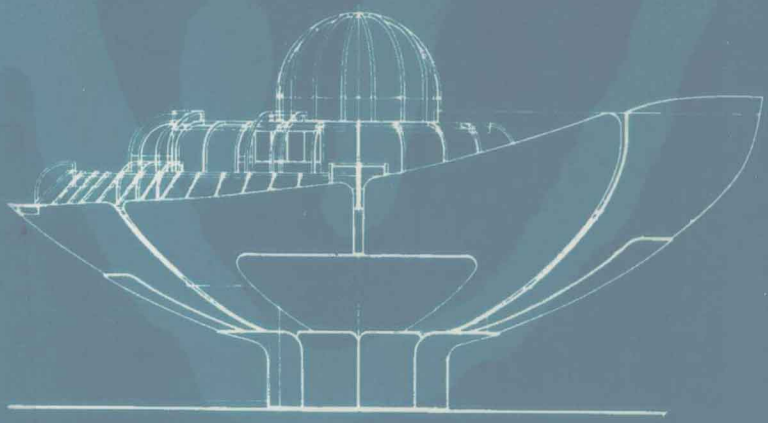
Muslims in Europe

Edited by Bernard Lewis
and Dominique Schnapper



SOCIAL CHANGE IN WESTERN EUROPE

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edited by
BERNARD LEWIS
and
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CONTENTS

1

LEGAL AND HISTORICAL REFLECTIONS ON THE POSITION OF MUSLIM POPULATIONS UNDER NON-MUSLIM RULE

BERNARD LEWIS

One of the earliest Muslim visitors to Western Europe in modern times was a certain Mīrzā Abū Tālib Khān, an Indian of Perso-Turkish background, who travelled in England and France between 1798 and 1803, and wrote an extensive and detailed account of his travels, adventures and impressions. During his stay in London he was taken several times to the Houses of Parliament. He was not impressed by what he saw, remarking that the oratory reminded him of the squawking of a flock of parrots. However, he was astonished when he found that this was a legislative assembly, with the duty of enacting laws to regulate both civil and criminal matters – defining offences and prescribing penalties. The English, he explained to his readers, unlike the Muslims, did not accept any divinely revealed holy law to guide them and regulate their lives in these matters and were therefore reduced to the pitiable expedient of making their own laws 'in accordance with the exigencies of the time, their own dispositions, and the experience of their judges'.

In this comment, Mīrzā Abū Ṭālib Khān was revealing an essential difference between classical Islamic and modern Western views on the nature of law and authority, and therefore of the functions and jurisdiction of the state. For the Muslim, law is an essential, indeed a central part of his religion, which is inconceivable without it. The law in all its details is divine not human, revealed not enacted, and cannot therefore be repealed or abrogated, supplemented or amended. Deriving from the same authority and sustained by the same sanctions, it deals equally with what we would call public

and private, civil and criminal, ritual and even dietary matters. Its jurisdiction is in principle universal, since God's revelation is for all mankind, but in practice personal and communal, since its enforcement is limited to those who accept it and submit to its authority. For such, its authority is absolute and applies to every aspect of human life and activity. In theory, therefore, there is no legislative power in human society, since the making of laws is for God alone. According to a frequently cited Muslim dictum, to forbid what God permits is no less an offence than to permit what God forbids. This principle is of obvious relevance to certain contemporary situations in which modern social mores conflict with traditional Islamic practice.

While in principle there is no legislative function in the Islamic state, in practice Muslim rulers and jurists, during the fourteen centuries that have elapsed since the life of the Prophet, have encountered many problems for which revelation provided no explicit answers, and have found answers to them. These answers were never seen as enactments nor presented as legislation. If they came from below, they were called custom. If they came from government, they were called regulation. If they came from the jurists, they were called interpretation. Like lawyers everywhere, Muslim religious lawyers could accomplish many changes by the reinterpretation of even the most sacrosanct texts.

For Muslims, the most sacred text – indeed the only text to which that adjective can properly be applied – is the Qur'ān. The Qur'ān is the primary source of holy law and where it contains a clear and unequivocal statement, this is accepted as an eternal commandment equally valid for all times and all places. The clearer and more explicit the statement, the less room there is for interpretation. But where, as often, the statement is elliptic or allusive, there is a need for interpretation and an opportunity for creative ingenuity.

The scope for interpretative ingenuity is correspondingly greater in dealing with the second major source of Islamic law, the corpus of traditions, transmitted through the generations, describing the actions and utterances of the Prophet. Such traditions are known as *ḥadīth*. While *ḥadīth* is also binding and in principle equally so, it differs from the Qur'ān in an important practical respect. While there is a single Qur'ān with an undisputed text, there are vast numbers of different and sometimes contradictory *ḥadīths*, some of them surviving in variant versions and many of them regarded as questionable or even false by respected authorities. The collection,

transmission, study and authentication of such traditions became a major branch of Muslim religious scholarship. In time scholars assembled a considerable body of traditions, which were widely accepted among Muslims as authentic. But even these were subject to a variety of interpretations, often differing considerably. To regulate this, certain principles of interpretation were accepted, involving analogy and other forms of reasoning and even, within limits, the exercise of independent judgement. The dominant principle accepted by the vast majority of Muslims was the *sunna*, a word meaning practice or precedent, and specialized to mean the practice of the Prophet and his Companions and other revered early Muslims, sanctified by tradition. According to a much cited saying attributed to the Prophet, 'my community will not agree upon an error'. This was interpreted as meaning that after the death of the Prophet, God's guidance passed to the Muslim community as a whole, and has led to the acceptance of the doctrine of consensus, in Arabic *ijmā'*, which might be approximately translated as the climate of opinion among the powerful, the learned and the pious. To follow precedent was *sunna*, and considered to be good. Departure from precedent was *bid'a*, innovation – the nearest Muslim equivalent to the Christian notion of heresy.

The principle of consensus made it possible for jurists over a period of time, in one or other part of the Muslim world, in practice though never in theory, to modify and adapt the law to meet changing circumstances. They were further helped in this by another principle laid down by the jurists, that of *ḍarūra* necessity. Even in the Qur'ān there are verses that permit, sometimes implicitly and sometimes even explicitly, on ground of necessity, what would otherwise be forbidden. As developed by the jurists, the principle of necessity applied in two forms. The first, relating to individuals, deals with the dire constraints under which a person might find himself. A Muslim may for example eat pork or carrion rather than starve to death. A seafarer may throw another seafarer's goods into the sea if their boat is overladen and about to sink. In the second sense, necessity no longer refers to individual constraint, but rather to the exigencies of social and economic – and some would add political – life. But the principle of *ḍarūra* has limits. For the individual, these are clear and unequivocal. Thus, for example, a Muslim may eat pork to save his life, but he may not commit murder. The social limits are more subtle, more debated, and, of course, more relevant.

The most important among those who rejected the Sunnī view are the Shī'atu 'Alī, the faction or party of 'Alī, the major breakaway group in Islam. In the classical Sunnī perception, the Muslim community is guided by God, its ruler is ordained and approved by God, and its history reveals the working out of God's purpose for mankind. For the Shī'a, all the sovereigns of Islam since the abdication of Hasan, the son of 'Alī, the founder of their sect, in the year 41 of the *hijra*, are usurpers. The Muslim world is living in sin and history has taken a wrong turning. In practice, the two differed rather less from each other than their doctrines would appear to require. The Shī'a found themselves obliged to make a series of compromises and live at peace under rulers whom theoretically they regarded as tyrants and usurpers. Sunnīs for their part were obliged to compromise on their definitions of what constitutes a legitimate and just ruler, and to accept a series of usurpers and tyrants, whose only claim to power was the possession of sufficient military force to seize and hold it. Accepting them meant recognizing their legitimacy in terms of *sharī'a*, and this in turn meant that obedience to them was a religious obligation, disobedience a sin as well as a crime. Tyranny, according to a common saying, is better than anarchy. The reason was eloquently set forth by the eleventh-century theologian and philosopher Ghazālī:

> Which is better, to declare that the qāḍīs are revoked, that all authorizations are invalid, that marriages cannot be legally contracted, that all acts of government everywhere are null and void and thus to allow that the entire population is living in sin – or is it better to recognize that the imamate exists in fact and therefore that transactions and administrative actions are valid, given the actual circumstances and the necessities of these times?

Other scholars go even further and say that any ruler who can seize power and maintain order – even if he is barbarous or vicious – must be recognized and obeyed 'for the welfare of the Muslims and the preservation of their unity (i.e. their social cohesion)'. From a barbarian and a tyrant to an infidel it was only one step, but a very difficult one. Some writers were willing to take even that step, and from the eleventh century we find Arabic and Persian authors quoting a maxim, and sometimes even, absurdly, attributing it to the Prophet, that a just infidel is preferable to an unjust Muslim ruler – or, as some put it, government can exist with unbelief, but not with injustice. The more usual view among the jurists, for whom justice is defined by the holy law of Islam, is that the worst of Muslims is preferable to the best of infidels.

ture it is invariably interpreted in a military sense and the jurists go into great detail on such questions as the opening, conduct, and termination of hostilities, the treatment of prisoners and non-combatants, the definition and division of booty.

Islamic teaching and, with few exceptions, Islamic practice reject forcible conversion. However, the power of the Islamic state and therefore the jurisdiction of Islamic law were extended in the early centuries of the Islamic era over vast territories and population. The literature of the time clearly reflects the belief that this process would continue without interruption until, in a not too distant future, the whole world either accepted the Islamic faith or submitted to Muslim rule. In the meantime, the world was divided into two, the *Dār al-Islām*, the House of Islam, in which Islamic government and Islamic law prevailed, and the *Dār al-Ḥarb*, the House of War, where infidel rulers still remained in power. The denizens of the *Dār al-Ḥarb* were known as *ḥarbī*.

The swift vast conquests achieved by the early Muslims brought great numbers of non-Muslims into the Islamic empire; for some time they constituted the majority of the population. Even after their majority status was ended by conversion and assimilation, they remained in significant numbers as minorities living among the now Muslim majority. Later, when the first great wave of conquest was finished and a more or less stable frontier was established between the House of Islam and the House of War, other non-Muslims came to the Islamic lands as visitors or as temporary residents, sometimes as students or diplomats, most commonly for purposes of trade. Muslim law deals at some length and in great detail with the first group and also devotes some attention to the second.

Non-Muslims who were permitted to live as permanent residents under Muslim rule were called *dhimmī*, that is to say members of a community which had been granted a *dhimma* a pact, by the Muslim authorities. Under the terms of the *dhimma* the non-Muslim subjects agreed to recognize the primacy of Islam and the supremacy of the Muslims. Their submission was symbolized by the payment of a poll tax and the acceptance of certain social restrictions, notably proscription to bear arms. In return, they were allowed to practice their religion, to maintain and when necessary repair their places of worship (a ban on the construction of new churches and synagogues was rarely enforced). In general they enjoyed a large degree of autonomy under their own religious chiefs, to whom they owed obedience, and who exercised jurisdic-

In the course of time, different schools of jurisprudence arose among the Muslims. The Shī'a, of course, have their own, but even among the Sunnīs several different schools emerged in the Middle Ages, four of which have survived to the present time. These are the Mālikī school, which predominates in almost the whole of Muslim Africa outside Egypt; the Shāfi'ī school, which is found principally in the Eastern Arab countries and among the Muslims of South and Southeast Asia; the Ḥanafī school, in Turkey, Central Asia, and the Indian sub-continent; and the Ḥanbalī school, in Saudi Arabia. While these differ from each other on many minor and a few major points, all nevertheless recognize each other as Muslim and within the limits of permitted difference of opinion. Indeed there is a tradition, almost certainly spurious, according to which the Prophet said: 'Difference of opinion within my community is a sign of God's mercy.'

In most systems of law, actions are divided into two categories, permitted and forbidden, or, in religious matters, commanded and forbidden. Islamic law, dealing with both religious and worldly matters, divides actions into five categories, which one might render as:

1. required, commanded;
2. recommended;
3. permitted;
4. disapproved;
5. forbidden.

The first category is subdivided into individual and collective commandments. Thus, for example, the duty of fighting in *jihād*, the holy war for Islam, is a collective duty on the community as a whole in offence, but becomes an individual duty of every able-bodied male Muslim in defence.

It is under the heading of *jihād* that the Muslim jurists normally discuss the various legal problems arising from relations between Muslims and non-Muslims – authorities, communities, individuals. The reason for this classification is clear. Muslims, like Christians, believe that the revelation which has been given to them is for all mankind, and that it is their sacred duty to bring it to those who are not aware of it or have not yet accepted it. In the language of the holy law this obligation is known as *jihād*, usually translated as holy war but literally meaning striving. In later times this was sometimes interpreted in a moral sense. In classical juristic litera-

tion over them. Apart from the measures necessary to protect the security of the state, maintain public order and decency, and safeguard the primacy of Islam, they lived by their own and not by Muslim law. Most civil matters, including marriage, divorce and inheritance, as well as disputes between members of the same community, were heard before their own courts and decided by their own judges according to their own laws. Education was also the responsibility of their community chiefs, who controlled schools, teachers and curricula.

The visitor or temporary resident from abroad was called *musta'min* the holder of an *amān*, or safe conduct. This might be personal or might be granted to the country of which the visitor was a subject. The *musta'min* was exempt from the poll tax and many of the other restrictions imposed on the *dhimmī*, but enjoyed the same right to live by his own laws and under his own ruler, in this case usually the consul of his city or country. The *amān* was normally granted for a limited time and could be renewed. If the *musta'min* overstayed his *amān*, he became a *dhimmī*. The foreign communities, under the authority of their consuls, functioned as autonomous states within the state. In later centuries, when the changing balance of military and economic power transformed the relationship between the West and the Islamic world, what had originally been a voluntary concession granted by Muslim governments in accordance with the logic of their own laws became a ruthlessly enforced and bitterly resented extra-territorial privilege imposed by the now dominant Western powers.

In the early centuries of Islam, when the juristic schools were formed and the major legal treatises were written, the status of temporary or permanent non-Muslims under Muslim rule was a current and almost universal issue, and therefore needed elaborate consideration and regulation. The corresponding problem of Muslims under non-Muslim rule hardly arose, and where it did, received only minor and fleeting attention. In an age when the frontiers of Islam were continually expanding and when such losses of territory as occurred were tactical and temporary, it was hardly likely that the jurists would devote much attention to what was largely a hypothetical question.

When this question is discussed at all it is, naturally enough, under the same general heading *jihād*, and in the same categories (permanent resident and temporary visitor) as the status of the non-Muslim under Muslim rule. In the earliest juristic literature,

the position of a Muslim permanently resident in a non-Muslim land is considered only in one contingency, that of an infidel in the land of the infidels who sees the light and embraces Islam – surely a rare occurrence. The question they discuss is whether he may remain where he is or must leave his home and migrate to a Muslim country. The Shī'a jurists, more attuned to the idea of surviving in a hostile environment and under a hostile authority, allow him to stay and indeed see him as an outpost and beacon of Islam. The majority of Sunnī jurists, accustomed to the association of religion and authority, insist that he must leave and remove himself to a Muslim land where he can live in accordance with the holy law of Islam. In this he would be following the sacred precedent set by the Prophet and his Companions when they left their homes in pagan Mecca and undertook the migration *(hijra)* to Medina, where they established the first Muslim state and community. Some jurists even go so far as to say that if he remains where he is and his country is subsequently conquered by the Muslims, then his non-Muslim family and his property are liable to be treated as booty by the conquerors in the same way as those of his infidel neighbors and compatriots.

Two cases of such conversion cited in the biographies of the Prophet indicate that the departure of a convert would be an act of expediency as well as of piety. The Byzantine governor of Ma'ān in South Jordan embraced Islam and wrote to the Prophet. When he refused to recant he was executed by the Byzantine authorities. Another story tells of a churchman at the court of Byzantium who responded to the Prophet's summons and publicly recited the Muslim profession of faith, whereupon he was beaten to death by the crowd.

The question of a Muslim traveller to the lands of the infidels for a voluntary or involuntary, brief or protracted visit was of more practical concern and receives more attention. Prisoners captured in war or at sea had no choice, and the jurists offer guidelines on how a Muslim who suffers this misfortune should conduct himself, until he is ransomed, exchanged, or escapes. As regards voluntary visitors, the first question to be decided was whether such visits are permissible at all in law and, if so, under what circumstances and subject to what rules. Mālik, the founder of the Mālikī school, allows Muslims to visit the lands of the infidels for one purpose only – to ransom captives. It is significant that the reports of the Moroccan ambassadors to the various courts of Europe are almost all headed 'Report of a Mission for the Ransoming of Captives', no

doubt in order to avoid possible legal difficulties for themselves or for their sovereign.

There was lively discussion among Mālikī jurists as to whether it was permissible to travel to the lands of the infidels for purposes of trade and specifically in order to buy foodstuffs during periods of dearth in the lands of Islam. Juristic answers to this question fall into three main groups. According to one group, it is forbidden in all circumstances to trade with the infidel, since they would use their profits to make war against Islam. If this means famine, then it must be endured. A second group, invoking the principle of *ḍarūra*, necessity, allow trade and travel only in order to secure supplies of foodstuffs in times of shortage. A third group are more willing to extend a general tolerance to Muslim travel and temporary residence abroad, and allow a Muslim to accept *amān* from a non-Muslim government and stay for a while in a non-Muslim country, with the status of *musta'min*. The assumption is that he would enjoy the same privileges and accept the same duties as applied to an infidel *musta'min* in a Muslim land. The acceptance by a Muslim of a non-Muslim *amān* is subject to certain conditions from the Muslim side, the most important of which is that he be able to 'manifest the signs of Islam'. This phrase, which occurs frequently in discussions of Muslims *in partibus*, will need some further consideration.

The presence of Muslims, in groups or even as individuals, in the House of War raised the question of jurisdiction, to which the juristic schools give different answers. Are such Muslims still subject to Muslim law? Of more practical importance, are Muslim judges empowered to deal with persons living, or actions committed, under infidel rule? The Shī'a say yes, the Ḥanafīs usually say no, and the others adopt a variety of intermediate positions.

Muslim discussions of these matters were concerned almost exclusively with Christendom, seen as the House of War *par excellence*. The jurists were much less worried about the colonies of Muslim merchants established from early times in India, China and other parts of Asia and Africa. These were, so to speak, religiously neutral zones, offering no threat to Islam in either the religious or the political sense. On the contrary, their peoples were seen as potential recruits to the Islamic faith and their lands as potential additions to the Islamic domains. This expectation proved historically justified. Only in Christendom did Muslims encounter a rival and in many respects a similar religio-political power, challenging their claim both to universal truth and to universal authority.