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Religious Pluralism and Islamic Law

Dhimmīs and Others in the Empire of Law

ANVER M. EMON



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Series Editors:

Anver M. Emon, Clark Lombardi, and Lynn Welchman

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Satisfying the growing interest in Islam and Islamic law, the Oxford Islamic Legal Studies series speaks to both specialists and those interested in the study of a legal tradition that shapes lives and societies across the globe. Islamic law operates at several levels. It shapes private decision making, binds communities, and it is also imposed by states as domestic positive law. The series features innovative and interdisciplinary studies that explore Islamic law as it operates at each of these levels. The series also sheds new light on the history and jurisprudence of Islamic law and provides for a richer understanding of the state of Islamic law in the contemporary Muslim world, including parts of the world where Muslims are minorities.

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*For
Allyssa and Hafez Atticus*

Series Editor's Preface

The Oxford Islamic Legal Studies series was created to promote studies informed by close engagement with Islamic legal texts and with important issues in contemporary legal theory and policy. In this second volume in the series, co-editor Anver M. Emon theorizes the legal regime governing minority religious communities living permanently in Muslim-ruled lands, the *dhimmīs*. In doing so, Emon juxtaposes the pre-modern legal regime with more contemporary ones, and he provocatively challenges widely held views about the regulation of minority religious communities in both Islamic and Western liberal democratic constitutional regimes.

In pre-modern Islamic law, *dhimmī* rules established rights, obligations and responsibilities for the members of *dhimmī* communities. Examining Islamic legal doctrines governing the *dhimmī* across different legal schools (*madhāhib*), Emon points out that the jurists who developed the *dhimmī* rules shared a number of common assumptions. These include ones about the universal scope of the Islamic message, about the preferability of an imperial model of governance, and, finally, about the nature of the legal and administrative institutions that would keep order in a Muslim empire. These premises informed the juristic expectations about the effects of *dhimmī* rules on the *dhimmī* communities and on society at large. From this insight, Emon draws several conclusions. First, he argues that if we accept the assumptions that underlay the *dhimmī* rules, those rules would seem intelligible, appropriate, legitimate, and just. On the other hand, a person who does *not* share the jurists' views about morality and society may view the pre-modern *dhimmī* rules as unintelligible, inappropriate, illegitimate, or unjust. Many Muslims and non-Muslims around the world no longer accept the basic assumptions that informed the pre-modern *dhimmī* rules. Emon explores how the embrace of modern assumptions has informed modern views of the *dhimmī* rules. He explains why many people in the contemporary world find the pre-modern rules problematic. Finally, in a section that is sure to be controversial, Emon turns his attention to liberal democratic states and to the legal regimes that they have developed to regulate minority faith communities. He points out that liberal democratic regimes make their own assumptions about ethics, about society and about the

effects that particular rules will have in society. Emon then compares the pre-modern Islamic regimes with modern liberal democratic ones. Provocatively, he concludes that if one looks at the social effects each system was supposed to produce, their regulatory dynamics prove to be quite similar.

Clark B. Lombardi
Lynn Welchman

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Introduction

Well before the onset of the twenty-first century, academic and popular debates have either implicitly or explicitly positioned Muslims, Islam, and Islamic law as the paradigmatic "Other" to be managed and regulated through policies of multiculturalism and human rights.¹ This is especially the case in societies identified by such labels as *western, liberal, democratic*, or some combination thereof. That paradigm is mirrored in Muslim majority countries that both acknowledge an Islamic contribution to their core values, and participate in a global network in which that Islamic content is at times suspiciously viewed from the perspective of liberal democratic approaches to good governance and individual autonomy, which have become standard benchmarks of governance, or at least are perceived to be so.² The suspicions about Islam and Muslims tend to beg one important question that animates considerable debate in popular venues and the public sphere, i.e., whether or not Muslims, in light of their faith commitments, can live in peace and harmony with others, and treat all people, regardless of their faith traditions, with equal dignity and respect.³ To use the more common terms of reference,

¹ See, for example, Natasha Bakht, "Family Arbitration Using Shari'a Law: Examining Ontario's Arbitration Act and its Impact on Women," *Muslim World Journal of Human Rights* 1, no. 1 (2004): Article 7. On religion in liberal constitutional legal systems more generally, see Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts," *Fordham Law Review* 75 (2006): 427–69. For research centers and academic initiatives devoted to the study of religion in the public sphere, see the University of Toronto's "Religion in the Public Sphere Initiative"; Columbia University's "Institute for Religion, Culture and Public Life." For a center devoted to the study of Islam and Muslims in particular, see the University of Exeter's "European Muslim Research Centre."

² For policy-oriented studies that negotiate the tensions this dynamic creates, see United States Agency for International Development (USAID), *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan* (Washington D.C.: USAID, 2005); Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton: Princeton University Press, 2006). For an analysis of how a Muslim majority country (i.e., Egypt) negotiates its commitments to its Islamic values alongside its constitutional commitments to citizenship and equality for both its Muslim majority and non-Muslim minority (i.e., Coptic Christians), see Rachel M. Scott, *The Challenge of Political Islam: Non-Muslims and the Egyptian State* (Palo Alto: Stanford University Press, 2010).

³ Such debates occur in both scholarly and public arenas. One highly public endeavor has been the work of those behind the letter "A Common Word Between Us and You," which consists of a letter from Muslim clerics to Christians about their shared values. See

the question can be restated as follows: "Do Muslims and their religious tradition (in particular Islamic law) have the capacity to *tolerate* those who hold different views, such as religious minorities?"

The question about tolerance and Islam is not a new one. Polemicists are certain that Islam is not a tolerant religion.⁴ As evidence they point to the rules governing the treatment of non-Muslim permanent residents in Muslim lands, namely the *dhimmī* rules that are at the center of this study. These rules, when read in isolation, are certainly discriminatory in nature. They legitimate discriminatory treatment on grounds of what us moderns would call religious faith and religious difference.⁵ The *dhimmī* rules are invoked as proof-positive of the inherent intolerance of the Islamic faith (and thereby of any believing Muslim) toward the non-Muslim. Some Muslims and others, on the other hand, seek to portray Islam as a welcoming and respectful tradition.⁶ They do not give much weight to the *dhimmī* rules as indicative of an Islamic ethos regarding the non-Muslim living in Muslim lands. Further, historians of Islam have shown that its historical and legal traditions contain examples that vindicate both perspectives of tolerance and intolerance toward the non-Muslim, thereby suggesting that the question about whether Islam is tolerant or not is one that cannot be answered definitively one way or another.⁷

This study problematizes *tolerance* as a conceptually helpful or coherent concept for understanding the significance of the *dhimmī* rules that governed and regulated non-Muslim permanent residents in

<<http://www.acommonword.com/>> (accessed July 14, 2010). For scholarly approaches to this debate, see Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009); Mohammad Fadel, "The True, the Good, and the Reasonable; The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law and Jurisprudence* 21, no. 1 (2008): 5–69. Louise Marlow addresses the tensions between egalitarianism and social differentiation in early Islamic thought, though does not address the *dhimmī* in any great detail. Consequently, while that study offers an important set of insights into philosophies of political community, identity and difference, the difference posed by the *dhimmī* raises a host of questions not addressed in Marlow's study: Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (Cambridge: Cambridge University Press, 1997).

⁴ Indeed, this view is foregrounded in the titles of certain books. See, for example, Robert Spencer, *The Truth About Muhammad: Founder of the World's Most Intolerant Religion* (Washington D.C.: Regnery Publishing, 2006); idem, *Religion of Peace? Why Christianity Is and Islam Isn't* (Washington D.C.: Regnery Press, 2007).

⁵ For an important study on the concept of "religion" and its role in demarcating the non-secular, see Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Palo Alto: Stanford University Press, 2003).

⁶ This was one of the main topics of the letter "A Common Word," which opined on Islamic teachings of love of God and one's neighbor as principles that are shared by both Muslims and Christians. For the text of the letter and supporting documents, visit The Official Website of *A Common Word*: <<http://www.acommonword.com/>> (accessed July 14, 2010).

⁷ For more on these distinct approaches, see Chapter 1.

Islamic lands. In doing so, it suggests that the Islamic legal treatment of non-Muslims is symptomatic of the more general challenge of governing a diverse polity. Far from being constitutive of an Islamic ethos, the *dhimmī* rules are symptomatic of the messy business of ordering and regulating a diverse society. This understanding of the *dhimmī* rules allows us to view the *dhimmī* rules in the larger context of law and pluralism. Further, it makes possible new perspectives from which to analyze Sharīʿa as one among many legal systems; and that far from being unique, it suffers similar challenges as other legal systems that also contend with the difficulty of governing amidst diversity. A comparison to recent cases from the United States, United Kingdom, France, and the European Court of Human Rights shows that however different and distant premodern Islamic and modern democratic societies may be in terms of time, space, and tradition, legal systems face similar challenges when governing a populace that holds diverse views on a wide range of values.

This study is organized around four major themes, all of which are inter-related. One might even find the work fugal, in the sense that the basic focus on the *dhimmī* rules makes possible these thematic departures, all of which are distinct and can stand alone from each other, and yet together reverberate with a harmony that offers something richer and more robust. The *dhimmī* rules raise important thematic questions about tolerance; rule of law and governance; and the way in which the aspiration for pluralism through the institutions of law and governance is a messy business. A bottom line in the pursuit of pluralism is that it can result in impositions and limitations on freedoms that we might otherwise consider fundamental to an individual’s well-being, but which must be limited for some people in some circumstances for reasons extending well beyond the claims of a given individual. This introduction will outline the four basic themes that animate this study, showcasing their distinct contributions to the study of the *dhimmī* rules, and illuminating how, in the aggregate, they raise important questions about the scope of freedom possible through the law in a context of diversity and difference.

THEME A: THE LIMITS OF “TOLERANCE”

The first theme focuses on the premodern Sharīʿa-based rules governing non-Muslim permanent residents in Islamic lands. The technical term of art for this group is *dhimmīs*, and the rules governing them are thereby called the *dhimmī* rules. According to Islamic legal doctrines, the *dhimmīs* would enter the *ʿaqd al-dhimma*, or contract of protection (whether express or implied) with the ruling Muslim authorities. That contract permitted them