



A CURA DI
PAOLO LOBIATI, ROSA PALAVERA, ANNA SAMMASSIMO

ITINERARI DI DIRITTO ISLAMICO

Tra pluralità e alterità



Itinerari di diritto islamico

Tra pluralità e alterità

a cura di

PAOLO LOBIATI, ROSA PALAVERA, ANNA SAMMASSIMO

Volume I



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On the Distinction between Land of Islam and Land of War and its Ongoing Reflections on the Prohibition for Muslim Women to marry Christians and Hebrews

STEFANO BARBATI*

A traditional distinction set by the Muslim Jurists in the middle age was the one between land of Islam (*Āl*) and land of war (*Dar al-harb*). The last one has often been called also *Dar al-kufr*, that is to say land of the unfaithfuls.

The above distinction is traced upon Koran 9.3-5: «And *this is* a proclamation from Allāh and His prophet to the people on the day of the Greater Pilgrimage, that Allāh is clear of the idolaters, and so is His Messenger. So if you repent, it will be better for you; but if you turn away, then know that you cannot frustrate *the plan of* Allāh And give tidings of a painful punishment to those who disbelieve, excepting those of the idolaters with whom you have entered into a treaty and who have not *subsequently* failed you in anything nor aided anyone against you. So fulfil to these the treaty *you have* made with them till their term. Surely, Allāh loves those who are righteous. And when the forbidden months have passed, kill the idolaters wherever you find them and take them *prisoners*, and beleaguer them, and lie in wait for them at every place of ambush. But if they repent and observe Prayer and pay the Zakāt, then leave their way *free*. Surely, Allāh is Most Forgiving, Merciful» (*The Holy Qur'ān – Arabic Text and English Translation* [M. SHER 'ALĪ], Islam International Publications Ltd. Islamabad-Tilford, 2004, 204 f.).

This step marks a final evolution in the Koran, in which, during the Mecca period, Muslims were not authorized to bring war, no matter if they

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were attacked (16.127; 13.22 s.), then in the Islamic State of Medina they were earlier authorized to react towards attacks brought to them (2.190-193, 216; 8.61; 22.39-40).

It goes by itself that especially Koran 9.5 (... *kill the idolaters wherever you find them* ...) is quoted by the Islamic extremists to justify their attacks led in Europe and in each other place – with the exception of the holy land of Mecca and Medina – where not believers in Islam lie.

The aim of this kind of war is to convert each human being to Islam and to ensure to Allāh's domination the earth and its inhabitant. That is to say that the Jihad is not only an internal war against evil that lies inside a human being but it is also an external one to lead against the disbelievers in Islam to conquer them to the Islamic faith.

At the same time it is said that the Prophet would have sent messages to lands dominated by monotheists asking them to convert to Islam. If no, to accept the domination of Muslims and pay a timely tribute to them, although with the chance to keep their faith (otherwise war would have been brought to them); on the contrary to the polytheists only the chance to convert or to undergo to war was given (S.A. ALDEEB ABU-SAHLIEB, *Introduction à la société musulmane*, Editions d'Organisations-Paris, 2006, Ital. Ed. [M. ARENA], *Il diritto islamico. Fondamenti, fonti, istituzioni*, Carocci-Bari, 2008, 517).

The importance of the reminded distinction in history is self-evident, stretching from the middle age – one must for instance conjure the regain of Southern European Lands like Sicily by Christians – to the colonial period of one century ago.

The fundamental topic was whether a Muslim was allowed to stay in the land of war or if he/she should make return to the land of Islam as soon as possible. Being Islamic Lands under control of we European if it was mandatory for instance for an Egyptian to abandon Egypt and go to countries, as Turkey, not under control of the unfaithfuls (or, for the Indians, to refuge Afghanistan).

The traditional answer given by the Muslim jurists, the fatwa on that issue, was that the residence in the land of war – like the ones now under the domination of the disbelievers in Islam – was to avoid and could have been tolerated just if it would have been impossible to leave the place. Otherwise the only chance given was to reside there to bring war to the unfaithful; in that case staying in the land of war would have been recommended.

Nowadays, the importance of distinction grows up, because of the increasing migration and residence of Muslims in non-Muslim countries.

The main issue is whether the forementioned distinction is still ongoing and, in case, what marks the difference between land of war and land of Is-

lam and, moreover, which consequences stem from the above traced dichotomy.

About the validity of the traced separation of the world the up to date doctrine of the Islamic Law Schools is to reject it in favour of the general description of the world with the koranic category of the land of treaty (*Dar 'ahd*). At least all United Nations countries would enjoy this feature (amongst others M. ABU-ZAHRAH, *Al-'ilaqat al-duwaliyyah fil-islam*, Dar al-fikr al-'arabi-Cairo, 1995, 57). As a consequence, the rejection of external Jihad against disbelievers in Islam is automatic.

About Koran 9.3-5, it is stated that the Surah is strictly related to the historical period in which it came into light, so that it must be referred to people living in the Arabic environment during VII century a.Chr. The idolaters were the ones whom attacked or deprived them from practicing their Islam at this period. More over a distinction has been said traced by the Prophet between the monotheists and the polytheists, in so far that ongoing attacks towards Christians and Jews could meet no justification at all neither under the Koran nor under what has been directly witnessed of the Prophet's doctrine.

Thinking on the present world, it should be also explained what the land of Islam and what the land of war would be, it has been noted by this part of the doctrine.

Would the land of Islam be just the country where Sharia is entirely in force? That is to say, as a matter of fact, just in very few countries, chiefly Saudi Arabia.

Or the conditions for a country to be classified as *Dar-Al* would be fulfilled just by the application of Sharia in matters involving family law (probably also law of heritage)?

Those conclusions are rejected by other members of Islamic world, that is to say by people who give an extremist interpretation of the Koran and of the Islamic tradition and laws.

The Surah 9.5 should be interpreted – they state – literally. The Jihad against unfaithfuls is not only allowed by Islam but a duty of each Muslim, in order to convert the all world to Islam. The use of violence would be the way taught by Koran and by the Prophet to gain to Islam all mankind.

Keeping the above distinction still validity in the view of the Muslim extremists, it should be clarified what in their view is the land of Islam and what the land of war.

One can say that the land of Islam is represented by countries in which sharia is at least in force in family law, although this is not shared by some extremist group, which conceives as land of Islam only the one in which sharia has thorough application. Egypt is not one of them, so it must be

treated as land of war in the view of the group called by the Egyptian police *Al-takfir wal-hijrah* but on called *Al-jima'ah al-islamiyyah* (to identify such a distinction from the only by speeches Muslims), which has committed various attacks in the Arab Republic.

Finally, about the consequences that stem from the drawn distinction in the view of the extremists, we must focus especially on the topics of the allowance whether to live or not in the land of war, of the behaviour that a Muslim must keep in *Dar al-kufr*, if the acquisition of the citizenship of a country of unfaithfuls ought to be acknowledged or must be seen as a sign of apostasy and finally unfaithfuls what should be the attitude of the land of Islam towards Muslims who emigrate in it and what should be the political shape of the land of Islam.

To start from this last point, one can immediately grasp that the goal of the so-called Islamic State is to create an unified Islamic country, where sharia is entirely in force and where all Muslims who moved from abroad could be welcomed and rewarded with the citizenship of the State. As long as the aim of a whole single Islamic country will not be realized, each Islamic country ought to protect Muslims giving its citizenship to each who comes from the land of war.

Regarding the issue of the residence in the land of war, the extremists must deal with the ongoing migration for economic reasons of Muslims citizens of Islamic countries to non-Muslim lands.

As far as this migration is really forced by the lack of chances to lead a life marked by dignity, that migration could be accepted because not willing but in some way compelled. Still the extremists strongly discouraged it and conceive it, generally speaking, as a sin, except if it is meant to convert the unfaithfuls to Islam, in case bringing war to them.

Once the Muslim one lies in the land of war – preferably because compelled to stay there, which excludes the Muslims to go to the land of war to study the language of the unfaithfuls (see the fatwa of Ibn-Baz in *Majallat al-buhuth al-islamiyyah*, 27, 1990, 83 f.) – with no intention to convert or bring war to the unfaithful, he is supposed to keep at least an appropriate behaviour.

The guidelines of this Islamic doctrine could be read in an anonymous guide for the Muslim male abroad (*Dalil-al-muslim fi bilad al-ghurbah*, Dar al-ta'aruf lil-marbu'at-Beirut, 1990).

Provided that the Muslim must not go abroad, to the land of war, if that expose him to jeopardize his faith – which normally involves dangers also for women and children, to be avoided to be brought with him –, we can recall the following guidelines (indeed to put in danger the Islamic faith means for this guide to commit each sin against Islam, no matter how im-

portant it could be, to the extent that it must be included also the cut of the beard and the shaking of the hand of the foreigner woman):

- If a danger for his faith is involved in the trip abroad (that is to say to commit each kind of sin against Islam), it could be allowed just for very important reasons (as to recover from a serious illness) and no more than to the extent needed;
- Follow the daily prayers, don't eat forbidden foods, don't drink alcohol, refrain from sitting at the table together with people who eat forbidden foods or drink alcohol, don't accept selling alcohol or pork jobs;
- Avoid using toilets if they are in the direction of Mecca since this precaution is unobserved in western countries;
- Avoid any relationship with foreigner women, although the marriage with a Christian or a Hebrew is authorized according to the koranic rules (but it should be preferably temporary, since this guide is Scythian); In case of divorce children should be taken by the Muslim man;
- Don't bury a Muslim among the unfaithfuls except if it is impossible to bring the dead in a Muslim country;
- Don't gamble or be involved as workers in gambling;
- Don't sell or buy music instruments;
- Let themselves be checked only by male doctors if intimate contact or watch is involved (or by female doctors for women);
- Medicine students are advised to avoid, as far as possible, contacts with women – since in western countries the faculty is not divided amongst male and women – and to refrain from behaviours that can arise sexual desires in those kind of studies;
- Overall put each effort to convert the unfaithful to Islam in order to be forgiven by the sin of having left *Dar Al*.

Not just the extremists but also a remarkable amount of Muslims claim for the application of sharia in family and heritage issue (the so called personal status) for Muslims living abroad in non-Muslim countries, especially in Europe, in the name of religious freedom (see references, also to Egyptian professors, in S.A. ALDEEB ABU-SAHLIEH, *Il diritto*, cit., 533-536). As a matter of fact, also polygamy should be allowed, albeit within strict limits, accordingly to the claimed koranic spirit, as well as the unilateral repudiation of woman ought to be ruled in a way that could near it to judicial or agreed by the parties divorce. One can recall also the position of the sheikh of El-Ahzar Mosque Tantawy (end of December 2003), who recognized the right of France to forbid, as religious external sign (as well as Christian, Hebrew and each other sign of every religious faith, it must be reminded), the Islamic veil, provided that the rule stems by non-Muslims, which prevents Muslims to complain about it. His position has been immediately challenged by

the Mufti of the Arab Republic of Egypt, 'Ali Jum'ah, at the beginning of 2004 and shortly after, following the Friday prayer, a crowd of Muslims from Cairo gathered in front of El-Ahzar Mosque to claim Tantawy to resign.

Of course, that topic leads to the issue of the acquisition of the citizenship of a non-Muslim country by a Muslim, since, for instance, a proposal for the application of sharia in family law in European countries for the benefit of Muslims living there (F. RIAD, *Pour un code européen de droit musulman*, in J-Y. CARLIER-M. VERWILGHEN [dir.], *Le statut personnelle des musulmans. Droit comparé et droit international privé*, Bruylant-Bruxelles, 1992, 380) states that the personal code for Muslims should not be applied to acquired European citizenship Muslims.

To sum up, the extremists conceive the acquisition of the citizenship of a country in the land of war as an apostasy because that would mark the complete involvement in the laws and customs of the unfaithfuls, willingly accept to join their societies and to obey to their laws.

On the other hand, some part of the radical exponents of Islam remarks that sons of emigrated in the land of war could acquire by default their citizenship, following the rules of *ius sanguinis* or of *ius soli*, that is to say not willingly submitting themselves to the community and laws of the disbelievers in Islam.

As a matter of fact, the topic let quarrels arise in all Islamic doctrine, because of the complete acceptance of foreigner laws that the naturalization involves (although it must be reminded that, generally speaking, law has a territorial application in Europe, no matter of the citizenship of the subject who resides or lies just temporarily in that land). To the extent that the above quoted project for the application of Muslim family law in Europe does not apply, as mentioned, to European citizens, no matter if Muslims.

The division on the topic is witnessed by the omission of any answer, about 30 years ago, by the Islamic Academy of *fiqh*, on the question (asked by the Islamic centre of Washington D.C., U.S.A.) whether a Muslim is allowed or not to take the citizenship of a non-Muslim country. Omission caused by the tough disagreement on the issue amongst the member of the Academy.

One can wonder what is the relationship between the drawn distinction land of war-land of Islam and the prohibition for Muslim women to marry not Muslims.

The link stands instead clear, once we remind the Surah on which the Islamic jurists established that forbiddance.

Koran 2.222: «... and give not *believing women* in marriage to idolaters until they believe ...» (*The Holy Qur'ān – Arabic Text and English Translation*, cit., 36).

Koran 60.11: «O ye who believe! When believing women come to you as Refugees, examine them. Allāh knows best their faith. Then, if you find them *true* believers, send them not back to the disbelievers. These women are not lawful for them, nor are they lawful for these women ...» (*The Holy Qur'ān – Arabic Text and English Translation*, cit., 662 f.).

One can immediately catch the difficulty to count the monotheists, especially Hebrews and Christians, amongst the idolaters (*mušrikūn*), given that the Koran repeatedly labels them as the people of the Book (*Ahl Al-Kitāb*).

Being aware of the disharmony to classify Christians and Hebrews amongst the *Mushrikun* (the polytheists), the Muslim jurists have traditionally quoted Koran 5.73 and 9.30-31 to count them on the execrated category of the *Mushrikun*. Still Koran 5.73, in a part of the Koran devoted to the People of the Book, especially Christians and Hebrews, classifies amongst (not idolaters but) disbelievers people («Indeed they are disbelievers») «who say 'Surely, Allāh is none but the Messiah, son of Mary', whereas the Messiah *himself* said 'O Children of Israel, worship Allāh Who is my Lord and your Lord'. Surely, whoso associates partners with Allāh, him has Allāh forbidden Heaven, and the Fire will be his resort. And the wrongdoers shall have no helpers» (*The Holy Qur' ān – Arabic Text and English Translation*, cit., 128 f.). Without going further into the details of the Christian concept of Trinity, it is enough to point out that the Surah refers to the disbelievers instead of the idolaters. To the same way, once again in a part devoted to the people of the book, Koran 9.30-31 states: «And the Jews say, Ezra is the son of Allāh, and the Christian say, the Messiah is the son of Allāh; that is what they say with their mouths. They imitate the saying of those who disbelieved before them. Allāh's curse be on them! How are they turned away. They have taken their learnt men and their monks for lords beside Allāh. And *so they have taken* the Messiah, son of Mary. And they were not commanded but to worship the One God. There is no God but He. Too Holy is He for what they associate *with Him!*» (*The Holy Qur'ān – Arabic Text and English Translation*, cit., 208 f.). Once again the implicit reference to disbelievers is clarified in the following Surah (Koran 9.32 that nouns them as disbelievers). Hence, there are nowadays well known Muslim jurists who state that Christians and Hebrews cannot be classified as *mushrikun*, category that would embrace particularly the animists (M. CHARFI, *Influence de la religion dans les pays musulmans*, in *Recueil des cours de l'Academie de droit international de la Haye*, 3, 1987, 450).

Of course, in the Muslim perspective Christians and Hebrews are disbelievers (*Kafir*).

Hence, Koran 60.11 instead of Koran 2.222 forbids Muslim women to marry them.

Still, reading the Surah, with its reference to refugees who come back – followed by quotation of slavery –, it is clear the historical context in which this Surah takes place. The historical background in which was drawn as said the distinction between land of war and land of Islam.

That is to say that if nowadays the vitality of this distinction is purported only by the extremists, who supports the literal interpretation as much as they can, whilst it is being rejected or at least put in stand by the Muslim law schools, one can wonder if Koran 60.11 could still be interpreted explicitly – literally in meaning, outside of its clear historical background.

That is why a for now very limited part of the Muslim doctrine states that the forbiddance for Muslim women to marry also the monotheists, that is now to say Christians and Hebrews, could not find a clear and undoubtful prohibition in the Koran.

To that extent it would be probably stand more firmly the traditional motivation found under the prohibition, which points out that, since Christians and Hebrews don't recognize the holiness of the Prophet, their Muslim bride would be led to disguise them, that is to say to feel repulsion for her husband, so jeopardizing the future of the family itself (see amongst others R. ALUFFI, *Il matrimonio nel diritto islamico*, in S. FERRARI [cur.], *Il matrimonio. Diritto ebraico, canonico e islamico: un commento alle fonti*, Giappichelli-Torino, 2006, 200 & ft. 85). Or that Islamic doctrine expects children to follow father's faith.

As far as these motivations are concerned, one must admit that they are not deprived of meaning.

Still one must also take into account other considerations.

A Muslim woman able and willing to marry a Christian or a Hebrew is for sure a woman who has taken into deep consideration the consequences of her act, being aware on how deep the taboo of the marriage with the non-Muslim is rooted in Muslim societies.

That is to say that the bride should be at least in abstract skilled to forecast whether his partner and future husband is willing to love her and to respect her Muslim faith neither compelling her to convert nor especially affecting her rights to be cared and loved by him notwithstanding the disparity of faith. All of that would also reflect in the care and education of children.

So, one can wonder if this deeply rooted forbiddance in Muslim countries does not reflect a treatment of woman that is not equivalent to the same dignity accorded to men and women by declarations of human rights

to which most Muslim countries adhere (and that, by the way, forbid religious impairments into the access to marriage, of course from a civil, not religious, point of view).

Of course, with the exception of Turkey and few other countries, family law of Muslim countries is based on sharia (in the case of Egypt just for Muslims), hence it contains the above prohibition: even the most liberal country in the southern part of Mediterranean sea, that is to say Tunisia, albeit it didn't forbid explicitly that kind of marriage in its family law, in the silence of legislation on the matter, praxis has no doubt on the ongoing validity of the forbiddance.

For those countries who apply Sharia in their family law the question is whether Sharia might be seen as containing no explicit prohibition for the marriage of the Muslim woman with a Christian and a Hebrew.

It can be stated, if one agrees with the above considerations, that in an up to date application of the Koran this is not the case.

It should be highlighted that this lack of ongoing explicit prohibition would not involve a total freedom of the act: it could be not generally endorsed but case by case be authorized by the Islamic religious authority.

The reference must be drawn to the marriage between a Christian and a Muslim.

In fact, we must admit that, since the Hebraic marriage strictly forbids each difference of faith, allowing only the marriage between Hebrews, it could not be asked to the Muslim woman to convert to Hebraism, for the sake of freedom of faith.

A difference runs instead with the Christian faith, which allows – the reference is here to the Christian Catholic Church (art. 1086, 1125-1127 Catholic Church Code) – the marriage with a non-Christian (non-baptised) only if authorized by the competent bishop, after a thorough examination of the intentions and the maturity especially of the Christian spouse, with no claim for the non-Christian to convert to Christianity.

One can wonder – and hope – if the Islamic law doctrine could reach in the future a similar position, authorizing case by case a Muslim woman to marry a Christian after a deep examination of the couple, as well as on the motivations of the Muslim woman and the discretion of the intentions of the Christian husband to respect and ensure to her bride complete freedom to profess Islam as well as to teach Islamic faith to the children of the couple (although one must admit that this is a harsh topic, since it is clear that the sons cannot be Christians and Muslims at the same time, but it should be stated that the kids must be grown up in a peaceful and full of mutual fostering familiar environment that can lead them to choose freely whether to follow Christianity or Islam during their adult age, as well as to choose not

to follow both, according to the basic principle of freedom of conscience and no constriction in religious issues, shared by Christianity and the Koran itself).

As a matter of fact, globalization, deeper contacts between people of different cultures, which must be welcomed as a mutual-foster chance in terms of understanding and erasing of violence and evil that stems from it, will make the frequency of marriages between Christians and Muslims increase, that is to say that the harsh issue of the marriage between a Christian male and a Muslim woman will appear more and more often.

It must be questioned whether the best solution is to prevent them – in so far putting a high barrier against spread of love and mutual understanding – or to solve them compelling the man to convert to Islam, which in many case can be easily imagined to result in a just formal act that the man will do, if practitioner of the Christian faith, just because compelled to do so and seeking with a deep internal conflict how to remain into the Christian faith without losing a love (for the Muslim woman) that he will see as sent to him by God himself. Or if it could be imagined that the Islamic law doctrine might reach an agreement to underline the risks that lie under those kinds of marriages, generally speaking seeing them with no favour, but allowing them to be authorized case by case by the Muslim authorities (the Imam of the competent Mosque or maybe the Mufti of the country itself, if the bride comes from an Islamic country, after a thorough examination led by the competent Imam).

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