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Thomas J. O'Shaughnessy

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THOMAS J. O'SHAUGHNESSY

AMONG all the religious sciences Muslims put the study of the Sacred Law (the *Shari'ah* or "beaten path") in first place. Such emphasis has Hebraic overtones and, like many other parts of Muhammad's message, was probably inspired by the practice of the Jews living in the Arabia where he was born. Like the Hebrew Law too, as it was interpreted for several centuries before Islam, the *Shari'ah* exercised an extremely broad control over the believer's life. In addition to purely religious matters it regulated inheritances, land taxes, eligibility for public office, and a mass of other details that in the West are the concern of civil codes. Since orthodox Muslims still regard lawmaking as reserved exclusively to God, in theory the text of their legal system, founded on divine revelation, can admit of no change.

As the desert armies of Islam carried the new faith into the cultured societies of the Middle East of the 600's, observance of the civil provisions of the *Shari'ah* became more and more difficult. In their place were soon adopted customary codes differing from region to region and based on usages antedating the Muslim conquests. Legal adaptation has by now developed to such an extent that Muslim countries are nearly all ruled by codes taken from those of Europe. Substitution appeals to the devout Muslim more than any attempt

to amend the Law, because it leaves its precepts intact as an ideal to be realized when the *mahdī* (Rightly Guided One) comes in the last days of the world to institute a golden age of justice. The conservative view of the *Sharī'ah* here described is still held by the majority of Islam's legal thinkers, even those little influenced by traditional theology.

Self-rule for Muslims and liberty to follow the Law are closely bound up with the theory of territorial rights in Islamism. Today both have a new relevance for Muslims in many parts of Africa and Asia, including Indonesia and the Philippines. They also furnish a good example of juridical adaptation imposed by the ups and downs of Islamic conquest over thirteen centuries.

Early Muslim jurists regarded the world as divided into two spheres: "Islamic territory" (*dār al-islām*), in theory constituting a single monarchy ruled by the Caliph or successor of Muhammad, and "hostile territory" (*dār al-harb*) or countries inhabited and governed by non-Muslims. One of the chief duties of the Caliph's office, as originally conceived, was to keep extending the geographical limits of Islamic territory by means of the "holy war" (*jihād*), as long as there were those who denied the unity of God and Muhammad's divine mission. A truce in this war of expansion was allowed only when the superiority of the enemy or the weakness of the Muslim forces made a halt necessary in order to resume hostilities later when victory appeared more likely.

In the first decades after the rise of Islam, when one military triumph followed upon another almost without interruption, this theory needed no alternative provisions. But when lines of communication became extended and not only temporary halts but even occasional reconquests by non-Muslim forces began to occur, recourse to the legal fonts permitted the ruling that land no longer subject to Muslims automatically reacquired its former status as hostile territory. If it could not be regained for Islam, its Muslim inhabitants had the obligation to emigrate in order not to remain under foreign

domination.¹ So exacting was the ruling that a woman refusing to follow her husband in this emigration was by that fact divorced.

In the course of time, however, "necessity" (*darūrah*), always an influential factor with Muslim jurists, brought about a mitigation of this severe interpretation of the legal fonts. Now Islamic territory, when reconquered by non-Muslims, became hostile territory only if three conditions were verified: 1) if the unbelievers' law should replace the *Sharī'ah*; 2) if the reconquered territory should border immediately on hostile territory; and 3) if Muslims and their protected clients should be rendered insecure. Since the first of these three conditions was considered the most important, gradual acceptance was found for the opinion that freedom for Muslims to observe the *Sharī'ah* sufficed by itself to maintain a territory reconquered by non-Muslims in the status of *dār al-islām*.

The growing toleration of government by non-Muslims was manifested in decisions of the Shāfi'ite and Mālikite legal schools early in the sixth century of Islam (c. 1140 A.D.) which recognized as valid the appointment of a Muslim judge by a non-Muslim ruler. In the following century this liberal view was further tempered after the capture of Baghdad in 1258. On that occasion the Mongol conqueror Hulagu sought from the Muslim jurists of the city a reply to the question whether the rule of a just unbeliever should be preferred to that of an unjust believer. Those consulted rendered their verdict in favor of the just unbeliever, thus sanctioning the government of Muslims not merely by a member of a tolerated cult but by an "idolater".

¹ The incapacity of Christians and Jews to govern Muslims (idolaters in theory are not permitted to remain alive in Muslim territory) is commonly based on Koranic texts like those of chapters 4, 144 and 5, 51 (Cairo edition), but it was more probably inspired by Byzantine legislation forbidding the same function to Jews and heretics in regard to Christians. This reciprocal treatment of non-Muslims by Muslims occasioned further reciprocity in legislation passed under Gregory IX (1227-41) and Eugene IV (1431-47) regarding the treatment of Muslims in Christian lands.

The occupation of Muslim countries by European powers, especially in the last hundred and thirty years, raised the question again in modern times. As late as the beginning of the nineteenth century jurists of two of the moderate legal schools, the Hanafite and the Mālikite, recognized the more liberal view above described but considered it as less probably licit.

There is another opinion [besides the one imposing emigration] according to which it is permitted to remain in a country that has come under the control of unbelievers, provided that the laws of Islamism are there in force. . . . This is a weak opinion because of the abasement and humiliation which it permits and sanctions.

From this would follow as more probable the obligation to institute the *jihād* or "holy war" if success in it could be reasonably hoped for. But in modern times this alternative has found less and less favor in the Muslim world and attempts to organize hostilities on a purely religious, as opposed to a political basis, have gained little popular support. By the middle of the last century it was more commonly held by Muslim jurists that a country did not become hostile territory by the mere fact of non-Muslim conquest, but only when Muslims were impeded in the free observance of the *Sharī'ah*.

This opinion today represents the generally accepted solution to the problem posed by the invasion of Islamic territory by non-Muslim nations. Jurists who follow it usually recognize four divisions of the *dār al-islām*, namely, forbidden, reserved, canonical, and irredentist territories. Forbidden territory, such as Mecca and Medina together with their sacred environs, is that from which non-Muslims are excluded under pain of death. Territory under continuous Muslim control until modern times is regarded as "reserved". Its extent is variously estimated, some restricting it to the Arabian Peninsula, Palestine, Syria, and Iraq, and others adding to this all the lands conquered under the first four successors of Muhammad, namely, Persia, Egypt, and perhaps Afghanistan and Cyrenaica. Other Muslim territories today controlled by non-Muslim governments (like Sulu and parts of Mindanao) properly belong to the third division or to canonical territory,

where Islamism is the religion officially recognized by the unbelieving rulers. Even though its Muslim inhabitants should constitute only a minority, a region still retains the status of canonical territory as long as they are influential enough to obtain official provision for the public functioning of Islamic law.

Finally, Muslims still consider as irredentist territory—that regarded as belonging by right to Islam—all those lands in which their religion once held political sway but from which it was later expelled. This conviction of just title has never ceased to awaken the regrets of Muslim poets for the loss of Crete and Sicily and especially of the Balearic Isles and Andalusia where so many buildings once dedicated to Islamic ritual worship still remain.

Another opinion, today little in favor, would relegate lands once Muslim but later reconquered by unbelievers to a category which would be neither Islamic territory nor hostile territory, but intermediate to both, and known as *dār as-sulh*, that is, treaty or capitulation territory. This term was formerly applied to Jewish or Christian states not under Muslim rule but tributary to Islam by treaty, as opposed to lands on which tribute had been imposed by force. Muhammad himself concluded such a treaty with the Christian community of Najrān, guaranteeing its security in exchange for stipulated payments which were later interpreted as a land tax (*kharāj*). Those who would apply this conception to territories wrested from Muslim control by alien states would, by a legal fiction worked out for this situation, regard gifts sent by non-Muslim governments to local rulers as the *kharāj* collected in Islamic countries. Most jurists, however, have in the past rejected the application of the notion of *dār as-sulh* to lands removed from Muslim rule as without basis in the fonts of Islamic law. They interpret the agreements cited to exemplify it as another form of the truce originally permitted for the purpose of regrouping Muslim forces in the holy war of expansion.

Formerly concluded only with Jews Christians—regarded in Islam as possessing a true but superseded revela-

tion—these truces are at the present time made without regard for the religious faith or lack of it on the part of the other signatory, and from being temporary agreements they have come today to be alliances unlimited in duration. This lay outlook, which *de facto* rules the international policies of modern states peopled by Muslims, has further tended to make merely nominal the supremacy accorded in theory to the *Shari'ah*.

But the practical workings of international politics have not nullified the juridical ideal still prevalent within Islam: to push back the boundaries that now contain the Muslim "nation" and to bring the whole world into the *dār al-islām*. For this, individual conversions are valued only as a means; the end is to insure that the "rights of God," that is, the prescriptions of the Koran, are respected in the social and political organization of all countries. This acknowledgment will be gained, according to the view common today in Islam, as soon as a Muslim group is firmly enough established in the land of the unbeliever to put into effect all the external practices characteristic of a Muslim community—thus constituting what has already been described as canonical territory.

Yet despite all the compromises dictated by necessity and facilitated during the past forty years by a growing disregard among its educated class for the fundamental religious deposit of Islamism, the principle still remains—and is bolstered today by the xenophobia encouraged for political purposes in some Muslim lands: the government of Muslims by a non-Muslim ruler is a juridical irregularity to be tolerated only as long as the governed are unable to bring about a change. This underlying sentiment in Islam came into the open in recent times in a situation which the community could control, as it involved its own members and those in limited numbers. In 1924 about two thousand Muslims, living in Algeria, Morocco, and Tunis, who had chosen French citizenship organized the *Ligue des Musulmans Français*. Their fellow Muslims promptly branded them as traitors, and the legal experts (*'ulamā*) made the condemnation official by declaring

that those who give up citizenship in the smaller national groupings that make up the *dār al-islām* by that fact make themselves inhabitants of hostile territory (*dār al-harb*). Members of the *Ligue* were ostracized, deprived of Koran readers at their funerals, and denied Muslim burial. Riots, violations of tombs, and killings finally, in 1937, forced the passage of a law which enabled them to resume local citizenship.

The consciousness of belonging to an international brotherhood with a memory of thirteen centuries of religious tradition and of a golden age of political and cultural preeminence is far from dead in the Muslim masses, especially in the Arab bloc of the Middle East. For them and for the generality of Muslims everywhere the *dār al-islām* is still a reality and the nationalistic aspirations of the West are artificial and unreal. Non-Muslim regimes in several of these lands have, it is true, encouraged such aspirations and have sought to refashion popular sentiment in accord with them but without gaining the support of the Muslim community as a whole. The more vital tendency in Islam today seems rather to reform social institutions according to Islamic principles. A re-formation on such a basis is destined to put increasingly greater emphasis on the traditional notion of the *dār al-islām*.