

# *3rd Tuanku Najihah Syariah and Law Lecture 2007*

**Topic:**

**“International Law and Human Rights  
in Islamic and Western Perspectives”**



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## **INTERNATIONAL LAW AND HUMAN RIGHTS IN ISLAMIC AND WESTERN PERSPECTIVE**

By:

His Excellency Judge Christopher Gregory Weeramantry

International law and Human Rights are topics of universal interest. In fact they are topics of vital importance to the human future and the survival of civilisation, and as such are in need of all the insights that all the world's cultures and civilisations can offer. Islamic law has a particularly valuable contribution to make in this regard.

Our task today is to draw together some strands of thought from the worlds of Islamic and Western jurisprudence in this all important area.

### **Separation of Law from Religion**

In dealing with Islamic and Western law approaches, there is a major distinction to bear in mind, whether we are dealing with domestic law or international law.

In Islamic law, law and religion interact with each other at every point, with the high principles of religion constantly fertilising the legal system in the absence of a barrier between them.

In the West however, despite various attempts in history to have a fused system there has been a long-standing division between law and religion.

In the earliest times there was the distinction between Canon law and Civil law. This is reflected to this day even in the terminology of law degrees – LLB, LLM, LLD. In each of them the double letter L reminds us that one had qualified in two systems of law. One therefore graduated in both systems of law in early times and there was a clear realisation that the civil law and the religious law were distinct.

In the Western world this distinction was further accentuated by the wars of religion which showed that even religious teaching was not a matter of general consensus but that vastly different interpretations were possible of the same religious text.

This distinction came to a head when the Treaty of Westphalia 1648 brought to an end the Thirty Years War, which had ravaged the world of Christianity through the conflict between Catholics and Protestants. It was in the aftermath of this conflict that modern Western international law emerged.

In this setting it was felt that the law regulating relationships even among Christian states should shake itself free of dependence on religion and should rely for its authority not on any sacred text but on the experience of humanity. This was the mould in which modern international law was cast. Hence when it began its career at the hands of Hugo Grotius and others, international law became an entirely secular discipline.

Consequently we have a separation in Western culture between Law and Religion – a dichotomy which does not exist in Islamic Law. When therefore we talk of International Law and Human Rights in Islamic and Western perspectives we must bear this important historical and conceptual difference in mind.

### **The Common Core of Worldwide Teachings Relevant to International Law**

International law cannot of course be based on the principles taught by any one culture or civilisation because it governs states of all cultural and religious backgrounds. Yet it needs to draw what inspiration it can from all of them.

The secular nature of modern international law tends to obscure the fact that religion is still a valuable source for the fertilisation of modern international law. Indeed, all the great religions have a common core of basic teachings which have much to offer us on many matters which are fundamental to international law – such as the sanctity of treaties, human dignity, the unity of the human family, sustainable development, the rights of future generations, humanitarian conduct, basic human rights, asylum, international trade etc. The list is long and impressive and much work needs to be done on this common core of principles, so as to collect a reservoir of basic principles which all the world accepts, as a fertilising source for the development of modern international law. We tend unfortunately to ignore this common core and to accentuate the points of difference.

This seminar can help greatly in promoting dialogue on these matters and I shall say more about this later. For the present we need to realise that both the great religious traditions we are discussing today have an enormous contribution to make to modern international law - a source of enrichment which modern international law has neglected to its detriment. That detriment continues to be suffered by international law despite the enormously increased access to the core teachings of all religions which has been made available by information technology.

### **The Fertilising Influence of Islamic Scholarship on the Western Intellectual Tradition**

It is no overstatement to assert that almost every branch of the Western intellectual tradition has at some stage felt the impact of Islamic scholarship. This applies to international law as well.

During the time when Europe was passing through the dark ages, an era of dazzling intellectual achievement illuminated the Islamic world, and shed its light even beyond. It was the Islamic world that kept alive what Bertrand Russell<sup>1</sup> described as the apparatus of civilisation, and whether it was logic or metaphysics, chemistry or physics, astronomy or medicine, mathematics or sociology, the Islamic scholars were in the forefront. The Arabs evolved the science of optics, developed studies on the velocity and refraction of light, pioneered new methods of sublimation and filtration in chemistry, discovered basic substances like alum, borax, sodium carbonate, silver nitrate, nitric acid and sulphuric acid and made the first accurate descriptions of smallpox, measles and pleurisy. Muslim merchants developed modern commercial instruments such as cheques, letters of credit and joint stock companies. In the period

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<sup>1</sup> Bertrand Russell; *History of Western Philosophy*; 2<sup>nd</sup> Edition, 1961, p. 420

from the eighth to the twelfth centuries of the Christian era the civilisation of the Arab world was "one of the cultural marvels of history"<sup>2</sup>

Arab philosophers of this renaissance of learning had a seminal influence on Western thought. Among them were Avicenna (Abu ibn Sina, 980 – 1027) and Averroes (Ahmed ibn Ruschd, 1126 – 98) whose scholarly leadership in various realms of intellectual activity greatly influenced the theologians and philosophers of the West. Just as in the fields of mathematics, medicine, philosophy, chemistry and physics, Islamic scholarship gave an impetus to Western thought, so also in the field of law, Islamic legal learning made a substantial contribution to the sum total of universal scholarship.

Commercial law, trusts, concepts of legal personality, notions of trusteeship of political power, the right of rebellion against unjust rulers and many basic concepts of the laws of war and peace are some of the areas where Islamic legal ideas could well have moved westward to a greater extent than is commonly supposed.

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

Aristotle's work therefore lay submerged in the West for a millennium but it did not escape the attention of the Arab philosophers among whom the work of the Greeks had gained wide currency. Aristotle's work was widely studied both in Greek and in Syrian and Arabic translations. It was through these studies that Aristotle re-entered the domain of Western philosophy.<sup>3</sup>

Aristotle's philosophy of individual freedom, thus reintroduced into the West, no doubt had a great impact on the emergence in the West of the philosophy of individual liberty which is the bedrock of modern human rights doctrine.

Another matter of significance was the evolution of the doctrine of double truth which paved the way for the release of reason, which had been kept confined by teachings such as that of Duns Scotus (1266 - 1308) that it was not for humans to seek to understand the reasons for a rule laid down by God. Avicenna and Averroes paved the way for the release of reasoning from its strict confinement by pointing out that God did not give man the faculty of reason without a purpose: it was meant to be used. While fully accepting the word of God in the *Qur'an*, they

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<sup>2</sup> H. J. Carroll et al., *The Development of Civilization*, Vol. 1, 1961, p. 237

<sup>3</sup> Julius Stone, *Human Law and Human Justice*, 1965, p. 46

taught also that there was room for the co-existence of human reason and the word of God. This was the doctrine of double truth.

This was the fundamental conceptual basis on which the path was opened out for the release of free inquiry and reason, which had been kept confined for centuries. It was this release which led to free inquiry, which led eventually to the renaissance and reformation in Europe.

When we speak of international law and human rights we need to have this background in mind, for current developments in these two disciplines stem largely from the freedom of thought which resulted from the release of Aristotelian thinking and the liberation of human thought. The work of those Islamic jurists had a great deal to do with the historic development which shaped the later course of Western history.

### **The Insulation of International Law from Domestic Law**

All too often international law and human rights tend to be treated as though they are bodies of learning distinct from the individual legal system of the country concerned. International law and domestic law are therefore kept in separate compartments without the necessary interaction between them.

Although treating the two as one system (monism) has been accepted by some states, there are still numerous states that reject this idea and adopt a dualist approach. This is to be lamented when in this day and age the entire world is fast becoming one single global community. We must endeavour to sink our individual nationalistic divisions and think in terms of one human family and one world, of which we are all citizens in common. That world is governed by one set of overarching principles.

Islamic philosophy from its earliest days rejected the philosophy of dualism, for there is one common set of overarching principles which govern all human relationships, be they domestic or international.

Even in the field of international law, there is a tendency on the part of many – and this includes not only officials of foreign offices but also scholars – to treat international law in such a compartmentalised fashion.

### **Monocultural views of international law**

International law is often viewed as a mono-cultural Eurocentric product which the western world has worked out and given to all of humanity.

This is the reverse of the truth, for international law represents the quintessence of the thinking of the best minds of humanity down the centuries going all the way back to the earliest civilisations we know of. They were striving towards a vision of human rights and an understanding between nations as early as the ancient Assyrian and Babylonian civilisations. There was a striving towards it in the Code of Hamurabi around 4000 years ago and through the ages the best minds have engaged in a search for this. All the great religions likewise have taught principles of universal value regarding the unity of the human family, the dignity of every

individual and peaceful relations between nations. Minds like Socrates, Plato and Aristotle in the Western world, Confucius and the Hindu philosophers in the East, customary legal systems in Africa, the Americas, Australasia and the Pacific have all given their attention to these. We can trace this stream of thought down the ages through philosophers like Aquinas, Erasmus, Kant, Tolstoy and Bentham down to Mahatma Gandhi in modern times, who have given their considered attention to this topic. What do justice and equity require and dictate in terms of our common humanity both as regards the individual and the state? Furthermore, what guidance do they offer regarding the relationships of states with each other?

### **The Universalising of International Law**

Such is the background to international law and human rights and I have throughout my years as lawyer and judge, stressed these universal aspects. My recent book *Universalising International Law* is centred around this theme and shows how universal are the concepts on which this discipline is based.

International law is not a discipline in which we can have compartmentalised bodies of knowledge for this state or that. All the wisdom of humanity needs to be poured into it and two of the most valuable are the Western and the Islamic streams, which must not be kept separate but must mutually fertilise each other. That is why the topic of today's lecture is of such major significance.

Current narrowness of thought, both national and international, tends to treat these two invaluable systems as mutually exclusive if not antagonistic to each other, when in fact they are complementary and naturally reinforce each other. It is sheer ignorance and lack of historical perception that causes this intellectual myopia and distortion, and this urgently needs to be corrected.

In tracing this universalism I have drawn heavily on all the world's cultures and religions and one factor that has stood out when one surveys the entire field is the important influence that Islamic philosophers have had upon the development of these branches of law – particularly international law, in which the first works which we could recognise as books on the subject emerged at the hands of Islamic jurists. This was even eight centuries before the great western jurist Hugo Grotius produced his masterly exposition of the subject in his great work on *War and Peace* in 1625.

These books of the Islamic jurists, of which the treatise by Al-Shaybani was perhaps the earliest, dealt with such matters as the sanctity of treaties, the treatment of prisoners of war, environmental protection in time of war and the respect due to diplomats. These are among the core topics of modern International Law and they were dealt with in the light of passages in the Holy *Qur'an* and the numerous *Hadiths* or traditions of Prophet Mohammed. It is not commonly known how numerous those traditions are and what a wealth of material is contained in them.

I have often stressed in my educational work that international law is an instrument for peace which we should present in simple and attractive form to children even from their school days. They know nothing of it and consequently even when they are adults and full citizens of their country, they fail to insist that their rulers should act in conformity with this wonderful

system. This applies to all countries both in the developed and the developing world and we must as educationists communicate to all in the educational professions the importance of these deeply neglected areas of basic education.

So much by way of general introduction regarding the importance and universality of international law I shall now start with a short overview of Islamic law in this field.

The existence of this body of law has been largely unknown to or ignored by the rest of the world and particularly by the Western world. This is remarkable when one has regard to:

- The extensiveness of Islamic literature on matters pertaining to International law.
- The fact that Islamic writings considerably ante-dated western writing on this subject.
- The fact that this knowledge was available to European scholars for many centuries, especially through Spain.
- The fact that later Spanish treatises such as *Las Siete Partidas*, the encyclopaedia of legal knowledge compiled by King Alfonso X of Castile in the 13<sup>th</sup> century included a section on International law which many scholars are agreed was largely taken over from the Islamic writings.<sup>4</sup> In this way it entered the mainstream of Spanish legal literature.
- The works of, Spanish theologians such as Francisco Suarez (1548 – 1617) and Balthasar Ayala (1548 – 1584) who wrote against the backdrop of a once dominant Islamic culture were no doubt known to Grotius and succeeding writers.

However that may be, the extent of coverage by Islamic writers of matters of importance to modern International Law is quite considerable. These writings drew both upon the Holy *Qur'an* and the numerous *Hadiths* of the Prophet which have relevance to modern International law.

Among them were:

- The peaceful resolution of disputes
- The sanctity of treaties
- The treatment of prisoners of war
- Respect due to diplomats
- The laws relating to international trade
- Conduct on the field of battle (*jus in bello*)
- The protection of civilians
- The custody of enemy territory and property
- The treatment of aliens
- Asylum
- Rules regarding the recognition of foreign states
- International Environmental Law

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<sup>4</sup> See R.W.Nice (ed). *Treasury of Law*, New York Philosophical Library, Introduction pp. 62  
Nussbaum, *A Concise History of the Law of Nations*, 1954, pp. 52

- Islamic law related to Human Rights

Many of these are central parts of modern international law - in particular the sanctity of treaties which Grotius made the bedrock of the new international system he was devising.

A few observations follow on the approach of Islamic law to some of these topics – an approach which though written over a thousand years ago, is surprisingly modern.

### **The Peaceful Resolution of Disputes**

I would like to start with one of the *Hadiths* which gives us a beautiful description of what humanity is doing to itself. It is known as the tradition of the two-decked boat.

This parable requires one to imagine a boat with two decks. There are people on both decks and as is the human custom they begin to quarrel with each other – both on the lower deck and on the upper deck. There is also a major quarrel between the people of the lower deck and the people of the upper deck. The people of the lower deck desperately need to go to the upper deck to collect water but cannot do so owing to the quarrel between them. A hot-head on the lower deck then says, “Can’t you all see that there is water everywhere” and he takes a pick-axe and makes a hole in the bottom of the boat. In the result the whole group is extinguished, merely because two sections cannot resolve their differences by discussion.

This is one of the most telling descriptions one can find of what humanity is doing to itself for lack of discussion and understanding between different segments of the human community.

It is a perfect introduction to any discussion of international law and global problems. We have in International law a supreme instrument for the peaceful resolution of disputes and yet we do not use it although it is vitally necessary.

### **The Sanctity of Treaties**

Grotius quite rightly made the sanctity of treaties a foundation stone of his new system of international law. The principle was based on honour and good faith and the sanctity of the pledged word. It became especially important between princes as a means of preserving international law and order and saving it from descending to the law of the jungle.

The Islamic writers had anticipated this, elevating to the international level the fundamental Islamic concept of good faith and the observance of agreements.

These were elaborated in the light of many agreements entered into by the first Islamic state under the guidance of the Prophet and hence constituted a body of *Sunnah* principles in addition to those set out in the *Qur’an*.

The utmost good faith was required in the performance of a treaty, irrespective of formalities. Muslims were obliged to honour their treaties even with non-believers 'to the end of their term' (*Qur'an*, IX: 4) and 'not to break oaths after making them' (*Qur'an*, XVI: 93).

Apart from the strictly legal material, there is a vast amount of information regarding treaty practice in Islamic states. A well-known early example of a treaty in relation to the large-scale exchange and ransoming of prisoners was the treaty of 804 between the Caliph Harun-al-Rashid of Baghdad and the Emperor Nicephorus.<sup>5</sup> The treaties entered into between the Ottoman Empire and Christian powers (such as that between Suleiman the Magnificent and King Francis I of France in 1535), those between Islamic states *inter se*, trading agreements between Islamic sultans and European rulers or trading companies, and treaties between Moghul Emperors and non-Muslim Indian rulers are some examples.

Various kinds of treaties known in Islamic treaty practice included treaties concerning exchange of territories, treaties settling political relations, treaties concerning safe conduct, performance treaties, non-aggression pacts and military alliances.<sup>6</sup>

### **The Treatment of Prisoners of War**

Western international law has made meticulous provisions in numerous international documents in regard to the treatment of prisoners of war. The Geneva Conventions make detailed provisions in regard to the care of the sick and wounded and the necessity for medical treatment. Records need to be kept containing details of their conditions and they should be protected and not subjected to cruelty or torture.

Islamic law had given its attention to this from the very inception.

In relation to prisoners of war the *Qur'an* states that after they have been subdued and captured 'thereafter is the time for either generosity or ransom until the war lays down its burdens' (XLVII: 4). A prisoner, *qua* prisoner, cannot be killed. On the contrary he must be mercifully treated. At the battle of Badr the Prophet ordered, 'Take heed of the recommendation to treat the prisoners fairly.'

Prisoners must be fed in accordance with *Qur'anic* injunction 'Feed for the love of Allah, the indigent, the orphan and the captive, saying, "We feed you for the sake of Allah; no reward do we seek from you nor thanks"'. (*Qur'an*, LXXVI: 8).

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<sup>5</sup> Nussbaum, 1954, p.47

<sup>6</sup> Singh, *India and International Law*, Vol. 1 (New Delhi: S. Chand) 1973, pp. 178-87

Concern for prisoners went further. They could not be charged for their maintenance and this was solely the responsibility of the capturing state. Their dignity was to be respected, near relatives were not to be separated and they were to be permitted to draw up their last wills, which were to be transmitted to the enemy through some appropriate channel.<sup>7</sup>

All of this including the provision regarding last wills indicates that Islamic law even in its earliest formulations was imbued with the humanitarian spirit underlying the Geneva Conventions.

### **Respect due to Diplomats**

There is total complementarity here between the two systems and each could be used to strengthen the other. The respect due to diplomats and the protection to be accorded to them are important parts of Western international law. International incidents and even wars have resulted from the non-observance of this principle.

Western international law consequently spends much effort on working out principles relating to immunity and other principles such as consular immunity, absolute immunity, qualified immunity and the like.

It was a part of the Islamic tradition to show honour and regard to foreign envoys. The envoys of Abyssinia were ceremoniously received by the Prophet and he afforded them complete immunity. Indeed there was a Master of Ceremonies who received envoys prior to their presentation to the Prophet.

Such traditions of the Prophet were elaborated on in the treatises written over the centuries and often an important set of values regarding the priorities and privileges of foreign emissaries.

Foreign envoys were also presented with gifts. The importance of the subject is shown also by the existence of a classical treatise on diplomacy by Ibn al Farra.<sup>8</sup>

### **The Law of International Trade**

The law of international trade is one of the fastest developing areas of international law. It draws heavily on western principles based on freedom of contract, autonomy of parties and freedom of trade. Commercial and maritime codes, rules and practices of arbitration, quality control, absence of discriminatory measures, restraints on protectionism - all these approaches

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<sup>7</sup> S. R. Hassan, *The Reconstruction of Legal Thought in Islam* (Lahore: Law Publishing), 1974, p. 177

<sup>8</sup> For this and other references see S. R. Hassan, 1974, p. 164

are permeated with the spirit of maximum freedom to determine prices, terms and conditions. In the result principles of fair trade and equality of bargaining power tend to be neglected.

Islamic law on the other hand emphasizes the spirit of fairness and justice in trade. This is of special importance having regard to the fact that some of the pioneering developments in modern international commercial law were at the hands of Islamic traders and jurists.

Their pioneering work on negotiable instruments and cheques indicated the sophistication of their trading practices and of the mercantile law that accompanied it. Islamic traders did much to develop international trade and there was a significant evolution of fair trade principles developed against the background of fundamental principles of good faith and fair dealing.

The prevalence of a state of war did not necessarily mean the suspension of trade. It was for the state to decide what trade would or would not be permitted. In this context a tradition of the Prophet is often cited to the effect that he once sent dates from Medina to Mecca, and received hides in return, at a time when hostilities prevailed between Mecca and Medina. Nor did the outbreak of war release a debtor from liability to pay his debts. A tradition on this matter is that Muslims who owed debts to enemy aliens who were expelled from the Islamic state were ordered to pay them, the Prophet observing, 'The debts cannot be obliterated on account of war.'<sup>9</sup>

### Conduct on the Field of Battle

Humanitarian law has been worked out in much detail in recent Western international law. The Geneva Conventions have made specific and detailed provisions regarding such matters as the treatment of prisoners of war, the protection of civilians, the wounded and sick among the armed forces, victims of conflict, and so forth.

All of these important principles could be greatly reinforced if the principles and practices worked out centuries ago in the Islamic world were better known.

Honourable conduct in battle was often part of the instructions of caliphs to their commanders. The Caliph Abu Bakr wrote to the commander Usamah, 'I enjoin upon you ten commandments. Remember them. Do not embezzle, do not cheat, do not break trust ...'<sup>10</sup>

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<sup>9</sup> See the references to these two traditions in S. R. Hassan, 1974, p. 172

<sup>10</sup> Ahmad Ibrahim, "Religious Beliefs and Humanitarian Law with special reference to Islam"; *Journal of Malaysian and Comparative Law*, Vol. 11, (1984) p. 133) 1984, p. 133

In fact some European writers at the time of the crusades expressed surprise at the way in which some of these rules were obeyed. One writer, Oliverus Scholasticus, relates how the sultan al-Malik-al-Kamil supplied a defeated Frankish army with food.

“Who could doubt that such goodness, friendship and charity come from God? Men whose parents, sons and daughters, brothers and sisters had died in agony at our hands, whose lands we took, whom we drove naked from their homes, revived us with their own food when we were dying of hunger and showered us with kindness even when we were in their power”.<sup>11</sup>

The crusaders, although aggressors, proceeded on the principle that no faith need be kept with infidels. Says the noted English historian Lane-Poole, with an eye to the crusaders, ‘The virtues of civilization were all on the side of the Saracens.’<sup>12</sup>

### Protection of Civilians

The protection of civilians is an important part of Western humanitarian law and has been developed through a number of conventions especially the Geneva convention of 21<sup>st</sup> October 1950. Part Two of the Convention deals with the general protection of the population and Part Three with the status and treatment of protected persons. The various Articles of these provisions deal with matters such as protection of civilian hospitals, the prevention of pillage, the prohibition of reprisals and the prohibition of the taking of hostages, the protection of children under fifteen years, pregnant women and mothers of young children

There are also specific provisions relating to the protection of public property and the care of occupied territory.

Islamic law did indeed refer specifically to several of these but what is important is that it spelt out general principles wide enough to cover all these cases.

The killing of non-combatants was strictly forbidden. Women, children and old persons were specifically protected. Numerous traditions of the Prophet cover this as do the practices of several Islamic rulers. For example the Caliph Abu Bakr, already mentioned, warned his soldiers to spare women, children and old men, and required them not to take from the provisions of the enemy more than they needed.<sup>13</sup>

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<sup>11</sup> Heer, *The Medieval World; Europe 1100 – 1350*. tr J. Sondheimer, Mentor Books, 1968, p. 144

<sup>12</sup> Nussbaum, *A Concise History of the Law of Nations*, New York, 1954, p. 54, citing Lane-Poole, *Saladin and the Fall of the Kingdom of Jerusalem*, 1926, p. 307

<sup>13</sup> Nussbaum, *op. cit.* p. 52

## Asylum

In modern law the right to asylum has perhaps not yet become a general principle of law. Oppenheim observed 50 years ago<sup>14</sup> in relation to the right to asylum that "it cannot yet be said that such a right has become a general principle of law" as recognised by such states and as such forming part of international law. However the notion of asylum was one which has long been recognised by Islamic law.

The right of granting shelter to a political refugee who surrendered and asked for protection was long recognised in Islamic international theory and practice. Such a procedure no doubt caused resentment to the country from which refuge was sought.

A well-known example of such grant of asylum occurred when King Bahadur Shah of Gujarat gave asylum to Muhammad Zaman Mirza, Governor of Bihar under Emperor Humayun.

## Recognition of Foreign States

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

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

More significantly the caliphs, the Moghul emperors and other Islamic sovereigns recognised and exchanged diplomatic envoys with numerous European, Central Asian and Indian non-Muslim states.

One of the better-known examples of express recognition of a non-Islamic state was the treaty, already mentioned, between Suleiman the Magnificent, ruler of the Ottoman empire, and King Francis I of France.

These are only a few instances but they illustrate the extent to which Islamic writers anticipated Western writers in addressing some of the fundamentals of modern international law.

This raises the question whether international law was a legal phenomenon separate from and unrelated to the resurgence of international law that occurred in the West from the

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<sup>14</sup> *International Law*, Vol. 1, 8<sup>th</sup> Edition, p. 677

seventeenth century onwards. In other words was this Western development an independent take-off or did it draw upon the pre-existing body of Islamic knowledge?

Another aspect of the wisdom and reach of Islamic law is its teaching in regard to the environment and the long term human future.

### **International Environmental Law**

Environmental law and its recent elaboration through the concept of sustainable development have now become central themes of modern international law. International law has indeed been extremely slow to evolve the necessary concepts for the protection of the environment and the result has been the environmental crisis which faces modern civilisation. Indeed it has been a matter of such concern that a conference of Heads of States was held in Johannesburg to in 2002 consider this problem.

The importance of the subject in modern international law is so great that it needs to be considered in some detail especially because it affects the rights of future generations and imperils the whole of civilisation. Indeed, it is one of the most important areas of international law and one most urgently in need of development.

The insights which Islamic law can offer this rapidly developing branch of law are quite considerable.

#### a) The Respect due to the Environment.<sup>15</sup>

Islam, as a way of life expects human beings to conserve the environment for several reasons. Its concern for the environment appears in many Quranic verses:

*“Allah is he who raised The Heavens without any pillars that ye can see... He has subjected the sun and the moon! Each one runs (its course) for a term appointed. He doth regulate all affairs, explaining the Signs in detail... And it is He who spread out The Earth, and set thereon Mountains standing firm, and (flowing) rivers: and fruit of every kind He made in pairs, two and two: He draweth the Night as a veil O'er the day. Behold, verily in these things there are signs for those who consider! And in the earth are tracts (diverse though) neighbouring, and gardens of vines and fields sown with corn, and palm trees-growing out of single roots or otherwise: watered with the same water, yet some of*

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<sup>15</sup> See generally Fazlun Khalid with Joanne O'Brien, Cassell, ed., *Islam and Ecology ( World Religions and Ecology series)* London 1992, *Islam and Ecology: A Bestowed Trust*, Harvard Center for the Study of World Religions (Oct 1 2003), Ba Kader, Abou Bakr Ahmed. *Environmental Protection in Islam*, Washington, D.C.: Island Press, 1995.

*them We make more excellent than others to eat. Behold, verily in these things there are signs for those who understand!" (Qu'ran 13: 2-4) .*

All this is God's creation and Muslims should therefore seek to protect and preserve their environment. Moreover by so doing they protect God's creatures who are not merely objects but are believed to have a spirit and purpose of their own. They are in fact believed to pray to God and praise Him. Humankind might not be able to understand how these creatures praise God but this does not mean that they do not do so: *"The seven heavens and the earth, And all beings therein, Declare His glory: There is not a thing But celebrates His praise; And yet ye understand not How they declare His Glory!" (Qur'an 17:44)*

One is that humans act as the agents of God on earth. This agency is not blind and mechanical but is creative in its own way and moreover it must be fulfilled by operating according to God's instructions.

Another reason why, in Islam, humans are expected to protect the environment is that no other creature is able to perform this task. Humans are the only beings that God has "entrusted" with the responsibility of looking after the earth. This trusteeship is seen by Islam to be so onerous and burdensome that no other creature could 'accept' it.

*"Lo! We offered the trust Unto the heavens and the Earth and the hills, But they shrank from bearing it And were afraid of it And man assumed it" (Qu'ran 33: 72).* By this act of acceptance, humans accepted responsibility for the custody of the environment.

#### b) Extravagance and Luxury in the Use of Resources are forbidden

One of the principal causes of environmental damage today is the waste of earth resources. Western international or domestic law has scarcely anything to say on this topic for they tend to be centred largely on the philosophy of the rights of the individual.

'Islam expects a believer to respect the benefit derived from the blessings of Allah made available in the form of natural resources. Islam is likewise adamant that resources should be utilized only to the extent of necessities and a luxurious life with extravagance should be avoided. The Quaranic ruling, *"consume from the eatables and healthy drinks but do not indulge in excess"* is the key to a healthy individual and society. God is the creator of the universe and it is He who should be revered. His creation must be made the best use of, but it has to be considered as a means to approach the creator, God.<sup>16</sup>

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<sup>16</sup> Saeedullah Qazi, *Environment and Islam*, Da'wa Academy, Islamabad, 1998, (at preface)

A creation which is so valuable and designed with such a high purpose must be respected, and wastefulness in its use is not a sign of due respect. This is not just or righteous conduct but the very reverse.

#### c) The Relationship between Humans and the Environment

This is another topic on which Western international law had scarcely anything to offer, until in the late 20<sup>th</sup> century it awoke, very belatedly, to the seriousness of the problem.

In Islam the relationship between humankind and the environment is part of social existence, for there can be no social existence without the environment to support it.

The *Qur'an* contains many verses that can be referred to for guidance in this respect. The following verse, verse 21 of the second chapter, is one example:

*"O people! Worship your Lord, Who hath created you and those before you, so that you may ward off (evil) Who hath appointed the earth a resting-place for you, and the sky a canopy; and causeth water to pour down from the sky, thereby producing fruits as food for you."*

The word in this verse which is translated as "may ward off evil" is in Arabic *tatuqun*. It enjoins piety and awareness which is accompanied by an appreciation of the surrounding environment. In this verse the *Qur'an* speaks directly to all groups of people, whether believers, or not. It attempts to mobilise people to the importance of a way of life that enjoins justice and equity in handling the system created by Him'.<sup>17</sup>

#### d) Productive Use of the Environment

Here is another important area on which the Islamic texts offer many useful principles.

Islam requires the environment to be productively used. A close reading of the *hadiths* reveals that the Prophet was a staunch advocate of the productive use of the environment. There are numerous traditions of the Prophet which show his intense concern with these aspects.

Here is one: *"Whosoever plants a tree, he will be rewarded with as much reward as is relevant to its yields"* (Bukhari).

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<sup>17</sup> *The Holy Quran, English Translation of the Meanings and Commentary*, Revised & Edited by The Presidency of Islamic Researches, IFTA, Call and Guidance, Saudi Arabia.

On another occasion he said: "whosoever plants a tree, or grow crops, and a man, bird or an animal or a beast of prey eat its fruits, it is a charity for him" (Bukhari).

According to another *Hadith*, plantation is so important that even if doomsday starts and a person has a palm seedling or palm shoot in his hands he should plant it (*Bukahri*).

"There is none amongst the believers who plants a tree, or sows a seed, and then a bird, or a person, or an animal eats thereof, but it is regarded as having given a charitable gift [for which there is great recompense]." [Al-Bukhari, III:513]

The Prophet not only encouraged the sustainable use of fertile lands, but also told his followers of the benefits of making unused land productive such as: planting a tree, sowing a seed and irrigating dry land. They were all regarded as charitable deeds.

#### e) Governmental Duties in regard to the Environment

Islam was also in advance of the West in imposing environmental duties upon governments themselves. While formulating all these principles relating to obligations towards the environment, it also translated these into practical governmental duties with the necessary institutions for enforcement.

The primary duty of the Islamic state is to promote good and forbid wrongdoing. As part of these functions, it has the mandate to protect land and natural resources from abuse and misuse. From its earliest years the Islamic state established an agency known as the *hisba* whose specific task was to protect the people through promoting the establishment of good and forbidding wrongdoing. This agency was headed by a learned jurist (*muhtasib*) who functioned like a chief inspector of weighing and measures and chief public health officer rolled into one. He was also responsible, among other similar duties, for the proper functioning of the *hima* and *al harim* zones and he acted as what one might describe as an environmental inspectorate.<sup>18</sup>

For the protection of the land, forests and wildlife, the Prophet created inviolable zones known as *hima* and *haram*. In these zones the natural resources were to be left untouched.

#### g) Living in Harmony with Nature

The ultimate objective of life for a Muslim is salvation which is achieved through peace and harmony. "*Salam*, the Arabic root of the word "Islam," means "peace and harmony".

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<sup>18</sup> Fazlun M khalid, *Islam and Environment*, op. cit.

Therefore, Islamic theologians argue that an "Islamic way of life entails living in peace and harmony" at individual and social as well as ecological levels (*Hadith*).

#### h) Rights of Generations yet Unborn

International law in the Western tradition is singularly short sighted in relation to matters that affect the rights of future generations. Most of its rules are aimed at ensuring peace, order and prosperity in the present generation, but the rights of future generations tend to pass unheeded. Nuclear waste which contaminates the environment for 50,000 years and nuclear weapons which cause cancers and transmits defects to generations yet unborn, are blind spots in international law, as are its neglect of attention to climate change.

On the other hand it is impermissible in Islam to abuse one's rights as *khalifa* (*agents or trustees*), because the notion of acting in "good faith" underpins Islamic law. The planet was inherited by all humankind and "all its posterity from generation to generation.... Each generation is only the trustee. In other contexts, the concept of *khalifa* refers to the fact that waves of humanity will continuously succeed each other and inherit planet earth.<sup>19</sup>

'Being mindful of the needs of current and future generations is an important aspect of piety in Islam. In the words of the *hadith*, "Act in your life as though you are living forever and act for the Hereafter as if you are dying tomorrow" (quoted in Izzi Deen 1990, 194).

#### i) Rights of Other Forms of Life

International law is awakening very late in the day to the grim spectre of the rapid extinction of thousands of species which have lived on the planet for millions of years. This is in consequence of international law's total lack of concern with the rights of all species other than human beings. It reflects a very self-centred attitude on the part of humanity. Islamic law has a different tradition.

The Prophet has placed great emphasis on the conservation and protection of animals and birds. Once he passed by a weak camel. Looking at it he said: "Fear Allah with regard to these deaf and dumb animals". He also prohibited people from beating and striking the animals on their faces. He once saw a donkey, whose face had been branded and castigated the brander.<sup>20</sup>

The Prophet considered also that land, forests and watercourses should have rights.

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<sup>19</sup> Abu-Sway, Mustafa, "Toward an Islamic Jurisprudence of the Environment" (*Fiqh al-Bi'ah f'il-Islam*), op. cit.

<sup>20</sup> Saeedullah Qazi, *Environment and Islam*, op. cit.

"No creature is there on earth nor a bird flying with its wings but they are nations like you" (The Qur'an - 6:38).

"If anyone wrongfully kills even a sparrow, let alone anything greater, he will face God's interrogation" [Mishkat al Masabih].

### **Human Rights**

In Western law the concept of human rights was a very late arrival. Individual Western systems under the influence of philosophers like Locke, recognised human dignity and the rights of the individual within the national legal system. This proceeded under the protection of the domestic legal system. The notion that there was such a universal system was furthest from the minds of Western lawyers.

Human rights were in general looked upon as belonging to the world of philosophical idealism and were seen as being far too visionary and insubstantial to be viewed in terms of internationally recognised legal rights. Indeed when the United Nations committee chaired by Mrs. Eleanor Roosevelt was working towards a Universal Declaration of Human Rights, most of the learned observers of the time doubted that any agreement could be reached – so ephemeral was the idea of universal human rights, and so far away were human rights from being recognised as legally enforceable rights..

By way of contrast to its late evolution in the West, human rights in Islam were a logical development from its basic postulates. From these postulates the basic principles of human rights such as are now enshrined in international documents followed logically as a necessary part of Islamic law.

Since this was not generally realised, Islamic scholars addressed themselves to the task of formulating a Universal Islamic Declaration of Human Rights. This was done at the International Islamic Conference held in Paris on 15 September 1981 to mark the beginning of the fifteenth century of the Islamic era. The document that emerged the *Universal Islamic Declaration of Human Rights*<sup>21</sup> was proclaimed by the Islamic Council of Europe. Framed by eminent Islamic scholars and representatives of Islamic movements across the world, the document proclaimed in its preamble that the human rights decreed by the divine law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice. It stressed further that by virtue of their divine source and sanction these rights can neither be curtailed, abrogated nor disregarded by authorities or other institutions, nor can they be surrendered or alienated.

Just as individual dignity is a central proposition of modern Human Rights Law in the West, so also individual dignity ranked high in Islamic law. Human freedom and dignity did not

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<sup>21</sup> See European Human Rights Reports, vol. 4 (1981) pp.433-41.

depend upon whether one belonged to the fold of Islam. Being part of the human condition these attributes belong to all humans and must be respected by every Muslim.

“Individual dignity ranks high in Islamic law and the concept of human rights fits naturally within the framework. The *Qur'an* warns repeatedly against persecution, denounces aggression, warns against violations of human dignity and reminds believers of the need to observe justice in all their dealings.”<sup>22</sup>

So also participation in government (democracy is a right of every individual)

“Indeed, ‘The individual is regarded in Islam as the most important unit of the Cosmos’ (Abdel - Wahab, 1962) functioning under God and God’s law.”<sup>23</sup>

Whether it was in relation to human dignity or the rights of individuals, there was much that Islamic jurisprudence contributed in the past and can contribute in the future.

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

These aspects, not often readily perceived by the human rights scholar, were the subject of percipient comment by a Western scholar, Count Leon Ostorog, 60 years ago, long before the advent of modern human rights doctrine.

“Those Eastern thinkers of the ninth century laid down, on the basis of their theology, the principle of the Rights of Man, in those very terms, comprehending the rights of individual liberty, and of inviolability of persons and property; described the supreme power in Islam, or Caliphate, as based on a contract, implying conditions of capacity and performance, and subject to cancellation if the conditions under the contract were not fulfilled; elaborated a Law of War of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted”.<sup>24</sup>

It is against this background that the various provisions of the Universal Declaration in the West need to be considered, when comparing them with Islamic law. Time does not permit the examination of these rights individually but in general Islamic law gave them recognition not as philosophical ideals but as an actual part of law itself. Consequently their observances were mandatory and not merely a matter of grace and favour.

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<sup>22</sup> C G Weeramantry, *Islamic Jurisprudence: An International Perspective*, 1988, p. 114

<sup>23</sup> Ibid pp. 114 - 115

<sup>24</sup> Ostorog, Count Leon, *The Angora Reform*, 1927, pp. 30-1 (Count Ostorog was judicial advisor to the Ottoman Government and later a lecturer in the University of London); also Fyzee, *Studies on the Civilisation of Islam*, 1963, pp. 30 - 31, pp. 51-2

### Justice in Rulership

Islam complemented its basic teaching on what we would today call human rights with extensive expositions of justice in rulership.

In the West rulers were looked upon as holding their authority by the grace of God and it was in general to God rather than to their subjects that they were held accountable. In Islam, on the other hand, justice in rulership was almost a condition prerequisite to the exercise and continuance of the ruler's power, with the right of rebellion against an unjust ruler being specifically envisaged.

Justice in rulership was the subject of detailed discussion because of the numerous references to this both in the *Qur'an* and the Sunna. The unjust ruler will be punished for "Oppression is Darkness on the Day of Judgement" in the words of the Prophet.<sup>25</sup>

"One day in the office of a just ruler is better than sixty years of worship' and 'The most beloved in the eyes of Allah is the just ruler and the most hateful in his eyes is the unjust ruler' (for sources of both these *hadiths* see Ibrahim, 1985, referring to Ibn Taymiya on public and private law in Islam) "<sup>26</sup>

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A broad overview of the Islamic perspectives such as I have attempted in the preceding observations indicates the extent to which the international system and Western perspectives could derive benefits from the experience and the insights of the Islamic system as worked out over the ages. It is a great pity that these insights and sources of reinforcement have to a large extent been neglected thus far. Indeed many in the Western world, even in the highest places of learning and the highest positions in public office, remain unaware of them. Dangerous talk is in the air about a clash of civilisations when we should be talking rather of the confluence of civilisations in regard to all the causes that matter concerning the advancement of the human condition.

I see this as a forum for emphasising that confluence and stressing how much the great world traditions supplement and complement each other. We must have a process of mutual appreciation born of mutual awareness and understanding. This way we shall carry forward that great civilising and peacekeeping mission which lies at the very heart of the two great cultural inheritances which constitute our topic today. Humanity can take a great leap forward by adopting the path of understanding and appreciation and I compliment the organisers for having made this our central topic for consideration today.

I hope there will radiate outwards from this new seat of learning a shining light of cross cultural scholarship and understanding which can help all cultures to appreciate the contribution which each has made in the past and can make in the future towards the betterment of the human condition.

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<sup>25</sup> (Mishkat al – Masabih Vol. 1 p. 586)

<sup>26</sup> C G Weeramantry, *Islamic Jurisprudence an International Perspective*, p. 116