth philosophically, than what 'the elite' demonstrate cannot conflict with the Koran, 'for truth does not oppose truth but accords with it and bears witness to it.' Allegorical interpretation of the Koran will reveal, as necessary, its harmony with philosophical conclusions.[82]

The explanation by Jordan is based on the second chapter of Ibn Rushd's Decisive Treatise, which is entitled 'Philosophy Contains Nothing Opposed to Islam'. In essence, the chapter demonstrates that demonstrative truth and scriptural truth cannot conflict. In support of his view, Ibn Rushd refers to the following verse of the Holy Qur'an:

> It is He who set down upon thee the Book, wherein are verses clear and definite, and others ambiguous. As for those in whose hearts is doubt, they follow the ambiguous part, desiring dissension, and desiring its interpretation; and none knows its interpretation, save only God, And those firmly rooted in knowledge say, 'we believe in it; all is from our Lord', yet none understand, except those who are well-grounded in science.[83]

According to Ibn Rushd, it is only those skilled in demonstration who are capable of deciding on questions of interpretation involving allegory. These

[80] See A Hourani *Averroes on the Harmony of Religion and Philosophy* (1961) 44–45.
[81] O Leaman *Averroes and His Philosophy* (1988) 148.
[82] Jordan (note 70 above) 352–353.
[83] Q 3: 5–7.

are the philosophers, who know the difference between the demonstrative use of analogy (*qiyas yaqini*) and mere legal analogy (*qiyas zanni*).[84] He argues that there can be no other route to comprehension of ambiguous verses except rational thought. The second chapter of the Decisive Treatise also points out that the intention (*maqsad*) of the Divine Law is to instruct all human beings in true knowledge and true action. This, of course, requires the interpretation of the Divine Law. As stated earlier, philosophical interpretations of scripture should not be taught to the majority.

In the third chapter of the Decisive Treatise, Ibn Rushd expands on this point, stating that 'not everyone has the natural ability to accept demonstrations or dialectical arguments, let alone demonstrative arguments which are so hard to learn and need so much time even for those who are qualified to learn them'.[85] Once it has been accepted that religion or faith is fully reconcilable with philosophy or reason, Ibn Rushd asserts, we ought then to examine the nature of human beings. Analysing the Treatise on this aspect, Mahdi[86] remarks:

> Belief in the truth of a universal divine law does not free the believers from the requirements of their natures as human beings. Indeed, their belief itself is an expression of their natures as human beings and accords with their natures as human beings who come to assent through different kinds of arguments ... [D]ivine law takes cognizance of and addresses itself to human nature as it is and as it can be known through human wisdom; it takes into account the broad natural differences among human beings with respect to the methods of assent; and it calls on each human being to know God and his creation according to his natural capacity. The divine law perfects human nature ... [T]he determination of the connection between divine law and human wisdom must ultimately be based on understanding the nature of one of God's creations, man, which the divine law and human wisdom mean to perfect in their respective ways.

The essence of the Islamic concept of human nature is that the human being is, as Yusuf Ali states, naturally inclined to right and virtue. This natural inclination has been made obligatory upon the human being by the Command of the Supreme Being for Almighty God declares in the Qur'an:

> They believe in God and the Last Day
> They enjoin what is right,
> And forbid what is wrong,
> And they hanker after good works.[87]

In his commentary of this verse, Yusuf Ali states that it implies first, a firm faith, secondly, doing what is right, setting an example to others in this regard

[84] See O Leaman (note 81 above) 152.
[85] Decisive Treatise 19, 13–14; see also A Hourani (note 80 above) 64.
[86] M Mahdi 'Remarks on Averroes' Decisive Treatise' in ME Marmura (ed) *Islamic Ideology and Philosophy* (1984) 201–202.
[87] Q 3: 114.

and having the power to ensure that right and good prevails and, thirdly, eschewing wrong, setting an example in this regard and having the power to ensure that wrong and injustice are defeated.[88]

It must be made abundantly manifest that in one important respect Ibn Rushd's view of the relation between religion/revelation and philosophy/reason has often been misunderstood. The doctrine or theory of 'double-truth' — that there is truth in religion and truth in philosophy — was attributed to him by Christian writers in the thirteenth century, but the error in doing so is quite understandable upon reading the Decisive treatise, where Ibn Rushd explicitly maintains that the truth as philosophy demonstrates it may be accommodated in religion by allegorical interpretation of any Scriptural passage whose 'apparent meaning' does not already accommodate it.[89] Jordan elaborates further:

> In other words, [Ibn Rushd] holds that nothing may be considered literally true in religion that differs from the demonstrated conclusions of philosophy. Such is the sense in which he means that religion and philosophy are in basic agreement.[90]

Regarding Ibn Rushd's contribution to the intellectual life of the Middle Ages, Gibson writes:

> What the intellectual life of the Middle Ages might have been if Saint Augustine had never existed, I am not prepared to say; but I feel just as unable to fancy what might have become of it without Averroes and his Latin disciples, not only because they themselves would not have been there, but also because, had they not been there, the work of Saint Thomas Aquinas would not have been what it was.[91]

(c) Islamic influences on European legal philosophy and law

Viewed from a broader perspective, what impact or influence did Islamic legal thinking have on European legal philosophy?

(i) *Introduction*

In 1841, Thomas Carlyle attempted to initiate in Western literature a new approach to Islam and Islamic thought.[92] The reason for this was the animosity towards Islam prevalent in English literature.[93] This animosity and hostility dates back to the Crusades and, more recently, the Ottoman Empire. In the latter half of the 20th century, Edward Said[94] analysed the systematic

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[88] YAli *The Holy Qur'an — Interpretation & Commentary* (1989) 151.
[89] Jordan (note 70 above) 354.
[90] *Ibid.*
[91] Gilson (note 75 above) 66.
[92] See *On Heroes, Hero-Worship and the Heroic in History* (1841).
[93] CG Weeramantry (note 67 above) 164.
[94] *Orientalism* (1978).

distortion of Islam by Western scholars while Norman Daniel[95]described the distortion and deformed image of Islam as the legacy of the Crusades. At the dawn of the 21st century (of the Christian era), it is necessary to engage in a renewal of thought outside the Western/European tradition and to reappraise the contribution of Islamic legal thought to European legal philosophy.

In a recent article on medieval legal thought Tobias van Reenen writes:[96]

> The foundations of modern Western civilisation were undeniably and irrevocably laid n the Middle Ages. Modern Western legal and political history can only be understood in terms of the medieval adaptation and realisation of classical legal and political thought. Medieval culture was equally firmly rooted in both the Greek and the Roman traditions . . . It was a period of the consolidation of what remained of antiquity as well the synthesis and integration of Graeco-Roman and Judaic-Christian culture and thought.

Van Reenen adds that 'a lot of uncertainty' still exists as regards the early part of the Middle Ages and that between 1000–1225 the 'rediscovered Aristotle' was 'made relevant for Christianity'.[97] There are grave flaws in his approach.

First, his assertion that the Middle Ages was a period of the 'synthesis and integration of Greco-Roman and Judaic-Christian culture and thought' is, from a purely historical and factual viewpoint, incomplete in that he affords no recognition to — in fact does not even mention — the contribution of Islamic thought during the medieval era.

Secondly, in stating that 'a lot of uncertainty' still exists concerning the early part of the Middle Ages, Van Reenen assumes that because Europe experienced a dark age between the fall of the Roman empire and the Renaissance this darkness was prevalent everywhere. Yet one need only possess a cursory knowledge of the Spanish language to realise that La Edad Media denotes an age/era/period existing between two other ages or periods.[98] Thus the influence of the great intellectual activity of Islamic Spain in the 11th and 12th centuries on medieval Western Europe cannot be overlooked.

And thirdly, he correctly states that between the years 1000 and 1225 the 'rediscovered Aristotle' was 'made relevant for Christianity'. However, who rediscovered Aristotle? Who translated the Greek texts? Into which language were they translated? Indeed, who made Aristotle relevant for Christianity? These questions are left unanswered. They can only be answered by analysing

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[95] *Islam, Europe and Empire* (1966).

[96] 'The Comparison of Law in Medieval Legal Thought' (1995) *TSAR* 659.

[97] Ibid. See also De Rijk *Middeleeuwse Wijsbegeerte Traditie en Vernieuwing* (1977); Du Plessis *Westerse Regsdenke tot en met die Middeleeue* (1984) and D Knowles *The Evolution of Medieval Thought* (1988).

[98] TB Irving (Ta'lim Ali) 'Whose Middle Ages' 1980–1981 *Arabic Studies* 25.

and assessing the influences which the intellectual activity of 11–12th century Islamic Spain had on medieval Western Europe.

Finally, any reference to Jewish philosophy in the Middle Ages would, of necessity, require an understanding of the development of Islamic philosophy and thought during that period. For, in the words (once again) of that great historian Copleston:

> Jewish philosophy in the Middle Ages was dependent, to a considerable extent, on the philosophy of Islam. This statement is not intended to imply that Jewish thinkers were devoid of originality, nor that they had no problems of their own to cope with. The fact remains, however, that Jewish philosophy grew and developed, for the most part, in the Islamic world . When Aristotelianism came to the fore in Jewish medieval philosophy, it was Aristotelianism as interpreted and developed by Islamic thinkers which constituted a datum for acceptance, rejection or rethinking and modification. Jewish philosophers in Moslem Spain often wrote in Arabic. And, with certain notable exceptions, they tended to take over from Islamic thinkers the treatment of philosophical issues which were not clearly connected with religious problems involved in the rational justification of Judaism.[99]

Indeed, Islamic scholarship synthesised, developed and pioneered ideas. As a whole, whether in the fields of science, philosophy or law, it was a developer and not only a transmitter.[100] In the period from the 8th to the 12th centuries of the Christian era, the civilization of the Arab world was described as 'one of the cultural marvels of history'.[101] And 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'.[102] It has also been stated that the greatest power and influence of Islamic thought lay in the fact that it presented the old material in an entirely fresh form.[103]

There can be no doubt that the foundations of modern Western civilization, and of European philosophy and law, are to be found in the Middle Ages. In order to understand the impact of Islamic legal thinking on European legal philosophy, it is necessary not only to trace the history and development of Islamic thought,[104] but also to be aware of the Latin

[99] See FC Copleston (note 72 above) 105.

[100] CG Weeramantry (note 67 above) 17.

[101] HJ Carroll *The Development of Civilisation* (Vol 1) (1981) 237.

[102] B Gibbon's *Decline and Fall of the Roman Empire* (1900–1902) 28. Annals means 'a historical record of events year by year'. It comes from the Latin 'annus' meaning 'year'; thus 'annales(libri)' meaning 'yearly (books)'.

[103] DL O'Leary *Arabic Thought and its Place in History* (1963) vi.

[104] See Introduction.

translations of the works of the Arab philosophers and commentators. And it is to this aspect that we now turn.

(ii) *The transmission of knowledge from the Islamic world to Europe*

Weeramantry writes that in order to obtain an idea of the extent of the transmission of knowledge from the Arabic world to Europe it is necessary to look at the translations from Arabic to Latin which occurred in Toledo (Italy), Barcelona (Spain), Narbonne and Toulouse (France). The Italian Gerard of Cremona, who lived in Toledo, translated as many as 71 treatises from Arabic to Latin. The entire Aristotelian corpus was translated from Arabic to Latin. So too were the works of the great Islamic philosophers such as Al-Kindi, Al-Farabi, Ib Sina and Al-Ghazali.[105]

Toledo was under Muslim rule from 712 to 1085 and Arabic was still spoken there as late as the 12th century. The Latin translations took place over a period of more than a century. Raymund, the Archbishop of Toledo from 1130 to 1150, wished to make the Arabic philosophy available for Christian use and founded a college of translators there.[106] Dominico Gundisalvi translated Al-Farabi's *On the Intellect*, while Gerard of Cremona translated Al-Kindi's *On the Intellect.* In 1217, Michael Scot visited Toledo and translated, inter alia, Ibn Rushd's *Commentaries on Aristotle's De Caelo et de Mundo*, as well as the first part of the *De Anima.*[107] In 1240 and 1256 respectively, Hermannus Alemannus completed his translations of Ibn Rushd's *Commentaries on the Nicomachean Ethics and Poetics* at Toledo. By the middle of the 13th century almost all the philosophical works of Ibn Rushd were translated into Latin.

In the context of these translations and the influence of the Arab philosophers on Latin scholasticism, a few words on the Arabic libraries of the day will place the history of medieval legal philosophy and its transmission in proper perspective. There were libraries in Baghdad (Iraq), Cordoba (Spain) and Damascus (Syria) containing tens of thousands of volumes. In 1171, Baghdad's public library contained 150 000 volumes, while its House of Learning (Bayt-ul-Ilm) was reputed to contain over 700 000 volumes.[108] The most famous of Islam's medeieval libraries, the House of Wisdom (Bayt-ul-

[105] CG Weeramantry (note 67 above) 21.
[106] DL O'Leary (note 103 above) 276.
[107] Ibid 281.
[108] CG Weeramantry (note 67 above) 16.

Hikmah) in Cordova, contained around 500 000 volumes, while its catalogue alone consisted of 44 volumes.[109]

(iii) *The impact of Ibn Rushd on St Thomas*

In the light of the development of Islamic legal thought and the transmission of knowledge from the Islamic world to Europe, what was the impact or influence of Ibn Rushd's Aristotelian commentaries on the thinking of St Thomas of Aquinas?

You have seen that Ibn Rushd was born in 1126 in Cordoba. Saint Thomas was born in 1225 at Roccasecca, near Aquino, about halfway between Rome and Naples. In his great work *Summa Theologiae*, he distinguishes between reason and revelation and further harmonises the two disciplines. The doctrine of double- truth was one of the principal bases for Saint Thomas's intellectual system in harmonising the truth of reason with the truth of revelation.

In this regard, he was directly influenced by Ibn Rushd's famous work, *The Decisive Treatise on the Harmony of Religion and Philosophy* (Kitab Fasl Al-Maqal). It has been said that when St Thomas wrote his magnus opus he had Ibn Rushd's Kitab Fasl Al-Maqal constantly by his side. There may also well have been indirect influences of Islamic legal philosophy on St Thomas. His *Summa Theologiae* reveals substantial influence of and reliance on the *Etymologiae* of Saint Isidore of Seville. And Isidore was influenced, in many respects, by Islamic law.

(d) Conclusion

Islamic legal philosophy has thus made a substantial contribution to the sum total of universal legal scholarship. Islamic philosophy has played a significant part in stimulating the emphasis on reason which would lead eventually to the Renaissance and the resulting transformation of European legal systems. This leads Weeramantry to ask:

> It is interesting to speculate how the entire Renaissance in European thought, on which many human rights concepts are based, might have been delayed, or what different course it might have taken, had not [Islamic] thought and, through it, Aristotelian thought, been thus introduced into Europe'.[110]

Another author writes:

> Greek philosophy . . . survived and was continuously studied and the considerable Arabic contribution to this survival is by no means adequately realized in the world

[109] Ibid.
[110] Ibid 104–105.

> of scholarship. Had the Arabic philosophers done nothing apart from saving Greek philosophy from being completely disregarded in the Middle Ages — and they did more — they would deserve the interest of twentieth-century scholars for this reason alone.[111]

It is a matter of historical fact that the Islamic civilisation followed upon Roman civilisation and preceded the European Renaissance. One cannot properly understand and appreciate the Renaissance without, too, understanding what preceded it. As was stated in the Introduction to the section on Islamic legal philosophy, by expanding the enquiry to include non-Western legal thought, the higher ideal of civilisation equality is being propounded.

QUESTIONS

(1) Briefly trace the history and development of Islamic legal thought.
(2) Discuss Ibn Rushd's idea of Reason and Revelation.
(3) Discuss Ibn Rushd's ideas on the nature of the human being.
(4) Anaylse the influence of medieval Islamic legal philosophy on European legal philosophy.
(5) Briefly discuss the influence of Ibn Rushd on the thought of St Thomas.
(6) Does the idea of 'Revelation and Reason', as enunciated by Ibn Rushd, St Thomas and other medieval philosophers, still have any relevance today?
(7) Bearing in mind the history and development of Islamic legal thought and its influence on European legal thinking, consider its significance today as part of South Africa's legal heritage.

FURTHER READINGS

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[111] R Walzer 'Islamic Philosophy' in George (ed) *History of Philosophy: Eastern and Western* (1953) 121.