

# *The Islamic Conception of Migration\**

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This article discusses migration as viewed by classical Islamic law, a corpus of disparate juridical institutions and concepts accumulated since the seventh century which is based on two principal sources, The Qur'an and the *Sunnah* of Muhammad. The Qur'an; the first source of Islamic law, collects the revelation transmitted by God to Muhammad between 610 and 632 A.D., date of his death. Muslims believe that the author of this book is not Muhammad but God himself. The present text was established fifteen or twenty years after the death of Muhammad. The *Sunnah* of Muhammad is the second source of Islamic law. This term designates sayings, accounts and facts, called also *hadiths*, attributed to Muhammad, infallible model according to the Qur'an and interpreter of God's will. These *hadiths* are reported in many collections and in the biographies whose authenticity is often questioned.

We begin by examining the conception of migration according to the Qur'an and the *Sunnah* of Muhammad, looking at what the classical jurists said about these texts.

## *MIGRATION IN THE QUR'AN AND THE SUNNAH*

The Qur'an mentions in 27 verses the term *hijrah* (immigration) and its derivatives in the meaning of "to abandon." Thus, the husband should abandon his disobedient wife alone in the conjugal bed to make her see reason (4:34) and the believer must flee from the abomination (74:5). However, this term is used very often to designate the fact of fleeing from a country governed by the infidels in order to join the Muslim community.

Immigration marked the Muslim community since its beginning. Biographers of Muhammad reported how he sent some of his followers to Abyssinia to protect them from the persecutions of the inhabitants of Mecca. He gave them a message for the king of Abyssinia asking him to welcome them, to recognize that he (Muhammad) is the messenger of God, and to forsake pride (Hamidullah, 1985:100). Later, Muhammad asked the king to become Muslim in order to spare his life (*aslim taslam*) and to send the immigrants back to

\*Editor's Note: This is an abridged version of the conference paper, which included detailed analysis of *bidun* (stateless) persons, particularly in Kuwait, the status of Palestinian refugees and that of foreign workers in Arab states. A section on Muslim immigrants in France also was included in the conference paper.

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him (Hamidullah, 1985:103–104). According to the Islamic sources, the king assented to the requests of Muhammad (Hamidullah, 1985:104–107).

Similarly, in an effort to escape persecutions, Muhammad, accompanied by some of his followers, left his native city Mecca in September 622 and went to Yathrib, the city of his mother, later named Medina. That marks the beginning of the Islamic era, the era of Hegira, era of migration. Those who left for Medina were called *muhagirin* (the immigrants). Those who gave them good reception were called *ansar* (the supporters).

Some Muslims, however, remained in Mecca and practiced their faith in secret. Constrained to participate in the fight against the troops of Muhammad, some were killed. Referring to this tragic episode, the following verses urged the Muslims in Mecca to join the Community:

Those whom the angels take in death while they wrong themselves, the angels will say, "What was your stand?" They will say, "We were abased in the land." The angels will say, "Was not God's earth wide, so that you might have emigrated in it?" Such as those, their abode shall be Gehenna; how wretched a destination! Except the feeble among men and women and children who can contrive nothing, and are not guided to a path. (4:97–98)

These two verses urge each Muslim living in an infidel country to leave it and join the Muslim community, unless he is unable. Other verses express the same sense (4:100; 9:20). The purpose of this migration was to protect them from persecution, to weaken the infidel community, and to participate in the effort of war of the new community. Therefore the Qur'an uses together the terms: those who believe, and those who emigrate and strive in the way of Allah (2:218; 8:72, 74, 75; 8:20; 16:110).

Verse 8:72 establishes an alliance between the immigrants and those who gave them hospitality. It forbids such an alliance with Muslims who remain in the infidel country "as long as they have not emigrated." But if these remaining Muslims outside of the community seek help in a "matter of religion," then it is the duty of the Muslim community to help them, except against a people to which the Muslim community is bound by treaty.

Verse 4:89 urges Muslims not to choose friends from the infidels "unless they forsake their homes in the way of Allah." The Qur'an displays mistrust towards nomads, these eternal migrants without fixed domicile who, after declaring their allegiance to Muhammad, returned to the desert (*ta'rib*) to escape from his control in a critical moment when the new community was in need of warriors for defense and expansion (see verses 9:97; 9:90, 99, 101, 120; 49:14).

The Muslim immigrants had abandoned all their goods behind them, and they were called to put an end to any link with the infidels, including family links (9:23). They had to be taken in charge by the other members of the community. The Qur'an urges those who are rich to help them (24:22). The agreement established by Muhammad between the immigrants, the *ansar*, and the Jews living in Medina affirms that these three groups constitute one

community (Hamidullah, 1985:59). The Qur'an gives a part of war's spoil to the immigrants, and he even places them before the residents (59:8–10). He establishes a fraternity between all believers (49:10; 3:103; 9:11) implying inheritance rights, rights reserved afterwards to the next of kin (33:6).

Muhammad conquered Mecca in 630; he declared the end of immigration and changed it by promising to participate in the war (Ibn-al-Athir Al Gazari, 1969:606–607). However, Muhammad also said: "Immigration [to the Muslim community] will never stop as long as the infidels are fought" (Ibn-al-Athir Al-Gazari, 1969:606). This saying seems to concern immigration from a nonconquered country to the Islamic country.

### *Dar al-Islam/Dar al-Harb*

Using arguments based on the Quran and the *Sunnah*, Muslim jurists have divided the world in two: *Dar al-islam* (the land of Islam) and *Dar al-harb* (the land of war) or *Dar al-kufr* (the land of infidelity). *Dar al-islam* includes all the territory under Muslim control, whether or not the inhabitants are Muslims. On the other side of the frontier is *Dar al-harb* which will sooner or later pass under the authority of Islam. What should be the relation between *Dar al-islam* and *Dar al-harb*?

Before Muhammad's departure from Mecca, the Qur'an demanded of the Muslims not to resort to war even if they were attacked: "Endure patiently. Your endurance is only by the help of Allah. Grieve not for them, and be not in distress because of that which they devise" (16:127; see also 13:22–23).

After the departure from Mecca and the creation of the Islamic state in Medina, the Muslims were authorized to fight against those who fought against them (22:39–40). Later, after they had become strong, they received the order to fight against those who aggress against them and to make peace with those who wanted peace (2:190–193; see also 2:216 and 8:61). Finally, they were permitted to initiate war. In case of an armistice treaty without a time limitation, Muslims could put an end to it. If a treaty was limited in time, war could be initiated only after the end of the armistice (9:3–5) (These steps are explained by Mawlawi, 1988:33–47.)

According to the traditionalists, Muhammad wrote messages to the different chiefs of his time demanding that they become Muslims. If they were monotheists and wanted to remain in their religion, they had to submit themselves to the political authority of the Muslims and pay a tribute. If they refused both solutions, they had to prepare for war. If they were nonmonotheists, they had only the choice between conversion or war.

*Dar al-harb* can conclude an *'ahd*, a treaty of temporary peace, becoming thus *Dar 'ahd*, country of treaty. According to Abu-Yussuf (d. 798), the great judge of Baghdad, "It is not permitted that, when he has on them the superiority of forces, the representative of the Imam makes peace with the enemy; but if

his purpose was to lead them by the mildness to Islam or to become tributaries, it is permitted until an arrangement is reached on their side” (Abou Youssef, 1921:319). Abu-Yussuf here merely paraphrases the Qur'an: “So do not falter and cry for peace when you will be the uppermost” (47:35).

Three centuries later, Mawardi mentions among the duties of a chief of state:

To fight those who, after having been invited, refuse to convert to Islam, until they convert or become tributaries, for the purpose of establishing the laws of Allah by making them superior to all other religions. (Mawardi, 1982:31)

He states that if the adversaries convert to Islam, “they get the same rights as us, are submitted to same charges, and remain masters of their territory and of their goods.” If they demand grace and ask for an armistice, this armistice is not acceptable unless it is very difficult to defeat them and on condition that they accept to pay; the armistice must be as short as possible and not exceed ten years; after ten years, the armistice is no longer valid (Mawardi, 1982:31).

Ibn-Khaldun (d. 1406), three centuries after Mawardi, distinguishes between a war (*jihad*) conducted by Muslims and a war conducted by the followers of other religions. The war (offensive) of Muslims is legitimate due to the fact that they have a universal mission to lead all populations to join the Islamic religion, either by force or voluntarily. This is not the case with followers of other religions who do not have a universal mission; they are permitted to make war only for self-defense (Ibn-Khaldun, n.d.:202).

Besides this territorial division based on religion, we find an internal division inside *dar al-islam*, based also on religion. On one side is the dominant Muslim community, and on the other, the conquered religious communities with a protection treaty (*dhimmis*). These communities can continue to sojourn in *dar al-islam* if they pay a tribute (*gizyah*) and accept a number of restrictions.

The division *dar al-islam/dar al-harb* has consequences for the concept of migration:

- What is the statute of Muslims inside *dar al-islam*?
- Is it possible for a non-Muslim from *dar al-harb* or *dar al-'ahd* to travel and to sojourn in *dar al-islam*?
- Is it possible for a Muslim from *dar al-islam* to go and to sojourn in *dar al-harb* or *dar al-'ahd*?
- Is it possible for a Muslim whose reconquered country becomes *dar harb* to remain there or should he immigrate to *dar al-islam*?

These questions are examined in the following sections.

### *Migration Within Dar al-Islam*

In classical Islamic law, *dar al-islam* constitutes theoretically one homeland for all the Muslims. No frontier separates the different regions. Each Muslim is a part of the *Ummah*, the Islamic nation; he can move and sojourn wherever he likes in

this vast empire which becomes larger and larger, including new nationalities. This is the universalism in expansion such as we find it later in the French and Bolshevik revolutions.

Mawardi considers religion to be the most important of those factors which unify human beings – followed by kinship, matrimonial alliance, friendship, and beneficence. Basing his arguments on the verse 3:103, Mawardi asserts that religion has succeeded in unifying the Arab tribes. The stronger the links it creates between his followers, the stronger the hostility it provokes towards those who do not have the same convictions. Religion can even break the natural links between father and son. Abu-'Ubaydah Ibn-al-Garrah killed his father in the battle of Badr and took his head to the Prophet in evidence of obedience to God and to his messenger. Verse 58:22 refers to this event. Mawardi adds: "As religion is the strongest bond of union, any divergence within it becomes a powerful cause of separation" (Al-Mawardi, 1991: 184–186).

The unity of religion has not prevented friction between ethnic groups. One can notice especially the revolt of non-Arab converts to Islam (*shu'ubiyyah*) against the Arab Muslims. Arabs, indeed, considered themselves superior to those non-Arabs converted to Islam. This revolt created a religious schism in the first century of Islam, during the rule of the first four caliphs. Such tension still characterizes the Islamic world which is divided between Shia and *Sunnis* who often do not accept each other in their own regions, even today.

The growth of regionalism has also been important. The Egyptian of Cairo did not feel at home in Baghdad, and the Syrian of Damascus did not have the same ideas as the inhabitant of North Africa. This self-esteem was clear in the attribution of administrative and judiciary functions. The central authority took into consideration this national feeling when it chose local magistrates. Under the Abbassids, the great judge of Baghdad should not be a foreigner to this city. The Cairenes sent a delegation to Baghdad to prevent the nomination of a non-Egyptian judge. Their wish was granted. One of the notables of Cairo, consulted in the choice of a judge, says to the governor of Egypt: "Nominate who you like. We have only one desire: avoid choosing a foreigner or a peasant" (Tyan, 1938:248–250).

Ibn-Khaldun (d. 1406), three centuries after Mawardi, witnessed the breakup of Muslim society into rival groups. As a result he based his social conception on the idea of *'assabiyyah*, the link of blood (Ibn-Khaldun, n.d.:113–118). He goes so far as to consider that prophecy itself needs the *'assabiyyah* to succeed (ibid., 139–141).

### *Migration of Harbis to Dar al-Islam*

The *harbi* is an inhabitant of *dar al-harb*. If he is captured by Muslims, he can be killed or enslaved. His goods are considered spoils of war. The Qur'an however says:

If any of the polytheists seeks your protection, then protect him so that he may hear the word of Allah and afterward convey him to his place of safety. That is because they are a people who know not. (9:6)

Referring to the above verse, the jurists developed the institution of the *aman*, pledge of security, by virtue of which the *harbi* (national of *dar al-harb*) would be entitled to protection while he is in *dar al-islam* (see Khadduri, 1979:162–168). This institution made possible commercial relations with *dar al-harb*. According to Abu-Yussuf (d. 798), the *musta'min* (the secured) who prolonged his sojourn in *dar al-islam* was invited to go home; if he sojourned one year more, he must submit to the tribute (Abou Yousof, 1921:293). This means he becomes a *dhimmi* with the right of permanent residence in *dar al-islam*.

The jurists have formulated certain limitations concerning the property which a *harbi* may acquire. Abu-Yussuf writes:

The Imam should forbid an enemy person who comes to us, whether with *aman*, or as messenger of a foreign prince, to take with him slaves, weapons and other commodities which could strengthen the enemy to attack Muslims. Concerning clothes, wares and similar things, their exportation is not forbidden. (p. 232)

The commentary of Al-Sarakhsi (d. 1090) on the book of Al-Shaybani (d. 804) forbade the *musta'min* to take with him to his country the commodities that Muslims were forbidden to sell to *dar al-harb* (Al-Sarakhsi, 1971:1573). If he was authorized to come into *dar al-islam* with weapons, he could also leave with them. But if he had sold or exchanged them, he could not take them out (p. 1575). Neither could he take slaves with him (p. 1580).

Ibn-Rushd (d. 1126), the imam of the Mosque of Cordoba, great father of Averroes, based the *aman* on the fact that Muhammad had purchased goats from a non-Muslim shepherd who came to him. He gave a list of commodities that the *harbi* could not buy: weapons, iron, elegant clothes in which he would appear superior to Muslims, copper to make war drums, Christian slaves who could lead him against Muslims and tell him about their weaknesses. It was prohibited to give the enemy horses and weapons as ransom for Muslim prisoners unless they would not accept other ransom (Ibn-Rushd, n.d.:613–614). Al-Qurtubi (d. 1071), from Cordoba, added to this list saddles and mineral oil (*naft*) (Al-Qurtubi, 1980:481–482).

Afterwards, this system of *aman* became a system of genuine treaties between states, called *capitulations*. The first important one was signed in 1535 between François I and the Caliph Soliman II. It contained seventeen chapters concerning trade and right of residence and establishment (Abu-Sahlieh, 1979:58–60).

### *Migration of Muslims to Dar al-Harb*

Al-Gurgani (d. 1413) gives the following definition of the term *higrah*: “The act of terminating one’s sojourn among the infidels and of joining *dar al-islam*”

(Al-Gargani, 1990:257). This is the only legal meaning that migration can have. Indeed, Muslim jurists are extremely reserved concerning the emigration of Muslims to *dar al-harb*; they treat it summarily (see Khadduri, 1979:170–174).

The commentary of Al-Sarakhsi (d. 1090) on the book of Al-Shaybani (d. 804) does not discuss at length prohibition of the traveling and sojourning of Muslims in *dar al-harb*. His concern is to prevent Muslims from selling commodities to *dar al-harb* that could strengthen the enemy, such as iron (including the needles), silk (used to make flags), horses, etc. Other commodities can be purchased on condition that a maximum of precaution be taken (Al-Sarakhsi, 1971:1567–1573). It is repugnant if a Muslim in *dar al-harb* marries a woman from a monotheistic religion (free or slave), for fear that their children would become captives or adopt the morals of the infidels. The Muslim can only enter into such a marriage as a means to avoid adultery. He sees, however, no impediment to the marriage of a Muslim with a *dhimmi* or Muslim woman who is captive in *dar al-harb* (pp. 1838–1840).

This same commentary states the norms Muslims must apply in *dar al-harb*. If a Muslim commits a crime against a *harbi* in *dar al-harb*, he cannot be punished since there is no authority which applies the law (*in'idam al-mustawfi*) (Al-Sarakhsi, 1851–1852). In their relations between themselves, Muslims remain ruled by Islamic norms except for the crimes punished by *lex talionis* or the crimes of *had* (crimes fixed by the Qur'an) (pp. 1883–1884).

Al-Shafi'i (d. 820) asks whether the migration of Muslims from *dar al-harb* to *dar al-islam* as mentioned in the Qur'an is still obligatory. According to him, it is obligatory when the *jihad* has been declared, and on condition that the Muslims are able to move. A Muslim can stay in *dar al-harb* as long as he can practice his religion. He invokes the fact that Muhammad permitted some converts to Islam to stay in Mecca (before its conquest) as long as they did not risk the undermining of the religion (Al-Shafi'i, 1980:169–170). Al-Shafi'i says nothing about the Muslim who travels to *dar al-harb*.

Ibn-Qudamah (d. 1223) treats immigration in the same sense as Al-Shafi'i. He considers that Muslims living in *dar al-harb* must immigrate to *dar al-islam* if they cannot practice their religion. Exception is made for those who cannot move because of illness or weakness. Immigration, however, is always preferable since by immigrating Muslims can participate in the *jihad* against the infidels and make the Muslim community more numerous. He relates the story of Al-Abbas, uncle of Muhammad, who delayed his immigration because his family guaranteed his protection after his conversion. Muhammad said to him: "My family expelled me and wanted to fight against me, and your family protected you and wanted you to stay." Al-Abbas answered: "Your family expelled you towards the obedience of God and *jihad* against his enemies, but

my family retained me from the immigration and from the obedience of God” (Ibn-Qudamah, 1983:514–515).

Muslim jurists who had been in contact with the non-Muslims of the Iberian peninsula were particularly hostile to the sojourn of Muslims among the infidels. They considered their immigration to *dar al-islam* as obligatory. This was the position taken by Ibn-Hazm and by the Maliki jurists.

Ibn-Hazm (d. 1064), from Cordoba, forbids trade in *dar al-harb* if its norms are applied to merchants. He forbids them to take into *dar al-harb* copies of the Qur'an, weapons, horses, and other commodities that strengthen the enemy against the Muslims. He quotes Muhammad who said: “I consider myself rid of any Muslim who sojourns among the polytheists.” He allowed travel into *dar al-harb* only to participate in the *jihad* or to deliver a message of the emir (Ibn-Hazm, 1980:349).

Al-Qurtubi (d. 1071), also from Cordoba, considers illicit the sojourn of a Muslim in *dar al-kufr* as long as he can leave it. The Muslim, according to him, should not marry a woman from an infidel country or sojourn in a country where infidel law is applied (Al-Qurtubi, 1980:470).

Relying on the authority of Malik (d. 795), Ibn-Rushd (d. 1126), imam of the Great Mosque of Cordoba, states that the obligation of immigration is maintained until the day of resurrection. He quotes Qur'anic verses 4:97–98 and 8:72 and the saying of Muhammad: “I consider myself rid of any Muslim who sojourns among the polytheists.” Those converted to Islam in an infidel country must emigrate to *dar al-islam* so that the Islamic norms could be applied to them. *A fortiori*, a Muslim cannot travel to an infidel country for trade or other purposes since the laws of this country will be applied to him unless he wants to ransom a Muslim captive. If he goes to *dar al-harb* willingly, without constraint, he cannot preside over the prayer and his testimony is rejected. Ibn-Rushd urges the Muslim authority to establish controls on the roads so that no Muslim can travel to *dar al-harb*, especially if he is transporting forbidden commodities which could strengthen the enemy against the Muslims. Ibn-Rushd adds: “God fixed to everybody a fate that he will reach and wealth that he will obtain” (Ibn-Rushd, n.d.:611–613).

Ibn-al-'Arabi (d. 1148), judge of Seville, is also opposed to the sojourn of Muslims in *dar al-harb* as well as in *dar al-bid'ah*, country of schism (by virtue of verse 6:68). He also directs Muslims to emigrate from a country which is dominated by the illicit (*haram*), where they are in danger for their health, their life, their goods and their families. He quotes Abraham (29: 26 and 37:99) and Moses (28:21) who escaped for reason of fear (Ibn-al-'Arabi, 1972:484–486).

The same position is taken by the great Andalusian Sufi Ibn-'Arabi (d. 1240):

Make sure to emigrate and not to stay among the infidels, because to stay among them constitutes an insult to the religion of Islam, an elevation of the word of the infidelity over the word of Allah. God, indeed, had not ordered the fight but to make



the word of God superior, and the word of infidels the inferior. Take care not to sojourn or not to enter under the protection (*dhimmah*) of an infidel as long as it is possible. You must know that he who sojourns among the infidels – although he can leave – has no share in Islam, since the Prophet (prayer of God and his salute on him) says: “I consider myself rid of any Muslim who sojourns among the polytheists.” He does not recognize in him the qualities of a Muslim. God says about those who died among the infidels: “Those whom the angels take in death while they wrong themselves, the angels will say, ‘What was your stand?’ They will say, ‘We were abased in the land.’ The angels will say, ‘Was not God’s earth wide, so that you might have emigrated in it?’ Such as those, their abode shall be Gehenna; how wretched a destination!” (4:97)

For this reason, we have forbidden to the people in this epoch to visit Jerusalem (*bayt al-maqdis*) or to sojourn in it because it is in the hands of the infidels. The authority belongs to them, as well as the domination on the Muslims. The Muslims with them stay in the worse situations – may God safeguard us from the domination of passions. Those Muslims who visit today Jerusalem or sojourn in it are those concerning whom Allah says: “Their works are vain, and on the day of resurrection we assign no weight to them” (18:104). Because of that, emigrate from any human creature condemned by the religious law and by the Truth in his Book or by the Prophet of Allah (prayer of God and his salute on him). (Ibn-'Arabi, 1988:43)

The fear of Muslim jurists for the faith of their co-religionists traveling into *dar al-harb* was limited to that part of the Muslim world in contact with the Christian world which remained closed until the nineteenth century. This fear contrasts with the necessity of life and with the fact that Muhammad (before his mission) and many of his companions were merchants who undertook long travels to sell their products. A saying of Muhammad states: “The honest Muslim merchant worthy of confidence will be with the martyrs on the day of resurrections.” The Muslim merchants sailed all over the Indian Ocean as far as China, contracting mixed marriages and sometimes converting their contacts. In this way, Islam came to Sumatra, Java, the Moluccas, and Malacca. The same process occurred in Sudan and in the Horn of Africa. These merchants were followed by missionaries when they were not themselves missionaries (Ferre, 1985:6–8).

### *Muslims Whose Country Became Dar Harb*

In the tenth century, the Christian reconquest and counterattack began, obliging (sometimes temporarily, sometimes definitively) the Muslims to withdraw from conquered former Christian territories. This was the case in Sicily and on the Iberian Peninsula. Maliki jurists faced the question whether Muslims could stay in these country which became *dar harb* or whether they should emigrate to Muslim territories. This dilemma faced by the Muslim populations was resolved by their voluntary or forced departure.

In 1091, the reconquest of Sicily was achieved after an Islamic occupation of more than 270 years. A great number of Muslims left the island (about

50,000 according to the minimal estimations) in a period of 50 years and found refuge on the other side of the Mediterranean.

The Imam Al-Mazari (d. 1141, in North Africa), whose family came from Mazzara (Sicily), received from Muslims living in Sicily a question about the legality of their sojourn there and on the value of a judicial decision pronounced, on deposition of sworn witnesses, by a Muslim judge nominated by a non-Muslim prince.

In the first part of his answer, Al-Mazari recalls the interdiction of sojourn in *dar al-harb*. There are, however, exceptions to this rule: sojourn in an enemy country for an imperative reason; voluntary sojourn in ignorance of the fact that the sojourn is forbidden; and the sojourn in an enemy territory hoping to snatch it from the occupying force and return it to the Muslims, or hoping to lead the infidels on the straight way or, at least, to divert them from any heresy. Here Al-Mazari quotes Al-Baqillani (d. 1012) and the companions of Malik who stated briefly the possibility to penetrate in an enemy territory to free a captive.

In these cases, says Al-Mazari, one cannot attack the probity of the judge. If, however, this judge is giving his decision by refusing to take into consideration the interdiction of sojourn, or turning away knowingly any effort of interpretation, there is surely a motif undermining his probity. However, there is a divergence inside the Maliki school on the question of the testimony of a person who willingly enters enemy territory for trade. Al-Mazari quotes here, "a fundamental principle . . . which is to consider favorably any Muslim and to free him of any suspicion of disobedience."

Concerning the nomination of the judge by a non-Muslim prince, Al-Mazari says that this does not affect the judgements of the judge since they are for the protection of those under purview exactly as if nominated by a Muslim prince. Al-Mazari quotes Malik, who states the legality of any interim exercised by the notables of any locality in the absence of the prince (*sultan*); the purpose of this is to make it possible to deal with emergencies (Turki, 1980:697-704).

With the capitulation of Toledo in 1085, the great majority of Muslims left the city. Those who remained could safeguard their mode of life and their proprieties, their habitual residences, as well as their fiscal regime and their religious freedom by paying a tribute (Quesada, 1992:134). These Muslims were despised by those who emigrated and by those who had not been conquered. They were called *ahl al-dajn*, or *mudajjan*, words used to describe the tamed or domestic animals as opposed to free or wild animals. They became known in the Spanish language as *mudéjar*.

However, the tolerance of the Christian kings of Spain towards their subjects, Jews as well as Muslims, did not last. Many Muslims converted to Christianity but continued secretly to live their faith, exposing themselves to the fury of the Inquisition. They were called Moriscos. This situation ended when it was decided to expel them, as the Jews had been expelled before them

in 1492. The expulsion was carried out primarily in 1610, but other complementary operations took place in the three following years. "There should be no half measures: it was better to expel all those under suspicion, at the risk of punishing sincere Christians, than to leave one seed of a so bad grass on the Spanish soil." Some thousand Moriscos, among them old men and women, willing to die in the Christian faith were allowed to remain by virtue of certificates proving their Christianity delivered by their prelates.

The number of the expelled, according to some sources, was about half a million. According to other sources, this number could be 300,000 to which should be added 10,000 to 12,000 persons killed in the rebellions of Valencia or who died from fatigue on the way to their exile.

Moriscos under the Christian authority hid their religion. Legitimizing such an attitude, a *fatwa* (religious decision) of mufti Ahmad Ibn Jumaira, dated December 1504, gives them precise instructions to fit their hostile milieu. Thus, if the Christians obliged them to insult the Prophet, they should pronounce his name as Hamed, like Christians do, and think not of the messenger of God but of Satan or of a Jew called Muhammad. If forced to go to the church at the time of Islamic prayer, they will be absolved for doing so and the cult will be considered as if they have accomplished the Qur'anic prescription of prayer turned to Mecca. If they are prevented from doing the prayers during the day, they should do them at the night. The ritual ablution could also be replaced; according to the circumstances, they could plunge in the sea or rub the body with a clean substance, soil, or wood. If obliged to drink wine or to eat pork, they can do so, but knowing that it is an impure act and observing a mental reserve. If forced to renounce their faith, they should try to be evasive – if they are pressed, they should inwardly deny what they are obliged to say (Cardaillac, 1977:88–90; Sabbagh, 1983:49–53).

The precedent *fatwa* seems to concern Muslims who could not emigrate from their country (Sabbagh, 1983:53). Concerning those who were able to leave, Al-Wansharissi (d. 1508) is of the opinion in two *fatwas* that they should not remain, an opinion contrasting with that of Al-Mazari, whom he quotes without commentary (Al-Wansharissi, 1981:107–109).

The first *fatwa*, written in 1484, concerned immigrants who regretted their emigration and wished to go back to their country, considering that the migration should be done not from Spain to Morocco but in the opposite direction. Al-Wansharissi was asked what he thought about this behavior and if he felt that the emigration from *dar al-harb* should be done only when the *dar al-islam* was in a position to give good reception to the immigrants and to guarantee their needs, or, on the contrary, if it was sufficient that *dar al-islam* guarantees the protection of the religion of the immigrants and the security of their families, whatever might be the material situation that awaited them.

Al-Wansharissi says that the emigration from infidel territory to *dar al-islam* remains obligatory until the day of resurrection. The same obligation exists to leave a country of *fitnah* (revolt). He reports that Malik forbids a person to sojourn in a locality where he had to behave with injustice. If he does not find a just country, he should choose a country with less injustice. Al-Wansharissi quotes here verse 4:97. Exception is made for those who cannot move because they are paralyzed, in captivity, or very sick or feeble. They must, however, keep in mind that they are to immigrate whenever it becomes possible. Al-Wansharissi adds that it is forbidden to sojourn among the infidels just as it is forbidden to eat pork or to kill a person without reason. A person who refuses to immigrate abandons the community. Al-Wansharissi quotes seventeen verses which, in his opinion, forbid alliance with the infidels (*al-muwalat al-kufraniyyah*); he also quotes four sayings of Muhammad in the sense of the interdiction of any common life with the infidels and, *a fortiori*, the sojourn under their authority. He cites Ibn-Rushd (d. 1126), Ibn-al-'Arabi (d. 1148), and Ibn 'Arfah (d. 1401).

Al-Wansharissi rejects the complaints of immigrants because of the material situation which they faced in Morocco. He describes them as persons with small faith and brains. He quotes the example of the first immigrants who left their goods, their homeland and their parents, and even fought against the latter. Therefore, the immigrants should not use the argument of poor living conditions to deny a duty of immigration; religion should be their supreme value. He quotes here verse 63:9. Those who make this argument, deserve the harshest punishment (Al-Wansharissi, 1981:119–133).

The second *fatwa*, written in 1495, concerns a Muslim who used his knowledge of the language of those in authority in Marbella to defend his oppressed fellow Muslims. Could this Muslim stay if his departure would harm the oppressed who had nobody to replace him?

Al-Wansharissi answered that the Muslim must flee from the sojourn with the infidels to safeguard his faith. His aide to the “disobedient Mudéjars” cannot be a valid reason to delay his immigration. Only one ignorant can invoke such a reason. It is forbidden to sojourn with the infidels even one hour in view of their impurity and the religious and temporal damages that such a sojourn can produce for one’s entire life.

The person who remains under the authority of infidels approves of the superiority of infidelity over Islam. He cannot fulfil the prayer without having the infidels laugh at him – a fact condemned by the Qur’an (5:58) – neither can he fulfil the duty of the legal alms (*zakat*) due to the imam which is an important element of Islam, nor the fast of Ramadan, nor pilgrimage to Mecca, nor the *jihad*. A sojourn in the infidel country is contrary to the word of Muhammad who says: “The Muslim should not degrade,” and “The superior hand is better than the inferior one.” Such a sojourn exposes the Muslim to perversion in matters of religion. And supposing that the adults can avoid the perversion, what about

children, unable persons and feeble women? In addition, by staying among the infidels, the descendants and the women (*furug*) of Muslims risk to be diverted from their religion by the non-Muslims through marriage and by adopting their clothes, their bad customs, and their language. If a Muslim loses the Arab language, he also loses the rituals linked to it. And last, Muslims cannot trust the infidels, who can find pretexts to overwhelm them with taxes and to fail in their commitments (Al-Wansharissi, 1981:137–141).

In another text, Al-Wansharissi states the opinion that the decision of Muslim judges nominated by the Christians are not recognized because they are not legitimate. He points out that jurists differ on the question of whether the goods of Mudéjars accepting the domination of the Christians are exempt or not (Al-Wansharissi, 1981:109).

Another problem was created by the advance of the Tartars. A *fatwa* of Ibn-Taymiyyah (d. 1327) concerns the city of Mardine in Turkey whose soldiers were Muslims but did not practice Islamic law. Should Muslims consider it as a part of *dar al-silm* (country of peace) or of *dar al-harb*? Could they continue to sojourn in it or should they emigrate? Is it possible to collaborate with the new masters considered as enemies of the Muslims?

This *fatwa* is important because modern fundamentalist Muslims refer to Ibn-Taymiyyah and accuse the Arab regimes of having substituted positive law for Islamic law.

Ibn-Taymiyyah says that Mardine is neither *dar silm* nor *dar kufi*, but falls in another category. The Muslims who live in it should be treated according to what they deserve; those who do not respect Islamic law should be fought according to their behavior. If the Muslim cannot practice his religion in the city, the emigration is obligatory; if they can, the emigration is not obligatory but still preferable. The Muslims, however, should not help the enemies of Islam; if emigration is the only way to avoid helping such enemies, it becomes obligatory (Ibn-Taymiyyah, 1978:240–241).

As we have seen above, the Muslim should also emigrate from a country which falls in the hands of a sect. Sects themselves required their followers to emigrate from their country to join them. This was especially the case of Kharigis who considered any major sin as an infidelity, necessitating the declaration of  *Jihad* against the person who commits it, and hence immigration (Al-Shahrestani, 1968:170–184).

### *MIGRATION IN MODERN ISLAMIC CONCEPTION: DAR AL-ISLAM, DAR AL-HARB AND THE NATION STATE*

Despite the split of the Ottoman empire, the end of the Caliphate in 1924, and the creation of nation-states, three schools of thinking dominate the Arab world: regionalism, pan-Arabism, and pan-Islamism. Thus in Egypt, Ahmad

Lutfi Al-Sayyid (1872–1962) defended the idea of the “Egyptian-ness.” The Egyptian, for him, is someone who recognizes no other country except Egypt. Someone who has two homelands, that is, lives in Egypt but considers another country temporarily as his own country, is not at all an Egyptian in the true sense of the word (Al-Garidah, 1/16/1913). He qualifies pan-Arabism and pan-Islamism as “illusions and imaginations of the spirit.” When President Nasser sent him the text of the Constitution of 1956, he returned it with this inscription: “I read the first Article which considers that Egypt is a part of the Arab nation and I concluded that it is not necessary to read the rest” (Akhbar al-yom, 8/6/1977). The political reality of the modern Arab world, with its division into independent states, each with its own constitution, people, territory, and government, corresponds quite closely to the regional model.

The second school asserts the existence of an entity called the Arab nation (pan-Arabism). This ideology is defended by Christian and Muslim Arab intellectuals. Among the Muslims, one should mention especially Sati' Al-Husri (1881–1970), considered to be the philosopher of Arab nationalism.<sup>2</sup> Pan-Arabism is at the root of the League of Arab states created in 1945 and of many attempts at political unification in the Arab world. We find it also in the constitutions of Arab countries that consider themselves as part of the Arab nation. Thus, Article 1 of the Constitution of Egypt states: “The Egyptian people are part of the Arab nation and work for the realization of its comprehensive unity.” The countries of North Africa add their membership of the Maghreb or of Africa. Thus the preamble of the Constitution of Tunisia states: “To remain faithful to the teaching of Islam, to the unity of the Great Maghreb, to its membership of the Arab family, to cooperation with the African peoples in building a better future and with all peoples who are struggling for justice and liberty.” Article 2 adds: “The Tunisian Republic constitutes part of the Great Arab Maghreb, towards whose unity it works within the framework of common interests.”

The third school is in favor of an entity called the Islamic nation (pan-Islamism), a notion largely utilized in the modern Arab books. According to this current of thought, pan-Arabism and nation-state are secular concepts, atheist, contrary to Islam. They are imported from the West to infringe upon Islam and to put an end to the Islamic authority represented by the caliph. This ideology is at the root of many pan-Islamic organizations, the most important being the Organization of the Islamic Conference which includes all the Muslim countries. The Arab constitutions, excepting those of Syria and Lebanon, declare Islam to be the state religion and Islamic law as a principal source of the law – or even the principal source of the law. But membership in the Islamic community is not stated, although one can find some echoes. The

<sup>2</sup>His writings in this field have been published in three volumes by the Studies Centre of the Arab Unity (Al-Husri: Al-a'mal al-qawmiyyah).

preamble of the Algerian Constitution says that Algeria is the “land of Islam,” and the first Article of the Yemenite constitution considers the Yemenite people as part of the Muslim world. The Constitutions of Bahrain (Art. 1), of Morocco (preamble), and of Mauritania (Art. 1), as well as the fundamental law of Saudi Arabia (Art. 1) qualify these countries as Islamic states.

Muslim authors try to adapt the traditional division between *dar al-islam* and *dar al-harb* to this new political reality.

Abu-Zahrah affirms that the present world is united in one organization (the United Nations) whose members are committed to respect its laws. Islam requires in this case the respect of all agreements by virtue of the Qur'an (17:34). Because of that, the countries that are members of this world organization can no longer be considered as *dar harb* but must be treated as *dar 'ahd* (country of treaty) (Abu-Zahrah, 1984:57).

Al-Zuhayli says that the division *dar islam/dar harb* was created for a concrete situation: the hostility of non-Muslim countries towards the Muslim countries. If this hostility ends, the division ends too. A country becomes *dar harb* if it is in a situation of war. But if the war ends, the country is no longer a *dar harb* but *dar 'ahd* or *dar muwada'ah* (country of treaty). What is important here is the criteria of security and not the criteria of the adhesion to Islam (Al-Zuhayli, 1989:195–196). He adds that because of the U.N. Charter, the non-Muslim countries must be considered as *dar 'ahd* (Al-Zuhayli, 1983:108–109).

Mawlawi says that if *dar al-islam* is where the Islamic norms are integrally applied, one should conclude that most of the Muslim countries can no longer be considered as *dar al-islam*. Is it sufficient that a country applies the laws of personal statute to consider it as Muslim? What then about Turkey which does not apply these laws – is it still a Muslim country? If the criterion is the practice of religious rituals, then what does one say about some non-Muslim countries where Muslims practice their rituals more freely than in the Muslim countries? Surely these are not Muslim countries but there are few differences between them and the Muslim countries which do not apply the Islamic laws but allow only the Islamic rituals. Mawlawi is of the opinion that the non-Muslim countries which are not at war or which have treaties with the Muslim countries must be considered as *dar 'ahd* or *dar da'wah* (country of mission in view of their conversion to Islam) (Mawlawi, 1988:98–104).

We have seen that Muhammad gave his followers sent to Abyssinia for protection a letter addressed to its king inviting him to become Muslim. To convert others to Islam remains a permanent goal for Muslims. The constitutional Model of the Islamic Council of 1983 (see, Aldeeb Abu-Sahlieh, 1994:557–565) says: “The state and society are based on the following principles: . . . obligation to engage in Islamic mission (*da'wah islamiyyah*)” (Art. 3). Article 10 of the constitutional Model of the Liberation Party of 1952 states that “the appeal to Islam is the principal duty of the state” (pp. 528–540).

This freedom to change one's religion is, however, one-directional; conversion of Muslims to another religion is forbidden. In addition, the *jihad* is not excluded as a means of extending the authority of Islam. The Model of the Liberation Party says: "The *jihad* is a duty [*fard*] for Muslims" (Art. 90). The commentary specifies that one should begin by calling the infidels to the Islamic faith. If they refuse to convert, then they can be fought. This Model forbids treaties of absolute neutrality because they reduce the authority of the Muslims. Treaties of permanent delimitation of frontiers are also forbidden because such delimitation means the nontransmission of the Islamic faith and the end of the *jihad*.

Finally, we must point out that present Arab law books use neutral terms, without religious connotation. As to Islamic books using the classical terminology, they generally replace the terms *dar al-harb* (country of war) and *harbi* (habitant of country of war) with *dar al-kufr* (country of infidelity) and *kafir* (infidel). We will use, from now on, this terminology.

### *Migration Within Dar al-Islam*

According to the classical division *dar al-islamn/dar al-harb*, each Muslim is part of the Islamic *Ummah* and can sojourn wherever he wants in *dar al-islam*, benefiting from the same rights as other Muslims. If we adopt the concept of pan-Arabism, we introduce the notion of Arab citizens benefiting from rights that non-Arabs cannot have since they are considered as foreigners. If we adopt the modern concept of the nation-state, only the citizens of the state can benefit from all the rights, and the others are considered as foreigners whatever be their religion. Although it is the modern concept of the nation-state which has triumphed, we can see the survival of the other two concepts.

At the beginning of this century in Egypt, a Persian Shi'ite claimed to be subject to the mixed courts. Once consulted, the Mufti of Egypt, Muhammad 'Abdou, issued a *fatwa* (dated November 17, 1904) stating that there is no citizenship in Islam and that there are no privileges for a Muslim over another Muslim. Any country where a Muslim sojourns is his homeland whose laws are applied to him. The country of a Muslim is the place where he intends to settle and earn his living. The country where he was born or where he grew up is not considered. Hence, he becomes *ra'iyah* (subject) to the governor under whose authority he lives, excluding any other governor. The laws of this country must be applied to him. He acquires the same rights and duties as the other subjects of this governor, excepting the access to public functions and to parliament which are reserved to the Egyptians, just as municipal elections in Cairo or in Alexandria are reserved only to the inhabitants of these two cities (Al-fatawi al-islamiyyah min dar al-ifta al-masriyyah, 1981:1527–1530).

Today too, the Arab countries continue to apply the Islamic norms in matters of personal statute to any Muslim despite the fact that Arab private



international law subordinates this field to the national law of the persons concerned. A French man who converts to Islam is subject to Islamic law. He can contract a polygamous marriage and repudiate his wife; after his death, his daughter receives as inheritance half of that which is received by a son (*see*, Aldeeb Abu-Sahlieh, 1979:189; Manaf, 1990:156).

But in the field of citizenship and of residence, the situation has changed. Every Muslim state has henceforth its law in these two fields, including Saudi Arabia where the Muslim pilgrims are obliged to leave the country once their pilgrimage is terminated. Religion, however, intervenes in matters of naturalization. Some countries give their citizenship only to Muslims (*e.g.*, Saudi Arabia and other Gulf countries); in other countries, adhesion to Islam makes easier the acquisition of its citizenship (*e.g.*, in Egypt) (Aldeeb Abu-Sahlieh, 1994:93–94).

We have to point out here that the return to the classical conception of *dar al-islam* is one of the claims of the fundamentalist Muslims. Thus, the Constitutional Model of Garishah of 1984 (Abu-Sahlieh, 1994:566–569) says:

The Islamic Community constitutes one Community. *The best entity among those which compose it is the most pious*, all the barriers: frontiers, nationalities [*qawmiyyat*] and links of blood [*‘assabiyyat*], are void (Art. 2).

This constitutional Model adds that the chief of state “opens the door of immigration into *dar al-islam* to believers” (Art. 19).

The constitutional Model of the Islamic Council of Europe of 1983 says that the state adopting this model is “part of the Muslim world and its Muslim people are an integral part of the Muslim *Ummah*” (Art. 2). It adds that “It is the duty of the state to strive by all possible means to seek the unity and the solidarity of the Muslim *Ummah*” (Art. 72). Concerning citizenship, this Model says: “Every Muslim has a right to seek citizenship in the Muslim state. This may be granted in accordance with the laws” (Art. 14). The second Islamic Declaration of Human rights, published by the Islamic Council in 1981 (Aldeeb Abu-Sahlieh, 1994:486–496) says in its Article 23(c):

The homeland of Islam (*dar al-islam*) is one. It is a homeland for every Muslim, whose movement within [its domain] cannot be restricted by any geographical impediments nor political boundaries. Every Muslim country must receive any Muslims who emigrate thereto, or who enter it, as a brother welcomes his brother: “Those who entered the city and the faith before them love those who flee unto them for refuge, and find in their breasts no need for that which had been given them, but prefer the fugitives above themselves though poverty become their lot. And whose is saved from his own avarice – such are they who are successful.” (59:9).

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