

# Pluralism and Plurality in Islamic Legal Scholarship



# The Modern Muslim World

11

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# Pluralism and Plurality in Islamic Legal Scholarship

The Case of the Fatāwā l-‘Ālamgīriya

Mouez Khalfaoui

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## AUTHOR'S PREFACE FOR THE ENGLISH TRANSLATION

The French version of this book was published more than a decade ago but has not lost its relevance. On the contrary, both the *Fatāwā l-ʿĀlamgīriya* and issues of pluralism and plurality in Muslim legal scholarship have acquired greater pertinence for our societies today. With the English translation of this work, I am now happy to present the results of my research to the English-speaking audience.

This translation has been made possible by the excellent work and cooperation of colleagues to whom I owe my profound thanks. Emily Pollak's translations of several parts of the book provided a sound draft, while Ben Niran thoroughly edited the final draft which Sina Nikolajew subsequently prepared for publication. The final manuscript has been shortened in several places and I added some significant new references.

This study shows how we may study religious texts in relation to their social, political and cultural contexts by focusing on Muslim-non-Muslim relations in seventeenth-century South Asia. By interpreting legal sources with the aid of social, historical, legal and literary analytical methods, it compares three Hanafi legal doctrines: the "original" theory which developed in Iraq during the formative period of Islamic law; the central Asian variant, which emerged between the eleventh and fourteenth centuries, and the doctrines of the South Asian Branch of the Hanafi school, which evolved from the fourteenth to the seventeenth centuries. These three legal corpuses are presented and compared on the basis of writings from the *Fatāwā l-ʿĀlamgīriya*.

This study should appeal to specialists of Islamic law, Islamic studies, theology, South Asian studies, cultural studies and to cultural anthropologists and other interested readers. By addressing the central theme of Muslim–non-Muslim relations, the book provides an overview of the classical theory of minority rights developed by Muslim legal scholars in the premodern era. It addresses both the life of non-Muslim minorities under Muslim rule and the way in which premodern Hanafi scholars conceived of the norms governing interfaith relations.

The publication of this work was made possible by the substantial financial and support of the Luxembourg School of Religion & Society (LSRS), which provided me a space for reflection and quiet work to bring this work to its end. My thanks go especially to Jean Ehret, the director of the LSRS, for his support. I also wish to thank the Academy for Islam in Science and Society (AIWG) for its financial support as well as my colleagues and the staff of my chair and the University of Tübingen for their help in producing this work.

Tübingen, Mai 5, 2021

# INTRODUCTION

South Asia or the Indo-Pakistani subcontinent occupies a more important place in the Islamic world and its history than that we could imagine. On the other hand, the Islamic dimension in Indian history and civilisation is more profound than we could imagine.<sup>1</sup>

My aim in this book is, firstly, to present the positions held by Hanafi Muslim jurists in South Asia in the seventeenth century with regard to the coexistence of Muslims and non-Muslims, and, secondly, to compare the opinions of these South Asian jurists with those of their counterparts in Central Asia and the Middle East regarding this subject. To this end, I have chosen to focus on *Al-Fatāwā l-hindīya l-‘ālamgīriya* (henceforth FA), a legal tome commissioned by the Mughal sultan Aurangzeb Alamgir (1618–1707) and completed no later than 1674. This valuable compendium of *fatāwā* (plural of *fatwā*, a nonbinding legal opinion in Islamic law)<sup>2</sup> covers topics relating to everyday life. Written during what is considered a late period in the history of Islamic law, it summarises most of the Hanafi juridical works known to its authors. The fact that the book was compiled in the second half of the seventeenth century is highly significant. For this reason I will begin by presenting the main features of this context.

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<sup>1</sup> Marc Gaborieau, *Islam et société en Asie du Sud* (Paris: Ecole des Hautes Etudes en Sciences Sociales, Paris, 1986, 7).

<sup>2</sup> J.R. Walsh, *Fatwa*, in *Encyclopaedia of Islam*, vol. II, New Edition, Brill, 1965, 866–67.

## 1. THE HISTORICAL CONTEXT: SOUTH ASIA IN THE SEVENTEENTH CENTURY

The seventeenth century was a crucial period in the development of the Muslim world. It was marked by the efforts of Muslim rulers to modernise governmental structures, armies and branches of public life—elements which would prove indispensable to their efforts to both adapt to and resist the looming spectre of Western modernism. The Mughal Empire (1526–1858) was no exception to the global phenomenon of modernisation and concurrence that characterised this era. Yet the second half of the seventeenth century saw the culmination of a gradual shift that had been underway in South Asian Muslim political scene since 1526: in 1658, Aurangzeb Alamgir (d. 1707), son of the renowned sultan Šah Ğahān (d. 1666), ascended to the throne of the Mughal Empire after assassinating his older brother Dara Šikoh, imprisoning his father (who was by then sultan in name only) in the Agra Palace and removing his two other brothers through deception and intrigue. Aurangzeb would rule for almost half a century, until his death 1707.

The reign of Aurangzeb ushered in a new era on the Indian subcontinent, characterised by the unprecedented geographical and political expansion of the Mughal Empire. Indeed, most of his reign was dedicated to military campaigns against both Muslim and non-Muslim enemies, particularly in the Deccan region. Among Aurangzeb's prominent foes was the Hindu rebel Shivaji (d. 1680), whom the Mughal state imprisoned but failed to subjugate definitively.<sup>3</sup> Shivaji was among the more ruthless rebels operating in the southern part of the subcontinent, where the rulers of the provinces of Marāṭā and Golconda were waging an incessant guerrilla war against the Mughal armies. Despite the sustained Mughal military effort in the Deccan, the forces of the Marāṭā, Golconda and their ally Shivaji and his descendants were never definitively defeated. This state of perpetual war was fuelled by revolts and unrest in the northern subcontinent, which

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<sup>3</sup> On Shivaji, see Ishwar Das Nagar, *Futuhāt-i-Alamgiri*, trans. M.F. Lokhandwala and Jadunath Sarkar, rep. (Vadodara: Oriental Institute, 1995), 60–66.

eventually led to a loss of power by the sultan in the south. Attempting to re-establish order in an unstable empire, in 1679 Aurangzeb decided to re-impose the poll tax (*ġizya*) on his non-Muslim subjects, before moving to southern India in 1682, where he faced violent conflict until the end of his life.

The re-imposition of the *ġizya*, as well as other measures Aurangzeb adopted to safeguard the political and administrative systems of the Mughal state, demonstrate his willingness to impose harsh measures, even in non-convenient circumstances. These measures have been seen as having contributed to the fall of the Mughal Empire after his death in 1707. In effect, the legacy of Aurangzeb's incessant wars was an era characterised by hostility and opposition. The relations between the Mughal Empire and the other dynasties existing in its orbit—as well as those between the sultan and his subjects and between his enemies and allies—was marked by rivalry and hostility. In contrast to his brother Darā Šukoh, and despite his significant contribution to the geographical and political expansion of the empire, Aurangzeb is remembered chiefly as a champion of Muslim orthodoxy who instituted discriminatory policies against his non-Muslim subjects. These policies included the abolition of court music (in 1668)<sup>4</sup>; the re-introduction of the *ġizya* (which had been abolished by his grandfather Muḥammad Akbar in 1564); the destruction of Hindu temples as well as the suppression of religious Hindu teachings.

Both the geographical extension of the borders of the Mughal Empire under Aurangzeb and his political rise intensified his rivalry with other powerful Muslim dynasties, notably the Ottomans, the Safavids and the Uzbeks. Aurangzeb's reign was marked by his hostility toward the Safavids, expressed in his support for the rebels fighting against Šāh 'Abbās II (1642–1666). On the other hand, the Safavids had supported Aurangzeb's son Prince Muḥammad in his rebellion against his father in 1681. In particular, the Deccan affair, which had exhausted the Mughal

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<sup>4</sup> Katherine Butler Brown, "Did Aurangzeb Ban Music? Questions for the Historiography of his Reign", *Modern Asian Studies* 41, no. 1 (2007): 77–120.

treasury, reinforced the enmity between the two dynasties.<sup>5</sup> Despite this hostility, it is still possible to see the Indian subcontinent (as Karim Najafi does) as a cultural centre of the Muslim world which had attracted men of culture from Persia and Central Asia since the medieval period.<sup>6</sup> Despite Aurangzeb's ceaseless military engagements, the Mughal court continued to attract prominent cultural figures throughout the seventeenth century, becoming a cultural "Eldorado" of the Muslim world.

As the ruler of a continuously expanding empire in a state of permanent war, Aurangzeb was conscious of his twofold responsibility to reform society and to maintain power over a vast territory in which the majority of the population was non-Muslim.<sup>7</sup> This characterised the Mughal Empire by an ambivalent feature. The ambivalence of the Mughal Empire is specifically illustrated by the Mughal judicial system which, under the reign of Aurangzeb, was based on Islamic legal codes that had mostly evolved outside the subcontinent and originated in distant periods. As such, these codes had to be adapted to suit a society that was situated on the margins of the classical Muslim world facing an impending wave of modernisation. Rafat Bilgrami has emphasised that justice was a permanent preoccupation of the Mughal state as it responded to the internal conflicts persisting throughout its history. In his work *Religious and Quasi-Religious*, Bilgrami also describes the deleterious state of the juridical system on the subcontinent during this period, noting the extensive power of

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<sup>5</sup> This enmity was sparked by the humiliating treatment Aurangzeb's ambassador received at the Safavid court, when he returned with an insulting letter from Abbas II implying that Aurangzeb had discriminated the Shiites of the Deccan. Cf. Aziz Ahmad, *Studies in Islamic Culture in the Indian Environment* (Oxford: Clarendon Press, 1964), 42–45.

<sup>6</sup> Karim Najafi Barzegar, *Mughal-Iranian Relations During the Sixteenth Century* (Delhi: Indian Bibliographies Bureau, 2001), 229–232.

<sup>7</sup> Syed Moinul Haq, *Khafi Khan's History of 'Alamgir*. Being an English translation of the relevant portions of *Muntaḥab al-lubāb*, with notes and an introduction by S. Moinul Haq (Karachi: Pakistan Historical Society, 1975), 18.

the *qādis* and widespread corruption—a situation that urgently necessitated legal reform.<sup>8</sup>

Conscious of the paramount role the juridical domain would play in any attempted reform, Aurangzeb decreed the institution of a legal code consisting of Hanafi law that could be applied throughout the imperial territories. This code took the form of an inventory of Islamic law and was entitled *Al-Fatāwā l-hindīya l-‘ālamgīriya* (henceforth FA). The compilation of this work was entrusted to a writers’ guild consisting of at least forty-five scholars from nearly every region of the Mughal Empire. Šaiḥ Niẓāmuddin, a confidant of the sultan, was elected head of this commission and assumed both the role of editor-in-chief and responsibility for drafting the project. The writers themselves received various privileges and generous remuneration from the sultan, who actively participated in the editing process. Alain Gunther has emphasised the apparent legal aspect of the work, while also attributing to it a pioneering role in the reform of Muslim society during this period. As Gunther observes in an article on Hanafi law in Mughal India,

[t]he work united diverse ‘ulamā’ from various regions of Muslim India in a common project of reviewing the existing collection of authorities, weighing their relative authority, deciding between contradictory rulings, and selecting the material most applicable to seventeenth-century India. The result was a comprehensive, multi-volume compendium of Islamic law. Through its regular quotation of older authorities, it provided continuity with the past. Through its inclusion of the best of recent Hanafi works, some of them written by Indian scholars, it updated the shari‘a to take the current situation into account. Being written in Arabic, it served to strengthen the role of Indian fuqahā’ in mainstream Hanafi thought.<sup>9</sup>

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<sup>8</sup> Rafat Bilgrami, *Religious and Quasi-Religious Departments of the Mughal Period (1556–1707)* (Delhi: Munshiram Manoharlal, 1984), 99–160.

<sup>9</sup> Alan Gunther uses the term “revision”, while Jadunath Sarkar speaks of “simplification” to describe the work of the authors of the FA. See Alan Gunther, “Hanafi Fiqh in Mughal India: the Fatāwa-i-‘Alamgīriyya”, in

The primary purpose of the FA was to reform the Mughal judicial system. Yet its compilation also served political and social objectives. Muḥammad Mujeeb underscores the fact that Aurangzeb's interest in reforming Muslim society and the imperial legal system was inspired by the war of succession.<sup>10</sup> In another interpretation, Aurangzeb's succession corresponds to the triumph of the partisans who supported the *naqšbandīya* Sufis as opposed to the proponents of *qāḍīrism* as represented by Darā Šukoh. Furthermore, the drafting of the FA coincided with a specific political and cultural setting in which Muslims had to contend with two religious concepts: Hinduism and syncretism.

## 2. INTERFAITH RELATIONS IN SEVENTEENTH-CENTURY SOUTH ASIA

In order to understand the interplay between religion and politics and the relation of Islam to South Asian beliefs such as Hinduism and syncretism, it is necessary to consider the problematisation of the relationship between Muslims and non-Muslims in South Asia during this period. Hinduism, demographically the dominant faith in South Asia at the time, was the subject of an ongoing conceptual and historical debate. The accepted opinion in Western academic religious studies suggests that Hinduism was a nineteenth-century Western (to be exact, British) invention. As Heinrich von Stietencron observes,

[T]he term "Hinduism" as a designation for the religion of the Hindus, did not appear until the 19<sup>th</sup> century in Bengal, where it was introduced by employees of the English East India Company in order to summarize in one term what they considered to be numerous Indian religious sects. That these were in fact several religions, some of which had very different ideas, had not yet been noticed, but perhaps it could not be noticed immediately, because the followers of these religions lived together as naturally and peacefully as it was not even possible

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*India's Islamic Traditions: 711–1750*, ed. Richard Eaton (Delhi: Oxford University Press, 2003), 209–230, here 224–225.

<sup>10</sup> Muhammad Mujeeb, *The Indian Muslims* (New Delhi: Munshiram Manoharlal Publishers, 1985), 247–260.



at that time in Europe among Protestants and Catholics, let alone with Jews or Muslims.<sup>11</sup>

Von Stietenron's definition has been corroborated by Axel Michaels, who, drawing on the latter's interpretation, posits that the concept of "Hinduism" is misleading. Michaels observes that Indians historically cited their caste or sect to indicate their religious affiliation and that the identity of the Indian population was modified by European influence (in particular, by the influence of British colonialism) via the abstract concept of "Hinduism". While Michaels' and Stietenron's contentions are generally accepted by contemporary researchers, they have been challenged by Willi Sweetman, who dates the first use of the term "Hinduism" to the seventeenth century. Sweetman maintains that the concept of Hinduism was formed through the development and systematisation, within Western academia, of two other religious concepts; namely, "religion" and the "Orient". This development led to the emergence of new concepts such as "Hinduism" and "Buddhism", which were then added to the group of monotheistic religions: Judaism, Christianity and Islam. According to Sweetman, "Hinduism" cannot correspond to a religion, as it does not conform to the structural criteria applicable to other faiths, of which Christianity is the prototype.

In light of these claims, it appears that Hinduism as a concept is the result of an historical development. In his *The Nationalisation of Hindu Tradition*, Vasudha Dalima divides this development into three periods, the first of which concerns my aims in this book. This first era, which lasted from the ninth to the thirteenth century, saw the arrival of Muslims in South Asia. Dalima highlights one particular ethnic distinction made during this period: the term "Hindu" was employed to distinguish indigenous Hindus from Persians and Turks—in other words, from Muslims. Dalima asserts that the current usage of this term obscures the other stages of its evolution. Thus, the seventeenth-century rapport between Islam and the Hindu population does not suggest interchange between monotheism and a singular non-Muslim faith or

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<sup>11</sup> Heinrich von Stietenron, *Der Hinduismus* (München: C.H. Beck, 2001), 7 (translated by M. Khalfaoui).

ideology; rather, it signifies a relationship between Islam and various Hindu faiths of which the concept “Hinduism” is only an abstract manifestation. If Hinduism was the dominant faith in South Asia in the seventeenth century, syncretism was the most contentious interpretation of interreligious exchange during this period. Sven Hartman defines syncretism as follows:

Roughly speaking, in actual language the term syncretism is used to denote any mixture of two or more religions, as for instance, in Hellenistic syncretism, where elements from several religions are merged and influence each other mutually. It might also be used to refer to cases when elements from one religion are accepted into another without basically changing the character of the receiving religion (because of the relatively small quantity of adopted elements).<sup>12</sup>

A popular example of syncretism in South Asia during the Mughal period is the doctrine of *Dīn-i Ilāhī*, which corresponds to a fusion of the Islamic, Buddhist and Hindu faiths. This belief system was introduced by the sultan Muḥammad Akbar, who aspired to synthesize all religions into a single, syncretic faith. Gail Minault Graham places syncretism during the Mughal period in opposition to the two emblematic (and controversial) figures of Akbar and Aurangzeb. Graham posits that the period preceding Akbar’s reign had witnessed the birth of various syncretic Hindu beliefs, in addition to those initiated by Kābir (d.1518), Nanāk (d.1539) and Tukarām (d.1650), who had criticised the Hindu caste system and were inclined toward the egalitarian principles enshrined in monotheism. Graham attributes this shift to the influence of Muslim Sufism. Nevertheless, this era of syncretism has been challenged by the emergence of orthodox Muslim offshoots, for instance that of Šeiḥ Aḥmad Sirhindī (d.1624) which experienced certain sympathy and commitment from sultan Aurangzeb, who succeeded in vanquishing his brother Dara Šikoh and assuming control of the Mughal Empire.

The relationship between Islam and other South Asian religious faiths thus exposes a characteristic unique to the Muslim

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<sup>12</sup> Helmer Ringgren, “The Problems of Syncretism”, in *Syncretism*, ed. Sven S. Hartman (Stockholm: Almqvist & Wiksell, 1969), 7–14, here 7.

religion in this region, which I will call “Indian Islam”. In effect, this form of Islam does not correspond to a homogenous faith; rather, it is a heterogeneous religion comprising various religious characteristics. Likewise, the teachings of the Sufi orders should be highlighted; they played a decisive role both in the conversion of the Indian population to Islam (notably in the first centuries of Muslim settlement on the subcontinent) and in the development and orientation of Muslim public and official thought. In the literature pertaining to this subject, it is often postulated that only the poor Hindus or the middle classes embraced Islam. This idea is refuted by Bruce Lawrence who, while emphasising the Sufi influence in the conversion of the Hindu elite to Islam, points to the existence of a fruitful interchange between the elites and the Muslim and Hindu communities, the latter of which was driven by sacred Hindu principles to convert to Islam.<sup>13</sup>

In terms of its development in South Asia, Islam, as a monotheistic religion, has had to contend with a polytheist ideology on the one hand and a demographical imbalance on the other. The fact that in seventeenth-century South Asia the Muslim community was a societal minority deterred its members from merging with other religious identities. This incontestably influenced the nature of Muslim religiosity in South Asia and led to the development of two trends of religiosity at the heart of Islam: a “lived Islam” characterised by the need for proximity with other religious communities and a purist and elitist Islam situated in opposition to the former. The objective of the purist form was to preserve—if not to reform—the lived Islam, which encompassed several pagan rites. While the first type of religiosity is attributed to the Muslim masses living in direct contact with practitioners of other faiths and exposed to reciprocal influences, the second type is what I would call “transmitted Islam”. This refers to religious belief as transmitted by the ‘*ulamā*’, who generally represented an abstract and militant legal theory and a ‘purist’ concept of Islam.

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<sup>13</sup> Bruce B. Lawrence, “Early Indo-Muslim Saints and Conversion”, in *Islam in Asia*, ed. Yohanan Friedman (Jerusalem: Magness Press, 1984), 109–45.

Regarding the analysis of Hindu-Muslim relations in works of history, Govind Gokhale Balkrishna affirms that this relationship was often influenced by the various phases of evolving Indian nationalism. Balkrishna therefore criticises Tara Chand's thesis, which he sees as reproducing the position held by the nationalist Indian government—essentially, that Hindu and Muslim communities were distanced from each other by the discriminatory politics of Aurangzeb.

In effect, interpretations of Muslim-non-Muslim relations under Aurangzeb vary according to the period, the researchers' political and academic affiliation and the nature of the sources used. The debate on this topic was sparked at the beginning of the second decade of the twentieth century, a time marked by the discord between Hindu nationalism and Muslim separatism that dominated the political scene in South Asia and led to the partition of India in 1947. These two movements, opposed in their ideologies and their conceptions of reality, emphasised their mutual incompatibility and inability to coexist on a common territory. They based their positions primarily on their respective interpretations of the medieval history of the Indian subcontinent.

Thus, for the nationalist Hindu party, the medieval period was a bleak era characterised by Muslim violence, while the reign of Aurangzeb represented an example of Muslim hostility, epitomised by the demolition of temples and the levying of discriminatory taxes. This interpretation is adopted by historians such as Stanley Lane-Poole, Vincent Smith, Wolsely Haig and Jadunath Sarkar, who portray the history of medieval India as a succession of wars and revolts.<sup>14</sup> In contrast, certain Muslim historians of the same period, such as Muḥammad Habib, Zahirudin Faruqi and Muhammad Nazim, consider Aurangzeb a worthy representative of Islam and insist that he treated his non-Muslim subjects fairly.

The opposition between these two academic camps becomes particularly apparent in their respective analyses of the fall of the Mughal Empire. Whereas the anti-Aurangzeb historians view this

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<sup>14</sup> Cf. Jadunath Sarkar, *History of Aurangzib. Mainly Based on Persian Sources* (Calcutta: M.C. Sarkar and Sons, 1916), vol. 3 (First Half of the Reign 1658–1681), 1–434.

collapse as a consequence of the discriminatory behaviour of certain Mughal sultans and nobles, Muslim historians such as Faruqi, Shibli Nomani,<sup>15</sup> Moinul Haq and Ishaq Qurashi offer a contrary interpretation, denying any connection, causal or otherwise, between the fall of the Mughal Empire and the behaviour of Aurangzeb or any other Mughal sovereign. The historical method employed by researchers addressing the subject of Muslim-non-Muslim relations is thus demonstrably inefficient when it comes to revealing tangible and valid results—a shortcoming illustrated, for example, by the remarks of Zahirudin Faruqi and Jadunath Sarkar. The contradiction in the approaches of these two historians, representing the two opposing camps, is perplexing for expert and uninformed readers alike. For example, while certain researchers cite Sultan Aurangzeb's order to destroy Hindu temples as proof of the claim that he practiced discriminatory policies towards his non-Muslim subjects, researchers with an Islamic affiliation refer to the sultan's subsidisation of the construction of Hindu temples in 1681 and 1690. The debate over these opposing orientations also touches many subjects relevant to modern era. One example is the pre-partition divergence between the Muslim separatist party and the National Congress of India, each of which profited from historians' contradictory interpretations of the medieval period, which they used to develop their own respective conceptions of Muslim-non-Muslim coexistence after independence. This conception is clearly illustrated by the following declaration by Muhammad Ali Ğinnah, then leader of the Muslim League:

The Hindus and Muslims belong to two different religious philosophies, social customs, literature [...] They belong to two different civilizations which are based mainly on conflicting ideas and conceptions [...] Musulmans are a nation according to any definition of a nation, and they must have their homelands, their territory, and their state.<sup>16</sup>

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<sup>15</sup> Cf. Šibli No'mānī, *Aurangzib 'Ālamğīr Par 'ik Naẓar* (Lahore: Atina Adab Gawg Minār, 1942).

<sup>16</sup> Peter Hardy, *The Muslims of British India* (Cambridge: Cambridge University Press, 1972), 240.

This opposition between the two historiographical and political camps demonstrates the danger of basing any study of the subject of Muslim-non-Muslim relations uniquely on an historical method. I therefore decided to focus not on historical interpretation, but rather on the theme of interreligious relations between Muslims and non-Muslims in seventeenth-century South Asia, through the lens of Muslim legal literature—notably the *Fatāwā l-Ālamgīriya* (FA), as this corpus of Islamic law, written at the behest of the last of the great Mughal emperors, reflects the norms of precisely this type of relations. In my research, I thus rely primarily on Islamic legal literature, using historical information (for instance, regarding the social history of the region and period), to interpret my findings from legal sources and to compare the methodologies of these disciplines.

### 3. PLURALISM: MORE THAN JUST TOLERANCE

While most studies of the reign of Sultan Aurangzeb are based on the notions of tolerance or discrimination of Muslim states vis-à-vis non-Muslims, my research focuses on the notions of plurality and pluralism. *Plurality* refers to the idea or state of multiplicity, composed of various elements in the same place. *Pluralism*, on the other hand, refers to a political, social or economic doctrine that aims to develop favourable conditions for individuals by respecting their beliefs. In his book *Liberalism, Pluralism, Communitarianism*, Winfried Brugger states that the goal of pluralism is to guarantee the people's freedom and the recognition of their diversity and multiplicity.<sup>17</sup> Using this definition, I would like to limit my use of the concept of pluralism to its general meaning as the recognition of plurality as a basic right—in contrast to the concept of tolerance, which refers to an amnesty offered by the dominant party to the dominated. Pluralism goes hand in hand with the concept of plurality. From this perspective, plurality, as a reality, has a long tradition on the Indian subcontinent, which served as a setting for the birth and development of indigenous

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<sup>17</sup> Winfried Brugger, “Liberalismus, Pluralismus, Kommunitarismus: Studien zur Legitimation des Grundgesetzes”, in *Interdisziplinäre Studien zu Recht und Staat* 12 (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 199.

as well as non-indigenous civilizations. In this context, plurality is not limited to a multiplicity of beliefs, which has been a characteristic of the Indian subcontinent for centuries, but rather refers to the diversity found in all areas of life. Pluralism can thus be defined as form of conduct or behaviour, while plurality refers to a given situation. Pluralism is a point of view, a choice or a form of organisation that implies a right to diversity and difference. Jamal Malik insists on the difference between “being plural” and “being pluralistic”, observing that “religious pluralism is more than mere diversity; it implies active engagement with plurality. It is not a given, but has to be created. It requires participation; and it is more than mere tolerance [...]”.<sup>18</sup> T.N. Madan presents religious pluralism as an ideology in South Asia, stating that

[c]ontrary to the assumption of many modernists that religious faith is necessarily exclusive and therefore results in communal conflict, there is considerable historical and ethnographical evidence that the common people of India, irrespective of individual religious identity, have long been comfortable with religious plurality. They acknowledge religious difference as the experienced reality: they do not consider it good or bad. In other words, social harmony, or agreement, is built on the basis of difference.<sup>19</sup>

This distinction between pluralism and plurality does not favour any one criterion in particular; rather, it aims to specify the semantic fields of the two concepts. My decision to address the problematic nature of this research from the perspective of pluralism was motivated by one essential factor; namely, that the perspective of pluralism exceeds value judgements such as “tolerant/intolerant” or “discriminatory”, which are often replicated in research pertaining to the reign of Aurangzeb and his treatment

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<sup>18</sup> Jamal Malik, “Introduction”, in *Religious Pluralism in South Asia and Europe*, ed. Jamal Malik and Helmut Reifeld (Oxford: Oxford University Press, 2005), 1–20, here 19.

<sup>19</sup> T.N. Madan, “Religions of India: Plurality and Pluralism”, in *Religious Pluralism in South Asia and Europe*, ed. Malik Jamal and Helmut Reifeld, 42–75, here 72.

of non-Muslims. Thus, pluralism relies on the free organisation of any entity or group in the same shared environment, without rejection or exclusion.

In particular, I would like to outline my motives for not focusing on the concepts of tolerance and syncretism. Tolerance is based on a paradox, since “it leads to accepting others, though they may represent a subject of discomfort for oneself”<sup>20</sup> and is founded on value judgements. In contrast, pluralism essentially signifies the guarantee for each person and each group to exist without suffering constraints, restrictions or prejudice. Although my research does not deal with legal pluralism, it does illustrate how Muslim jurists dealt with legal issues pertaining not only to Muslims but to other communities as well. I should emphasise that this study does not aim to defend any concept of law, Islamic or otherwise; its purpose is rather to use legal concepts as a case study to understand the reality at the time.

The problem revealed in my research concerns the originality and innovativeness of South Asian Islamic Law, and can be posed as follows: What was the relationship between the Islamic law practised in South Asia and that exercised in Central Asia or the Middle East? If one accepts the originality or specificity of Islamic Law in South Asia, it is necessary to investigate the role played by the geographical and socio-cultural milieus in the emergence of new interpretations of Islamic legal theories. This would strengthen the thesis that the Islamic legal tradition was never centralised and that over the course of time it developed into different and distinct regional practices.

#### 4. CORPUS, HYPOTHESIS AND RESEARCH METHOD

I have chosen to focus on the *Fatāwā l-Ālamgīriya al-Hindiya* because this little-known and understudied work of Islamic law offers a pertinent understanding of the relationship between Islamic law and lived reality. An analysis of the *Fatāwā l-Ālamgīriya (FA)* will allow us to identify the principles behind the Muslim legal

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<sup>20</sup> Patrice Deramaix, “La tolérance paradoxale: aux frontières du pluralisme”, accessed 23 April 2003, [www.members.lycos.fr](http://www.members.lycos.fr) (author’s translation).



concepts concerning everyday life on the Indian subcontinent in the pre-modern era. Likewise, it will allow me to address the subject of interreligious relations under the reign of Aurangzeb and will serve as an alternate source for information on the events of this period, complementing other historical sources which have already been exhaustively researched. Finally, it will allow me to portray the interaction between Muslims and non-Muslims in South Asia in the seventeenth century as the fruit of reciprocity—a sort of horizontal exchange between various protagonists. This interpretation departs from the view that these relations constituted a vertical hierarchy between a powerful, discriminatory Muslim leadership and weak, submissive non-Muslim subjects.

My research hypothesis concerns the concept of pluralism. Based on an analysis of the FA, I will argue that the Muslim Hanafi jurists of the 17<sup>th</sup> century South Asia adopted two contradictory strategies for dealing with non-Muslims. The first of these, based on lenience, aimed to respect non-Muslims and their liberties. This strategy consisted in refraining from intervening in the internal affairs of non-Muslims and fortifying the borders separating them from Muslims, in order to maintain a peaceful co-existence between the two populations. By contrast, the second strategy, which could be qualified as restrictive, coercive or “anti-pluralist”, can be seen as an expression of the will of Hanafi jurists of that time to limit the liberties of non-Muslims and to discriminate against them.

Rather than seeking to substantiate the existence of these two contradictory streams of thought within Islamic Law (particularly within the FA), my objective is to recognise their respective characteristics and to explicate the norms that guide them. I admittedly avoid focusing on the authors’ positive, pluralist attitude toward non-Muslims (which was often the subject of elegiac literature that emphasised the tolerance of Muslim states toward their non-Muslim subjects). I thus focus less on texts extolling interreligious harmony and examine rather texts pertaining to the anti-pluralist position. Several essential questions thus emerge. What are the factors that drove the Hanafi jurists of seventeenth-century South Asia to adopt discriminatory attitudes towards non-Muslims? When does such a tendency appear, and when does it

disappear from the texts? How might such a tendency have affected social relations between the two groups at that time?

An important methodological tool used in this study is comparison. Using the comparative method, I examine the evolution of the Hanafi legal concept of non-Muslims by comparing three Muslim legal conceptions: the Middle Eastern concept, which emerged during the classical period, for instance in the 8<sup>th</sup>–9<sup>th</sup> centuries; that of the Central Asian branch of Hanafi law (the development of which coincided with its transplantation to Transoxiana in the eleventh to fourteenth centuries) and the most recent concept, which developed in South Asia between the sixteenth and the seventeenth centuries. I will trace the history of the Hanafi school from its origins in the eighth century Middle East to the seventeenth century South Asia in order to compare the point of view of the first jurists of the school with that of their successors in subsequent periods of Islamic history. Further, this comparison will take place retrospectively. Taking the most recent period (seventeenth-century South Asia) as a starting point, I will present the positions of Hanafi legal scholars from the two previous eras in order to see how the South Asian ‘*ulemā*’ judged the opinions of previous scholars. The aim of this comparison is not to determine which of these doctrines was more permissive or restrictive vis-à-vis non-Muslims, but rather to demonstrate how and why these legal scholars privileged one legal position over another.

Yet engaging with the FA also opens a debate on the relation between theory and practice in Islamic legal scholarship. The FA has been cited by several researchers as exemplary of the divergence between theory and practice in Islamic Law in general. Chafik Chehata classifies the FA as a legal text whose authors limited themselves to presenting solutions to special cases without considering the lived reality. According to Chehata, although these legal works were called *fatāwā* or *responsa*, they do not deal with any actual case of consulting.<sup>21</sup> Chehata further observes that

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<sup>21</sup> This idea was introduced by Joseph Schacht, who reproduced it from Ignaz Goldziher and Snouck Hurgronje. Chehata’s thesis was reproduced by his student Ya’kov Meron. Joseph Schacht, Abdelmagid Turki and

the authors of these texts must have had very lively imaginations, as they discuss issues that have no foundation in reality, and notes that the casuistic method of this genre of writing is, in many cases, similar to that of Talmudic and Semitic law.<sup>22</sup> This assumption will be examined via textual analysis. Complementing this approach, I also apply an intertextual method which allows for the analysis and comparison of opinions regarding the rights of non-Muslims under Muslim rule held by various Hanafi jurists in different eras and regions. While Gérard Genette defines intertextuality as the presence of two or several texts in the same place at the same time, intertextuality usually consists of the presence of a text within another text.<sup>23</sup> Interestingly, intertextuality is the most prevalent mode of text correlation in the FA, which consists of numerous legal texts from different periods and different regions of the Muslim world that intersect and, so to speak, interact. In this sense, the text of the FA can be described as a metatext or “architext”. The only theoretical link between the individual components of the metatext is their common affiliation with the Hanafi school and their overlapping topics (which they approach, however, from different viewpoints). This textual diversity

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Paul Kempf, “Introduction au droit musulman”, in *Islam d’hier et d’aujourd’hui* 20, trans. Paul Kempf and Abdel Magid Turki (Paris: Maisonneuve et Larose, 1983), 165–173; Chafik Chehata, *Théorie générale de l’obligation en droit musulman hanéfite* (Paris: Editions Siry, 1972), 41–61; Ya’kov Meron, “The Development of Legal Thought in Ḥanafi Texts”, in *Studia Islamica* 30 (1969): 73–118.

<sup>22</sup> Chehata, *Théorie générale*. These ideas are further explained by Emile Tyan who, reproducing the opinion of Christian Snouck Hurgronje, argues that this separation was the cause of the devolution of Islamic law. Tyan goes on to observe that while the law schools were teaching theory, reality was moving on. For Hurgronje’s position, see Christian Snouck Hurgronje, *Oeuvres choisies, présentées par G.-H. Bousquet et J. Schacht* (Leiden: Brill, 1957), 262.

<sup>23</sup> Gérard Genette, *Introduction à l’Architexte* (Paris: Éditions du Seuil, 1979), 8. In formulating this definition, Genette adopted the concept of Julia Kristeva and referred to a more general concept employed by Michael Rifaterre, who defines intertextuality as a perception of relations between a precedent and present work.

demonstrates that the FA contains no “principal” and “secondary” text, since the entire work is intertextual. Upon closer examination, the majority of its text-segments prove to be reproductions of other beliefs or opinions. The intertextuality resulting from the interaction between the various sub-texts invites the reader to discover in each passage new correlations between the reference texts cited by the authors.

Accordingly, I will compare the legal texts from the three historic periods mentioned above which, as noted, correspond to the Middle Eastern, Central Asian, and South Asian branches of the Hanafi school. The first period corresponds to development of the school in Iraq from the eighth to the ninth centuries—the time and place that saw the birth and formation of the Hanafi school. These included scholars such as Abū Ḥanīfa, Muḥammad aš-Šai-bānī and Abū Yūsuf, who possessed archetypal authority alongside their successors and whose works comprise the genre *Zāhir ar-Riwāya*, which will be compared with the South Asian and Central Asian corpus.

The second branch of the Hanafi school relevant to my research is the Central Asian, which corresponds to the phase of the development, transition and systematisation of Hanafi doctrine from the tenth century onward, parallel to the relocation of the centre of Hanafi learning from Iraq to Central Asia. The Hanafi masters in this region discussed the beliefs of their Iraqi predecessors and questioned some of their opinions. The opinions codified in this period will be compared with those of the South Asian branch in order to ascertain the possible effect of the Central Asian context on the Muslim legal philosophy of South Asia.

The last branch of the Hanafi school that concerns us in this study developed in South Asia in the seventeenth century and constitutes the primary subject of my research. This branch corresponds to the third phase of the development of the Hanafi school of law. Although the masters of this branch are less known than their counterparts in the two preceding branches, their work is even more valuable to an understanding of the conception of Hanafi law. The work of the South Asian Hanafi jurists consisted in examining the corpus of the preceding two periods, from which

they endeavoured to extract a new legal corpus. The FA is an illustrative example of this process.

The other major work of Hanafi law relevant to this study is the *Al-Fatāwā t-Tātārḥāniya* (FTT).<sup>24</sup> Written during the period of the Sultanate of Delhi (1206–1526), the FTT is similar to the FA in many respects, while also containing significant differences. It also represents a reference for many legal cases discussed in the FA. Taken together, these two works represent a comprehensive corpus of South Asian Hanafi legal opinion, which I will compare with the beliefs of certain eminent Central Asian masters as reflected in *Al-Hidāya*, a twelfth-century masterwork of Hanafi law written by Burhān-Dīn al-Marḡinānī (d. 1197),<sup>25</sup> and in *Fatāwā Qāḍīḥān* of al-Ḥasan b. Maṣṣūr Qāḍīḥān (d.1323).<sup>26</sup> The writings of the masters of Buḥārā, Balāḥ and Samarqand (*ṣuyūḥ Balāḥ/Buḥārā/Samarqand*) will likewise be examined.

As a benchmark of comparison, I will utilise the texts of *Zāhir ar-Riwāya*, a legal genre attributed to the Iraqi Hanafi school. The *Zāhir ar-Riwāya* is represented mainly by six books of law written respectively by the three Hanafi masters Muḥammad aš-Šaibānī (d. 805), Abū Yūsuf (d. 795) and Abū Ḥanifa (d. 767).<sup>27</sup> Although these scholars' edicts were assigned an archetypical authority by their successors, they continued to be questioned by the Hanafi jurists of Central Asia (including the *ṣeiḥs* of Buḥārā, Balāḥ and Samarqand) and South Asia. A reading of these texts in these three clusters offers a glimpse into the internal Hanafi legal discourse concerning the problem of the treatment of non-Muslims, and further illustrates the rise of Islamic law in this regard. It is precisely the discussion between these three Hanafi branches that constitutes the core of my research. My analysis thus consists of two comparative dimensions: firstly, an examination of the FA

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<sup>24</sup> ʿĀlim ibn al-ʿAlāʾ Hindī-Dihlawī, *Al-Fatāwā t-Tātārḥāniya*, 5 vols (reprint, Beirut: Dār Iḥyāʾ at-Turāṭ al-ʿArabī, 2004).

<sup>25</sup> Burhān-Dīn al-Marḡinānī, *Al-Hidāya šarḥ bidāyat al-Mubtadi*, 4 vols (Cairo: Al-Maktaba at-Tawfiqiya, n. d.).

<sup>26</sup> Al-Ḥasan ibn Maṣṣūr Qāḍīḥān, *Fatāwā Qāḍīḥān* reprint, Beirut: Dār Ṣādir, 1991). Henceforth: *Fatāwā Qāḍīḥān*.

<sup>27</sup> Cf. W. Heffening and J. Schacht, "Ḥanafīya", in *Encyclopaedia Islamica. New Edition*, vol. 3 (Leiden: Brill, 1971), 162–164.

alongside other texts of the same genre within the Hanafi *corpus juris*, and secondly, a historical contextualisation of the legal judgements contained in the FA.

## 5. AIMS AND METHODOLOGY

This study of the FA has two fundamental objectives. First, it seeks to explore the norms that informed relations between Muslims and non-Muslims on the Indian subcontinent in the seventeenth century and thereby to reveal the guiding notions behind the Islamic *concept of the other*. Secondly, this work attempts to expose the historical evolution of the Hanafi school of law in South Asia through the lens of the FA and to illuminate the prevailing divergences at the heart of the Islamic *conception of non-Muslims*. In other words, I wish to highlight the importance of the South Asian context regarding the idea of coexistence and inter-religious dialogue. This issue is highly relevant for modern societies, particularly for Western and European states with Muslim minorities, where many questions emerge regarding the Muslim approach to coexistence, interreligious relations and the ability of Islamic legal doctrine to cope with a changing reality.

My study of Muslim-non-Muslim relations in seventeenth-century South Asia is based on the assumption that Islamic legal theory flourished not only in the Middle Eastern context of its origin and on the Iberian Peninsula, where coexistence between the three monotheistic religions reached an apogee, but also on the Indian subcontinent in the premodern era. Although Western academia unfortunately still concentrates mostly on the Middle East as the neuralgic centre of Islamic civilisation, South Asia and other “distant” regions sometimes have more to teach us about the development of Islamic doctrine. It is with this in mind that I embark on a comparative study of these three Islamic doctrines.

*Chapter 1* presents the genre of the FA, the circumstances of its composition and its authors’ relationship to Sultan Aurangzeb. *Chapter 2* examines the notion of minority and the relations between the Muslim minority and the non-Muslim majority in South Asia. This section delineates the paradox of Muslim existence in seventeenth-century South Asia, focusing on the question of how the Muslim minority was able to maintain control over the non-

Muslim majority. This topic is examined further in *Chapter 3*, which is dedicated to the question of borders. Here, I contrast physical borders with symbolic or social borders – two notions fundamental to Islamic social concepts. These first three chapters will permit me, in *Chapter 4* to qualify the legal status of non-Muslims in Islamic legal scholarship, which will in turn allow me to investigate the Islamic conceptualisation of non-Muslims in South Asia. *Chapter 5* focuses on edicts of the FA concerning the spiritual liberties of non-Muslims as defined in the FA.

*Chapter 6* will be dedicated to discussing the individual liberties of non-Muslims under Muslim rule. *Chapter 7* discusses the personal status of non-Muslims. There I will discuss subjects of marriage and divorce as well as mixed marriages between Muslims and non-Muslims. *Chapter 8* of this book is dedicated to economic relationships between Muslims and non-Muslims as they appear in the FA and is of particular significance for the whole subject of this study. The last chapter of this study (*Chapter 9*) consists of, firstly, an interpretation of the civic relation of non-Muslims to the Muslim state as seen through the lens of topics such as civil and military service, and secondly, of an explanation of the notion of social stratification within the Islamic legal philosophy of this period. In the conclusion, I present a summary of interreligious relational norms and an analysis of a recapitulative section of the FA featuring the general norms governing intercommunal relations.





## CHAPTER ONE.

# THE TEXT OF THE *FATĀWĀ L-‘ĀLAMGĪRĪYA*

This chapter will address the *Fatāwā l-‘Ālamgīriya* (FA), as it is portrayed by seventeenth-century historians. I will begin by introducing the authors of the FA, their relationship to the sultan Aurangzeb Alamgir and the modality of their collaboration. I will then address the question of the genre of the FA, taking into consideration the difficulty of classifying it as a fatwa. Finally, I will discuss its main topics.

Bakhtawar Khan, the author of *Mir’āt-i-‘ālamgīri*, describes the compilation of the FA, which he considers to be Aurangzeb’s masterpiece, as follows:

As it is a great object with this Emperor that all Muhammadans should follow the principles of the religion as expounded by the most competent law officers and the followers of the Hanafi persuasion, and as these principles, in consequence of the different opinions of the kadis and muftis which have been delivered without any authority, could not be distinctly and clearly learnt, and as there was no book which embodied them all, and as until many books had been collected and a man had obtained sufficient leisure, means and knowledge of theological subjects, he could not satisfy his inquiries on any disputed point, therefore His Majesty, the protector of the faith, determined that a body of eminently learned and able men of Hindustan should take up the voluminous and most trustworthy works which were collected in the royal library, and having made a digest of them, compose a book which might form a standard canon of the law, and afford to all an easy and

available means of ascertaining the proper and authoritative interpretation. The chief conductor of this difficult undertaking was the most learned man of the time, Shaikh Nizam, and all the members of the society were very handsomely and liberally paid, so that up to the present time a sum of about two hundred thousand rupees has been expended in this valuable compilation, which contains more than one hundred thousand lines. When the work, with God's pleasure, is completed, it will be for all the world the standard exposition of the law and render everyone independent of Muhammadan doctors.<sup>1</sup>

In effect, the FA can be described as a compendium of fatwas. It was drafted between the years 1664 and 1672<sup>2</sup> by a guild of forty-five authors, assembled and recompensed by the sultan.<sup>3</sup> The conditions of the work's drafting, its textual problematics and its genre and form all remain controversial to this day. Historical sources indicate that Aurangzeb commissioned the book from several prominent Hanafi legal masters from various regions of the empire. The stated objective of the project was to simplify and systematise Islamic law,<sup>4</sup> which had become increasingly complex due to the abundance of juridical texts, and thus increasingly inaccessible to judges.<sup>5</sup> In his *Benefits of the Emperor Aurangzib-Ālamgir (Maāsir-i-Ālamgiri)*, Sāqī Must'ad Khan, summarises the difficulties faced by judges and legal authorities at the time and the importance of the project of the FA as follows:

All the aim of his exalted heart was devoted to making the general Muslim public act according to the legal decisions and precedents of the theological scholars (ulamā) of the Hanafi school; but seeing that these rulings as found in the existing law-books were confused (literally mixed) on account of the

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<sup>1</sup> Bakhtawar Khan, "Mira'āt-i-Ālam", in *The History of India, as Told by its Own Historians*, ed. John Dowson, rep. (London: Trübner, 1877), 145–65.

<sup>2</sup> While the date of the FA's compilation is unclear, researchers generally believe the work was composed between 1666 and 1674 or between 1664 and 1672.

<sup>3</sup> No complete and authentic list of the authors exists, leaving much space for speculation. For an approximative list, see Chapter 2, 33–37.

<sup>4</sup> In this case, Hanafi law.

<sup>5</sup> Cf. FA, vol. 1, 1.

diversity of opinion among the qāzis and muftis and the weakness (meaning little weight or authority) of the traditions, and the contradictory nature of the declarations of those ancient authorities—and above all as these rulings were not embodied in one book, so that till many law books were collected and men (in India) could acquire adequate mastery of the science of jurisprudence, it was impossible to make a correct extract (of the Qurānic precept applicable to the particular case),—(therefore) the heart of this Emperor, the asylum of the faith, was set on this that a syndicate of celebrated theologians and well-known scholars of Hindustan should go through the long authoritative books on jurisprudence, which had been collected in the imperial library, extract the rulings of muftis, and compile one comprehensive book out of them all, so that all may find out the authoritative rulings (or their cases) with ease. This great work was entrusted to a board presided over by that highest of scholars Shaikh Nizam ... About two lakhs of rupees were spent in preparing this book, which was entitled the the *Fatāwā ‘Ālamġirī*, and which rendered the world independent of all other books on jurisprudence.<sup>6</sup>

Moin-ul-Haq’s synopsis raises several questions. The initial conundrum is the fact that the FA was written in Arabic yet was drafted in a context in which Arabic was neither the language of daily communication nor of public administration. This raises the question of the work’s accessibility.

As Arabic was not widely used in South Asia, the FA was clearly not designed for a large audience.<sup>7</sup> Rather, it was directed at an elite comprised of members of judicial bodies, with the goal of simplifying the numerous and partly obsolete works of Hanafi *fiqh*. The use of Arabic may thus be interpreted as a kind of code

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<sup>6</sup> Sāqī Must‘ad Khan, *Maāsir-i-‘Ālamġirī. A History of the Emperor Aurang-zib-‘Ālamġir*, trans. Jadu-Nath Sarkar (Calcutta: Royal Asiatic Society of Bengal, 1947), 315–16.

<sup>7</sup> Cf. Alan Guenther, “Hanafi Fiqh in Mughal India: the Fatāwa-i-‘Ālamġirīyya”, in Eaton, *India’s Islamic Traditions*, 224–225; Fadila Brahimi and Jonathan Owens, “Language Legitimization: Arabic in Multiethnic Contexts”, in *Arabic as a Minority Language. Contributions to the Sociology of Language/CSL* 83, ed. Jonathan Owens (Berlin: De Gruyter, 2000), 405–46.

that guaranteed judges the exclusive ability to represent and enact Islamic law. Yet the situation was contradictory: although written in Arabic, the FA was also concurrently translated into Persian (by Maulana Šelpi ‘Abdullah Rūmi and his disciples, under the patronage of Zeb-un-Nissa, daughter of Sultan Aurangzeb).<sup>8</sup> Accordingly, it might appear that the choice of Arabic truly signalled elitism and that the purpose of the Persian translation was to simplify the text or even to render it accessible to a wider readership. The symbolic discrepancy between the two versions has led Alain Gunther to qualify the Arabic version as one of prestige and the later Persian and Urdu translations as adding a practical dimension.<sup>9</sup>

Likewise, it is possible to distinguish between two literary trends, corresponding to the two linguistic versions of the FA. The Arabic original reflects the universal character of the Mughal Empire,<sup>10</sup> which was in continuous expansion. This version refers to the sultan by his pseudonym *‘ālamgīr* (“conqueror of the globe”). In contrast, the Persian translation reflects the local dimension of the compilation. Consequently, the FA, while rooted in its South Asian context, was able to achieve universality, to the point that it is considered an international reference even today, as Anwar Qadri has observed.<sup>11</sup>

The second quandary concerns the ways in which the book has been researched historically. Most past research has focused on certain aspects of the FA while ignoring or overlooking its global meaning. While certain sections have been meticulously analysed, others have been consistently neglected, despite the

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<sup>8</sup> Khan, “Mirʿat-i-‘Ālam”, 160. Khan refers to a Persian translation but does not mention Zeb-un-Nissa’s supervision of the work.

<sup>9</sup> Guenther, “Hanafi Fiqh in Mughal India”.

<sup>10</sup> In this context, language should be understood as a vehicle for the transmission of values. Hichem Djāit ascribes another role to Arabic—namely, that of cultural and religious communication—and observes that Arabic was a vehicle for transmitting the cultural and religious values of Islam. Hichem Djāit, *La crise de la culture islamique* (Paris: Fayard, 2004), 146.

<sup>11</sup> Cf. Anwar Ahmad Qadri, “The Fatāwā ‘Ālamgiri”, *Journal of the Pakistan Historical Society* 14, no. 1 (1966): 180–99.

importance of their subject matter.<sup>12</sup> Due to its difficult style and largely inaccessible content, the FA is less known than other works of Hanafi *fiqh*—a fact that has long confounded researchers. These better-known works include *Al-Hidāya*, a collection of writings from Central Asia compiled by al-Marġinānī (d. 1195) that was known across the Muslim world and served as the principal reference work in Mughal (and later, British colonial) courts.<sup>13</sup> Likewise, Mahdi Mozaffari, in his index of historically influential fatwas, grants more importance to other legal corpora. Muzaffari argues that the FA is essentially a collection of pre-existing Hanafi fatwas, and therefore cannot be compared to other works by prominent Hanafi teachers.<sup>14</sup>

Over the past twenty years, the FA has nevertheless become an object of interest for an increasing number of researchers. Scholars of history, religion and anthropology all over the world have attempted to investigate certain aspects of the work, without, however, considering all of its features together. My research is an attempt to approach the FA in a global perspective in order to render it accessible and reintroduce it into our broader understanding of Hanafi legal scholarship.

## 1. THE GENRE OF THE *FATĀWĀ L-‘ĀLAMĠİRĪYA*

In the title of the *Fatāwā l-‘Ālamġirīya*, the names of the authors are supplanted by the name of their patron Aurangzeb, and that of the head of the group of authors, Šeiḥ Niẓāmuddin. In historical sources as well as in the volume itself, Aurangzeb and Šeiḥ Niẓāmuddin are cited as the work’s sole authors, implying that it

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<sup>12</sup> The FA was partially translated into English in 1869. Cf. Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India”, in *Institutions and Ideologies: A SOAS South Asia Reader*, ed. David Arnold and Peter Robb (Hoboken: Taylor and Francis, 2013).

<sup>13</sup> The only English translation of *Al-Hidāya*, by Neill Baillie, is limited to the chapters on commerce and civil law. Neill Baillie, *A Digest of Moolhummudan Law on the Subjects to Which it is Usually Applied by British Courts of Justice in India* (London, 1969).

<sup>14</sup> Mahdi Mozaffari, *Fatāwā: Violence and Discourtesy* (Aarhus: Aarhus University Press, 1998), 25. On the continued legal relevance of the FA in the Muslim world, see Qadri, “The Fatāwā ‘Ālamġiri”.

consists of fatwas compiled by Šeiḥ Nizāmuddīn on Aurangzeb's orders. Yet the question of whether this volume truly belongs to the genre *fatwa* remains open.

In his article, "On the Title of the *Fatāwā 'Ālamgīriyya*",<sup>15</sup> Joseph Schacht rejects the notion that the work constitutes a fatwa, suggesting rather that it is a collection of authoritative opinions and accepted judgements taken from works by Hanafi masters, and pointing out that stylistically it resembles other types of writings from South Asia.<sup>16</sup> Schacht underscores the importance of the title of the FA to his assertion, noting that the work "presents two extraordinary features: that a prince should appear officially as the sponsor of a work of Islamic law in its title, and that, being in reality a collection of extracts from authoritative works, it should be called *fatāwā*".<sup>17</sup> Indeed, the FA is a work of fatwa which does not comprise fatwas in the proper sense of the term. Schacht's remark suggests that the FA is stylistically different, and therefore transcends the fatwa genre as it is known in Islamic legal scholarship.

This dilemma concerns the general framework of the relationship between a written work and its genre, a question which has been a subject of intense debate since antiquity.<sup>18</sup> The FA consists not of fatwas pertaining to real questions and answers but rather of previously submitted legal opinions organised into thematic entries, a fact which makes it very difficult to classify the work as a fatwa according to the criterion of the genre of Fatwa developed by 'Uṭmān Ibn aṣ-Ṣalāḥ (d.1245).<sup>19</sup> In modern

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<sup>15</sup> Joseph Schacht, "On the Title of the *Fatāwā 'Ālamgīriyya*", in *Iran and Islam*, ed. C.E. Bosworth (Edinburgh: Edinburgh University Press, 1971), 475–78.

<sup>16</sup> Cf. Zafarul Islam, "Origin and Development of *Fatāwā* Compilation in Medieval India", *Hamdard Islamicus* 20, no. 1 (1997): 7–18.

<sup>17</sup> Schacht, "On the Title of the *Fatāwā 'Ālamgīriyya*", 475.

<sup>18</sup> Aristotle was the first to address this issue. Cf. Amelie Oksenberg, *Essays on Aristotle's Rhetoric*, Philosophical Traditions 6 (Berkeley: University of California Press, 1996), 1–2.

<sup>19</sup> Ibn aṣ-Ṣalāḥ is a prominent Shafī'ī specialist of hadith. Cf. 'Uṭmān Ibn aṣ-Ṣalāḥ, *Adab al-Muftī wa-l-Mustaftī*, rep. (Beirut: 'Ālam al-Kutub, 1986), 86–94.

literature critic Jean-Marie Schaeffer approaches the problem of the textual and generic identity of texts by asking whether titles of corpus and literary production are merely a question of theoretical invention—in his words, “a question of theoretical terms related to definition invented explicitly by critics or theoreticians in order to introduce some principle of order into a heterogeneous mass of documents”.<sup>20</sup>

According to the norms of the fatwa genre as determined by Ibn aṣ-Ṣalāḥ, the name of the mufti (the author of the fatwa), should figure in the work’s title.<sup>21</sup> The name of the mufti can be just as significant as the fatwa itself and imbues it with additional authority.<sup>22</sup> Once the name of the mufti appears in the title of the fatwa, it represents divine authority and the author “signs instead of God” as Ibn Quayyim has underlined.<sup>23</sup> Yet as noted above, the title of the FA does not include its authors’ real names, and the work thus does not bear the title it technically should. Given that the work’s title was not established by its authors or by historians but rather originated from the ruler’s name, the best approach to understanding it is by examining the connection between the FA and Aurangzeb Alamgir.

To study the link between the FA and its author(s), Schacht suggests comparing its genesis to that of *Al-Fatāwā t-Tātārḥāniya* (henceforth FTT, also known as *Al-Ḥāniya*), a legal work

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<sup>20</sup> Jean-Marie Schaeffer, *Qu’est-ce qu’un genre littéraire?*, Collection Poétique (Paris: Éditions du Seuil, 1989), 65 (author’s translation).

<sup>21</sup> Ibn aṣ-Ṣalāḥ, *Adab al-muftī wa-l-mustafī*, 145.

<sup>22</sup> For example, the *Fatāwā ibn Taimīya* are named after their author, Taqīyu ad-Dīn Ahmad ibn Taimīya (d. 1328), as are the *Fatāwā* of al-Ġazālī (d. 1111) and Ibn aṣ-Ṣalāḥ himself.

<sup>23</sup> According to Ibn Qaiyim al-Ġauziya (d. 1350). In his *Iḷām al-mu-waqqi‘īn ‘an rabbi l-‘ālamīn* (“A Warning to those who Sign in the Name of God”), Ibn al-Ġauziya discusses this issue and the importance of maintaining the distinction between religious functions, according to which the mufti is considered the one who answers in the name of God. Ibn Qaiyim compares the mufti to a state employee who signs in the name of the sovereign sultan. Šams ad-Dīn ibn Qaiyim al-Ġauziya, *Iḷām al-mu-waqqi‘īn ‘an rabbi l-‘ālamīn* (Beirut: Dār al-ġil, 2001), 37–39.

attributed to ‘Ālim ibn al-‘Alā’ (d. 1397).<sup>24</sup> Joseph Schacht comments that “the practice of naming a work of religious law after a prince therefore goes back in India to the first half of the eighth century of the hijra [thirteenth century CE]”.<sup>25</sup> Besides the fact that these legal works were both commissioned by erudite rulers, the FA and the FTT share similarities in terms of their literary form. Both works were meant to imitate the form of *Al-Hidāya*, which was regarded as a prototype for legal compendia at that time.<sup>26</sup> Schacht observes that in the introductory formulation of the FTT, the author “says that he has arranged his subject-matter according to the arrangement of the *Hidāya* (*wa-rattabtu abwābaha ‘alā tartībī abwābi l-hidāya*)”.<sup>27</sup> The introductory formulation of the FA is remarkably similar, and states that “in compiling its chapters, they [the authors] chose the order of *Al-Hidāya* (*wa-ḥtārū fī tartīb kutubihā tartīb al-hidāya*)”.<sup>28</sup> According to Ḥāḡḡī Ḥalīfa, the true author of the FTT, ‘Ālim b. ‘Alā’ al-Ḥanafī (d. 1397), refused to lend his name to this work,<sup>29</sup> which is why it was attributed to Tātārḥān. In contrast, Aurangzeb intentionally named the FA after himself, as the aim of the project was related to his personal political and social agenda.

The question of the FA’s genre leads back to the ambiguity of the semantic sphere of the fatwa, or more precisely, to the uncertainties surrounding the legal institution of the fatwa (also known as *futyā*). The meaning of the term *fatwā* has changed the established norms of this genre, since the word fatwa originally denoted a response to a question.<sup>30</sup> As the meaning of the term

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<sup>24</sup> An eminent scholar at the court of Sultan Muḥammad b. Tuḡluq (ruled 1324–1351). This work was named after Tātārḥān (d. after 1351). Islam, “Origin and Development of Fatāwā Compilation in Medieval India”.

<sup>25</sup> Schacht, “On the Title of the Fatāwā ‘Ālamgīriyya”, 477.

<sup>26</sup> The introduction of the FA indicates that *Al-Hidāya* served as its model. Cf. FA, vol. 1, 1.

<sup>27</sup> Schacht, “On the Title of the Fatāwā ‘Ālamgīriyya”, 476.

<sup>28</sup> FA, vol. 1, 1.

<sup>29</sup> Cf. Ḥāḡḡī Ḥalīfa, *Kaṣf az-ẓunūn ‘an asāmi l-kutub wa-l-fūnūn*, rep. (Bagdad: Maktabat al-muthannā, 1987), 1226.

<sup>30</sup> The term *fatwā* appears in the Quran, where it signifies the Prophet’s response to questions of the Muslim community. Cf. J.W. Walsh,



evolved, it gave rise to a distinct literary genre.<sup>31</sup> Although Schacht attests to the existence of other examples of religious writings that are indeed comparable to the FA, within context of genre theory the link between the title of the FA and its literary genre remains unclear. Again, the FA’s title contains a semantic discrepancy with respect to the fatwa genre, since the book does not actually constitute a fatwa, but rather consists of opinions or positions. Moreover, the name “‘Ālamġīr” indicates not the work’s author, but rather its commissioner. Additionally, no sufficient explanation has yet been presented concerning the nature of the link between the FA’s title and its authors. In the light of Schacht’s explanation, it becomes clear that such a formulation was not uncommon in the Indian context.<sup>32</sup> A geographical interpretation of the nomenclature of the FA would thus be more convincing.

Since the early twentieth century, the FA has been known throughout most of the Muslim world by another title: *Al-Fatāwā l-hindīya*. Since the adjective ‘*ālamġīriya* is not widely known, the two titles appear to be widely understood as referring to two different works.<sup>33</sup> The adjectives *hindīya* and ‘*ālamġīriya* correspond to contradictory geographical references: while *hindīya* is a reference to *al-hind* (in the Islamic context, a reference to the Indian subcontinent), ‘*ālamġīriya* contains a universal dimension, as noted above. In the South Asian context, the FA thus carries a universal dimension, while in all other areas of the Muslim world, it refers to a local version of Islamic Law linguistically designated as the “Indian case” or “Indian exception”.

Furthermore, the FA presents numerous opinions on subjects pertaining to Islamic law from different eras and regions. As noted earlier, the aim of the project was to systematise the law in order

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“Fatwā”, in *Encyclopedia of Islam. New Edition* 2 (Leiden: Brill, 1965), 866–67.

<sup>31</sup> Ibid.

<sup>32</sup> For a list of works in the *fatāwā* genre compiled in South Asia, see Islam, “Origin and Development of Fatāwā Compilation in Medieval India”.

<sup>33</sup> Abdelawahhāb Bouhdiba uses the title *Fatāwā Hindīya*. Abdelawahhāb Bouhdiba, *Sexuality in Islam* (London: Routledge and Kegan Paul, 1985), 33.

to provide jurists of the Mughal Empire with a practical legal index. The section of the FA devoted to the subject of the judge (*Kitab al-qāḍī*) includes a reference to a literary genre: the authors specify that their task consists of gathering the opinions held by the mufti in order to transmit them to the *mustaftī* (the client).<sup>34</sup> Although it may not correspond to the theoretical model of the fatwa genre, the FA adheres to the general framework of *futya* (giving answers), an institution meant to provide judges with guidelines for adjudicating new cases. Although it continues to adapt to changing contexts, the fatwa is thus a genre that is clearly delineated by a concrete or abstract response.

### The Place of the FA in Hanafi Legal Scholarship

The FA belongs to the literary branch corresponding to the third genre of religious Hanafi writing, which will be discussed shortly. Historically, the FA belongs to the third era of the Hanafi *fiqh*, the era of reproduction (*taqlīd*), known as the genre of *furūʿ*, *nawāzil* and *wāqīʿāt*. The first phase of history of the literature dealing with Islamic law is that of legislation (*tašrīʿ*), which refers to the era of the Prophet Muḥammad (d. 632 ce). The second phase, that of innovation, lasted from the death of the prophet Muḥammad until the third century of the hijra (ninth century ce). This era—named after the Hanafi masters of that period, who were known as “innovators” (*muḡtahids*)—can in turn be divided into two phases: that of the “unlimited” and “limited” innovators. While this classification system is informed by the classical distinction between the eras of Islamic *fiqh* as cited by Joseph Schacht, Chafik

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<sup>34</sup> Most research on the institution of fatwa refers to its similarity to the Roman *ius respondendi* and the similarity of the mufti to the prudent of Roman law. Cf. Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2002). Crone presents all possible theories regarding this subject. Another approach is that of Roland Wilson, who compares the language of the Muslim fatwa to that of the Latin *Digest of Justinian*. Roland Knyvent Wilson, *An Introduction to the Study of Anglo-Muhammadan Law* (London: Thacker and Company, 1894), 85–88.

Cheḥata and Ya'kov Meron,<sup>35</sup> it is also based on the classical understanding of the chronology of the Islamic *fiqh*<sup>36</sup> which dominated Islamic legal scholarship in the second half of the twentieth century. Since these systems of classification have been revised and partly rejected by scholars such as Baber Johansen and Wael Hallaq,<sup>37</sup> it is legitimate to claim that the FA belongs to the second

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<sup>35</sup> Joseph Schacht et al., "Introduction au droit musulman", 63–67; Chafik Chehata, *Études de droit Musulman*, 2 vols., Travaux et recherches de la Faculté de droit et des sciences économiques de Paris 1 (Paris: Presses Universitaires de France, 1971), 15–31; Chafik Chehata, *Études de droit musulman II: La Notion de responsabilité contractuelle, le concept de propriété*, 2 vols, Travaux et recherches de la Faculté de droit et des sciences économiques de Paris: Série Afrique 2 (Paris: Presses Universitaires de France, 1973), 41–61; Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts", *Studia Islamica* 30 (1969): 73–118.

<sup>36</sup> These epochs and the criterion used to define them have not been sufficiently clarified. Baber Johansen, for example, re-examines the content of the classical epochs and rejects other definitions. He bases his arguments on the principle of casuistry in Islamic law to prove the existence of a link between theory and practice. Baber Johansen, "Casuistry: Between Legal Concept and Social Praxis", *Islamic Law and Society* 2, no. 2 (1995): 135–156. Wael Hallaq uses other arguments, such as that of the *muftī šurūṭī*, to present a new approach to this issue. Wael B. Hallaq, "Model Shurūṭī Works and the Dialectic of Doctrine and Practice", *Islamic Law and Society* 2, no. 2 (1995): 109–34. Christopher Melchert and Nurit Tsafrir limit their approach to Islamic legal schools at the frontier of Iran; they do not deal with the Indian subcontinent. Cf. Christopher Melchert, *The Formation of the Sunni Schools of Law: 9<sup>th</sup>-10<sup>th</sup> centuries CE*, Studies in Islamic Law and Society 4 (Leiden: Brill, 1997); Nurit Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism*, Harvard Series in Islamic Law 3 (Cambridge: Harvard University Press, 2004), 61–76. Claude Cahen, who has presented a pertinent explanation for the link between legal works and social history, does not deal with the subcontinent at all. Claude Cahen, "Considération sur l'utilisation des ouvrages de droit musulman par l'historien", in *Les peuples musulmans dans l'histoire médiévale: Ouvrage publié par le Centre National de la Recherche Scientifique*, ed. Claude Cahen (Damascus: Institut Français, 1977), 81–89.

<sup>37</sup> This point will be discussed in more detail below. The subject of the closing of the door of *iğtihād* is still a controversial one. Joseph Schacht

category of the *fatwā* genre. The first category within this genre constitutes fatwas written by legal consultants who were empowered to offer their personal opinions on certain questions. Most of these opinions were collected by consultants' disciples or associates (*'ashāb*) and were attributed to an individual, as in the case of the *Fatāwā an-Nawawī*, or the *Fatāwā Ibn Rušd*.<sup>38</sup> The second type of *fatāwā* comprises masters' viewpoints collected in the form of compendia; more precisely, collections of an undefined number of cases or fatwas whose contents make up a book of *fiqh* (examples include *Fatāwā Abī l-Laiṭ as-Samarqandī*, *Al-Fatāwā t-Tātārḥāniya* and *Fatāwā an-Nāṭifi*). It is this category to which the FA belongs.<sup>39</sup>

Yet the subcategory of fatwa as it appears in the FA is still subject to debate. For certain researchers, this genre corresponds to the era of reproduction, commentary (*ḥawāṣī*), and of abstracts (*muḥtasarat*) without the least innovation. Other scholars maintain that these fatwas are embedded in the *furū'*, the branch of Islamic law that had remained vibrant and grounded in reality, and therefore consider the authors of these collections "innovators" (*muğaddid*). The FA is thus characterised by the complex relationship between Islamic legal texts and the reality in which these texts emerged. While the work helped jurists solve the "real life" problems of their time, the solutions it offers are based on theoretical notions that can serve as a guide for any kind of

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argues that by the 3<sup>rd</sup>/9<sup>th</sup> century, the *fiqh* had reached the apex of its development and thus became impossible to innovate. This assumption has been refuted by other specialists of the field. Wael Hallaq and Baber Johansen argue that Schacht's assumption is nothing but a metaphor and that there was no real closing of the door of *iğtihād*. Cf. Wael B. Hallaq, *Law and Legal Theory in Classical and Medieval Islam*, Collected Studies Series CS474 (Aldershot: Variorum, 2000); Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2005), 239; Schacht et al., "Introduction au droit Musulman", 63–67.

<sup>38</sup> Cf. Wael B. Hallaq, "From Fatwās to Furū': Growth and Change in Islamic Substantive Law", *Islamic Law and Society* 1, no. 1 (1994): 29–65.

<sup>39</sup> *Ibid.*

reasoning and teaching. It is thus a catalogue of ideas and opinions that can be described as both practical and theoretical.<sup>40</sup>

The FA was also a means of legal opinions used by judges to address the problems of lived reality.<sup>41</sup> According to the hierarchy of Islamic corps juridique (legal personal), the qadi (judge) did not have the right to offer opinions or explanations, or even to conduct research. His role was limited to adjudicating (for example, issuing verdicts). If an explanation or further research was required, the judge was obliged to consult a mufti, whose function went beyond the simple application of legal norms.<sup>42</sup> This, then, was the purpose of the FA: to provide an index of viewpoints, interpretations and commentaries by juridical authors (*muṣannif*) on Islamic legal theory, which would serve as a basis for the qadis' jurisdiction.<sup>43</sup> It can thus be concluded that the FA, while closely reflecting the reality in which it originated, is also singularly linked to other works of *fiqh* that elucidate Islamic legal theory.

To summarise, the form and content of the FA do not conform to the formal norms and criteria of the fatwa genre as it was

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<sup>40</sup> Hallaq, Johansen and Anwar Qadri insist on the role of the FA in the general development of Islamic law. Hallaq uses a legal interpretation based on the last volume of the FA (vol. 6) to prove the relation of this book to reality. Meanwhile, Johansen cites the *fatāwā* as proof of a link between legal theory and lived reality; his interpretation concerns mainly Central Asia. Both Hallaq and Johansen challenge the theory of Chehata and his disciple Ya'akov Meron, as well as that of Schacht, who reject any considerable relation of legal theory to reality. In his article, "Islamic Legal Theory and the Appropriation of Reality", Aziz al-Azmeh exposes another argument against the Orientalist "topos" that continues to maintain the incompatibility of legal theory and reality. Aziz Al-Azmeh, "Islamic Legal Theory and the Appropriation of Reality", in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh, rep. (London: Routledge, 1989), 250–65.

<sup>41</sup> For a detailed approach to the history of research on the link between theory and reality in Islamic legal debate, see Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 3–39.

<sup>42</sup> Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 7–13.

<sup>43</sup> *Ibid.*

established and known by scholars such as Ibn aṣ-Ṣalāh.<sup>44</sup> The title of the FA does not convey thematic or technical aspects of the work and thus masks an essential aspect of its content. While it is indeed a collection of fatwas commissioned by the Mughal sultan in order to resolve political, religious and social conflicts,<sup>45</sup> the FA nevertheless falls between genres, as the application of theoretical concepts corresponding to literary genres reveals. This “intertextuality” lies at the very heart of the work and evokes the multitude of texts or fatwas that constitute it. These texts of various form and content serve to construct an “architext”.<sup>46</sup> These reference texts, which number over 214, stem from diverse eras and regions of the Muslim world.<sup>47</sup> Embedded in seamless intertextuality, they combine to form a model text (a textual prototype) containing opinions about and solutions to problems concerning religious and everyday life in South-Asian Mughal society. Moreover, the chapter in the FA on the institution of the fatwa (the mufti, the fatwa and their sphere of influence) is of fundamental importance—as suggested by the following passage, which reveals the authors’ message.

No one has the right to issue fatwas. He [Abū Ja‘far] says that this is permitted to him [the mufti] if he fulfils the following qualifications: he must be wise, possess a sufficient knowledge of the Qurʾān and the Sunna as well as innovation using his own mind [*iğtihād ar-raʿy*]. If he issues fatwas according to what he has listened to, he can issue fatwas even without fulfilling the previous conditions, because he is only reproducing what he has heard from other authoritative scholars. His mission [in this case] is like that of a narrator [*rāwī*] in the

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<sup>44</sup> Ibn aṣ-Ṣalāh’s *Adab al-muftī wa-l-mustafī* is still one of the major references in the theory of fatwa.

<sup>45</sup> According to Muhammad Khalid Masud, the FA has neither the form nor the content of a usual fatwa, and this represents the main form of innovation in this work. Muhammad Khalid Masud, “Muftis, Fatwās, and Islamic Legal Interpretation”, in *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad K. Masud, Harvard Studies in Islamic Law (Cambridge: Harvard University Press, 1996), 20–26.

<sup>46</sup> Genette, *Introduction à l’Architexte*, 8.

<sup>47</sup> Guenther, “Hanafi Fiqh in Mughal India”.

context of the Sunna of the Prophet and he should fulfil the conditions required for the transmission of hadith.<sup>48</sup>

Another passage presents the rules defining how a mufti may exercise his function: “Then, he does his work automatically according to the opinion of the authoritative imam Abū Ḥanīfa, then [according to] that of Abū Yūsuf, that of Muḥammad and that of Zufar and al-Ḥasan ibn Zaid, may God’s blessing be on all of them.”<sup>49</sup> In this case, the mufti faces a paradox: he must be an innovator (*muḡtahid*), yet he must also repeat or reproduce the beliefs of the masters of his school. If the introduction of the FA is to be taken literally, the work’s stated purpose is to reproduce and reinforce the works of the first masters of the Hanafi school in the context of the daily reality of seventeenth-century South Asia, or, to quote the original, “to write a book that strengthens the authority of *Zāhir ar-Riwāya* (*an yu’allifū kitāban ḥāmišan li-zāhir ar-riwāya*)”.<sup>50</sup> These objectives are reaffirmed by the authors of the section devoted to the qualifications of the judge (*kitāb adab al-qāḍī*), who declare that “the mission of the authors gathered here is limited to the transmission of the opinion of the mufti to the *mustafti*.”<sup>51</sup> However, the parameters of the FA extends beyond what is outlined in this introduction: the text does not merely reproduce the views of the Hanafi founding masters, but engages in innovation as well. This subject has been well developed by Wael Hallaq, who attempts to delineate the boundaries of *īḡtihād* (innovation/effort)<sup>52</sup> and *taqlid* (reproduction).

Hallaq takes up the idea of continuity—which corresponds here to the notion of reproduction—as it appears in the majority of Islamic legal texts (for example as *taqlid*, a straightforward

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<sup>48</sup> FA, vol. 3, 308.

<sup>49</sup> FA, vol. 3, 310.

<sup>50</sup> FA, vol. 1, 1.

<sup>51</sup> FA, vol. 3, 308.

<sup>52</sup> Chafik Chehata uses the term “effort” when referring to *īḡtihād*. Chehata, *Études de droit musulman* I, 24.

reproduction of the works of previous authors).<sup>53</sup> He establishes that, according to a literal translation, continuity and change are in fact two sides of the same coin.<sup>54</sup> Thus, in certain cases, “continuity” may represent the declaration of a new theory, whereas “change” may be based on an already existing theory.<sup>55</sup> In effect, the FA assigns the principal Hanafī masters an archetypical character. In the chapter on the mufti, which specifies the criteria of a mufti’s election and his functions, a clear distinction emerges between Abū Ḥanīfa and his disciples and associates on the one hand, and other Hanafī masters on the other. This distinction pivots on the concept of *iğtihād*, which differed in each era. The FA stipulates that while any individual may adopt and reproduce Abū Ḥanīfa’s opinions, only a mufti can modify or introduce change on them.<sup>56</sup>

On the meta-issue the authors of the FA insist that their own role is limited to transmitting the opinions of the *muğtahid* to the *mustafti*:

[S]o it becomes clear that those opinions attributed to the authors present hier, do not consist of fatwas; it is rather a transmission of the opinion of the mufti to the *mustafti*. There exist two channels for doing this: either directly from the primary source or the opinion is quoted from another source.<sup>57</sup>

This quotation confirms the role of the FA as it is understood by its authors; but it does not explain their role within the Hanafī

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<sup>53</sup> Hallaq categorically denies the existence of a blind reproduction of the opinion of the school’s first imams. Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law*, 236–41.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> FA, vol. 3, 308. Hallaq proposes another interpretation of the typology of the Islamic legal masters besides that based on the distinction between the eponymous masters and other classes of successor scholars. According to Hallaq, the first class corresponds to that of the *muğtahid*, then that of the *muḥarriğ* (which is relative to *taḥriğ*), then *tarğih*, and finally, the *muqallid* ... (*muṣannif*). Hallaq, *Authority, Continuity, and Change in Islamic Law*, 236–41.

<sup>57</sup> FA, vol. 3, 308.



legal scholarship and the impact of their work on the reality. Therefore, it is important to understand why these authors claimed to wish to perform a simple reproduction, when in reality, the FA also concealed other aspects of innovation.

In an article on the rights of non-Muslims as defined by Muslim jurists,<sup>58</sup> Baber Johansen addresses the radical change that the Hanafi legal doctrine went through. He advances a thesis which is also supported by other scholars<sup>59</sup> which stresses that from the tenth to the twelfth centuries, Johansen argues, the centre of the Hanafi school moved from its neuralgic sphere of Iraq to Transoxiana. From the eleventh century,<sup>60</sup> Hanafi doctrine in the Middle East was increasingly influenced by the local experience of the peoples of Transoxiana and by the opinion of prominent scholars from this region.<sup>61</sup> In addition, Johansen affirms that the impact of the masters from Transoxiana was also observed on Hanafi jurists in the Ottoman Empire in the fifteenth and sixteenth centuries.<sup>62</sup> This thesis addresses the role played by local custom and regional contexts, as well as by social and economic realities in

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<sup>58</sup> Cf. Baber Johansen, “Entre révélation et tyrannie: le droit des non-musulmans d’après les juristes musulmans”, in Baber Johansen, ed., *Contingency in a Sacred Law: Sacred Norms in the Muslim Fiqh*, Studies in Islamic Law and Society (Leiden: Brill, 1999), 219–37.

<sup>59</sup> Johansen explains his approach in detail in his book, *The Islamic Law on Land Tax and Rent: The Peasants’ Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988). Here, Johansen deals with *ḥarāğ* as it was debated by Ottoman jurists such as Ibn Nuğaim al-Miṣrī, who rejects the general assumption that all territories must pay the land tax (98). In his conclusion, Johansen affirms a radical change in Hanafi legal theory regarding the issue of land tax (122). Significantly, the first Orientalist to note this change was Gustav Flügel, who linked it to the relocation of the Hanafi school from Iraq to Transoxiana. Gustav Flügel, *Die Classen der ḥanafitischen Rechtsgelehrten* (Leipzig: Hirzel, 1861), 349–350.

<sup>60</sup> The school moved to Central Asia after the Ottoman occupation of its traditional capital in Iraq. In his explanation of this shift, Flügel attributes a central role to Persian traditions and heritage. *Ibid.*

<sup>61</sup> Cf. Johansen, *The Islamic Law on Land Tax and Rent*, 124–25.

<sup>62</sup> The Hanafi school is also known as the “Iraqi school”.

legal literature.<sup>63</sup> It also makes apparent why, despite the specificity of the South Asian context, the FA supports the edicts of the Iraqi Hanafi school (in particular, those concerning ties to non-Muslims), thereby bringing the South Asian *fuqahā'* into contradiction with their Central Asian counterparts, who dominated the Hanafi school during this period. The beliefs of the Central Asian masters would have been more congruous with the South Asian context than those of the Iraqi *Zāhir ar-Riwāya*. Johansen observes that Hanafi doctrine reveals a disparity between socio-political theory and reality, and that the purely juridical reflections of Abū Ḥanīfa yielded to the more pragmatic edicts of his counterparts from Transoxiana.

In contrast to the several opinions from Central Asia, the FA stresses the importance of the opinions of the Iraqi branch of Hanafi law. By reasserting the beliefs of Abū Ḥanīfa and his disciples, the FA bears witness to the nature of the links between the South Asian, Central Asian and Iraqi jurists. The authors of the FA prominently refer to beliefs attributable to the early Hanafi school, thus placing more value on the Iraqi than on the Central Asian sphere. Wael Hallaq dates the beginning of this trend to the formative era, the moment when the disciples of Abū Ḥanīfa (particularly Abū Yūsuf and Muḥammad), strayed from the opinions of their master. This phenomenon gained traction in the fourteenth century through the writings of Ibn Nuḡaym<sup>64</sup> and,

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<sup>63</sup> Muslim scholars recognise custom as a source of legislation and see it as one of the fundamentals of the law. Cf. Zain-Dīn ibn Ibrāhīm ibn Nuḡaim, *Al-Ašbāh wa-n-naẓā'ir*, rep. (Beirut: Dār al-kutub al-'ilmiya, 1999), 79–89. Hallaq speaks of the tendency to use the local tradition even in the doctrine of Abū Ḥanīfa. Hallaq, *Authority, Continuity, and Change in Islamic Law*, 219–20. He also attributes great importance to Ibn 'Ābidīn regarding the use of custom in rulings. For a more detailed discussion, see al-Azmeh, "Islamic Legal Theory and the Appropriation of Reality". For a summary of the debate on the use of custom, see Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law", *Islamic Law and Society* 4, no. 4 (1997): 131–55.

<sup>64</sup> Ibn Nuḡaim, *Al-Ašbāh wa-n-naẓā'ir*, 79.

particularly during the eighteenth century, Ibn ʿĀbidīn,<sup>65</sup> both of whom represent the last wave of Hanafi law to incorporate custom as a standard of legal judgement.<sup>66</sup>

All of the issues considered here regarding the interrelation between the regions and branches of the Hanafi school are summarised in the introductory section of the FA, which also explains the work’s objectives and methods, as well as the circumstances of its composition. This text, whose author cannot be identified, is of crucial importance to our understanding of the FA as a whole. Whether written by the “editor-in-chief” Šeiḥ Niẓām, Sultan Aurangzeb or someone else, this concise introduction helps the reader understand the FA and many of its complexities, and therefore necessitates a thorough interpretation. In the next chapter, I will interpret the introduction of the FA as a pact of fatwa.

## 2. THE FATWA PACT

The pact of the writing is a literary concept that designates an agreement between the author and the reader, in the form of a short text in which the author addresses himself to his readers and explains his motivations in writing his work. This practice is especially characteristic of the genre of autobiography. Philippe Lejeune, eminent theorist of the autobiographical genre, links this practice to a notion of progress, which he understands as a bridge between the author and his readers; he identifies this as “a step that the writer must take toward the reader who then makes the rest of the way in the other direction”.<sup>67</sup> In this section, I will apply this concept to analyse the introductory text of the FA, which describes the “pact” between the authors of the FA and its readers. The initial question that arises here is how one can trust a mufti’s words and accept them as guidance? The role of the pact

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<sup>65</sup> Muḥammad Amin Ibn ʿĀbidīn, “Al-Ḥāšiya”, in *Radd al-Muḥtār ʿalā d-Durr al-Muḥtār*, ed. Muḥammad ibn ʿUmar (Damascus: Dār at-Ṭaqāfa, 2000), 256.

<sup>66</sup> Hallaq, *Authority, Continuity, and Change in Islamic Law*, 219.

<sup>67</sup> Philippe Lejeune and Wolfram Bayer, *Der autobiographische Pakt*, Edition Suhrkamp Aesthetica 1896 (Frankfurt am Main: Suhrkamp, 1994), 13–19.

is not limited to assuring the delivery of a message from author to reader, from mufti to *mustafti*, but rather, plays an essential role in the interpretation of the text by providing the reader with the necessary interpretative tools. Whether this introductory text was composed by one of the authors, by Šeiḥ Niẓāmuddin or by a subsequent editor, it must be considered as part and parcel of the entirety of the FA. Although a whole chapter is devoted to the interaction between the mufti and the *mustafti* (analogous in this context to the author and the reader, respectively), the rules and framework of this relationship have long eluded scholars.<sup>68</sup>

Contrary to the autobiographical literature, the form of the fatwa as described in the FA is often non-written. In a usual case of fatwa, the *mustafti* personally approaches the mufti and poses confidential questions, thereby demonstrating his trust. The mufti's task is to offer precise answers.<sup>69</sup> In the case of the FA, the fatwa pact is collective rather than individual, since the mufti is appointed by the head of the Muslim state (the caliph or the sultan). In most cases, this appointment consists of an imposed pact: the governor or the political authority allow itself, on behalf of all its subjects, to appoint someone<sup>70</sup>, whom they entrust the task of *iftā'* (the act of giving legal advice). Accordingly, this mufti becomes in charge of responding to religious questions from all subjects or citizens in that region.

In the course of the Muslim history, the fatwa gained a great importance so that the authors of the FA discourage from residing in a village with no mufti.<sup>71</sup> This injunction testifies to the fact

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<sup>68</sup> As recently as 1996, the authors of "Muftis, Fatwā, and Islamic Legal Interpretation" failed to determine the precise rules governing this relationship and opted instead to summarise the problem in a chapter entitled "Questions and Responses", in which they attempt to shed further light on the issue. Masud, "Muftis, Fatwā, and Islamic Legal Interpretation", 20–26.

<sup>69</sup> *Ibid.*, 21.

<sup>70</sup> The authors of the FA insist that there are no gender requirements for appointing the mufti. FA., vol. 2, 308.

<sup>71</sup> The authors insist on respecting the existence of a mufti as a condition for living in a city. FA, vol. 1, 145: "*Al-miṣr fī zāhir ar-riwāya al-mauḍi' al-laḍī yakūnu fīhi muftin wa-qāḍin yuqīmu al-ḥudūd.*"

that the institution of *futya* or *fatwa* had become a cornerstone of the concept of Muslim urbanism in the premodern era, as the focus shifted from the mosque to the mufti as an essential aspect of daily life. In order to establish a successful *iftā'*, both parties—the mufti, the giver of the fatwa, and the *mustafti*, the claimant—must agree upon the fatwa pact on the basis of mutual trust. This trust is the fundamental condition for the satisfaction of the *mustafti*, without which the *iftā'* cannot exist. If the *mustafti* is not convinced by the mufti's response, he may reject the fatwa and seek out another mufti. On the other hand, the mufti does not have the right to freely communicate his thoughts, and the *mustafti* does not have the right to demand a particular response.

The FA describes the procedure of issuing fatwas as follows: “He [the mufti] must first quote the opinion of the imam [Abū Ḥanīfa], then that of Abū Yūsuf, then that of Muḥammad.”<sup>72</sup> This complex relationship creates a paradox: the authors declare that while the mufti must be innovative,<sup>73</sup> he must also reiterate the beliefs held by the principal masters before announcing his judgement on a given subject. A *mustafti* should not submit a request to a mufti belonging to a different school of *fiqh*, as he is likely to be dissatisfied with the response. The mufti and the *mustafti* are thus placed under similar constraints,<sup>74</sup> and may be required to add or change some aspect of their function to ensure that their interlocutor is satisfied with the transaction, which can be understood as a limitation of the fatwa.<sup>75</sup> The objective of this practice

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<sup>72</sup> Ibid.

<sup>73</sup> FA, vol. 3, 308.

<sup>74</sup> The pact between the mufti and the *mustafti* can be resumed as follows: the mufti pronounces publicly the name of the *mustafti*, the date of the emission of the fatwa and, if possible, the subject of the question, in order to confirm that he is dealing with his own specific purpose. The aim of this modality was to eliminate any attempt at falsification.

<sup>75</sup> Over time, the legal genre of the *fatāwā* changed from an oral to a written modality. One important reason for this transformation was the wish to prevent any attempt at fraud. Ibn aṣ-Ṣalāḥ notes that whenever the mufti received a written question, he had to fill in any gaps in order to preclude an attempt at fraud. This explains the situation of the *fuyā*

was to preserve the purity of the *fiqh* and to guarantee its continuity through time. Muhammad Khalid Masud considers that a fatwa should have an authoritarian character as an essential prerequisite to be transmitted. He also asserts that trust in a mufti's competence is the only criterion for establishing the authority of a fatwa. This trust can be acquired only via a fatwa pact that obliges the *mustafti* to accept the mufti's opinion.<sup>76</sup>

The introductory text of the FA resembles a pact addressed to a virtual claimant stating the work's objectives as well as the reasons for and the norms governing its composition. The existence of a fatwa consisting of several parts and containing legal opinions from different periods prompts the question of how these pieces are linked in the frame of one paragraph. Do they follow any hierarchy?

The theoretical form applicable to and reflected in most of the texts of the FA can be summarised as follows.

1. Presentation of the authors' initial viewpoint, including a definition, explanation or hypothesis.
2. Presentation of the viewpoint(s) and opinions of the Hanafi masters (the authors of the *Zāhīr ar-Riwāya*).
3. Presentation of various viewpoints concerning the subject of the debate.
4. Presentation of the chosen opinion or the final decision.

Certain features of this structure (specifically, the order in which the viewpoints are presented) can change according to the nature of the topic in question.

This form first emerges in the paragraph pertaining to the peace pacts between dhimmis and warriors.<sup>77</sup> In this case, we can distinguish between seven positions, including those found in the works *Al-Muḥīṭ*, *Al-Mabsūṭ*, *Al-Itābiya* and *Al-Ḥāwī* as well as those held by Abū Ḥanīfa and Muḥammad aš-Šaibānī. These

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at that time, since *mustaftis* would often modify the texts for their own personal gain. Ibn aš-Šalāḥ, *Adab al-muftī wa-l-mustaftī*, 137–39.

<sup>76</sup> Cases exist in which the *mustafti* claimed to be unsatisfied and consulted a second mufti. In such cases the fatwa pact is said to be “modified”.

<sup>77</sup> FA, vol. 4, 277.

perspectives are neither contradictory nor grossly divergent, but rather come together in a complementary manner, producing what I call an “architext”. We find the same textual structure in the paragraph devoted to the qadi,<sup>78</sup> which contains opinions from thirty different sources that delve into the nature of Islamic law and discuss the qualifications of muftis and qadis. Here the question again arises: On what basis did the authors of the FA select these judgements? Why did they opt for one solution or opinion over another?

To answer this question, it is necessary to understand the criteria according to which the authors of the FA qualified opinions as true (*ṣaḥīḥ*) or truer (*aṣaḥḥ*), or as models of judgement (*‘alaihi l-fatwā*). As I will show in more detail below, the authors were divided into four groups, each headed by a “chief editor” subordinate to Šeiḥ Nizām, the leader of the “editorial board”. Although we possess information on most of the authors, it is difficult to attribute any given passage or section of the work to a particular author.<sup>79</sup> To avoid misunderstanding, I approach the authors of the FA as a single entity. Each sentence must be considered the fruit of a collective effort for which the entire body assumed responsibility. It is for this reason that I employ the plural term “authors” when discussing the authorship of the FA. According to the introduction of the FA, there was consensus within the Hanafi school regarding the authority of the texts of the *Zāhir ar-Riwāya*, meaning that any mufti or judge accept quote this opinion without reservation. Therefore, and due to the dominant character of reproduction, the texts of the FA are mainly produced via two manners: formalisation and abridgement.

### **Formalisation as a Tool of Reception and Reproduction**

Formalisation refers to cases in which legal data (judgments or rulings) reach a certain degree of abstraction that allows them to be applied regardless of the circumstances in which they were

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<sup>78</sup> FA, vol. 3, 306.

<sup>79</sup> My attempts in this regard have proved unsuccessful. Aurangzeb himself exercised several functions and can be considered a member of the commission, editor, sponsor and reader.

issued. To achieve the formalisation of Islamic law, the authors of the FA applied two main methods: *tağrīd* (abstraction) and *talhīs* (abridgment).<sup>80</sup> These two methods together form what is called *tarğīh* (deliberation), a technical and doctrinal approach that the authors of the FA applied in order to weigh existing legal conventions regarding a given subject. Through *tarğīh*, the authors would select one convention to serve as the legal norm, which then became a standard for legal decisions.<sup>81</sup>

The criterium by which an opinion or judgement was selected is, however, unclear. Was it the authority of the legal scholar, the context, or the personal conviction of the individual tasked with anthologising the various opinions? Before addressing this question, it is important to understand the second mechanism, *tağrīd*. *Tağrīd* refers to the “purification” of a fatwa of any contextual information, such as references to the name of the mufti, the place or the circumstances of the emission of the fatwa, or a particular question (*suʿīla*, “he was asked”) or answer (*ağāba*, “he answered”). Through *tağrīd*, the fatwa becomes a template applicable to any situation or text regardless of its context. The following excerpt from the FA illustrates this idea.

It is not allowed by consensus to perform the call to prayer [*aḍḥān*] for another prayer, except the morning prayer [*ṣubḥ*], before performing the [upcoming] prayer; according to Abū Ḥanīfa and Muḥammad, God’s blessing on them. And in case of performing it ahead of the morning prayer, it should be performed again at the time of the prayer, as found in Ibn al-Malik’s explanation of *mağmaʿ al-baḥrain*. This should be the rule of the fatwa [*ʿalaihi l-fatwā*].<sup>82</sup>

The formalisation process thus consists in eliminating certain information from the fatwa, such as the claimant’s name and the place and time the fatwa was issued. This technique, prevalent in Islamic law, is applied particularly through abstraction (*talhīs*). In *talhīs*, an opinion or a fatwa issued by another author is adapted

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<sup>80</sup> Cf. Hallaq, *Authority, Continuity, and Change in Islamic Law*, 121–65.

<sup>81</sup> On *tağrīd* and *tarğīh*, see Hallaq, “From Fatwās to Furūʿ”.

<sup>82</sup> FA, vol. 1, 53: “*Taqdīm al-aḍān ʿalā l-waqt ġair aṣ-ṣubḥ lā yağūzu ittifāqan wa-kadā fi ṣ-ṣubḥ ʿinda Abi Ḥanīfa.*”



to fit the chosen topic, as illustrated by the following passage from the FA’s chapter on war (*siyar*), which refers to *Al-Hidāya* of Al-Margīnānī:

It [*ḡihād*] is not obligatory for male minors, slaves, women, or for a blind, retired or handicapped person, as cited in *Al-Hidāya*.<sup>83</sup>

This original version in *Al-Hidāya* offers more details:

*ḡihād* is not obligatory for underage boys (for being underage brings piety), for slaves or women (for the *walī* and the husband have priority rights over them), nor for the blind, retired or paralysed (since they are incapable [of warfare]).<sup>84</sup>

In another example of the use of abstraction, the authors of the FA observe that “it is forbidden to fight someone who has not been informed before, unless he [the imam] informs him, as found in *Al-Hidāya*”.<sup>85</sup> The original formulation of this opinion reads as follows:

If the Muslim armies enter a city or a region, they must call them to Islam, for, according to the words of Ibn ‘Abbās, God’s blessing on him, the Prophet, [...] has never declared war [...] except after calling on those people to embrace Islam.<sup>86</sup>

These examples indicate a substantial difference between the FA and the sources upon which it draws. Although similar to *Al-Hidāya* in its level of formality, the FA is longer and stylistically different from the former work. In the case of the other works cited in the FA, the most optimal techniques for creating content were abstraction, abbreviation and summarisation. A further example of abbreviation is offered by the FA’s citation of a passage from Qāḍīḥān. In a passage on divorce,<sup>87</sup> the FA provides a much-abridged version of a passage from the famous central Asian Hanafi jurist Qāḍīḥān’s work: whereas the original passage

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<sup>83</sup> FA, vol. 2, 189.

<sup>84</sup> *Al-Hidāya*, vol. 3, 31.

<sup>85</sup> FA, vol. 2, 193.

<sup>86</sup> *Al-Hidāya*, vol. 3, 33.

<sup>87</sup> FA, vol. 3, 565.

consists of sixty-nine words, the FA's version consists of just twenty-five.<sup>88</sup> It can be stated that the practice of *tarḡīḥ* belongs to the function of *taḥrīḡ*, which in turn corresponds to the third mechanism<sup>89</sup> used in the Hanafi subgenres of *wāqī'āt* and *nawāzil*. *Furū'* contains cases which were not addressed by the first Hanafi teachers but were, rather, resolved by their disciples. The large number of cases in the *nawāzil* genre contributed greatly to the evolution and expansion of the Hanafi school in different territories and at different times. Masters of this branch of law are known as "masters of derivation" (*aṣḥāb at-taḥrīḡ* or *muḥarriḡūn*). These titles allude to their function of developing new judgments in accordance with pre-existing ones. Quantitatively speaking, *taḥrīḡ*, which has been a dominant practice for centuries, forms the second major part of the methods of the four schools of Sunni *fiqh*. As a practice, *taḥrīḡ* belongs to the domain of *īḡtihād*,<sup>90</sup> which in this context refers to the provision of new judgments in cases in which judgments from former innovative masters are lacking—in other words, to innovation through reproduction.<sup>91</sup>

The FA has two functions in this regard. First, it provides normative rules that are to serve as a behavioural reference or model. Second, it legitimises the use of these new norms. In the context of this legal reform, the primary role of the authors of the

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<sup>88</sup> *Fatāwā Qāḏihān*, published on the margin of the FA., vol. 3, 49.

<sup>89</sup> The first mechanism is known as *īḡtihād fi l-uṣūl* and is distinct from that used in the *Zāhir ar-Riwāya*. Thanks to the canon of transmission and the quality of the transmitters, for whom this genre held particular importance, the authors of *īḡtihād fi l-uṣūl* commanded authority for centuries. The second mechanism, known as *nawādir* or *masā'il an-nawādir*, is attributed to three Hanafi masters and was not the subject of regular transmission.

<sup>90</sup> While Hallaq considers *taḥrīḡ* an instrument to reinforce the authority of the imam, he nevertheless argues, through the differentiation between different forms of *taḥrīḡ*, that this activity is merely an instrument of, or a way toward, innovation (*īḡtihād*). Wael B. Hallaq, "Takhrij and the Construction of Juristic Authority", in *Studies in Islamic Legal Theory*, vol. 15, ed. Bernard Weiss, *Studies in Islamic Law and Society* vol. 15 (Leiden, Boston: Brill, 2002), 317–64.

<sup>91</sup> Hallaq, *Authority, Continuity, and Change in Islamic Law*, 121–25.

FA was thus to mediate between legal theory and practice. As legal writers, they determined, with the aid of a precise system of qualification, the types of norms that were to appear in the text and to serve as legal models. Since most of the authors were practicing judges, muftis or legal consultants, the composition of the FA allowed them to draw on their practical experience to shape a new Hanafi legal canon—an undertaking which was tantamount to a rewriting of Hanafi legal theory.

To conclude, we may state that the FA belongs to the type of writing of the legal compendium (*taṣnīf*), which involves the act of writing according to the major themes of Islamic law writings. In the context of *fiqh*, *taṣnīf* refers to writing, as opposed to *ījtihād*, which is the creation of new legal opinions.<sup>92</sup> This function of *taṣnīf* belongs neither to the qadi, the mufti nor the teacher, but rather to the legal author (*muṣannif*). As compilers, the authors of the FA belong to the category of legal authors whose role was limited to the compilation of fatwas classified according to the topics under consideration. The benefit of such a compendium is that it can be used by students of law, judges, muftis and legal experts.

### 3. THE AUTHORS OF THE FA

The number, identity and political affiliation of the authors of the *Fatāwā l-Ālamġirīya* remains an enigma in the field of Islamic law. The FA constitutes one among very few legal compendia written collectively by so many authors. Despite several valuable efforts by Islamic legal scholars to determine the identities of the authors, no comprehensive list yet exists.<sup>93</sup>

The list presented in this section was produced by combining lists compiled by other researchers with information drawn from original Mughal-era historical sources. Each entry provides, in addition to the name of the writer and the source in which it was

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<sup>92</sup> Hallaq, *Law and Legal Theory in Classical and Medieval Islam*, 129–41.

<sup>93</sup> This is due to numerous inaccuracies regarding the identities of the authors as well as to the scarcity and disparity of historical sources, which is likely a result of the negligence with which the authors of the FA were treated by medieval historians, especially within the Mughal dynasty.

found, his qualifications, occupation and role in the compilation of the FA, as well as his relationship to Sultan Aurangzeb.

Historical sources suggest that the group was led by Šeiḥ Nizāmuddin, who reported directly to Aurangzeb. Nizāmuddin apparently managed four editors, each of whom was assigned approximately ten assistants.<sup>94</sup> The entire group consisted of no more than forty-five individuals. In addition to listing the authors' names, I will explain the group's organisational structure and geographical distribution and present each author's scientific qualifications and his relationship to the Mughal authorities.

### Sources

In the following, I will present the main sources I used to draw the list of authors of the FA. These sources are accompanied by their relative abbreviations.

- Al-Ḥasnī, 'Abdu-l-Ḥay ibn Fakhru-Dīn. *Al-I'lām bi-man fi tāriḫ al-hind min al-a'lām al-musammā bi-nuzhat al-ḥawāṭir wa-bahḡat al-masāmi wa-n-nawāzīr*. Hyderabad: Dā'irat al-ma'ārif al-ʿuṭmāniyya, 1951. Abbreviation: NK.
- Bhatti, Muḥammad Ishāq. *Barr-i-saḡīr pak wa-hind main ʿilm-i-fiqh*. Lahore: Idārat aṭ-ṭaqāfa l-islāmīya, 1973. Abbreviation: P
- Nadwī, Muḥammad Ṣadr al-Ḥasan. *Aurangzīb auwr tadwīn fatāwā ʿālamgīri*. Lucknow: Ḡarā'id maktabat dār al-ʿulūm nadwat al-ʿulamā', n. d. Abbreviation: SN
- Nadwī, Muḡīb-l-Lāh. *Fatāwā ʿālamgīri ki mu'allifīn*. Lahore: Markaz ṭahqīq diyal sinḡ, Trust Library, n. d. Abbreviation: NM<sup>95</sup>

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<sup>94</sup> Cf. Carl Brockelmann, *Geschichte der Arabischen Litteratur* (Weimar: Verlag von Emil Felber, 1898), 416. See also Bazmi Ansari, "Al-Fatāwā al-ʿĀlamgīriyya", in *Encyclopedia of Islam. New Edition* 2 (Leiden: Brill, 1965), 837. Mouez Khalfaoui, "Al-Fatawa Al-ʿĀlamgīriyya (al-Hindiyya)", in David Powers et al. (ed.), *The Encyclopedia of Islam* 3, Brill, Leiden, 120–122.

<sup>95</sup> These researchers present several lists which are derived from medieval sources such as Muḥammad Kāzim, "ʿĀlamgīr-Nāmā", in John Dowson, *The History of India*, 174–80; Khan, *Maāsir-i-ʿĀlamgīri*; Khafī Khan, "Muntakhabu-L-Lubab", in Dowson, *History of India* and Bakhtawār Khan, "Mira'āt-i-ʿĀlam", in Dowson, *History of India, etc.*

### Authors

- Abū l-Faraḥ, Amīr (Sayid Ma‘dan). P: 341 / SN: 71 / NM: 97 / NK (vol. 6): 16. From Burhanpur, Khandesh province, Gujarat. Served as qadi in Ahmadabad during the reign of Aurangzeb and was among the editorial board of the FA.
- Ad-Dihlawī, Muftī Abū l-Barakāt b. Ḥusām-Dīn b. Sulṭān b. Hāšim b. Rukn-Dīn b. Jamīl-Dīn al-Ḥanafī. P: 308–309 / SN: 62 / Nk (6): 4. Born in Delhi, where he served as mufti and qadi during the reign of Aurangzeb. His inclusion in the group of authors was likely the result of the popularity of his work, *Mağma‘ al-barakāt*.
- Ad-Dihlawī, Šah ‘Abd ar-Raḥīm. P: 327–330 / SN: 65 / NM: 35 / NK (6): 144–46. From the region of Delhi; founder of the Madrasah-i Rahimiyah. A member of the Naqšbandi order. Tasked with correcting passages of the FA, he was dismissed following a conflict with the head of the editorial board. Father of Šah Waliyullāh and grandfather of Šah ‘Abd l-‘Azīz, two prominent figures in the history of Islam in South Asia.
- Al-Burhānpūrī, Šeiḥ Niẓām-Dīn. P: 269–276 / SN: 38 / NM: 26–28 / NK (5): 420–421. From Burhanpur. One of the great masters of the period and a close friend of Sultan ‘Ālamgīr, who entrusted him with administrative and personal functions. Served as chief writer answerable directly to the sultan. Died in 1092/1681, buried in Burhanpur.
- Al-Anṣārī s-Sahālawī, Maulānā Muḥammad Sa‘īd b. Šeiḥ Qutb ad-Dīn. P: 320–321 / SN: 64 / NM: 97 / NK (6): 310–311. Born in Sahālaw. Following the assassination of his father by rebels, he was awarded the Faranġi Maḥal in Lucknow by Sultan ‘Ālamgīr, and later moved to Delhi, where he contributed to the writing of the FA. Nuzhat al-Khawatir notes that he died very young.
- ‘Alim, Amīr Mirān. SN: 71. From Burhanpur. Served as qadi in Sahālaw. After a period in Fatehpur, he returned to Delhi to contribute to the writing of the FA. Assassinated by rebels while travelling to Surat.
- Bhagalpūrī, Raḍiyu-Dīn. P: 281–282 / NM: 105 / NK (5): 149. From Bihar Province. Expert in the study of armed

conflict and the natural sciences. Known for his zeal in the *hisba*, he served as qadi of Jaunpur during the reign of Šah Ğahan and was transferred to Allahabad by Aurangzeb. He was an editor of the FA and was granted a daily salary of three rupees. He fought in the wars of Husain Ali Khan Bahadur and died in battle in 1081/1670.

- Bhalwārī, Šeiḥ Muḥammad Faṣiḥ ad-Dīn Ğāfarī Lāhūrī. P: 330–334 / SN: 60 / NM: 110 / NK (6): 223. Son of Amīr Aṭā’-Lāh Bihārī. Earned a daily salary of one rupee for his work and acquired 100 *ğarīb* of land at the end of the project, at which point he returned to Phulwari Sharif and taught the *fiqh* until his death in 1119/1707.<sup>96</sup>
- Faṭḥpūrī, Qadi Muḥammad Daulat. P: 317 320 / SN: 63 / NK (6): 303. Born in Saḥali.
- Fāyiq, Maulānā Sayyid (Muḥammad Fāyiq). SN: 71 / NM: 109. Earned a daily salary of two and a half rupees for his work.
- Gupāmuwī, Šeiḥ Mufti Waḡih-Dīn. P: 288 / SN: 50 / NM: 34 / NK (5): 430–431. From Awad, north of Allahabad. Served as qadi during the reign of Aurangzeb. Nuzhat notes that he was an editor and was ordered to write a quarter of the FA with the assistance of ten others. He died in 1083/1670.
- Jaunpūrī, Ḥāmid al-Ḥanafī P: 298–299 / SN: 54 / NM: 103 / NK 6: 60. From Jaunpur. Son of Šeiḥ ‘Abd ar-Raḥīm Jaunpūrī. Served as tutor to Aurangzeb’s son Muḥammad Akbar. Author of *Ḥāšiya ‘alā tafsīr al-baiḍāwī*.
- Jaunpūrī, Qadi ‘Abd aṣ-Šamad. P: 303–305 / SN: 62 / NK (6): 152. From Jaunpur. After the completion of the FA, he served as qadi in the Deccan before returning to Lucknow,

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<sup>96</sup> Bhalwārī was introduced to the sultan by Mullah Waḡih-Dīn, whom he had met during his studies in Delhi. According to al-Ḥasnī, following the completion of the FA Bhalwārī returned to Awad, where he assumed the function of tax collector. ‘Abdu-l-Ḥayy ibn Fakhru-Dīn al-Ḥasnī, *Al-ʿlām bi-man fi tāriḥ al-hind min al-ʿlām al-musammā bi-nuzhat al-ḥawātir wa-bahğat al-masāmī wa-n-nawāzīr*, 6 vols, rep. (Hyderabad: Dā’irat al-ma‘ārif al-‘uṭmāniya, 1951); henceforth: *Nuzhat al-Ḥawātir*.

- where he lived for eight years. Author of the well-known work *Rašīdiyya*. Served as tax collector in several regions.
- Jaunpūrī, Qadi Muḥammad Ḥusain. P: 286–87 / SN: 51 / NM: 33 / NK (5): 364. From Jaunpur, where he served as qadi during the reign of Šah Ğāhan. Summoned to Delhi to serve as procurator (*muhtasib*) in the Mughal army.<sup>97</sup> Died in Delhi in 1076/1699.
  - Hargāmī Badayūnī, Mullā Abū l-Wā‘iz. P: 305 / SN: 58 / NM: 90 / NK (5): 34–35. Born in Harguam. Served as tutor to the young Aurangzeb.
  - Kākūrī, Šeiḥ Muḥammad Ğaut. P: 322–324 / SN: 59 / NM: 95 / NK (6): 339. From Awad, where he served as tax collector by order of Aurangzeb. Died in Lucknow in 1118/1706 (aged sixty-two).
  - Lāhūrī, Mufti Muḥammad Akram. P: 324–327 / SN: 51 / NM: 109 / NK (5): 420. From Lahore. A teacher of Aurangzeb’s son Ḥudā Baḥaš. Served as qadi in Rumla after the death of Qadi ‘Abd al-Lāh. Nuzhat al-Ḥawāṭir notes that he single-handedly compiled a quarter of the FA.
  - Lāhūrī, Qadi Ğulām Muḥammad (Aḥmad Lāhūrī). P: 328 / SN: 71 / NM: 115.
  - Lucknawī, Qadi al-Quḍāt Mullā Ğulām Muḥammad. P: 341 / SN: 71 / NM: 97 / NK (6): 206. From Bihar. Served as *muhtasib* of the Mughal state. Author of *Ašraf aš-šaraf*. Died in 1136/1723.
  - Lucknawī, Qadi Išmat al-Lāh. P: 313–316 / SN: 61 / NK (6): 179. From Awad. Son of a prominent *faqih* of Lucknow. Disciple of the mufti Waḡih-Dīn Qubāmawī. A Sufi, he was elected qadi in the province of Moradabad. Died in 1113/1701 (aged sixty-seven).
  - Mišlišahrī, Ğalāl ad-Dīn al-Ğāfarī Muḥammad. SN: 49–50 / NM: 102 / NK (6): 56. From the region of Machhliahr, Jaunpur. Excelled in polemics. Served as qadi of the province of Jaunpur and as an editor of the FA project. Died in Machhliahr.

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<sup>97</sup> Muḥammad Išḥāq Bhattī, *Barr-i-saḡīr pak wa-hind main ‘ilm-i-fiqh* (Lahore: Idārat at-ṭaqāfa l-islāmīya, 1973 ), 286–87.

- Muḥaddiṭ, Mullā Diyā<sup>3</sup>-Dīn. SN: 71 / NK (5): 182. Appointed qadi in Kashmir and Akbarabad by Aurangzeb. Died in 1074/1663.
- Qāḍiḥān, Mullā Ḥaidar. SN: 72 / NK (6): 77. Born in Kashmir. Appointed chief qadi (*qāḍi l-quḍāt*) by Aurangzeb in 1117/1705. Worked in Jodhpur in 1110/1698; died in 1121/1709.
- Qannūjī, Mīr Saiyid Muḥammad. P: 289–290 / SN: 53 / NM: 28 / NK (6): 253–254. From the region of Agra. Belonged to the Jashti Sufi movement. Introduced Aurangzeb to masterpieces of Sufism such as Al-Ghazali's *Iḥyā' 'ulūm ad-dīn*. An expert in mathematics and literature, he was a regular member of the sultan's majlis. Appointed to represent the sultan in personal affairs (including the marriage of Muḥammad Āzam). Author of *Ḥāšīya l-muṭauwala*. Died in Kannauj in 1091/1679.
- Qubāmawī, Šeiḥ Aḥmad b. Abī l-Manšūr. P: 309–312 / SN: 58 / NK (6): 22–23. Born in Qubamau, died in the Hiḡaz. Excelled in *fiqh*, Arabic literature and uṣūl. Earned a daily salary of one rupee and fruit (sic!) for his work on the FA. Visited the Hijaz in 1102 and 1112.
- Sa'dallāh Ḥanī Ilāhabādī, Qadi Saiyid 'Alī Akbar. P: 300–303 / SN: 56 / NM: 100 / NK (5): 281. From Jaunpur. Served as tutor to the son of Sultan Muḥammad A'zam. A faqih, he excelled in Arabic and was a close associate of Wazīr Sa'dallāh Ḥanī. Served as qadi in Lahore, acquiring a reputation for strictness. Assassinated by the governor of Lahore in 1090/1679 because of his intransigence in legal issues.
- Šamdānī Jaunpūrī, Šeiḥ 'Abd al-Fattāḥ. P: 312–31 / SN: 61 / NK (6): 156–157. From Jaunpur. A religious expert, he served as instructor of *fiqh* to Šeiḥ Muḥammad Zāhid in Delhi. Died in 1101/1689.
- Šiddiqī-Jaunpūrī, Muḥammad Ğamīl b. al-Muftī 'Abd al-Ġalīl. P: 282–283 / SN: 55 / NM: 30 / NK (6): 294–295. From Jaunpur. Descendant of a family of eminent



masters.<sup>98</sup> Author of the Sufi work *Ḥāšiya ‘alā šarḥ al-Ġāmī*. Died in 1123/1711.

- Sirhindī, Šeiḥ Muḥammad Šafī Bihārī. P: 338–340 / SN: 69 / NM: 105. A distinguished scholar, He served as tutor to Sultan Aurangzeb’s sons. Bestowed upon himself the rank of Sayyid. Earned a daily salary of half a rupee, 12 *ḡunaih*, and 120 *ḡarīb* for his work on the FA.
- Tahāwī, Qadi Abū l-Ḥair. NM: 129 / NK (5): 18. From the region of Sind. Elected editor by ‘Ālamgīr, according to the *Tuḥfat al-Kirām*.
- Taḥṭāwī Sindī, Šeiḥ Nizāmu-Dīn b. Muḥammad b. Šukr al-Lāh. P: 277–279 / SN: 57 / NM: 102 / NK (5): 419–420. From the city of That in the region of Sind. Son of natives of Shiraz who had settled in Harat. Lived and died in Delhi.
- Waḡīh ar-Rabb, Mullā (Wāṭiq ar-Rab). P: 341 / SN: 70 / NM: 108. From Bihar Province.

Reading these names, it becomes clear that only eleven authors are mentioned in all sources listed above. While six appear in only one source, the other five are distributed between the second and third sources. This indicates the aura of mystery surrounding even those authors who are identified.<sup>99</sup> Moreover, the historical sources listed above mention different classes of authors rather than a homogeneous group of individuals. The first class is made up of “executive authors” or chief writers who wrote the texts of the FA and whose number is estimated at forty-five.<sup>100</sup> The second class consists of authors, publishers and editors. This group consisted of Šeiḥ Niẓām and Sultan Aurangzeb. In contemporary

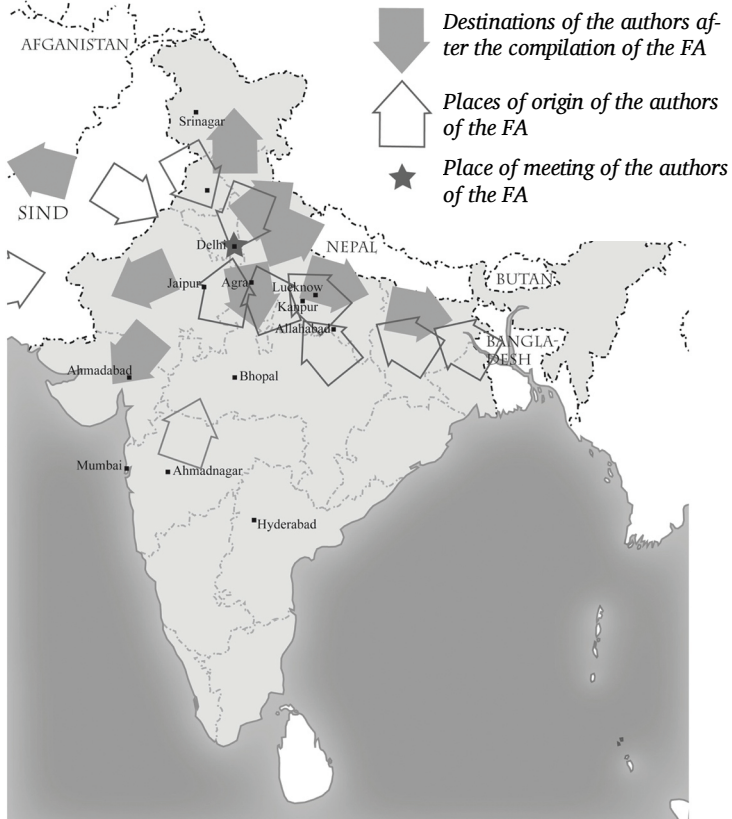
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<sup>98</sup> Šiddīqī-Jaunpūri was a well-known authority at the time of the writing of the FA. Al-Ḥasnī, *Nuzhat al-Ḥawāṭir*, vol. 6, 294.

<sup>99</sup> Bhatti’s list, which includes twenty-eight authors, is a reproduction of the list presented by Nadwī Naḡīb, which also includes the following authors not included in my list: Ġalabī ‘Abdallāh, Maulawī Saiyid Šah, Sayyid Niẓām-Dīn, Mīr Sirāḡ-Dīn, Muḥammad Sa‘īd Nāšir, Sayyid Muḥammad Kāzim and Mīr ‘Azīm-Dīn. These names are not mentioned in any historical sources known to me.

<sup>100</sup> Guenther insists on the geographical factor in his discussion of the authors of the FA. Guenther, “Hanafi Fiqh in Mughal India”.

terms of authorship,<sup>101</sup> the first two classes had neither moral nor material property rights over the work.



**Map 1: The geographical displacement of the authors of the FA**

The above map reveals that the authors of the FA represented most of the regions of the Mughal empire under Aurangzeb.<sup>102</sup> The geographical provenance of the authors seems to have been a decisive criterion in their selection. Although he could have limited his selection to writers from Delhi or nearby regions, Aurangzeb

<sup>101</sup> The conception of authorship is a rather modern one, as it concerns the relation of authors to editors.

<sup>102</sup> The region of South India (Deccan) is not represented.

instead chose to bring together jurists from different parts of his empire. The FA thereby acquired a representative quality symbolising the whole of South Asia. This fact was to play a decisive role in the dissemination and implementation of the FA. As the location where the texts were drafted, the capital Delhi played a particularly prominent role. The writers' sojourn in the city was an additional testament to their loyalty to the Mughal sultan.

It also appears that by choosing authors from different regions, the sultan guaranteed his support for the work after its publication. The sultan's support not only facilitated the transmission of the work and the dissemination of its systemisation of Islamic law, but also guaranteed its influence. This statement is supported by historical sources which attest to the fact that, following the realisation of the project, the authors were entrusted with various functions in different, far-flung regions of the kingdom.<sup>103</sup> As a result, and in part due to the fact that most of its authors were practicing judges, the FA became a common reference for jurists throughout the empire immediately after its publication.<sup>104</sup>

In addition to their public positions, the authors also assumed a collective religious function within the Mughal state, as legal writers (*muṣannif*). This function bestowed upon them a religious qualification that allowed them to become legislators or "lawmakers", a task reserved for legal authors, whose role was to reconcile daily life and legal theory. They were also responsible for the orderly reproduction of notes from other works of *fiqh*, in order to contribute to the simplification and standardisation of Islamic law.

Why did the authors of the FA seek to reproduce legal sources when what was expected of them was innovation? This question leads back to a consideration of the status of the FA in Islamic law. Chafik Chehata classifies the FA within a specific category of legal works that provide solutions without necessarily

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<sup>103</sup> As a reward for their work, some authors of the FA were elected to administrative posts, becoming qadis, muḥtasibs, prosecutors or muftis; others undertook the pilgrimage to Mecca or visited other regions of the Islamic world.

<sup>104</sup> Qadri, "The Fatāwā-i-Ālamġirī".

referring to theory.<sup>105</sup> Whereas Chehata rejects the idea that the FA embodies any analogous concept of formalisation, I would argue that it has a generalising aspect similar to Ibn Nuğaim's *Al-Ašbāh*, which Chehata cites as a model of legal formalisation.<sup>106</sup> However the FA, which covers all aspects of everyday life, draws on a larger number of references and is far more detailed than *Al-Ašbāh*. Through abstraction, abbreviation and other techniques, the writers of the FA transformed the cases presented into general standards of behaviour that could serve as a point of reference for any judge.

#### 4. AURANGZEB'S RELATIONSHIP TO THE AUTHORS OF THE FA

Satish Chandra describes the relationship between Aurangzeb and the authors of the FA as a reflection of the complex interlinkages between politics and religion. Chandra argues that Aurangzeb's relationship to the *ulamā'*, to politicians and to a variety of Islamic religious figures merits in-depth study.<sup>107</sup>

The distinction between the field of religion and the realm of everyday life, defined by the Arabic terms *dīn* and *dunyā*, is subject to debate in Islamic religious discourse. It has even become one of the primary points of concern of modernist movements in the contemporary Muslim world.<sup>108</sup> In his analysis of the relationship between politics and religiosity in the Muslim community of India, William Safran argues that the founders of the Delhi sultanate (1206–1526) brought with them the political

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<sup>105</sup> Chehata notes that Islamic law, which is based on the concept of casuistry, has produced no general theory since its inception. Chehata, *Études de droit musulman* II, 54. The theoretical notions that guide Islamic law, as well as the question whether these norms are comparable to those of Roman law, are still open to debate.

<sup>106</sup> The FA was designed to simplify and standardise Islamic law. The authors quote Ibn Nuğaim and may have been aware of his methodology.

<sup>107</sup> Satish Chandra, *Mughal Religious Policies, the Rajputs and the Deccan*, rep. (New Delhi: Vikas Publishing House, 1994), 207.

<sup>108</sup> Abdelmajid Charfi, "Pouvoir politique et pouvoir religieux dans l'histoire de l'Islam", accessed 2 December 2018, <https://nawaat.org/portail/2005/02/05/pouvoir-politique-et-pouvoir-religieux-dans-lhistoire-de-lislam>.

tradition of Central Asia, in which the custom was to pronounce the Friday sermon (*ḥutba*) in the name of the caliph, and suggests that the Mughals followed this tradition.<sup>109</sup>

Safran's assertion contradicts the statements concerning Friday prayers found in the FA,<sup>110</sup> according to which if an imam consents to or praises a political authority in his sermon, he may be committing apostasy: "He apostatises [*yakfuru*] if he says, 'I think the sultan of our time is fair.'"<sup>111</sup> By liberating the imam from the hegemony of the political establishment, this statement reveals the singularity of the South Asian context in which the relationship between the ulama and the political authorities was particularly complex. The rulers of the Muslim dynasties in India—and Aurangzeb was no exception—sought to pacify the ulama in order to gain their support for their continuous wars with their "believing" and "non-believing" enemies by waging war on the infidels or through campaigns of *ḡizya*.<sup>112</sup> The writing of the FA was thus in line with Aurangzeb's two objectives: diverting the ulama from interfering in the political domain by engaging them in a project in their own field, and securing their support with considerable financial remuneration.<sup>113</sup> According to Baber Johansen, the Ottoman sultan ordered muftis and qadis to develop Hanafi *fiqh* based on the opinions of Abū Ḥanifa, the

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<sup>109</sup> William Safran, *The Secular and the Sacred: Nation, Religion, and Politics* (London: Frank Cass, 2003), 247.

<sup>110</sup> FA, vol. 2, 281.

<sup>111</sup> Ibid.

<sup>112</sup> Sāqī Mustʿad Khan (in his *Maasir-i-Ālamgiri*) and Ishwar Das Nagar (in his *Futuhāt-i-Ālamgiri*) praise the sultan for his opposition to non-Muslims. Anees J. Syed, *Aurangzib in Muntakhab al-Lubab* (New Delhi: Somaiya Publications, 1977), 245–248; Khan, *Maāsir-i-Ālamgiri*, 316–318; Khan, "Muntakhabu-L-Lubab".

<sup>113</sup> "These circumstances are fundamental to a balanced interpretation of the FA, particularly when seen in the context of the dispute between the Ottoman and Mughal dynasties over Sunni Hanafi religious and legal doctrine. During the Ottoman era, the fatwas were considered the most relevant interpretation of the Sunni doctrine of the law." Baber Johansen, "Legal Literature and the Problem of Change: The Case of the Land Rent", in Johansen, *Contingency in a Sacred Law*, 446–64.

founder of the school.<sup>114</sup> Aurangzeb followed suit when he ordered the drafting of the FA for the same reasons. In the absence of a central legislative agency responsible for determining Islamic legal norms, the ulama, *fuqahā'* and muftis thus acquired great authority over the organisation, systematisation and simplification of Islamic law.<sup>115</sup>

To summarise, it seems that Muslim political authorities in the medieval era, aware of the danger posed by religious institutions, busied them with projects. If we consider that, in the medieval Islamic world, the central political power was not directly responsible for legal issues or for legislation, we can understand Aurangzeb's initiative as a step towards the codification of the law, although it was not until the mid-nineteenth century that the Ottoman Empire took a similar initiative.<sup>116</sup> The creation of a legislative agency through the modality of a legal compendium corresponding to all regions and social or religious affinities on the Indian subcontinent allowed the Mughal sultan to appear to represent all Muslims in South Asia.

In addition, a close reading of the above list shows that the majority of the FA's authors had a personal relationship with Aurangzeb, and thus sheds light on his selection criteria. The appointment of a given author must be understood as a sign not only of professional recognition, but of a personal bond with the sultan.

This is illustrated by the case of Šah 'Abd ar-Rahīm Dihlawī, the founder of the Madrasah-i Rahimiyah.<sup>117</sup> 'Abd ar-Rahīm's son,

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<sup>114</sup> Ibid.

<sup>115</sup> Hallaq, *Authority, Continuity, and Change in Islamic Law*, 125.

<sup>116</sup> Hallaq, *An Introduction to Islamic Law*, 93–103.

<sup>117</sup> Al-Ḥasnī, the author of *Nuzhat al-ḥawāṭir*, records that Aurangzeb was approached by several ulama with a request to assign them positions in the Mughal army. This explains both their situation of unemployment and why the army was so respected at the time. Cf. Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860–1900*, Princeton Legacy Library (Princeton: Princeton University Press, 1982), 29.

Šah Waliyullāh, recounts in his *Anfās al-ārifīn*<sup>118</sup> that his father refused a summons to edit passages of the FA. Waliyullāh goes on to describe how Aurangzeb, while revising a passage of the FA with Šeiḥ Nizām, realised that ‘Abd ar-Raḥīm had made corrections and added comments to the text. After the sultan demanded clarification, Nizām voiced his dissatisfaction to ‘Abd ar-Raḥīm, who subsequently left the project, protesting the sultan’s action which he saw as an intervention in his work as editor.<sup>119</sup>

This incident has implications for our understanding not only of Aurangzeb’s selection criteria, but of the connection between the sultan and the ulama as well. It is often assumed that the main criterion for the choice of an author was the degree of his zeal for Islamic law.<sup>120</sup> When considering this interpretation, one must never lose sight of the fact that the selection of each author was a strategic choice based on criteria established by the sultan with assistance from his personal adviser Šeiḥ Nizām. Regarding the role of the Aurangzeb’s religious background, Hussein Qureshi insists on the relevance of the sultan’s connection to a conservative stream of Islam founded by Šeiḥ Aḥmad Sirhindī (Muğaddid Alif Thānī) and which, according to Qureshi, influenced his political and religious agenda, especially since, as Qureshi observes, “Aurangzeb himself was brought to the throne thanks to the political movement of Muğaddid Alif thānī”.<sup>121</sup> All of this suggests that the link between Aurangzeb and the authors of the FA was complex, political and rooted in Islam.

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<sup>118</sup> Cited in Muḥammad Ṣadr al-Ḥasan Nadwī, *Aurangzīb Auwr Tadwīn Fatāwā ‘Ālamgīrī* (Lucknow: Ġarā’id maktabat dār al-‘ulūm nadwat al-‘ulamā’, n. d.), 65–69.

<sup>119</sup> This narrative can also be found in Bhatti, *Barr-i-sağīr pak wa-hind main ‘ilm-i-fiqh*, 327–30.

<sup>120</sup> In the introduction of the FA, the focus is on scientific diligence. Cf. FA, vol. 1, 1.

<sup>121</sup> Istiyaq H. Qureshi, *Ulema in Politics: A Study Relating to the Political Activities of the Ulema in the South-Asian Subcontinent from 1556 to 1947* (Karachi: Ma‘aref, 1974), 106. On this debate, see Yohanan Friedmann, *Šaykh Aḥmad Sirhindī: An Outline of his Thought and a Study of his Image in the Eyes of Posterity* (Montreal: McGill-Queen’s University Press, 1971), 16–18.

The FA reflects, with varying degrees of explicitness, the political strivings of authors and ruler alike. While the writers of the FA used their positions as religious representatives to gain political power, Aurangzeb, benefitted from the project to support his political and social agenda. While the FA was conceived by Aurangzeb as a tool to ensure the functioning of the Mughal legal system, the work belongs to its public, especially to the judges who have used it since its publication. This brings us back to the question of genre. The FA was designed to belong to the fatwa genre, meaning that it was meant to reproduce the opinions of the first Hanafi masters in an innovative way, without becoming just a static reproduction (*taqlīd*) of previous Hanafi legal works. The innovative role of its authors suggests that the FA, while it neither meets the theoretical criteria for the fatwa genre (question-answer-pattern) nor reproduces the ancient Hanafi texts, does indeed belong to the fatwa genre, and includes an innovative aspect whereby a multitude of opinions from different eras are recreated in a way that responds to contemporary reality.

In this chapter, I addressed certain aspects of Sultan Aurangzeb's rule of the Mughal Empire, and attempted to interpret his role as sponsor, patron, critic and editor of the FA. The relationship between the sultan and the FA is representative of the linkages between political power and society in Muslim culture. Aurangzeb ordered the writing of the FA because, as the sultan and the embodiment of the Muslim state in South Asia, he was eager to establish his hegemony and recognised that one way to control a complex society was to reform its legal system. In this chapter, I have shown that the fatwa, far from being an immutable genre with an easily identifiable genealogy, is synchronically and diachronically fluid. A structural analysis of the FA reveals that this work constitutes an architext consisting of numerous texts with diverse characteristics. Yet rather than constituting the sum of its works of reference, the FA represents a new type of text that emerges through intertextuality, or the combination of several works to form a model text (in this case, a legal opinion or norm). The FA belongs to the *furū'* branch of Islamic law, which supplies the legal theory behind substantive law.



I have also shown that the FA presents two facets of judicial theory. These include the strictly theoretical Hanafi norms reproduced for scholastic dissemination (comprising texts from the *Zāhir ar-Riwāya*) and concrete concepts referring to custom, models and legal standards. The aim of the FA in this sense was to reintroduce the opinions of the first Hanafi masters as legal rules in seventeenth-century India, illustrating the state's desire—indeed, its need—for legal reform. In their work, the authors of the FA were encouraged to distance themselves as much as possible from their colleagues in Central Asia, who were focused on adopting social and political norms as legal norms.

The issue of authorship was addressed from two perspectives. The first concerns the writers' biographies; the second, the concept of authorship itself. Regarding the former, I have identified the authors' names and professional affiliations to the extent possible, given the absence of a comprehensive list. I have provided a list highlighting the circumstances and modalities of writing, in particular the authors' geographical displacements, the criteria for their selection by the sultan and their functions in the Mughal Empire. The authors came from various parts of the empire: from the eastern and western regions as well as from Sind, Lahore, Bihar, Awad, and Delhi region. The work was written in Delhi over a period of eight years. The diverse origins of the authors, who together represented almost all the regions of the empire, endowed them with a character of glory and famousness which grew stronger following the completion of the project, when many of them assumed administrative functions throughout the empire. This phenomenon proved particularly conducive to the dissemination of the FA and to guaranteeing its usefulness and functionality.

I have also addressed the ways in which the authors of the FA engaged with general Hanafi legal theory. As innovators (*muğtahid*), the authors were tasked with providing a novel impetus to existing legal theory. By privileging the opinions of the Hanafi masters, known collectively as the *Zāhir ar-Riwāya*, the authors of the FA distanced themselves from their Central Asian counterparts. No other work of Islamic law has succeeded in bringing together so many authors from such diverse domains.

Yet the question remains: does the FA represent a rupture in Islamic literary thought, or can it be considered an anomaly?

## CHAPTER TWO.

### THE FA AND MINORITY RIGHTS

This chapter addresses the minority status of Muslims in seventeenth-century South Asia, where Muslims constituted a minority within a non-Muslim majority ruled by a Muslim sovereign. Such situations, while not common in the Islamic world, did exist in the formative era of Islamic history, during which Muslims constituted a minority in Iraq and other regions of the Middle East. Mass conversions to Islam had become typical throughout the Muslim world (with the exception of South Asia) after the twelfth century, when circumstances throughout the region changed in the wake of the Crusades.

My aim in addressing the topic of Muslim religious minorities in South Asia from the perspective of minority law is to highlight the paradoxical nature of these minorities. Although demographically a minority, Muslims ruled over the non-Muslim majority in South Asia for more than five centuries. This situation, in which Muslims and non-Muslims lived side by side and engaged in continuous processes of mutual acculturation, gave rise to cases of both coexistence and strife. This subject forms part of the general framework of minority studies. Research in this area has followed two axes. The first axis is the concept of minority rights in modern democracies, a new field of research that aims to strengthen the rights of minorities in modern societies and which is outside the focus of the present study.<sup>1</sup> The second axis

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<sup>1</sup> Cf. Mouez Khalfaoui, "Maqasid ash-Shari'a as Legitimization for the Muslim Minorities Law", in *The Objectives of Islamic Law: The Promises*

consists of two subcategories. The first of these concerns the rights of non-Muslim minorities in territories governed by Muslim states—a classic issue which remains controversial and should be re-examined in the light of novel interpretations of legal texts and newly uncovered historical evidence. The second subcategory is that of Muslim minorities residing in non-Muslim countries,<sup>2</sup> a subject that has received little attention until recently, as it was not a priority for pre-modern Muslim scholarship. The lack of interest in this issue was due to the fact that, since most Muslim legal scholars forbade Muslims to live outside of *dār al-islām* (the territory under Muslim political sovereignty), and since Muslim residence in non-Muslim territories was therefore considered exceptional, the number of Muslims affected by it was insubstantial. Since all Muslims were expected to eventually return to *dār al-islām*, this line of research appeared irrelevant to legal issues.<sup>3</sup>

Premodern Muslim scholars addressed the topic of non-Muslim minorities under Muslim rule by establishing behavioural rules for non-Muslims and by defining the nature of Muslim sovereignty to be exercised against them.<sup>4</sup> Two opposing perspectives

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*and Challenges of the Maqasid al-Shari'a*, ed. Idris Nassery, Rumea Ahmed and Muna Tatari (Lexington: Lexington Books, 2018), 271–84.

<sup>2</sup> Cf. Muhammad Khalid Masud, “Being Muslim in a Non-Muslim Polity: Three Alternate Models”, *JIMMA* 10, no. 1 (1989): 118–28.

<sup>3</sup> Cf. Khalid Abu el-Fadl, “Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries”, *Islamic Law and Society* 1, no. 2 (1994): 141–87.

<sup>4</sup> Significant in this regard is the role of the Pact of Umar, instituted by the caliph ʿUmar b. al-Ḥaṭṭāb. While its authenticity has been debated, this treaty played a prominent role in the definition of the relations between the Muslim state and its non-Muslim subjects. While Fahmī Huwaidī doubts the authenticity of the Pact of Umar, Ibn Qaiyim al-Ġauziya, who was strongly influenced by the Crusades, and his master Ibn Taimiyya, adopted it immediately. Cf. Fahmī Huwaidī, *Muwāṭinūn lā ḍimmīyūn* (Beirut: Dār aš-šurūq, 1990), 203–14 and Šams ad-Dīn Ibn Qaiyim al-Ġauziya, *Aḥkām ahl aḍ-ḍimma*, rep. (Beirut: Dār al-ġil, 2001). See also Wolfgang Kallfelz, *Nichtmuslimische Untertanen im Islam* (Wiesbaden: Harrassowitz, 1995), 77–82.

thus evolved regarding non-Muslim minorities under Islam. The first of these emphasised the values of Muslim tolerance (*at-tasāmuḥ al-islāmī*), highlighting the tolerant and welcoming attitude of Muslim societies and rulers toward non-Muslims. The second perspective emphasises a narrative of Muslim brutality toward the followers of other religions in territories under Muslim authority<sup>5</sup> and insisted that non-Muslims living under Islamic rule suffered discrimination. Bat Ye'or summed up this position in the title of her work, *The Dhimmi: Profile of the Oppressed in the East and in North Africa since the Arab conquest*.<sup>6</sup> These two opposing positions are in dialectic proximity, since writers addressing the subject inevitably either defended one position or targeted the other.

### 1. NON-MUSLIM MINORITIES UNDER MUSLIM RULE IN THE PREMODERN ERA

Discussions of this topic have been marred by erroneous interpretations of public opinion advanced by certain orientalists and Islamists, who have claimed, without basis, that Islamic minority law was established by a Muslim majority for non-Muslim religious minorities.<sup>7</sup> This assertion is contradicted by historical evidence from the eras in question, and it is evident that it is the result of a vague, if not downright false, interpretation of the history of Muslim and non-Muslim relations. Such interpretations often refer to Jewish, Christian or Zoroastrian communities who suffered discrimination and violence at the hands of the Muslim majority. This phenomenon cannot be generalised, and a balanced investigation of this topic requires paradigms other than that of tolerance versus brutality. Supporters of these interpretations

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<sup>5</sup> Cf. Bat Ye'or, *Le Dhimmi, profil de l'opprimé en Orient et en Afrique du nord depuis la conquête arabe* (Paris: Anthropos, 1980).

<sup>6</sup> Bat Ye'or's writing was based on her personal experiences in Egypt in the mid-1950s. Mark Cohen, *Under Crescent and Cross: The Jews in the Middle Ages* (Princeton: Princeton University Press, 2008), 11.

<sup>7</sup> Yūsuf al-Qaraḏāwī, for example, claims that minorities are by nature weak. Yūsuf al-Qaraḏāwī, *Fiqh al-aqalliyāt al-islāmīya* (Beirut, Cairo: Dār aš-šurūq, 2002), 15.

maintain that the interaction between Muslims and non-Muslims in medieval South Asia, where Muslims were a minority, constitutes an exceptional case and must therefore be studied separately. Yet during the formative era of Islamic law, which lasted from seventh to the ninth centuries and was initiated by masters such as Abū Ḥanīfa, Mālik b. Anas, aš-Šāfi‘ī and their disciples or successors, Muslims actually constituted a minority.<sup>8</sup> A prominent illustration of this situation in this period can be found in the history of Hanafi law itself.<sup>9</sup> The formative period of the Hanafi school corresponds to the appearance of the texts of the *Zāhir ar-Riwāya*. The most prominent masters of this school originated in Iraq, where the Muslim minority resided in *qasbas*, military forts or villages such as Kūfa, while the non-Muslim majority lived in the countryside.<sup>10</sup> This hypothesis has been confirmed by a quantitative historical analysis by Richard Bulliet, who also maintains that until the Crusades, the majority of the population living under Islamic rule in the Middle East was non-Muslim.<sup>11</sup>

Bulliet’s research, as well as other historical and geographical studies (such as those of the Muslim historian al-Ya‘qūbī), suggests that the first Hanafi concept relating to the interaction between Muslims and non-Muslims was established when Muslims were still a minority in the region of the Arabian Peninsula

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<sup>8</sup> Richard W. Bulliet, *Conversion to Islam in the Medieval Period: An Essay in Quantitative History* (Cambridge: Harvard University Press, 1979), 128–138.

<sup>9</sup> The only exception in this regard was the Ḥiğāz (the region of Mecca), where only Muslims were allowed to settle. The existence in the region of Christian populations such as the Taġlib has presented a critical case for Muslim jurists and formed the subject of a debate between Abū Ḥanīfa, Mālik and aš-Šāfi‘ī. See Muḥammad ibn Ġarīr aṭ-Ṭabarī, *Kitāb Iḥtilāf al-fuqahā’*, rep. (Leiden: Brill, 1933), 233–37.

<sup>10</sup> Aḥmad Ibn Abī Ya‘qūb, *Kitāb al-Buldān*, vol. 7, rep. (Leiden: Brill, 1891), 308–309. Regarding the region of Iraq, Abī Ya‘qūb observes that “the majority of the people residing in the region of Kufa are Christians”.

<sup>11</sup> Bulliet, *Conversion to Islam*, 128–135.

and Iraq.<sup>12</sup> This fact will be of crucial importance for the South Asian context, as it highlights the similarities between these two contexts during two different historical periods. Indeed, the edicts of Abū Ḥanīfa, Muḥammad aš-Šaibānī, Abū Yūsuf and many Iraqi jurists from the formative era refer to the fact that the majority of the Iraqi population consisted of non-Muslims, especially Christians.

The edicts concerning interreligious relations issued by the first Iraqi jurists had two fundamental objectives: to distinguish the Muslim minority from the non-Muslim majority and to ensure the existence of the latter, which guaranteed the prosperity of these territories.<sup>13</sup> The Hanafi approaches to the interaction between Muslims and non-Muslims can be categorised according to geographical, religious, socio-historical, and political context as follows.

1. The Iraqi approach, developed mainly in Kufa during the eighth and ninth centuries, at a time when Muslims were still a minority in the Middle East.
2. The Central Asian approach, an outgrowth of the Iraqi approach developed between the eleventh and the fourteenth centuries. This position takes into consideration the local religious and demographic circumstances in Central Asia at that time.
3. The South Asian approach, developed between the fifteenth and the seventeenth centuries in response to the situation of the Muslim minority in that part of the Muslim world.

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<sup>12</sup> Ibn Abī Ya‘qūb, *Kitāb al-Buldān*, 308–10. Describing the situation in his day, Abu Ya‘qūb observes that the non-Muslim population was dominant, while Muslims constituted a small minority.

<sup>13</sup> Albrecht Noth interprets the Pact of Umar based on the assumption that this treaty and its subsequent reproductions demonstrate Muslim jurists’ support for the Muslim conquerors of non-Muslim regions. Albrecht Noth, “Abgrenzungsprobleme zwischen Muslimen und Nicht-Muslimen: Die ‘Bedingungen ‘Umars (aš-šuruṭ al-‘umariyya)’ unter einem anderen Aspekt gelesen”, *Jerusalem Studies in Arabic and Islam* 9 (1987): 290–315.

While the differences between these approaches reflect a debate between the jurists of the corresponding branches of the Hanafi school, the beliefs of the Iraqi and the South Asian branches share certain similarities, as I will show. Likewise, while the Central Asian and South Asian branches differ in their approach to the status of non-Muslims, the similarity of the socio-demographic circumstances in seventeenth-century South Asia and formative-period Iraq makes it possible to identify characteristics that are common to both of them.

We should recall that the aim of the authors of the FA was to reproduce the opinions of the Iraqi masters, especially the authors of the *Zāhir ar-Riwāya*. We must now determine whether the applicability of Iraqi legal thought to the South Asian context stemmed from the similar socio-economic circumstances of non-Muslims in both regions. We must also keep in mind that the non-Muslim majority in seventeenth-century South Asia was different from the non-Muslim majority in the Middle East during the eighth and ninth centuries. While in the latter region, non-Muslims included Christians, Zoroastrians and Jews—that is, scriptural peoples—the religious culture of the non-Muslim population in South Asia was characterised by idolatry and polytheism.

This line of inquiry thus differs from investigations of the Maghreb or the Middle East, where non-Muslims were mainly People of the Book. In the following sections, I shall attempt to ascertain whether these South Asian legal scholars differ from their counterparts from other regions regarding concepts pertaining to Muslim minority law. Specifically, I will advance the hypothesis that the rules concerning the cohabitation of Muslims and non-Muslims crafted by the authors of the FA were shaped by sociodemographic and geographical factors, and that as a result, these jurists tended to follow the Iraqi rather than the Central Asian masters.

## 2. MUSLIM MINORITIES IN NON-MUSLIM TERRITORIES

The rights of Muslim minorities in non-Muslim territories constitute a far more recent area of specialisation. In his article “Islamic Law and Muslim Minorities”, Khaled Abu El-Fadl argues that Muslim minorities living in non-Muslim territories were often subjected



to unfair treatment by Muslim jurists.<sup>14</sup> Abu El-Fadl suggests that the history of legal discussions of this topic reflects an attempt to reconcile theoretical requirements with historical challenges, and argues further that this issue is linked to the Islamic legal idea that Muslims can only live under Islamic law and within a Muslim-controlled territory.

As noted above, Islamic legal scholars typically regarded the existence of Muslim communities in non-Muslim territories as exceptional, insisting that Muslim life is only possible within a Muslim state that implements religious concepts and guarantees the religious and civil liberty of Muslims (*işma*). Abu El-Fadl observes that this issue first arose in the context of the Muslim population in Andalusia after the fall of the last Islamic dynasties in the fifteenth century, adding that most studies of Muslim communities or societies in non-Muslim territories were written by jurists living in Muslim territories, who were not directly involved in the matter.<sup>15</sup> The opinions and fatwas of jurists living in Muslim territories were thus often influenced by the context of the mufti residing in *dār al-islām*, irrespectively of the external circumstances of the territory in which the questions arose. In response to this tendency, certain researchers and jurists called for the establishment of rights for Muslim minorities outside of *dār al-islām*.<sup>16</sup>

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<sup>14</sup> Khaled Abu El-Fadl, “Islamic Law and Muslim Minorities”. Abu El-Fadl’s argument has gained increased relevance in recent times due to the permanent residence of Muslim minorities in Western states. Cf. al-Qaraḍāwī, *Fiqh al-aqalliyāt al-islāmīya*, 15–21.

<sup>15</sup> Abu El-Fadl, “Islamic Law and Muslim Minorities”, 141–187.

<sup>16</sup> See, for example, the work of Yūsuf al-Qaraḍāwī, who repeatedly emphasized the importance of establishing rights for non-Muslims. My own analysis of this issue, which also contains a critique of the modern concept of minorities is, however, limited to the context of seventeenth-century South Asia. Khalfaoui, “*Maqasid ash-Shari‘a*”.

### 3. THE MUSLIM MINORITY IN SOUTH ASIA DURING THE SEVENTEENTH CENTURY ACCORDING TO THE *FATĀWĀ L-‘ĀLAMĠĪRĪYA*

During the seventeenth century, Muslims were a minority in South Asia, constituting ten to fifteen percent of the population. In order to understand the situation of this minority, it is important to remember that a minority is not only a demographic phenomenon, but has sociological, religious and cultural implications as well. A minority is subject to the social influence of the majority and must thus resist pressure from other groups. The texts of the FA reveal an extreme sensitivity on the part of South Asian Hanafi jurists to the issue of minority-majority relations. This sensitivity is reflected in their positions vis-à-vis non-Muslims living in Muslim communities, who were required, by edicts on a wide range of activities (including riding animals, performing religious ceremonies and walking in public), to adopt distinctive social, religious and cultural symbols that distinguished them from Muslims. The vigilance with which the South Asian Hanafi scholars approached these matters is also revealed by their dictums on economic behaviour, which show that Muslim traders benefitted from the exclusive support of the Muslim legal conception of that time.

Regarding the conception of interreligious relations as a whole as it appears in Muslim legal scholarship, one may observe that the jurists living at the time of the emergence of the Iraqi Hanafi school during the eighth and ninth centuries were keen to support the non-Muslim populations living in regions under Muslim rule by emphasising the division of territories and adopting a policy of distancing in order to assure each community a space in which to develop and prosper without coming into direct contact with its neighbours. Regarding the South Asian context, the rules laid down in the FA reveal a concept based on the notion of a border that would reduce the influence of the non-Muslim majority on the Muslim minority. Despite the tendency of South Asian legal scholars to separate Muslims from non-Muslims, their texts also reflect a degree of openness. This fact, and the questions it raises, forms the subject of the following chapter, which examines the geographical concepts presented in the FA, especially the

conceptual delineations of Muslim and non-Muslim territory (*dār al-kufr*).



## CHAPTER THREE.

# TOGETHER BUT SEPARATE: THE CONCEPT OF BORDER IN THE FA

The concept of border sheds light on the positions of Muslim jurists regarding the geographical context of the interreligious relations between Muslims and non-Muslims in the seventeenth century. This chapter examines two types of border: borders between social and religious groups and borders between political groups. Central to this discussion are notions of boundaries prevalent in contemporary sociological and anthropological research.<sup>1</sup> In current discourse, a border does not merely constitute a physical boundary, but establishes a separation between two or more ethnic, social or religious groups. This separation gives rise to a symbolic border whose parameters are sociological.

Any discussion of borders implies a discussion of the transgression of borders—a phenomenon linked to topics such as conversion, apostasy or interreligious marriage, which will be discussed in later chapters of this book. In the present chapter, I will compare the physical borders of the Mughal Empire with the symbolic border erected and/or maintained between Muslims and non-Muslims, in order to define the concept of border developed and propagated by Muslim jurists in seventeenth-century India. Through an analysis of the texts of the FA, I will illustrate the physical boundaries of the Mughal Empire under the reign of

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<sup>1</sup> Mouez Khalfaoui, “Together but Separate: How Muslim Scholars Conceived of Religious Plurality in South Asia in the Seventeenth Century”, *Bulletin of the SOAS Journal of Graduate Research* 74, no. 1 (2011): 87–96.

Aurangzeb as well as the nature of the relationships between the political and religious entities that existed within its orbit. My aim thereby is to ascertain whether seventeenth-century India corresponded to the Islamic geographical concept of the “territory of Islam” (*dār al-islām*) and whether the geographical borders of the Mughal Empire during this period were consistent with the symbolic borders advocated by the authors of the FA. Since this study is essentially based on a work of *fiqh*, my analysis will focus on the concept of border as formulated by scholars of Islamic law in order to determine whether the Hanafi legal concept of border (both symbolic and territorial) can be qualified as progressive or reactionary.

The concept of border is also linked to the notion of citizenship within the Muslim state of that time. Citizenship (here, the right to belong to a physical territory and to a political and legal entity) was an issue of particular relevance for non-Muslims. While Muslims had the right to travel freely within all territories under Islamic rule, non-Muslims did not have this freedom, since they were obliged to apply for a residence permit and to pay the corresponding taxes. While numerous exceptions did exist, this was the common model for Islamic legal concepts at the time. Indeed, citizenship as envisaged by classical Muslim jurists was based on the principle of religious belief: territorial loyalty played no role in the allocation of citizenship status to non-Muslims (*dhimmi*). As a result, faith was the necessary precondition for the right to residence, and thus for acquiring legal status, in the pre-modern Muslim state. All individuals were expected to practice some form of religion (atheists were afforded no legal status whatsoever).

The FA refers to three types of territory. These include the “territory of Islam” (*dār al-islām*) and the “territory of infidelity” (*dār al-kufr/ḥarb*), two expressions that appear often in the pre-modern Islamic tradition,<sup>2</sup> and the “territory of the Hindus” (*dār al-hind*), which is used to distinguish the territory of Islam from

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<sup>2</sup> In the Islamic legal corpus these terms are generally used in context of war and peace. Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins Press, 1955), 51–73.

the “land of infidelity”. The very existence of the term *dār al-hind* proves that the concept of “non-Muslim territory” was nuanced to reflect geographical and religious circumstances.

***Dār al-Islām.*** The FA reflects the Hanafi view of the division of territories as it appears in the *Zāhīr ar-Riwāya*. In the FA, territory that is governed by Muslims and administered through Islamic law is referred to as *dār al-islām*.<sup>3</sup> Residence in this territory was permitted to Muslims, non-Muslims (dhimmis) and temporary residents (*musta'min*).<sup>4</sup> The interactions between these groups were regulated by a religious code that guaranteed dhimmis their life and property.<sup>5</sup> The problem arising from the FA's definition of Muslim territory concerns the conditions necessary to change the status of a territory to correspond to the faith of its inhabitants, since, as noted above, the status of a territory depended on the religion of its population. The FA documents the debate between Abū Ḥanīfa and his followers on converting a territory from *dār al-islām* to *dār al-kufr* and vice versa.<sup>6</sup> Before discussing this issue, however, we must first answer a fundamental question: did the authors of the FA consider the Indian subcontinent *dār al-islām*?

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<sup>3</sup> “*ʿIlam anna dār al-ḥarbi taṣīru dār al-islām bi šarṭin wāḥidin wa-huwa iḏhāru ḥukm al-islāmī fihā.*” FA, vol. 2, 232.

<sup>4</sup> Julius Hatschek associates the concept of safe conduct with that of *min'a*, the place where “infidels” can reside or go if they withdraw from the Contract of Peace (*ʿaqd al-amān*), and where commercial transactions were allowed between Muslims and non-Muslims. Julius Hatschek, *Der Musta'min. Ein Beitrag zum internationalen Privat- und Völkerrecht des islamischen Gesetzes* (Berlin: Wissenschaftlicher Verlag, 1920), 74.

<sup>5</sup> There is an extensive body of literature on this subject. One of the most interesting interpretations regarding this subject can be found in Abu el-Fadl, “Islamic Law and Muslim Minorities”. See also Mohamed Alaudin al-Azhari, *The Theory and Sources of Islamic Law for Non-Muslims* (Decca: Asiatic Press, 1962), 3–6; Abel A., “Dār al-islām, Dār al-ḥarb”, and “Dār al-ṣulḥ”, in *Encyclopaedia of Islam. New Edition*, vol. 2 (Leiden: Brill, 1965), 126–28, 131.

<sup>6</sup> “*Qāla Muḥammad [...] innamā taṣīru dār al-ḥarb dār al-islām bi-šurūṭin ṭalāṭa.*” FA, vol. 2, 232.

The first precondition for establishing Muslim culture in newly conquered regions is, as Richard Bulliet has observed, conversion. The conversion of the population of a region would allow the Muslim authority to establish social institutions representing that particular society.<sup>7</sup> Conscious of the demographic factor, Bulliet observes that questions concerning Muslim culture cannot be addressed in areas where Muslims constitute a minority.<sup>8</sup> Although, according to this criterion, the Indian subcontinent cannot be considered synonymous with *dār al-islām* as it was understood in the medieval period, the FA nevertheless treats the subcontinent as an Islamic territory. A comparison between the edicts of the FA and those of the *Fatāwā t-Tātārḥāniya* (FTT), the main work of Hanafi *fiqh* written in South Asia during the fourteenth century,<sup>9</sup> reveals a disparity between their descriptions of the territory of Islam that reflects the different historical contexts in which these works were produced. While the FTT evokes the uncertainty Muslims felt during the first period of Muslim existence till the fourteenth century in that region,<sup>10</sup> the FA reflects the relative certainty of seventeenth-century Muslim jurists in defining South Asia as a territory of Islam. Such a definition was possible because Islamic law had already been established in this territory—which was the first condition for establishing *dār al-islām*, according to the Hanafi jurists of the time.<sup>11</sup>

The edicts of the FA and the FTT also differ in the terminologies they employ to refer to South Asia. While the FTT employs the term *dār al-islām* to denote confrontation between Muslims and non-Muslims, thereby obscuring its meaning, the FA uses it to distinguish between the territories.<sup>12</sup> Moreover, the authors of the FTT, while voicing concern over the intermingling of Muslims

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<sup>7</sup> Bulliet, *Conversion to Islam*, 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> See above, Chapter 1, L1.

<sup>10</sup> Cf. FTT, vol. 5, 222–24: “Concerning the territories of the infidels, the pious imam has said the territories which are under the control of the infidels should be considered part of *dār al-islām*.”

<sup>11</sup> This consisted of a discussion between Abu Ḥanīfa and his two disciples.

<sup>12</sup> FTT, vol. 5, 222–24.



and “infidels”, also express hope for divine support in spreading Islam throughout the territory.<sup>13</sup> The authors of the FA, by contrast, focus on the conditions for changing the status of territories.<sup>14</sup> These works thus reflect contradictory positions regarding the definition of *dār al-islām*: while the edicts of the FTT reveal the Muslim interest in the propagation of Islam, the FA evokes jurists’ fears that Islam would give way to infidelity and idolatry.<sup>15</sup>

Although both the FA and the FTT were written on the Indian subcontinent, they reflect different approaches to Islam, Muslims and non-Muslims. While the FTT presents “infidels” in a position of relative strength, the FA portrays them as weak; likewise, while the FTT refers to a struggle against “infidels” and presents Muslims as a minority fighting for its existence, the FA presents Islam as a robust religious culture whose rules are respected and whose territory is controlled by its adherents. The contrasts between these two works demonstrate the evolution of Islamic thought in South Asia between the fourteenth and seventeenth centuries in conjunction with a political change in favour of the Muslims. These definitions of the territory of Islam and of infidelity, as well as the Hanafi edicts contained in the FA, indicate that their authors indeed considered the Indian subcontinent as corresponding to *dār al-islām*—as an integral part of the territory of Islam, ruled by an imam whose ultimate goal was to implement Islamic law.<sup>16</sup>

This conclusion raises several considerations regarding inter-religious relationships. According to the FA, the interaction between the ruling Muslims and other communities in seventeenth-

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<sup>13</sup> “May God help us win the conquest.” (*‘Asā-l-lāhu an ya’ti bi-l-faṭḥi*). FTT, vol. 5, 155–57.

<sup>14</sup> “Know that the territory of Islam becomes a territory of infidelity, if ...” FA, vol. 2, 232.

<sup>15</sup> *Ibid.*

<sup>16</sup> See William W. Hunter, *The Indian Muslims: Are They Bound in Conscience to Rebel Against the Queen?* (Delhi: Indological Book House), 118–34. Hunter argues that the British colonisation of South Asia gave scholars such as Šāh ‘Abd al-‘Azīz the justification to declare India a “territory of the infidels” (*dār al-ḥarb*), before which it was considered *dār al-islām*.

century India possessed a unilateral or even vertical dimension which dictated the interaction between them.

*Dār al-Kufr.* The FA presents *dār al-kufr*, the land of disbelief, in systematic opposition to *dār al-islām*. Also referred to as the territory of war (*dār al-ḥarb*), *dār al-kufr* is, according to the FA, potentially convertible into Muslim territory. In Islamic legal doctrine, the term *dār al-ḥarb* refers to a territory that has not yet been conquered by Islam. The fate of this territory hinges on that of its inhabitants in the sense that a change in the status of the territory depends entirely on a change in the religion of its population. For a territory to remain neutral, its inhabitants must sign a temporary peace treaty with the Muslim authorities, which involves the payment of a tribute.<sup>17</sup> Historically speaking, *dār al-ḥarb* was often exposed to advancing Muslim armies, except in the situations when a peace treaty was possible.<sup>18</sup> Yet the “permanent struggle against the infidels” described in Islamic legal theory hardly existed in reality. The decision of the Muslim armies regarding the declaration of war (and peace) generally had more to do with the geographical and economic conditions of Muslim armies and that of their adversaries than with Islamic religious norms.<sup>19</sup> This reality gave rise to complex military strategies among Muslim armies, which can be understood as a ‘scenario’ concept which depends on different situations such as the

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<sup>17</sup> FA, vol. 2, 237.

<sup>18</sup> FA, vol. 2, 196–197. Majid Khadduri focuses on the Shafiite doctrine to justify an aggressive tendency in the Islamic conception of war. According to his interpretation, peace contracts between Muslim states and “infidels” were not permitted to last for more than ten years. Khadduri, *War and Peace in the Law of Islam*, 14–18. By contrast (in a case illustrative of the differences between the various schools of law), Abu Ḥanīfa and Malik maintain that such peace treaties may be extended indefinitely like any other peace treaty. M. Raquibuz Zaman, “Islamic Perspectives on Territorial Boundaries and Autonomy”, in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi, Ethikon Series in Comparative Ethics (Princeton: Princeton University Press, 2009), 79–101.

<sup>19</sup> Cf. FA, vol. 2, 196.

accessibility of the territories, the military strength of the enemies etc.

***Dār al-Hind***. The term “territory of the Hindus” (*dār al-hind*) appears to have been a novel addition to the classical repertoire of Islamic territorial concepts,<sup>20</sup> and is of fundamental importance for our understanding of the interaction between Muslim and non-Muslim territories.<sup>21</sup> The term raises two fundamental questions. What is the distinction between *dār al-hind* and *dār al-islām* (or *dār al-kufr*)? Is the emergence of this term a phenomenon specific to South Asia, given that it does not appear in formative works such as the *Zāhir ar-Riwāya*?

While Muslim jurists often addressed the subject of non-Muslim groups such as Jews, Christians, Byzantines or Persians, no precise terminology existed to delineate the territories belonging to these communities. No terms such as “territory of the Jews” or “territory of the Christians” appear in Islamic legal texts. The terms *dār al-kufr* (territory of infidelity) or *dār al-‘ahd* (territory of the pact) are often used to refer to all non-Muslim territories without religious or ethnic distinction. Moreover, these concepts are often linked to social and political factors such as peace and security. Thus, *dār al-hind* can be considered a new term that was invented and introduced into Islamic law by the Hanafī jurists of South Asia. The expression *dār al-hind* suggests the existence of a territory other than *dār al-islām* and *dār al-ḥarb*, implying that it was possible to invent new Islamic geographical terms. In theory, it would thus have been possible to generate appellations such as

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<sup>20</sup> The term appears in the FA, section on conditions (*kitāb aš-šurūṭ*), which notes that “[i]f a man enters the territory of the Hindus and then returns to the territory of Islam accompanied by a Hindu slave who says, ‘I am his slave’, then this Hindu converted to Islam...” FA, vol. 2, 9.

<sup>21</sup> The term also appears in other Islamic legal references from South Asia, such as the FTT (vol. 4, 248), which refers to the *Fatāwā l-ḥāmidīya* concerning this subject. See Muḥammad Amīn ibn ‘Ābidīn, “Kitāb al-Farā’iz”, in *Al-Uqūd ad-durriya fi-tanqīḥ al-fatāwā l-ḥāmidīya* (Beirut: Dār al-kutub al-‘ilmīya, 2008). This reference also refers to the terms *dār al-hind* and *dār at-turk*.

*dār al-yahūd*, *dār al-masīhiyīn* or even *dār at-turk*.<sup>22</sup> While the two classical terms used to denote religiosity, *islām* and *kufr*, carry no geographical connotation, the new terms *dār al-hind* and *dār at-turk*, which appear in the FA, refer to specific ethnic or religious communities or peoples.

The meaning of *dār al-hind* can be further clarified via reference to a detailed discussion of *dār al-islām* and *dār al-kufr* by the twelfth-century Central Asian jurist al-Kāsānī. According to al-Kāsānī's syntactical interpretation, the Arabic term *dār al-islām* is, grammatically speaking, a genitive (*murakkab idāfi*), composed by adding the term *dār* (territory) to the two terms *kufr* or *islām* to produce a nominal delineation between the "land of disbelief" and the "land of Islam". In this interpretation, the term *dār* has no meaning in itself, but is defined via additional concepts such as fidelity and infidelity or belief and disbelief.<sup>23</sup>

Al-Kāsānī goes on to argue that, like *dār*, the terms "Islam" and "infidelity" are meaningless in themselves and are defined via circumstances of peace or war. *Dār al-islām* denotes a secure territory in which the (Muslim) individual may reside tranquilly, while *dār al-kufr* suggests an insecure territory dominated by fear of imminent attacks. Whereas the term *hind* as used in the FA refers to a people, ethnicity or belief, the expression *dār al-hind* refers to both a people and a geographical boundary, denoting a territory distinct from *dār al-islām* but not identical to *dār al-kufr*. *Dār al-hind* thus denotes the territory of Hindus, or the population of the Indian subcontinent, and thus, in contrast to the other two terms, has a purely ethnic connotation.

The significance of this theoretical debate resides not only in the complexity of *dār al-hind* as a concept, but in the very existence of the term itself, which implies that, according to Muslim jurists, the indicated territory can have a status under Islam. Despite its possible pejorative connotations, the territorial appellation *dār al-hind* has the advantage of suggesting a recognition of the region as a *dār* (territory), a status which allows its

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<sup>22</sup> The *Fatāwā l-ḥāmidīya* refers to *dār at-turk wa-r-Rūm*.

<sup>23</sup> Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'ī' aṣ-ṣanā'ī'*, 10 vols (Cairo: Maṭba'at al-imām, n. d.), vol. 9, 429.

inhabitants to sign peace treaties or enter into war with the inhabitants of the territory of Islam. The recognition of the existence of a “Hindu territory” and its appellation as such appears to be unique to the FA. Indeed, in the FA, *dār al-hind* evokes neither negative nor positive connotations since it designates an area that both traders and Muslim warriors may enter.

This theoretical approach to the concept of territory introduced by the South Asian jurists was quite advanced for its time and can be understood as an expression of the latter’s desire to distinguish themselves with respect to the formative Hanafi authors. In addition, their approach reflects their apparent wish to employ a precise terminology when classifying newly conquered Muslim territories, while the existence of a “Hindu” territorial category suggests the possibility of creating other geographical legal frameworks, such as “Buddhist” or even “Marxist” territories. The introduction of the appellation “Hindu territory” opened the door for the creation of other geographical concepts that allowed the Islamic jurists of South Asia to transcend the duality implicit in the designation of territory as either the “land of infidelity” or the “land of Islam”.

To summarise, the authors of the FA addressed the issue of the border between Muslims and non-Muslims with a precision unprecedented in Islamic law. Their fusion of the concept of the border with the notion of ethnicity represents a step towards the idea of a nation-state in which the notion of religion merges with the concept of a people.<sup>24</sup> This brings us to the subject of the status

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<sup>24</sup> The concept of border corresponds to that of the Roman *dominium imperium* propagated by the Catholic Church. As a scientific, geopolitical concept, the border or frontier corresponds to the physical line of demarcation behind which an army establishes a defensive position. This conception of frontier became important with the advent of the modern nation state. See Jos J.L. Gommans, *Mughal Warfare: Indian Frontiers and Highroads to Empire, 1500–1700*, Warfare and History (London, New York: Routledge, 2003), 15. See also Ainslie T. Embree, “Frontier into Boundaries: From the Traditional to the Modern State”, in *Realm and Region in Traditional India*, ed. Richard G. Fox, Monograph and Occasional Papers Series 14 (Durham: Duke University, 1977), 255–80.

accorded to the Indian subcontinent in the FA, to which I now turn.

### 1. THE BORDERS OF THE MUGHAL EMPIRE IN THE SEVENTEENTH CENTURY

In his book *Mughal Warfare*, Jos Gommans attempts to identify the physical boundaries of the Mughal empire. After discussing the concept of border,<sup>25</sup> Gommans analyses Mughal military strategies according to the climate of the Indian subcontinent during the medieval period. His approach, which addresses the effect of religion on the geopolitics of Mughal border design, allows for an interpretation of the term “border” as it appears in the FA. Gommans notes that the frontiers of the Mughal Empire

were never lines, but always zones ... Apart from being areal in nature, this frontier also implies a zone of transition, for example between two different ecological or administrative regions.<sup>26</sup>

Gommans sheds light on the Mughal policy toward other populations through the study of the military campaigns of the Mughal sultans, who were often guided by the geopolitical situation of the subcontinent.<sup>27</sup> This approach is relevant to the present discussion of the symbolic borders of the Mughal Empire. It is useful to compare the Hanafi precepts contained in the FA with the Mughal military strategy.<sup>28</sup> Such a comparison raises several questions. If the expansion of Islam and the permanent struggle against “infidels” were fundamental norms decreed by the FA, how were these norms applied to the geopolitical context of

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<sup>25</sup> Gommans, *Mughal Warfare*, 15.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> It is important to note that the geopolitical factor was the first factor determining the relationship of the Muslim state to non-Muslims. A weak enemy was seen as an enemy to be defeated, while a strong enemy was seen as one to be negotiated with. Moreover, the conception that regulated Muslims’ relations with non-Muslims did not consider enemies living in regions far from Muslim territories.

seventeenth-century South Asia? Did they inform the strategic positions held by the Mughal Empire at that time?

The Mughal Empire was in permanent conflict with both Muslim and non-Muslim enemies, as evidenced by the Deccan Wars waged by Sultan Aurangzeb throughout the second half of his reign, and which exhausted the Mughal treasury.<sup>29</sup> These wars can be seen as having resulted more from Aurangzeb's geopolitical strategy than from religious considerations, since the religious identity of the enemy did not overly influence Mughal policy at that time. This echoes Gommans's interpretation of the concept of border and its relation to the geopolitical strategies of the Mughal dynasty. Noting that "the history of warfare cannot do without geography",<sup>30</sup> Gommans underlines the role of geography in shaping the military strategies of the Mughals:

In principle, the Mughal realm was unlimited. In practice, Mughal territorial rule became stranded at various inner frontiers all along the imperial high roads. Paradoxically, however, crossing the frontiers became the routine business and the *raison d'être* of the imperial army.<sup>31</sup>

According to Gommans, the geopolitical factor was more important than social or religious status:

Indeed, the social distinction appeared to be less important than the ecological circumstances that gave India's drylands, both in terms of man- and horsepower, by far the largest military potential.<sup>32</sup>

The borders of the Mughal Empire had always been drawn according to the geographical features of the subcontinent. In the case of its internal borders, these boundaries were linked to trade

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<sup>29</sup> The Deccan Wars lasted from 1682 to 1707. Aurangzeb visited the region several times during his struggle against the local *ṣubāḥdār* (governor) before his ascension to the Mughal throne. Ashvini Agrawal, *Studies in Mughal History* (Delhi: Motilal Banarsidass, 1983), 79–110; 135–170.

<sup>30</sup> Gommans, *Mughal Warfare*, 7.

<sup>31</sup> *Ibid.*, 169.

<sup>32</sup> *Ibid.*, 7.

and agriculture (for example, arid versus fertile regions), while the empire's outer borders were demarcated by the forests in the north and east. Mughal border policy was shaped by the need to exert control over the internal and external borders of the imperial territory.<sup>33</sup>

This analysis allows us to situate the relevant passages of the FA within the historical reality of this period. In developing its border control strategies, the Mughal Empire relied to a greater degree on its relations with non-Muslims, on enemy military strategy and on social, political, geographical and climatic factors than on religious considerations, as some researchers have suggested.<sup>34</sup> The borders of the empire corresponded, firstly, to the geographical zones of the Indian subcontinent, which experience monsoons,<sup>35</sup> and secondly, to the military ideology of its sultans. These two criteria were crucial to the stability of the empire. By contrast, the authors of the FA examine notions of border in a religious and political context, focusing on the distinction between believer and unbeliever and on the economic and political realities faced by the state.<sup>36</sup> In sum, the notion of border as it appears in the FA comprises two notions: it is both a legal concept that distinguishes the territory of Islam from other territorial types based on religious principles, and a reference to the geopolitical reality of seventeenth-century South Asia.

## 2. THE SOCIAL OR SYMBOLIC BORDER

Turning now to the second category of border, I will borrow the concept of the sociological border from the German sociologist Georg Simmel, who coined this term in the early twentieth

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<sup>33</sup> Embree, "Frontier into Boundaries", 273.

<sup>34</sup> Despite their differing interpretations of Aurangzeb's reign, Sarkar and Faruqi both attribute great importance to the political role of the ulama during that period.

<sup>35</sup> Gommans, *Mughal Warfare*, 15–16.

<sup>36</sup> The importance attributed to the notion of border in the FA is reflected by the following rule: "Know that *dār al-ḥarb* changes to *dār al-islām* only on one condition, [namely] the application of Islamic Law." FA, vol. 2, 232.



century. According to Simmel, a frontier is not a physical reality that has a sociological effect but rather “a sociological reality formed in space”.<sup>37</sup> Simmel describes sensitivity to the notion of space as an integral part of human existence and maintains that any proximity or distance between individuals must affect the space in which they live. Place itself thus has no influence, since no geographical element is tied to any particular nation or empire.<sup>38</sup> Simmel further contrasts the political designation of place with what he calls physical or psychological qualification, from which he developed his notion of “social borderline”, a boundary resulting from reciprocal influence between individuals (rather than between countries or nations).<sup>39</sup>

In maintaining this mutual influence, individuals seek to identify, via well-defined symbols, the boundary that separates them from other peoples. Simmel concludes that the border has its own meaning, but in a social, rather than geographical sense. By defining the border as a geographically-formed social entity,<sup>40</sup> Simmel emphasises the distinctly social function of the border. Simmel’s definition of a sociological boundary corresponds to what I call the *symbolic border*, a border consisting of ideological notions that shape the relationships and interactions between social groups. These borders consist of signs which allow us to identify an individual or group as well as the nature of their proximity or distance. Such a symbolic border may comprise, for example, tenets of Islamic law concerning clothing, symbolising the distinction between Muslims and non-Muslims. The distinctive signs non-Muslims were required to display reflect their obligation to respect the boundaries separating these communities. These signs are thus symbols of social boundaries.<sup>41</sup>

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<sup>37</sup> Georg Simmel, “Der Raum und die räumlichen Ordnungen der Gesellschaft”, in *Grenzsoziologie. Die politische Strukturierung des Raumes*, ed. Monika Eig Müller and Georg Vobruba (Wiesbaden: VS Verlag für Sozialwissenschaften, 2006), 15–23.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Khalifaoui, “Together but Separate”.

The concept of symbolic border refers to notions of borders that exist within each social group and serve to distinguish them from other groups. For example, an individual's clothes, insignificant in themselves, manifest meaning through what they signify, establishing a symbolic border through their colour, quality or form. Such borders exist in various domains and are rooted in the codes governing daily life. The FA contains exhaustive information on this topic. Whenever they address notions of boundaries, the authors advocate maintaining a distinction between Muslims and other communities by, *inter alia*, exhibiting the distinctive characteristics of individual lifestyles, whether Muslim or secular. The symbolic frontier corresponds to the norms of identification as portrayed by the authors of the FA regarding all types of relationship or interaction between Muslims and non-Muslims. The concept of the symbolic (as opposed to the physical or political) border permeates, explicitly or implicitly, all debates on interreligious relationships reflected in the FA. A comparison between the ways in which the authors of the FA address the concepts of physical and symbolic border reveals that the latter concept held greater significance for the Muslim jurists of seventeenth-century South Asia than it had for jurists in earlier periods and in other parts of the Muslim world.

Yet the notion of a physical boundary (signifying distances between groups) implies the crossing or disregard of symbolic borders and allows non-Muslims to live freely and unrestricted by Islamic law. Thus, it can be said that for these South Asian jurists, the concept of border carried a symbolic or ideological rather than a physical meaning. The border corresponds to a set of symbols representing a specific entity, which in turn defines other social, religious or political entities.<sup>42</sup> All mechanisms of distinction or identification, such as clothing, riding animals or social behaviour, define the concept of the symbolic or (to use Simmel's term) sociological border. The latter concept corresponds to an institution whose purpose is to shape, define and support the

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<sup>42</sup> Cf. Margit Pernau, "Multiple Identities and Communities: Re-Contextualizing Religion", in *Lived Islam in South Asia*, ed. I. Ahmad and H. Reifeld (Delhi: Social Science Press, 2004), 147–69.

identity of its followers in the face of aggression.<sup>43</sup> Because the institution of the border arises from a mutual influence between individuals, it requires a sustained proximity that determines the value of the interaction between social groups. Accordingly, the FA mandates the fortification of borders and, when necessary, the reinstatement of boundaries that have been violated.

The debate over the Hanafi concept of social border is worthy of attention. However, the approach to the problem of border found in the texts of the *Zāhir ar-Riwāya* differs from that adopted by the Central Asian and South Asian Hanafi masters. The fact that the FA emphasises the norms of the border more strongly than other Islamic legal doctrines is understandable considering the social and economic situation in seventeenth-century South-Asia. The authors of the FA lived in an environment in which non-Muslims enjoyed a socio-demographic advantage and therefore insisted that the social borders between Muslims and non-Muslims be respected. This concept of border is distinguished by its singularity, which is rooted not in the divergence between the viewpoints of the Iraqi jurists, but rather in the socioeconomic and demographic context of each region. As a minority in South Asia, Muslims were obliged to focus on their differences in order to safeguard their privileges.

Finally, it is necessary to consider the notion of transgression, which involves cases of individuals or groups attempting to cross a border, whether out of necessity or of their own free will. In the Islamic legal context, the crossing of boundaries can take the form of a permission granted to Muslims to disregard the codes of their religion in order to establish a relational interaction or transaction with non-Muslims. The jurists therefore conceived of the crossing of borders in terms of the notion of need (*al-ḥāǧa*). If the need is deemed vital, the crossing is accepted, but remains an exception. This signifies a shift from the rules of categorical

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<sup>43</sup> On the frontier as an institution, see Monika Eigmüller, “Der duale Charakter der Grenze: Bedingungen einer aktuellen Grenztheorie”, in *Grenzsoziologie. Die politische Strukturierung des Raumes*, ed. Monika Eigmüller and Georg Vobruba (Wiesbaden: VS Verlag für Sozialwissenschaften, 2006), 55–73.

borders to those of necessity and exception, raising the question of who has the authority to grant the right to cross the border. According to the authors of the FA, this authority lies with the religious institution of which they themselves are the representatives.

## CHAPTER FOUR.

# THE LEGAL STATUS OF NON-MUSLIMS

The authors of the FA refer to the non-Muslim inhabitants of the Indian subcontinent as dhimmi (People of the Book). In addition, they also used blanket terms such as “non-believers” or “disbelievers” (*al-kuffār*), while more specific terms such as “Hindu” can be found in passages dealing with topical contexts such as commerce, slavery and testimonial. This chapter examines the ways in which the authors of the FA determined the status of non-Muslims within the conceptual framework of the status of the dhimmi. It thereby sheds light on the status that the Muslim jurists of South Asia accorded to local non-Muslims, who were, for the most part, polytheistic and non-scriptural.

### 1. THE CONCEPT OF DHIMMA

The subject of dhimma has received much attention from Eastern and Western researchers alike.<sup>1</sup> Although several modern Muslim authors have broached this subject in order to emphasise Islamic

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<sup>1</sup> For an overview of the research on this subject until 1965, see Claude Cahen, “Dhimma”, in *Encyclopaedia of Islam. New Edition*, 2 (Leiden: Brill, 1965), 227–31. In this work, Cahen refers to Antoine Fattal, *Le statut légal des non-musulmans en pays d’Islam* (Beirut: Imprimerie Catholique, 1958). See also Noth, “Abgrenzungsprobleme zwischen Muslimen und Nicht-Muslimen”, in which Noth casts doubts on certain aspects of the Pact of Umar.

tolerance toward non-Muslims,<sup>2</sup> orientalists have adopted an approach that combines both subjective criticism and objective scientific analysis.<sup>3</sup> The concept of dhimma thus enables a discussion of the history, nature and modalities of interaction between Muslim and other religious communities.

In his pioneering study of the legal status of non-Muslims in the Islamic world, Antoine Fattal defines the concept of dhimma as

the convention according to which non-Muslims residing in territories that have been conquered by Muslims obtain from the latter the recognition of their rights on a public and private level [...]. In return, the Muslims commit themselves to the contract of dhimma, which requires them (1) to abstain from any act of hostility against the dhimmis (sic.) and to assume responsibility for any injustice committed by Muslims against dhimmi or their property and (2) to protect dhimmi against any internal or external attack. [...] In sum, the [convention of the] dhimma is an original formula of legislation for expansion and subjugation that has been used throughout antiquity and the Middle Ages.<sup>4</sup>

Fattal's definition of the dhimma convention as an "original formula of expansion and of subjugation"<sup>5</sup> has been the subject of scientific debate. Although many orientalists consider it pejorative,<sup>6</sup> other researchers, including Claude Cahen, have qualified

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<sup>2</sup> See Ḥasan Mimmi, *Ahl aḍ-ḍimma fī l-ḥaḍāra l-islāmīya* (Beirut: Dār al-ḡarb al-islāmī, 1998).

<sup>3</sup> See Bat Ye'or, *Le Ḍimmi: profil de l'opprimé en Orient et en Afrique du nord depuis la conquête arabe* (Paris: Anthropos, 1980), 29.

<sup>4</sup> Fattal, *Le statut légal des non-musulmans*, 72–74 (author's translation); see also Claude Cahen, "Dhimma". Cahen interprets the *dhimma* convention as a contract of integration, an argument which was challenged by Karl Binswanger. See idem, "Untersuchungen zum Status der Nichtmuslime im Osmanischen Reich des 16. Jahrhunderts: Mit einer Neudefinition des Begriffes 'Ḍimma'", *Beiträge zur Kenntnis Südosteuropas und des Nahen Orients* 23 (München: Trofenik, 1977), 326–353. See also Willi Heffening, *Das Islamische Fremdenrecht bis zu den islamisch-fränkischen Staatsverträgen* (Hannover: Lafaire, 1925).

<sup>5</sup> Fattal, *Le statut légal des non-musulmans*, 72–74.

<sup>6</sup> Ye'or, *Le Ḍimmi*, 220–28.

the dhimma convention as having a symbiotic character.<sup>7</sup> This polemic was summed up by Karl Binswanger in his reaction to Cahen and the latter's "theory of symbiosis", in which Binswanger notes that the dhimmi convention was often a policy of subordination whose objective was the neutralisation of non-Muslims in preparation for their extermination.<sup>8</sup> An important contribution to the discussion on dhimmi was provided by Baber Johansen.<sup>9</sup> Johansen elucidates the characteristics and general framework of the concept of dhimmi by exploring the following question: How is it possible to characterize non-Muslims and their religious literature after the advent of Islam? Johansen sees this question as fundamental to an understanding of the status of the so-called People of the Book in pre-Islamic times. While certain Islamic legal scholars maintain that the commandments of non-Islamic scripture remain valid as long as no text abrogates them, others hold that these legal norms were automatically abrogated by the advent of Islam. According to this approach, Islam is the last monotheistic religion, and as such annuls all religions that preceded it. Yet another group of scholars, Johansen observes, hold that the legal norms of other religions are admissible only if confirmed by an Islamic text.<sup>10</sup> The question of the status of Indian religions is thus linked to that of the validity of non-Islamic scriptures in general. In order to answer the above questions, Johansen differentiates between two meanings of the term dhimmi: a religious meaning, referring to the People of the Book (Jews and Christians) and a political meaning that applies to all non-Muslims. These two types of dhimmi are tied to the notion of immunity (*'isma*), which, as Johansen observes, constitutes the only link between man and the creator in Islamic thought.<sup>11</sup>

In his discussion of the notion of abrogation (*nash*) later in his work, Johansen argues that the Jewish and Christian scriptures were considered to have been divested of value following

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<sup>7</sup> Cahen, "Dhimma".

<sup>8</sup> Binswanger, "Untersuchungen zum Status der Nichtmuslime", 331.

<sup>9</sup> Johansen, "Entre révélation et tyrannie", 219–37.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

the advent of Islam. Islamic legal theory “outlawed” the followers of these faiths, since it held that their link to the creator had been broken by their refusal to accept Islam, and that this link could only be re-established via conversion to Islam. Should they fail to do so, the only way for them to acquire the right to live in Muslim territory was to submit to Islamic political power via the payment of a capitation tax (*ġizya*) and by assuming the status of dhimmi.

Johansen acknowledges the role of analogy (*qiyās*) in this reflection. According to Islamic doctrine, the caliph is God’s representative on earth, and any non-Muslim who recognises the caliph’s authority thereby recognises, both consequently and indirectly, the power of God and of Islam, thus re-establishing his or her link to God. Following this logic, all non-believers are equivalent in the eyes of Muslim jurists, as they believe in neither the truth of Islam nor in a Muslim God, and consequently, no distinction is made between Hindus, Buddhists, Jews or Christians.<sup>12</sup> This notion of the legal equivalence of non-Muslims is explicitly mentioned in the FA.<sup>13</sup> The ulama are thereby spared the effort of distinguishing between various religious groups; non-Muslims’ payment of the *ġizya* and recognition of Muslim political power procures them the same right to residency as Muslims. Non-Muslims who were not People of the Book were thus comparable to the latter, as this status had ceased to have value since the Sabaeans and Zoroastrians were labelled as *kitābi* or dhimmi.<sup>14</sup>

Abu Ḥanifa, the founder of the Hanafi school, grants non-Muslims the right to adhere to their religious principles without sanction or maltreatment in Muslim territory. Abu Ḥanifa based his ruling on the fact that the contract of the dhimma is the equivalent of the *‘iṣma*, which guarantees freedom of religion to non-

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<sup>12</sup> Ibid.

<sup>13</sup> FA, vol. 2, 188.

<sup>14</sup> With Abu Ḥanifa’s decision to extend the status of dhimmi to include the Sabaeans, the status of *ahl al-kitāb* lost its meaning. Accordingly, the authors of the FA did not distinguish between the various non-Muslim religions.



Muslims despite the Islamic abrogation of their religions.<sup>15</sup> Abu Ḥanifa further proposed that the *ḡizya* could be accepted from non-Muslims on the basis that it had been also accepted from the Sabaeans, who were non-scriptural. He also emphasises that the submission of non-Muslims is strictly political. Yet Abu Ḥanifa's successors, most of whom had been his disciples or associates, rejected their master's position, claiming that the Jewish and Christian scriptures had been abrogated by Islam.<sup>16</sup> Consequently, they considered the dhimmi politically and legally subordinate and saw their behaviour as incompatible with Islamic rules. In their view, dhimmi had to live according to Islamic legal norms in order to gain the right to reside in Islamic territory. To solve the problem potentially posed by this arrangement, Hanafi jurists relied on the principle of tolerance regarding the acceptance of non-Muslims into Islamic territory. Henceforth, Hanafi legal texts often used expressions such as "close your eyes" or "laissez-faire" to express jurists' leniency concerning the behaviour of non-Muslims.<sup>17</sup> Likewise, Abu Ḥanifa's approach to the *ḡizya* as an egalitarian tax paid to Muslims by non-Muslims was repudiated by his disciples during the codification of the Hanafi legal codex.

The classical framework for understanding the concept of dhimma can be used to interpret the FA's contribution to the

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<sup>15</sup> "The norm of Abu Ḥanifa is to allow the dhimmi to believe in their divinities, whereas his two disciples [Muḥammad and Abu Yusuf] think that they should not be allowed to do so." 'Ubaid al-Lāh ad-Dabbūsi, *Kitāb Ta'sīs an-naẓar*, rep. (Cairo: Al-Maṭba'a l-Adabiya, 1900), 13.

<sup>16</sup> Abu Ḥanifa's disciples, Muhammad and Abu Yusuf, argued that their predecessor had wrongly considered the Sabaeans as *ahl al-kitāb*. Cf. Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2003), 54–56.

<sup>17</sup> "We allow them to perform this act [marriage without witnesses] based on the pact of the dhimma and not because we agree with their actions; the same applies to the idolaters and Sabaeans." Muḥammad ibn Aḥmad as-Saraḡsī, *Kitāb al-Mabsūṭ*, 30 vols, rep. (Beirut: Dār al-ma'rifa, 1978), vol. 5, 38–40.

evolution of this field of study as well.<sup>18</sup> While they generally preferred to rely on the *Zāhir ar-Riwāya*, regarding the treatment of non-Muslims the authors of the FA often opted for the position of Abu Ḥanifa. At the same time, they rejected the positions of two of Abu Ḥanifa's disciples, suggesting that they had advocated a new interpretation of non-Muslim rights by shifting their discursive and conceptual focus away from the political domain. According to Baber Johansen, this refocusing had a disruptive influence on all dimensions of Islamic law as well as on the evolution of the Hanafi school.<sup>19</sup> An examination of the position of the FA's authors vis-à-vis non-Muslims outside of South Asia suggests that they opted to return to the edicts of the first Hanafi masters rather than to adopt the positions of their Central Asian and Iraqi contemporaries—a feasible option, considering that the two social contexts were broadly analogous.<sup>20</sup>

Does the FA classify South Asian non-Muslims as dhimmi? In order to answer this question, it is important to keep in mind that in seventeenth-century South Asia, “non-Muslims” were not Christians or Jews, but rather groups that Islamic doctrine defined as “idolaters” and which were effectively subsumed under the category of dhimmi. The authors of the FA presented two contradictory approaches to this issue. While Abu Ḥanifa favoured classifying non-scriptural peoples as dhimmi, his disciples Muhammad and Abu Yusuf emphasised the distinction between scriptural and non-scriptural peoples. Abu Ḥanifa's approach won out in the end, as the authors perceived a parallel between the (non-scriptural) Sabaeans, whom they recognized as dhimmi, and the non-Muslims of South Asia. Based on this analogy, the religious affiliation of South Asian non-Muslims no longer affected their status. Rather, they were regarded as nonbelievers or “infidels”, like all

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<sup>18</sup> Yohanan Friedmann, “Islamic Thought in Relation to the Indian Context”, in Eaton, *India's Islamic Traditions*, 50–63.

<sup>19</sup> Johansen, *The Islamic Law on Land Tax and Rent*, 180–82.

<sup>20</sup> The situation of non-Muslims during the first centuries of the Islamic era in the Middle East (particularly in Iraq) and in seventeenth-century South Asia were remarkably similar. In both cases, Muslims were politically dominant while constituting a demographic minority and adapted their legal norms to conform to this reality.

other peoples who had rejected the message of Islam. The authors thus use these terms to refer not to adherents of polytheistic faiths in general, but rather to individuals. In other words, the category of dhimmi includes polytheists and monotheists, Jews and Christians.

As noted above, the Iraqi legal approach to non-Muslim rights, which was confirmed and adapted by the authors of the FA, granted non-Muslims not only the right to live together with Muslims but also to establish relations of partnership and collaboration with them. However, Muslim jurists could not easily designate South Asian non-Muslims as dhimmi because the inhabitants of this region were neither scriptural people like the *kitābī* (Jews and Christians) nor semi-scriptural people (*mušabbah bi-ahl al-kitāb*)<sup>21</sup> like the Sabaeans. This problem was exacerbated by the multiplicity of South Asian sects and religious beliefs and by the historical gap between the seventeenth century and the period of the great *muğtahid* jurists of the founding era of the Hanafi school.<sup>22</sup> Khaliq Nizami has noted the lack of terminology to denote the non-Muslims of the subcontinent, which he interprets as indicative of a significant divergence between Islamic theory and the reality of life in that territory:

As a matter of fact, the attitude of the ‘ulamā’ was determined by what they found stated in books on *fiqh*, written outside India and without any specific reference to Indian conditions. No Indo-Muslim scholar of the thirteenth century sought to study the problem of the Indian Mussalmans and their relation with the Hindus in the light of the conditions operating in this country. Either such a study of the problem was considered unnecessary or the Islamic Law was too static to take any note

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<sup>21</sup> Cf. Bruce B. Lawrence, *Shahrastani on the Indian Religions: Muḥammad Ibn ‘Abd al-Karīm aṣ-Šahrastānī*, Religion and Society 4 (Berlin: De Gruyter, 1976), 16.

<sup>22</sup> Aṭ-Ṭabarī presents the discussion on non-Muslims as follows: “All masters think unanimously and without dispute or divergence that the one who pays the *ḡizya* among the People of the Two Books [...] will be accepted [...]. Then they [the masters] had a dispute regarding the idolaters [...]” Aṭ-Ṭabarī posits that Abū Ḥanīfa and Mālik accepted the *ḡizya* from the “idolaters”. Aṭ-Ṭabarī, *Kitāb Iḥtilāf al-fuqahā’*, 201–03.

of the changed circumstances. Even the *Adab-u 'l-Harb wa-Shuja'at*, which contains some stray references to the status and position of the zimmi in a Muslim state, does not make any reference to the Hindu. Fakhr-i-Mudabbir talks about Sabians, Christians, Jews etc. but makes absolutely no mention of the vast majority of the Hindu population in whose midst he had compiled his book.<sup>23</sup>

Nizami's analysis raises the following question. To what extent do the aspects ascribed to thirteenth-century South Asia apply to the seventeenth century? Assuming that Nizami's observations are accurate, did the treatment of Hindus change over time, and if so, can we see evidence of this in the FA?

In sum, by categorising the non-Muslims of South Asia as dhimmi, the authors of the FA reproduced the edicts of Abu Ḥanīfa regarding the status of non-Muslims, dismissing those of his disciples Muhammad and Abu Yusuf. As mentioned above, the authors based their decision on the precedent set by Abu Ḥanīfa's acceptance of the Sabaeans as dhimmi. The decision to classify all non-Muslims as dhimmi was thus neither arbitrary nor the result of negligence or disinterest. On the contrary, it is proof of the unique relationship between the FA and the reality in which it was written.<sup>24</sup> In addition, it proves that the theoretical distinction between the various populations of India had no effect in practice, since all non-Muslims were expected to pay the *ḡizya* and were thus considered dhimmi from an economical perspective as well. The notion that these communities constituted a single society paved the way for the acceptance of non-Muslims by Mughal politicians, and even led them to favour certain groups

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<sup>23</sup> Khaliq Ahmad Nizami, *Religion and Politics in India During the Thirteenth Century* (New Delhi: Oxford University Press, 2002), 334.

<sup>24</sup> Yohanan Friedmann sees the granting of this status to non-Muslims in South Asia as the last phase of the development of the concept of dhimma in classical Muslim thought. Yohanan Friedmann, "The Temple of Multān: A Note on Early Muslim Attitudes to Idolatry", *Israel Oriental Studies* 2 (1972): 176–82; Yohanan Friedmann, "Medieval Muslim Views of Indian Religions", *Journal of the American Oriental Society* 95 (1975): 214–21.

(such as the Rajputs, who were often exempt from taxes).<sup>25</sup> The principle of equality conveyed by the ulama also prevented ethnicity from playing too large a role in the policies of the Mughal sultans.<sup>26</sup> Furthermore, the dhimmi status allowed non-Muslims to avoid potential dangers resulting from the obligation to change their residence or else face religious violence legitimised by the state. Abu Ḥanifa's legacy thus granted non-Muslims in South Asia the status of dhimma and their payment of the *ḡizya* rendered them equal to Muslims, at least in terms of Islamic law.<sup>27</sup>

## 2. THE LEGAL QUALIFICATION OF NON-MUSLIMS

As noted above, although the authors of the FA designate non-Muslims as dhimmi, they repeatedly employ terms that signify subcategories of non-Muslims. The term "Hindu" appears about twenty times in the FA, most often in the sections concerning commerce,<sup>28</sup> the purchase and sale of slaves, and marriage (Hindus were permitted to act as witnesses at Muslim marriages). These texts feature three contradictory and complementary figures: the Hindu slave, the Hindu merchant and the Hindu witness. According to the FA, the servile Hindu man and woman are often subject to sale,<sup>29</sup> domestic exploitation, or being used in domestic work,<sup>30</sup> and are always depicted in opposition to the Muslim, who is portrayed as the master (an inverse arrangement was inconceivable for the authors of the FA). The Hindu slave is presented as a passive individual whose fate depends on his masters.

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<sup>25</sup> Jagadish Narayan Sarkar, *Mughal Polity* (Bombay: Idarah-i Adabiyat-i Delli, 1984), 394; Upendra Nath Day, *The Mughal Government: AD 1556 - 1707* (New Delhi: Munshiram Manoharlal, 1970), 134; Chandra, *Mughal Religious Policies*, 170–83.

<sup>26</sup> Michael Mann suggests that Muslims and Christians were the only groups to enjoy a higher status than the Hindus because they refused to prostrate themselves before them. Michael Mann, *The Sources of Social Power*, vol. 1 (Cambridge: Cambridge University Press, 1986), 349–63.

<sup>27</sup> See also aṭ-Ṭabarī's analysis of the *ḡizya*. Aṭ-Ṭabarī, *Kitāb Iḥtilāf al-fuqahā'*, 199–241.

<sup>28</sup> FA, vol. 6 (*Kitāb aš-Šurūt*), 248–49.

<sup>29</sup> FA, vol. 6, 247.

<sup>30</sup> FA, vol. 4, 89–91.

Further, the authors note the qualities of Hindu slaves and the beauty of Hindu women<sup>31</sup> and describe the language that Hindu slaves were required to use,<sup>32</sup> the earrings they had to wear and their required hairstyle and dress. More recently, Hindu nationalists have cited the depiction of the Hindu slave in the FA to support their claim that Hindus suffered abuse at the hands of the Mughals. Yet one can also remark that these images were typical of that era. Moreover, the notion of servitude, which implied the concept of a hierarchy in which one individual or group is “naturally” at the service of another, is inherent to the Hindu caste system. While the authors of the FA do not develop nor criticise this model, they were trying to regulate the slave trade and to establish the legal principle of equality among slaves.<sup>33</sup>

While the FA repeatedly portrays Hindus as slaves, it also includes depictions of Hindu merchants and Hindu witnesses. When discussing merchants, the FA does not directly employ the term *Hindu* as an ethnic qualifier, since the ethnicity or religion of merchants was often disregarded. By contrast, the FA advocates fair treatment of all merchants regardless of their religion or ethnicity, as illustrated by the following passage from a section on taxes:

When a Muslim passes by a customs officer, the latter should take from him a quarter of the tenth of the value of his produce [...]. If a dhimmi passes by the customs officer, the latter should take from him the half of the tenth [...] and should demand this tax only once a year [...]. Anyone—whether a Muslim, dhimmi or warrior—who passes by the customs

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<sup>31</sup> FA, vol. 3, 71

<sup>32</sup> FA, vol. 3, 70–71.

<sup>33</sup> “If he buys a female Turk slave who does not speak Turkish or does not master this language well [...] he has no right to bring her back to the seller [...], whereas, if he buys a Hindu slave that does not speak the Hindu language, he should know whether this is to be considered an inconvenience by the experts. If it is, he has the right to return her to the owner.” Ibid.

officer with an amount less than 200 dirhams is exempt from payment.<sup>34</sup>

This tendency toward a fair treatment of non-Muslims is also illustrated by another passage which, affirming the legitimacy of testimony given by non-Muslims, states that “all statements made by a Muslim that can be proven as believable can also be accepted as such if they are pronounced by a dhimmi”.<sup>35</sup> These examples show that, in addition to expressing trust in non-Muslim merchants, the authors of the FA also granted them freedom of movement and the right to trade and acquire wealth. A comparison between the Hindu slave and Hindu merchant reveals a striking contradiction: while the former was often subject to constraints, the latter enjoyed freedom and—in certain circumstances—wealth. Reflecting the fact that under Islamic law trade is open to all individuals—whether male or female, free or slave—numerous passages in the FA describe non-Muslim slaves who engage in commerce for the benefit of their Muslim masters. Since trade was permitted among slaves, the fact that the FA portrays Hindus both in positions of servitude and in the commercial sphere<sup>36</sup> poses no contradiction. This ruling is corroborated by historical literature testifying to collaboration between Muslim and Hindu traders. As Jagadish Sarkar observes concerning the situation of Muslim and Hindu merchants in the Mughal empire,

The marketing organization, including the commercial scene of India, was [...] dominated by a heterogenous body of merchants and financiers, great and small [...] Hierarchically, the merchants may be categorized into four classes according to their wealth and functions. Socially [...] this community comprised both groups and individuals; the groups belonged to a small number of specialized castes or races: the Muslims of the sea-board, Persians, Mughals, Pathans in different parts of the Mughal empire; the Baniyas and Parsis of Gujarat [...]. Socially speaking, the great merchants belonged mostly to the Muslims of the seaboard and foreign immigrants who were

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<sup>34</sup> FA, vol. 1, 183.

<sup>35</sup> Ibid.

<sup>36</sup> FA, vol. 1, 65–67.

active on both the coasts of the Deccan as well as in Gujarat and Bengal.<sup>37</sup>

The role of religion in the commercial interactions between the various communities of South Asia was thus minimal, despite the desire of certain jurists to take advantage of religious differences in order to monopolise areas of business that were open to all subjects of the empire.

Finally, in the section on marriage, the authors of the FA discuss the credibility of Hindus as witnesses. They refer to Muḥammad aš-Šaibānī's decision to accept non-Muslim witnesses under the condition that there be two of them and that they be able to report what they had witnessed to the judge.<sup>38</sup> This acceptance of Hindus as witnesses indicates that they were trusted and considered full members of society.

Regarding the legal status of non-Muslims, the FA is contradictory. While the authors associate non-Muslims with their religions, they make no clear reference to Hindus, Buddhists or Jains. This raises the following question: Why are Hindus not referenced by their religion in the chapters on the status of non-Muslims (especially in the sections on property and capitation tax—the two sections that deal most directly with the question of the taxpayers' religion? In these sections, the authors employ the term *dhimmi*, which, as observed above, does not indicate religious affiliation. The authors appear to have relied on the conception of *dhimma* to determine the status of non-Muslims, borrowing from Abu Ḥanifa and his disciples. Yet in their description of slaves and commercial exchange, the authors refer explicitly to Hindus—to Hindu language, dressing customs and territory.

The practice of naming Hindus in certain passages and ignoring them in others can be understood by comparing the FA to other works on Indian religions. Let us, for example, recall the distinction made by Heinrich von Stietencron between works by Muslim geographers or ethnologists and official governmental

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<sup>37</sup> Jagadish Narayan Sarkar, *Mughal Economy: Organization and Working* (Calcutta: Naya Prokash, 1987), 125.

<sup>38</sup> "If he marries in the presence of two Turks or two Hindus." FA, vol. 1, 268.



texts on the peoples of India.<sup>39</sup> Based on these sources, one may state that while philosophers and geographers generally offered precise descriptions of Indian religions, this was not the case with official, state-produced literature, which was intended to establish general norms for the cataloguing of non-Muslims, without attaching importance to their ethnicity or religion.<sup>40</sup> As opposed to jurists, eleventh and twelfth-century Muslim geographers, ethnologists and philosophers presented Indian religions and philosophies within the literary genre reserved for peoples and beliefs (*mīlāl wa-niḥāl*). These scholars, who included al-Bairūnī (d. 1048), al-Masʿūdī (d. 956) and Šahrastānī (d. 1153), described and criticised the various faiths practised on the Indian subcontinent, often presenting their defects from an Islamic perspective.<sup>41</sup>

In light of the above, and considering that it was commissioned by the Mughal sultan, the FA can be seen as belonging to the genre of governmental (and not philosophical) writings. The FA establishes a general conception of non-Muslims even in the field of taxation. The lack of distinction it makes between Muslims and non-Muslims regarding the *ğizya* suggests a policy of fair treatment.

While several scholars, including Khaliq Nizami,<sup>42</sup> have noted the absence of the term “Hindu” in Muslim legal literature,

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<sup>39</sup> Heinrich von Stietencron, “Religious Configurations in Pre-Muslim India and the Modern Concept of Hinduism”, in *Representing Hinduism: The Construction of Religious Traditions and National Identity*, ed. Vasudha Dalmia and Heinrich von Stietencron (New Delhi: Sage Publications, 1995), 51–81; Abū r-Raiḥān al-Bairūnī, *Kitāb Taḥqīq mā li-l-hind min maqūla maqbūla fi l-ʿaql au marḡūla*, rep. (Hyderabad: Maḡlis dāʿirat al-maʿārif al-ʿuṭmāniya, 1956); Abū l-Faṭḥ aš-Šahrastānī, *Al-Mīlāl wa-n-ḥāl*, rep. (Beirut: Dār al-fikr, 2005).

<sup>40</sup> Stietencron argues that the concept “Hindu” was developed by British administrators and differed from that developed by humanist scientists. Stietencron, *Der Hinduismus*, 7–10.

<sup>41</sup> Lawrence, *Shahrastani*, 16. Lawrence’s work is a translation of the above-mentioned book by Šahrastānī.

<sup>42</sup> Nizami observes that the literature he studied, which consisted mainly of thirteenth-century legal works, largely ignores the peoples of India. Nizami, *Religion and Politics in India*, 334.

this issue goes beyond a mere question of terminology: the strategy of the authors of the FA sheds light on their conception of the other. The omission of the term in the chapter on war (*Kitāb as-Siyar*) and the chapters on taxation can be understood as a choice to consider the societal role of Hindus in a perspective that transcends the dichotomy of believer/non-believer. Although the status of non-Muslims described in the FA borrows heavily from the formative conception contained in the *Zāhir ar-Riwāya*, it is distinctive when compared to other works on rights pertaining to the problematics of the dhimma.

Nizami's claim regarding the intellectual literature of the thirteenth century sheds light on the evolution of the status of non-Muslims in seventeenth-century Islamic legal texts. Whereas the works cited by Nizami (which include the *Ādāb al-ḥarb wa-š-šāğā'a*) do not mention Indian peoples, legal works from the fourteenth century onward consistently address non-Muslim Hindus. The FA reflects the extreme caution with which the ulama approached non-Muslims and which testifies to a change in the Islamic conception of the other. Instead of disregarding non-Muslims altogether, the authors of the FA introduce a binary set of identities that include dhimmi in matters of taxation and individuals belonging to specific groups (such as Hindus) in commercial contexts. In other words, the authors determined the category of "non-Muslim" depending on the situation (albeit inadequately, since the term "Hindu" was not used to signify any other ethnic group in South Asia during that period).

Despite the evident complexity of the legal status of non-Muslims, the authors of the FA were obliged to take a clear position on this matter. Forced conversion to Islam was an unsatisfactory option for the Muslim jurists of this region, since the alternative to conversion—expulsion—would have led to the impoverishment of the empire and the abandonment of arable land. Instead, the authors chose to borrow from formative Hanafi theory, effectively establishing statutory equality among non-believers. This equivalence in status enables the payment of *ḡizya* and grants non-Muslims the right to remain in the territory of Islam. This decision was understandable, as it provided the necessary legal

basis for the cohabitation of Muslims and non-Muslims.<sup>43</sup> The dual nature of the authors' strategy—their tendency to name but disregard the particularities of non-Muslims—reflects their desire to refrain from intervening in non-Muslim affairs (for example, from specifying the details of non-Muslim rituals or dress). In sum, the position of Muslim jurists concerning non-Muslims in South Asia mirrors the historical juxtaposition of Islam and polytheism.

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<sup>43</sup> The authors of the FA did not cite all the religious authorities of their time.



## CHAPTER FIVE.

# THE SPIRITUAL FREEDOM OF NON-MUSLIMS

In this chapter, I will discuss the spiritual freedom of non-Muslims as it is presented in the *Fatāwā l-‘Ālamgīriya*. I have chosen to focus on faith, the status of religious buildings and freedom of ceremony—three thematic elements that are fundamental to the analysis of intercommunal relations between Muslims and non-Muslims.

### 1. FREEDOM OF CONSCIENCE

The concept of society put forth by Muslim jurists rests upon the notion of faith. As Antoine Fattal has suggested, under Islamic law “no one is free to believe or not believe and to show this publicly”.<sup>1</sup> This seems to have been the guiding norm in the religious affairs of pre-modern societies, with conversion and apostasy constituting two fundamental aspects of the phenomenon of faith.

These two practices also reflect a struggle against the borders separating social and religious entities. While conversion permits the integration of non-Muslims and their assimilation into the Muslim community, apostasy is the rejection of this offer and usually results in the joining of a non-Muslim group and/or territory.<sup>2</sup>

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<sup>1</sup> Antoine Fattal, *Le statut légal des non-musulmans*, 160.

<sup>2</sup> In legal literature, apostasy is often associated with the joining of the territory of the “infidels” to that of Muslims, since in such a case, so-called infidels were not permitted to live under Muslim rule. This is

Conversion and apostasy are often addressed separately in Islamic legal doctrine. While conversion, as a modality through which non-Muslims acted in favour of Islam, is a common topic among Muslim jurists, apostasy is often understood as a sin that might be punished by death.

The concept of conversion as it appears in the FA is based on a typology of religions that is repeatedly cited in the text.<sup>3</sup> The purpose of this typology was to assess the distance separating each of the non-Muslim religions from Islam and thus to identify the mechanism, inherent in each community, through which the members of that community may convert to Islam.<sup>4</sup> The typology included two types of non-Muslim religions: monotheistic and non-monotheistic. Non-Muslim communities were categorised as either “People of the Book” (adherents of scriptural faiths, or dhimmis) or adherents of non-scriptural faiths (“idolaters”).<sup>5</sup> The authors of the FA used this distinction to determine the validity

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usually expressed by the legal formula, “if he/she apostatises and joins the territory of the infidels”.

<sup>3</sup> The same text is to be found in the *Fatāwā Qāḍīhān*. The terms used by the authors of the FA are identical to those of aš-Šaibānī. Muḥammad ibn al-Ḥasan aš-Šaibānī, *Kitāb as-Siyar al-kabīr* (Commentary by as-Saraḥsī), 4 vols, rep. (Ankara: Türkiye Diyanet Vakfı, 1989–1991), 161–66. See also FA, vol. 2, 195: “Al Qudūrī in his Kitāb says that infidels are of two categories. There are those who do not believe in the Creator... [and] those who believe in Him but do not recognise His unicity [...]. The idolater or the person who does not believe in the unique God does not become a Muslim if he says ‘Allah’ but [only] if he says ‘I am a Muslim’ he becomes Muslim [...]. But if a Jew or a Christian says, ‘there is no God but Allah’ he does not become Muslim, if he does not add ‘Muhammad is the messenger of Allah’. They argue further, because Jews and Christians live nowadays close to Muslims, if someone among them says ‘I attest There is no deity but God and Muhammad is the Messenger of Allah’, he will not be considered as Muslim until he renounces his former faith.”

<sup>4</sup> FA, vol. 2, 195.

<sup>5</sup> “In *al-Muḍmarāt* we find the following opinion: the idolater who does not believe in the Creator becomes Muslim if he says one of the parts of the *šahāda* [confession of faith], for example ‘I am a Muslim’ or ‘I believe in Islam.’” FA, vol. 2, 195.

of an individual's conversion to Islam, and focus on the rites of passage that non-believers were required perform in order to undergo conversion.<sup>6</sup>

The FA presents two types of conversion: the classical conversion, which involves the utterance of certain phrases by the convert, and a second type, involving gestures. The first type reflects the differences in status between non-believers and dhimmi: while Jews or Christians can only become Muslim after a careful examination of their beliefs, non-monotheist believers (such as Hindus) were merely required to utter a phrase such as "I am Muslim"<sup>7</sup> or "I believe in Muhammad". A non-Muslim who prayed with Muslims, made an Islamic pilgrimage or attended Friday prayers was considered a Muslim.<sup>8</sup> Given that the usual foundation for (and first stage of) conversion to Islam is to utter the words, "There is no God but Allah and Muhammad is his Prophet", the authors' focus on conversion practices requires closer examination.<sup>9</sup>

In their edicts on conversion rituals, seventeenth-century Muslim jurists were guided by the existing distinctions between different South Asian social groups—Brahmans, Untouchables and an indefinite number of castes. They were aware of the impact of the Hindu caste system on individual behaviour, and of the close link between religious and social identity. Since social belonging is always related to a collective identity, Muslim jurists concluded that the phenomenon of a non-believer praying with Muslims constitutes not just a physical gesture but a rite of

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<sup>6</sup> Cf. Mouez Khalfaoui, "From Religious to Social Conversion: How Muslim Scholars Conceived of the *Rites de Passage* from Hinduism to Islam in Seventeenth-Century South Asia", *Journal of Beliefs and Values* 32, no. 1 (2011): 85–93.

<sup>7</sup> The FA and the FTT differ on this issue. While the FTT emphasises that the unbeliever must speak this sentence to a Muslim (which means, that he or she should say "I am a Muslim like you"), the FA, by contrast, rules that the sentence "I am a Muslim" is sufficient for "idolaters" since they have no similar formula in their belief. FTT, vol. 5, 160.

<sup>8</sup> Individual prayer was not considered proof of conversion; prayer had to be performed communally in a mosque.

<sup>9</sup> Khalfaoui, "From Religious to Social Conversion".

passage into Islam. Through this ritual, the non-believer accedes to a new socio-religious group that supplants his Hindu caste with the Muslim social group with which he has prayed.

The rites of conversion contained in the FA thus reflect a radical change in the Muslim conception of conversion. The utterance of the *šahāda*, the first pillar of Islam and the first act of conversion, is followed by the second pillar: prayer. This change also reflects an acknowledgement of the differences between individuals at the collective level. The first Islamic jurists conceived of conversion in terms of a personal, private relationship between the individual and the creator. Conversion through prayer, however, is a public affair that affects the social group to which the person belongs. This shift from the religious to the social milieu facilitated conversion in a cultural context that placed great value on social practices.

Regarding the conversion of Hindus to Islam under Mughal rule, historical works from South Asia such as *Futuhāt-i-Ālamgiri* and *Maasir-i-Ālamgiri* recount only cases of conversion of Hindu notables; very little is known about the conversion of commoners. Though numerous historical accounts exist of Aurangzeb celebrating the conversion of Rajput nobles, these sources make no mention of the conversion of the masses of Untouchables or other non-Muslim groups in South Asia during this period. Whereas the conversion of notables was often celebrated and rewarded by the sultans, that of commoners went unnoticed.

In order to shed light on the issue of conversion in the FA, I propose to compare the latter with three earlier works of Hanafi law: the *Kitāb as-siyar al-kabir* (Great Book of Conduct) by Muḥammad aš-Šaibānī and the commentars of this book by as-Saraḥsī, *Al-Hidāya* of Al-Marḡinānī and the *Fatāwā t-tātārḥāniya* (FTT). A section on conversion in Volume 4 of *Kitāb as-siyar al-kabir*<sup>10</sup> contains a commentary by as-Saraḥsī on aš-Šaibānī's position on oral conversion through attestation to the singularity of

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<sup>10</sup> "Requirements to be fulfilled by individuals in order to become Muslims so that they will not be killed or enslaved." Shams al-ʿĀʿima as-Saraḥsī, *Kitāb šarḥ as-Siyar al-kabir* (Hyderabad: Maṭbaʿat Dar al-Maʿārif, n. D), vol. 4, 364–65.



God and his Prophet. While this section also presents the conversion methods available to Jews and Christians, the chapter makes no reference to conversion through gestures of prayer or pilgrimage.

The omission of conversion based on gestures is typical of texts from this period. While aš-Šaibānī does provide indications of such an innovation among the jurists of his time,<sup>11</sup> later jurists, especially those from South Asia, questioned the value of this type of conversion. In *Al-Hidāya*, the topic of conversion does not appear in the same form and with the same prominence as it does in the FA. This suggests that Al-Marġīnānī was not overly interested in the topic of conversion; unlike the FA and the FTT, his chapter on war (*Kitāb as-sayr*), lacks a section on this subject.

The lack of content pertaining to conversion can be explained by the fact that *Al-Hidāya* was written at a time when most of the population of Central Asia was Muslim.<sup>12</sup> This can be understood as proof of the impact of demographics on conversion. These two factors (demographics and social context) were essential to the development of the concept of conversion in the FTT and the FA. The author of the FTT emphasises the difference between dhimmi and non-dhimmi by presenting the divergence between Hanafī and Shiite conceptions of these categories, and consequently lists the conditions of conversion to Islam in a more detailed and extensive way than do the authors of the FA. Another distinction between the FA and the FTT is the inclusion in the FTT (but not in the FA) of the terms “I am a Muslim like you” and “I am Muslim”, which prospective converts to Islam are required to utter.

However, the FTT and the FA also contain similarities regarding the topic of conversion. Both texts confirm that the rituals of fasting (*ṣaum*) and paying taxes (*zakāt*) cannot be considered gestures of conversion and question the validity of pilgrimages made by non-Muslims accompanied by a Muslim. By rejecting these corporal rituals, the authors of the FA sought to emphasise

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<sup>11</sup> Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, 162–66.

<sup>12</sup> Al-Marġīnānī agrees that almost all of the inhabitants of Central Asia were Muslim. *Al-Hidāya*, vol. 3, 75.

the importance of conversion through prayer. Indeed, the gesture of prayer was only permitted with certain provisions: a conversion was only accepted if the convert's prayer was observed by the community. The authors of the FA and FTT unanimously accepted conversions of non-Muslims provided that the community attested to having seen the convert praying or being called to prayer on several occasions.<sup>13</sup>

The details of the conversion ritual contained in the FA and the FTT indicate their authors' deviation from orthodox Islamic legal tradition. Yet both compendia describe conversion as achieved through physical gestures, which are considered more important than verbal rituals. This suggests a conceptual shift from the spiritual to the behavioural realm: an individual's behaviour takes precedence over the expression of his or her faith.<sup>14</sup> Requiring the convert to pray with Muslims transforms conversion into a social phenomenon which can be instrumentalised in order to distance converts from their social group of origin and move them into a new social group characterised by the Islamic faith. The convert thereby achieves social mobility without the risk of isolation or uncertainty that his conversion might otherwise entail.<sup>15</sup>

As I have stated previously, religious conversion in South Asia did not necessarily correspond to social change. Rather, through everyday social rituals a rapprochement between Muslims and non-Muslims was achieved which allowed the convert to join a new social group. Conversion through prayer thus allowed

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<sup>13</sup> FTT, vol. 5, 330.

<sup>14</sup> Al-Kāsānī presents three forms of conversion: through attestation (*ṣahāda*), signification (*dalāla*) and assimilation (*taba'īya*). *Dalāla* is related to the act of prayer: "The proof of a symbolic conversion is that a person performs the prayer with a group of Muslims. According to aṣ-Ṣāfi'ī, he will not be considered a Muslim in this way. [...] Nevertheless [according to al-Kāsānī], our opinion is based on the fact that the prayer of the Muslims has a unique character, and its accomplished performance stands for access into the community of believers." Al-Kāsānī, *Badā'ī' aṣ-ṣanā'ī'*, vol. 9, 4312.

<sup>15</sup> Islamic doctrine emphasises maturity and liberty as conditions for conversion.

converts to change their social community and integrate into a new belief system. The perspective of gaining access to another social group without exposing themselves to ostracization encouraged many non-Muslims to cross social boundaries.

In conclusion, the value attributed to conversion through gesture by the authors of the FFT and the FA was shaped by South Asian Muslim jurists' understanding of conversion. Given that the FA was written in an environment dominated by polytheism, the rites of passage it presents likely offered an impetus for the local population to embrace Islam.<sup>16</sup>

## 2. HISTORICAL ASPECTS OF CONVERSION TO ISLAM IN SEVENTEENTH-CENTURY SOUTH ASIA

Despite the Mughal state's efforts to encourage conversion, Muslims remained a minority in South Asia during the seventeenth century. The rejection of Islam by the Hindu majority can be attributed both to the hierarchy imposed by Islamic doctrine and to Hindu notions of caste. The Islamic legal conception of equality is based on three binary oppositions that have remained constant throughout Islamic history: master and slave; man and woman and Muslim and "non-believer".

According to Bernard Lewis, these characteristics are common to the majority of Muslim communities.<sup>17</sup> If a non-Muslim embraces Islam, he may avoid being subjected to the distinction between believer and non-believer, but this will not allow her/him to change his/her social status.<sup>18</sup> Historically, many Hindus embraced Islam while maintaining their former social status,

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<sup>16</sup> It goes without saying that other factors play a crucial role in conversion. Bernard Lewis insists that demographics played a crucial role in the phenomenon of conversion in South Asia. Bernard Lewis, "L'Islam et les non-musulmans", *Annales Année* 35, 3-4 (1980): 784-800.

<sup>17</sup> Ibid. Lewis's theses are reproduced by Gaborieau, who qualified them as a fundamental requirement for understanding the phenomenon of conversion to Islam. M. Gaborieau, *La tolérance des religions dominées en Inde, article présenté lors d'un colloque à Nantes sur la Tolérance* (Rennes: Presses Universitaires de Rennes, 1999), 451-60.

<sup>18</sup> Gaborieau remarks that this discrimination may be of a triple character if it applies to a non-Muslim or to female slaves. Ibid.

while members of lower Hindu castes who converted to Islam found themselves in the lowest ranks of the Islamic hierarchy. Louis Dumont has observed a similar phenomenon with respect to the social hierarchy of Mughal society, showing that converts from low Hindu castes retained their (low) social status within the Muslim community, in which respect was reserved for “descendants of the Prophet” (*ašraf*).<sup>19</sup>

Although Aurangzeb ostensibly encouraged conversion among all Hindu castes, the names of those converts rewarded with a higher social status suggests that in fact, the Mughals’ focused primarily on leaders of non-Muslim communities and attached little or no importance to the conversion of low-caste Hindus. According to Muhammad Akram Lari Azad, who rejects Jadunath Sarkar’s claim that conversion was obligatory, Hindu converts were not motivated by religion alone,<sup>20</sup> but by the promise of access to civil services, release from prison or the granting of inheritance rights:

Some converts were by the Emperor’s orders, placed on elephants and carried in procession through city to accompaniment of a band and flags. Others got daily stipends, four annas at the lowest. The policy of putting economic pressure on unbelievers, was granting of rewards to converts and offering of posts in public services on condition of turning Muslim.<sup>21</sup>

Azad illustrates this policy with the following example:

Lajpat, an imprisoned amin and faujdar of Ram Garh, was released and his mansab was increased when he accepted Islam. Ratan Singh, the wicked son of Rao Gopal Singh Chandrawat, the zamindar of Rampura in Malwa, became a convert to Islam through Mukhtar Khan, the governor of Malwa, and thus

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<sup>19</sup> Louis Dumont, *La civilisation indienne et nous: Esquisse de sociologie comparée* (Paris: Colin, 1964), 69–70; *Homo hierarchicus: Le système des castes et ses implications* (Paris: Gallimard, 1966), 261–62.

<sup>20</sup> Muhammad Akram Lari Azad, *Religion and Politics in India During the Seventeenth Century* (Delhi: Criterion Publications, 1990), 225–27.

<sup>21</sup> *Ibid.*, 227.

secured from the emperor the possession of his ancestral estate, which was newly named Islampur.<sup>22</sup>

These examples illustrate decidedly non-religious motives for conversion. Indeed, socioeconomic factors played a decisive role in the conversion of rich and poor alike. The latter often opted for a formal or social conversion which allowed them to keep their property without being forced to change their faith, in order to avoid having to pay high taxes to the Mughal state. The great wave of conversion took place in the last two decades of the reign of Aurangzeb, following the re-imposition of the *ġizya* in 1679.<sup>23</sup>

The conversion of Hindus to Islam during the reign of Aurangzeb has been discussed by Satya Prakash Sangar.<sup>24</sup> Sangar devotes a significant portion of his *Crime and Punishment in Mughal India* to cases of socially-motivated conversion in which converts sought to acquire advantageous social positions (*mansab*) or money.<sup>25</sup> Through an epistemological analysis, Sangar concludes that most conversions were economically motivated, failing to mention cases of conversion due to persuasion or religious interest. He thereby supports the claim that Hindu conversion was occasionally indeed coerced. Furthermore, Sangar suggests that Aurangzeb had hoped that the conversion of Hindu political leaders would both encourage the common people to follow suit and allow him to divest the former of their social power, thereby neutralising any potential threat they might pose. Conversion was thus not a strictly religious affair and extended beyond the

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<sup>22</sup> Ibid., 228.

<sup>23</sup> Nagar, *Futuhāt-i-Alamgiri*, 79. Antoine Fattal attributes the conversion of masses of dhimmi in the Middle East before the second century of the *hiġra* to the introduction of a tax reform that negatively impacted non-Muslims. Fattal, *Le statut légal des non-musulmans*, 170.

<sup>24</sup> Satya Prakash Sangar, *Crime and Punishment in Mughal India* (New Delhi: Reliance Publishing House, 1998), 186–95.

<sup>25</sup> In this context, it is worth mentioning the phenomenon of “assisted conversion”, which involved the sultan’s wish to convert eminent personality from different ethnic and religious groups which would facilitate conversion for other groups. While individual conversion was encouraged among prominent individuals, mass conversion especially affected the lower castes.

theoretical framework of the FA, and it may be generally assumed that during the Middle Ages, the phenomenon of conversion was an economic, political and military, rather than a strictly theological issue.

It is important to note that during this period most conversions on the subcontinent were not carried out through the use of military force but were rather attributable to the influence of other actors—including, prominently, the Sufi orders, which acted as mediators between Hindu converts to Islam and the Muslims. The conversion overseen by the Sufis allowed the lower Hindu classes to both adopt Islam and improve their social status.<sup>26</sup> Similarly, the *ṣūfī shrines and ḥanqāhs* served as a place of acculturation between Muslims and Hindu religious leaders. As Fritz Lehmann has observed, these interactions often led to:

The ṣufis in their Khānqāhs were the mediators between the neo-Muslim masses and the immigrant-Muslim elite; the saints who founded or in whose name disciples founded Khānqāhs were invariably immigrant Muslims and thus shared in the prestige and status of the elite. By receiving the convert Muslims at their festivals and religious exercises, these Sufis provided the same kind of confirmation of new status that, in the nineteenth century, European Protestant missionaries provided to their converts of untouchable and tribal origin.<sup>27</sup>

This understanding of the Sufis' social function is corroborated by Bruce Lawrence, who likewise emphasises their role in the conversion of the Hindu elite. Lawrence draws on the opinion of the eminent Sufi Šeiḥ Nizāmu-Dīn, who saw conversion as a harsh struggle to justify the role of the Sufi mediators in the process of conversion.<sup>28</sup> Lawrence rejects the generalisation of some scholars, who suggest that only poor or middle-class Hindus embraced Islam, and argues instead that Hindus were prompted to

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<sup>26</sup> Fritz Lehmann, "The Sufi Khanqahs in Modern Bihar", in Friedmann, *Islam in Asia*, 227–40.

<sup>27</sup> *Ibid.*, 229.

<sup>28</sup> Lawrence, "Early Indo-Muslim Saints and Conversion", 109–45.

convert by the fruitful relationship that existed between the elites of the two communities.<sup>29</sup>

### 3. THE DEBATE ON APOSTASY

The FA contains one of the most extensive chapters on apostasy in the entire Islamic legal literature, especially when compared to the works of the *Zāhir ar-Riwāya* and the *Kitāb al-Ḥarāğ*, which dedicates only three pages to this subject.<sup>30</sup> This suggests that apostasy was a particularly complex and delicate subject for seventeenth-century Muslim jurists.<sup>31</sup>

In the section on apostasy in the FA<sup>32</sup> the authors adopt a logical, argumentative approach. After defining the concept of apostasy, they state the conditions that apostates must fulfil in order to initiate the process: “[T]he condition of apostasy is to pronounce its words [of apostasy] orally, after having been a Muslim [believer].”<sup>33</sup> In order for an apostasy to be valid, the apostate must be of mature age, mentally sound and acting of his own free will.<sup>34</sup> The apostasy takes effect immediately or after a period of three days.<sup>35</sup>

The FA stipulates that apostasy, like conversion, be performed either verbally or through gestures. “Gestures” in this case include leaving Islamic territory for the “land of the non-

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<sup>29</sup> Ibid.

<sup>30</sup> Ya‘qūb Abu Yusuf, *Kitāb al-Ḥarāğ*, rep. (Beirut: Dār al-ma‘rifa, 1979), 179–86. Aš-Šaibānī opens the section on war by treating the subject of apostasy and emphasising the goal of spreading the Muslim faith. This emphasis is especially apparent in his discussion of the conversion of children. Aš-Šaibānī declares that any child that converts to Islam is to be considered a Muslim and is to be treated as such even if he or she later apostatises. Muhammad ibn al-Ḥasan aš-Šaibānī, *Al-Ġāmi‘a š-ṣağīr*, rep. (Lucknow: Al-Maṭba‘a al-‘Alawī, 1970), 87.

<sup>31</sup> FA, vol. 2, 257–83.

<sup>32</sup> This chapter, one of the longest in the FA, it has a strong correlation with other subjects such as heritage, marriage, and divorce.

<sup>33</sup> FA, vol. 2, 25.

<sup>34</sup> FA, vol. 2, 253.

<sup>35</sup> Ibid.

believer”<sup>36</sup> or demonstrating sympathy with non-believers by, for example, dressing like them, participating in their ceremonies or presenting them with gifts on their holidays<sup>37</sup>—acts which may lead to the dispersion of goods as well as to familial, social and religious discord.<sup>38</sup> Significantly, some of these discussions of verbal apostasy are written not in Arabic but in Persian, which was widely used in South Asia.<sup>39</sup> This change in language indicates a shift in register. The authors of the FA employ in this section a direct language based on the conditional tense (as in the sentence, “If he articulates such or such a phrase, he apostates”<sup>40</sup>).

Although there is consensus within Islamic law that apostasy is punishable by death, the FA reveals a discrepancy between legal masters regarding the time granted to the apostate to reconsider his belief, before the execution. Challenging as-Saraḥsī’s insistence that apostates be executed immediately, the FA draws on Abu Ḥanīfa’s position, according to which male apostates must be granted three days for reflection before their execution.<sup>41</sup> The FA further stipulates—echoing the opinion of Abu Yusuf—that if the apostate repents but later apostatises again, he is to be granted the right to repent once more; for each act of apostasy committed during this period of reflection, his repentance will be accepted.<sup>42</sup> As noted above, as-Saraḥsī rejected this position, arguing that the

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<sup>36</sup> This reference to *dār al-kufr* evokes the norms of frontier, according to which individuals are defined according to the territory in which they live and not based on their faith.

<sup>37</sup> FA, vol. 2, 276.

<sup>38</sup> Fattal, *Le statut légal des non-musulmans*, 141.

<sup>39</sup> FA, vol. 2, 276.

<sup>40</sup> Ibid.

<sup>41</sup> Mouez Khalifaoui, “Female Apostasy in Islam: Historical Debate and Current Challenges”, in *Männlich und weiblich schuf Er sie: Studien zur Genderkonstruktion und zum Eherecht in den Mittelmeerreligionen*, ed. Matthias Morgenstern, Christiane Tietz and Christian Boudignon (Göttingen: Vandenhoeck Ruprecht, 2011), 409–20.

<sup>42</sup> “If we ask the apostate to repent, and he does so but [then] apostatises again [...] his repentance will be admitted for ever. [...] Those who claim that this repentance is valid only for the first three times are wrong.” Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 3, 434–35.



granting of a renewable period of repentance had only been justified during the first era of Islam, when the religion of Islam was still unknown. According to as-Saraḥsī, during this period individuals were granted the right to inquire about the faith in order to receive enlightenment.<sup>43</sup> Since by the eleventh century Islam had become well-known, apostasy in this later period is to be regarded as indicating arrogance rather than uncertainty,<sup>44</sup> and the apostate is therefore to be put to death immediately.<sup>45</sup>

The authors of the FA were thus willing to contextualise the problem of apostasy in the religious-legal (as opposed to the socio-political) sphere. Yet as-Saraḥsī's edict is also informed by the political disadvantages or other potentially negative effects of apostasy on the Muslim community. The arrogance which he describes as an attack on Islam is, in fact, an attack on the Muslim political community.

The authors thus consider the subject of apostasy in the sphere of the individual rather than that of the political community, casting faith in a legal light by granting everyone the freedom "to believe or not to believe". Abu Ḥanīfa's conclusion is, however, situated more in the domain of belief than that of apostasy: each individual has the right to question his belief in order to convince himself of the message of Islam. Political authority intervenes to help him secure his position in the community. As-Saraḥsī's views, by contrast, reflect a political approach to

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<sup>43</sup> In this approach, every Muslim is endowed with the ability to question his faith, judge himself and voice his doubts publicly without fear. As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 10, 98–100. As-Saraḥsī uses the same formula in his discussion of apostasy, where he emphasises the relevance of the political context in which the apostasy occurs and attributes Abu Ḥanīfa's decision to grant apostates three days of reflection to the fact that the latter lived in an era of transition when the message of Islam was not yet well-known.

<sup>44</sup> As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 10, 99.

<sup>45</sup> In contrast to Shams al-'A'ima as-Saraḥsī, the FA grants the three days of reflection without restriction: "... and this opinion is that of all our masters; it says that the apostate should always be asked to reflect on his decision; this opinion [also] figures in *Ġāyat al-Bayān*." FA, vol. 2, 254.

apostasy in which renunciation represents a challenge to the Muslim community that must be sanctioned.

In contrast to the FA's general depiction of apostasy, its portrayal of specific acts of apostasy reveals an "anti-pluralist" sentiment: the authors stringently oppose any gesture that does not conform to the rules of Islam. Why? For the authors of the FA, apostasy—an integral part of the Islamic conceptions of belief and conversion—became relevant in light of the interreligious interaction that characterised South Asia during the seventeenth century, when the Indian subcontinent was the locus for an intermingling of various religious communities. This reality was accommodated through a simplified form of conversion that did not require converts to explicitly renounce their original faith—indicating that harmonisation between Islam and other religions was indeed possible.

It seems therefore that Muslim scholars perceived this simplified form of religious intermingling as a threat since new converts often continued to be influenced by beliefs and rituals prohibited by Islam. To cope with this threat, the authors of the FA erected theoretical structures that allowed access to Islam but rendered apostasy impossible. In adopting this strategy, the authors revealed themselves less as theoreticians, but rather as "sociologists" aiming to record and compile phrases and gestures considered likely to lead Muslims to apostasy, in order to more effectively combat the phenomenon.<sup>46</sup>

But what did combatting apostasy mean for jurists in South Asia?<sup>47</sup> The answer to this question is linked to the FA's edicts regarding the relationship between Muslims and non-Muslims. In the section on conversion, the authors address non-Muslims, granting them the opportunity to join the Muslim community and to enjoy the resulting benefits. By contrast, the section on apostasy addresses Muslims, encouraging them to purify their faith and forbidding transgression. While common expressions of

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<sup>46</sup> FA, vol. 2, 253–83.

<sup>47</sup> Lewis and Gaborieau saw Muslim scholars' fear of apostasy as reflecting an integral part of the Muslim faith. Gaborieau, *La tolérance des religions dominées*, 451–60; Lewis, "L'Islam et les non-musulmans".

apostasy include the denial of the existence of God or the violation of Islamic moral norms, acts of apostasy committed by Muslims concern the latter's relationship with members of other religious communities. Examples of this form of apostasy include participation in non-Muslim festivities, wearing non-Muslim dress or giving gifts to non-Muslims on their holidays—all acts that were considered tantamount to apostasy through which the transgressor forfeited his status as believer.

The FA's view on apostasy reflects the notion of a categorical opposition between Islam and Hinduism, evident in the authors' insistence on the distinction between Muslims and non-Muslims. Following Marc Gaborieau's example,<sup>48</sup> this issue can be approached by examining the relationship between dominant and dominated religions. Because Hindu religious belief is linked to the concept of caste, any change of religion implies a (likely detrimental) loss of social status;<sup>49</sup> hence the scant importance attached by Hinduism to apostasy in cases in which no change in social status occurs. In contrast, Islam perceives the gap between Islamic faith and non-Muslim religions as small, since non-believers are seen, a priori, as potential Muslims. Gaborieau summarises the consequences of this difference as follows:

This is why Islam issued severe regulations, which carry the death penalty, on apostates, aiming thereby to hold together the community of Islam. [...] Since apostasy was unattractive for Hindus, it was not a matter for discussion in premodern times.<sup>50</sup>

According to Gaborieau, the above-mentioned situation derives from the fact that the Hindu convert is generally

excluded from his caste and becomes a sort of pariah. This is why he is not categorically obliged to stay in his community of origin[...]. At the same time, despite this apparent

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<sup>48</sup> Gaborieau, *La tolérance des religions dominées*.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

tolerance, the social pressure remains extremely strong and the sanctions rigorous.<sup>51</sup>

These citations suggest that an intense struggle was taking place between Islam and the religions of the dominated populations. The authors' preoccupation with the threat of apostasy is further reflected by the above-mentioned rulings concerning the three-day period of reflection and repentance granted to the apostate. It should be noted that apostasy by women was considered a grievous but not capital offense: female apostates were subjected to physical punishment and imprisonment,<sup>52</sup> but not the death penalty.<sup>53</sup> By contrast, male apostates were usually sentenced to death, suggesting that the loss of male followers was particularly unacceptable for the Muslim state.<sup>54</sup>

This preoccupation is particularly apparent in the FA and explains why acts such as wearing non-Muslim dress were considered acts of apostasy.<sup>55</sup> We know from historians and sociologists of South Asia that Hindu converts to Islam often continued to live like their neighbors and non-Muslim relatives and that Muslim and non-Muslim social customs were very similar. Since the authors of the FA protested this situation and, as members of the Muslim elite, were concerned with reforming the faith of the commoners, their position on apostasy suggests a contrast between "elitist Islam" and "lived Islam". Their struggle against apostasy reflects their desire to reinforce the boundaries separating the religions. It is in this context that the FA sought to regulate the norms according to which non-Muslims and Muslims were to live their lives, emphasising symbolic boundaries in order to preserve Muslim identity.

The concepts of conversion and apostasy are thus inseparably intertwined. As basic components of Islamic faith, they were used to promote the integration of non-Muslims into the Muslim

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<sup>51</sup> Ibid.

<sup>52</sup> Khalifaoui, "Female Apostasy in Islam".

<sup>53</sup> FA, vol. 2, 254.

<sup>54</sup> Gaborieau, *La tolérance des religions dominées*.

<sup>55</sup> If a Muslim dresses like adherents of another faith, he will be treated as a member of another religious community. FA, vol. 2, 276.

community (via a simplified version of Islam) and to encourage respect for the differences between Muslims and non-Muslims. Whereas the concept of belief presented in the FA reflects a tendency of acceptance, the FA's presentation of apostasy places this judgment in check. Indeed, the stringent regulations imposed on the convert (such as the prohibition against the retraction of conversion) testify to the austerity of the Muslim jurists. At the same time, they can be seen as a response to the demographic situation of Muslims in South Asia.

In light of the discussion above, we can state that Muslim jurists of South Asia contributed to changes in legal definitions of belief and apostasy in the seventeenth century. These changes—to the form and substance of expressions and characteristics of religiosity—reflected the sociodemographic composition of the region. A parallel can be drawn to Iraq of Abu Ḥanifa's time, when demographics (specifically, the fact that Muslims constituted a minority) likewise contributed to the development of the tolerant attitudes of the first Hanafi teachers, who also encouraged non-Muslims to embrace Islam. The authors of the *Zāhir ar-Riwāya* discuss more accessible forms of conversion in the context of their relationship to Jews and Christians, just as their South Asian successors would later do.

Yet the FA's presentation of conversion and apostasy contains a contradiction that reflects a tension between pluralist and anti-pluralist approaches to faith. Whereas the first approach considers faith (and particularly conversion) a personal affair and allows for the emancipation of individuals from their respective social systems via individual rites of passage, the second approach limits the freedom of subjects of the Muslim state.

#### 4. THE STATUS OF NON-MUSLIM RELIGIOUS BUILDINGS

The attitude of Sultan Aurangzeb towards Hindu places of worship is controversial.<sup>56</sup> Akram Lari Azad distinguishes the

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<sup>56</sup> The *Encyclopaedia Indica* provides detailed information on the destruction of temples by Aurangzeb, including the dates of the destruction of individual temples throughout India. Yet the entry also notes several exceptions. In Deccan, where Aurangzeb spent twenty-seven years of his

destruction of Hindu temples during periods of peace from analogous events during periods of conflict,<sup>57</sup> observing that while Aurangzeb did indeed order the destruction of certain temples, he also ordered the construction of others and allocated considerable sums to these projects. Aurangzeb's apparent hostility toward Hindus should thus be considered in a political and cultural context as well as a religious one. Azad and J. Sarkar offer two explanations for the destruction of Hindu temples, which although based on different data, point to a similar conclusion. Azad identifies two objectives for the destruction of Hindu temples: to instil fear in non-Muslim leaders and to establish dominance. Sarkar, basing his analysis on the *Farman of Benares*,<sup>58</sup> sees Aurangzeb's prohibition of the destruction of Hindu temples as proof of his desire for reconciliation after the war of succession against his brother Dara Šikoh.<sup>59</sup> Sarkar attributes Aurangzeb's 1669 decree outlawing religious education in Hindu schools and ordering their destruction to the personal state of the sultan and to cultural

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reign, the author argues that relations with the Hindu population were peaceful and observes that during this period, Aurangzeb did not order the destruction of any temples but in fact ordered the construction of temples—in Bishalpur (Bengal) in 1681 and 1690. The author adds that Aurangzeb gave gifts to a temple in Gaya and to a priest in Brahmanapur. Shyam S. Shashi, ed., *Encyclopaedia Indica: India, Pakistan, Bangladesh* (New Delhi: Anmol Publishers, 1996), 22–24; Sarkar, *Mughal Polity*, 416; Azad, *Religion and Politics in India*, 227.

<sup>57</sup> Lari shows that most of the destruction took place in 1669, when a general order was issued to demolish all schools and temples of “infidels”. *Ibid.*, 221–27.

<sup>58</sup> This *farman* was addressed by Aurangzeb to his governor in Benares; it has been interpreted by several researchers. According to Satish Chandra, Aurangzeb did not order the demolition of temples and agreed to allow Hindus to live under his protection. Chandra challenges the view that Aurangzeb was hostile to his Hindu subjects. Satish Chandra, “Aurangzeb and Hindu Temples”, *Journal of the Pakistan Historical Society* 5 (1957): 247–54.

<sup>59</sup> Aurangzeb's policy on Hindu temples was linked to his opinion concerning the freedom of religion and religious practice, exemplified by his tolerance of music. Catherine Brown, *Hindustani Music in the Time of Aurangzeb* (non-published PhD Thesis, SOAS, 2003).

factors of that era as well, arguing that Aurangzeb was compelled to react to the rebellions taking place throughout his territory and that his religious policy had been influenced by the theologians of his court.<sup>60</sup>

Yet historical interpretations such as those of Lari and Sarkar fail to grasp the full meaning of the information available to us. Claude Cahen has observed that because his fellow scholars often have difficulty understanding works of Islamic law, they resort to the claim that legal opinions are purely theoretical notions divorced from reality, thereby overlooking the fact that these legal corpuses constitute a dialectical link with reality and therefore contain information that cannot be found in historical material.<sup>61</sup>

Let us now consider the positions of the Hanafi jurists under the reign of Aurangzeb on the subject of non-Muslim religious buildings and civil liberties, in order to determine to what extent they are consonant with the above-mentioned critiques of Aurangzeb's policies vis-à-vis the Hindu population. In approaching this issue, the authors of the FA distinguish between urban and village settings. The FA reveals a consensus among Hanafi imams to prohibit the construction of non-Muslim houses of worship in cities and major settlements in Islamic territory.<sup>62</sup> According to Abu Ḥanifa, non-Muslim houses of worship were also forbidden in the outskirts of cities within a mile-wide radius.<sup>63</sup> In his *Kitāb al-Ḥarāğ*, Abu Yusuf commented on the status of non-Muslim religious buildings.<sup>64</sup> he argues:

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<sup>60</sup> Sarkar's critique of the Mughal court theologians reflects a mistrust, shared by other historians, of theological documents. Sarkar, *Mughal Polity*, 421–28.

<sup>61</sup> Cahen, "Considération sur l'utilisation des ouvrages de droit musulman".

<sup>62</sup> If dhimmis want to build synagogues and churches or the Zoroastrians, fire temples [...] in Islamic territory and in Muslim public spaces, they shall be prohibited from doing so, this is a consensus of all masters. FA, vol. 2, 247.

<sup>63</sup> Fattal, *Le statut légal des non-musulmans*, 174.

<sup>64</sup> For a detailed discussion see Kallfelz, *Nichtmuslimische Untertanen im Islam*, 76–7.

[While] I assume that there is nothing to demolish or to change among those buildings mentioned in peace treaties [...]. Regarding synagogues and churches constructed after [the signing of the peace treaty], they will be demolished.<sup>65</sup>

Additionally, the authors of the FA present two judgements by aš-Šaibānī concerning the destruction of temples in Muslim cities. While in one of his writings, aš-Šaibānī concludes that these places of worship should not be demolished, in another he expresses the opposite opinion.<sup>66</sup> To reconcile this contradiction, the authors of the FA resort to the authoritative opinion of as-Saraḥsī, according to which the declaration accepting the existence of non-Muslim religious buildings is the most accurate and is to be used by judges.<sup>67</sup> The prohibition of temples in Muslim urban areas can further be explained by the fact that Muslim legal scholars see these cities (*amṣār*) as site of Friday prayers and any violation of this status carries a penalty of “religious punishment” (*ḥudūd*). This prohibition is further explained by as-Saraḥsī in his commentary on aš-Šaibānī’s *Kitāb as-siyar al-kabīr*:

When one of their festivities arrives, in which they take out their crucifix in procession, they must do this within their old churches. They are not permitted to go out of their churches to show this in the city. This would be understood as a threat to Muslims. But they can take it out of their churches in a discrete way. If they manage to carry it out of the city, they can do whatever they want. This means that they must go far away from the Muslim city (*finā’ al-miṣr*) [...]. In cities and villages where Muslims do not reside, they may hold such processions, even if a few Muslims do reside there.<sup>68</sup>

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<sup>65</sup> Abu Yusuf, *Kitāb al-Ḥarāğ*, 143; Fattal, *Le statut légal des non-musulmans*, 175.

<sup>66</sup> “If this [dhimmi temple] is demolished, they will be allowed to rebuild it [...] and if the Muslims want to build a [new] city in that location, the temples and churches existing there will be demolished, and [the dhimmis] will be allowed to build similar temples outside of the city.” FA, vol. 2, 247.

<sup>67</sup> Ibid.

<sup>68</sup> Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 3, 129–30.



A reader of the FA may note that its authors are content to merely reiterate existing opinions on this issue. Yet their argumentation also suggests that, like most Islamic legal masters, they accepted the construction of temples in villages but not in cities. While the Hanafi legal masters unanimously condemned and forbade the construction of non-Muslim places of worship in cities, the FA reveals that the Hanafi masters were divided in their opinions regarding the construction of temples in small villages. Indeed, the authors take up the dispute between the Central Asian Hanafi masters—especially between the masters of the two regions of Balḥ and Buḥara. Whereas the former generally rejected the construction of non-Muslim temples (except in the case of villages with mostly non-Muslim populations), the Buḥaran masters unconditionally permitted their construction.<sup>69</sup> The arguments of the two groups rest primarily on their interpretations of aš-Šaibāni's position. While the Balḥ masters accepted aš-Šaibāni's position as valid only in Iraq, the Buḥaran masters considered the imam's judgements universal and thus valid in Central Asia as anywhere else in the territory of Islam. The debate culminates in the discussion of the ceremonial freedoms of non-Muslims, which I will address shortly.

Having presented the debate, the authors of the FA proceed to adopt the opinion of the Buḥaran masters, permitting and even encouraging non-Muslims to construct religious buildings in small villages.<sup>70</sup> This verdict contradicts their pronouncement regarding similar construction in cities. Why do the authors insist on prohibiting the construction of temples in Muslim cities and on restricting all non-Muslim religious activity? In answering this question, we must be mindful of the fact that mosques, churches and temples have a symbolic significance that surpasses their function as mere places of worship. They represent a central authority and the union of the entire religious community. Denying non-Muslims the right to build places of worship in cities was tantamount to preventing them from creating institutions of power in centres marked by a concentration of Muslims. Albrecht Noth has

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<sup>69</sup> FTT, vol. 5, 305.

<sup>70</sup> FA, vol. 2, 247–49.

interpreted the introduction of regulations concerning non-Muslim places of worship as a display of Muslim defensiveness. Drawing on historical and demographical data to interpret restrictions on worship in non-Muslim religious buildings,<sup>71</sup> Noth argues that measures such as the prohibition of ringing bells by non-Muslims were intended to protect the Muslim minority from the non-Muslim majority and suggests that, faced with a large number of non-Muslim temples, the Muslim authorities were compelled to support the few Muslim mosques by forbidding non-Muslims to use their own temples. The goal of these regulations, according to Noth, was to prevent friction between neighbouring religious communities.<sup>72</sup>

The two contradictory decrees of the FA concerning urban and rural religious buildings can thus be interpreted as strategic. By denying non-Muslims the right to build new places of worship in cities and limiting their religious freedoms in urban environments, the jurists were effectively encouraging non-Muslims to reside in villages and in the countryside, in order to reserve cities exclusively for Muslims. Through this strategy (which, as the jurists understood, would likely lead to the partitioning of geographical environments), the jurists were effectively drawing physical boundaries between the two groups in order to safeguard Muslim identity.

## 5. NON-MUSLIM RELIGIOUS CEREMONIES

As observed above, Muslim jurists unanimously prohibited the construction of non-Islamic places of worship in Muslim towns and cities. Their position on public non-Muslim religious celebrations was similar. Like other Hanafi jurists, the authors of the FA allowed non-Muslims to hold public rituals in towns and cities on the condition that they not disturb the Muslim community.<sup>73</sup> For

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<sup>71</sup> Cf. Noth, "Abgrenzungsprobleme zwischen Muslimen und Nicht-Muslimen".

<sup>72</sup> Ibid.

<sup>73</sup> "If a community of *ḥarbi* signs a treaty of dhimma and they wish to allow men to publicly marry their mothers or sisters or daughters, they will be prohibited from doing so." FA, vol. 2, 249.

example, non-Muslims were permitted to recite holy texts quietly but not “to ring the bells publicly”.<sup>74</sup> The authors feared that if their recitation disturbed their Muslim neighbours, this would lead to communal tensions.<sup>75</sup> Likewise, it was forbidden to ring bells during the Muslim call to prayer, and crosses could only be displayed in a “modest fashion”. While Muslim jurists were thus rather strict regarding regulations in urban environments, they were relatively permissive in their judgements in rural settings. Here as well, the FA reflects the diverging views of Hanafi scholars:

If they show something that has not been agreed upon, such as drums, flutes, songs, games, shouting or playing with pigeons in a Muslim town or village, they will be prohibited from that, as it is also prohibited for Muslims.<sup>76</sup>

This restrictive position can be better understood in the context of the general debate between the branches of the Hanafi school. While the early Iraqi Hanafi jurists denied non-Muslims the right to perform any ceremonial act, their successors in Balḥ and Buḥara granted them this right, creating a point of contention between the authors of the *Zāhir ar-Riwāya* and aš-Šaibānī. While the latter granted non-Muslims spiritual freedom in small villages and in the countryside, the Balḥ masters rejected this view, citing the disparate socioeconomic circumstances in Iraq and Central Asia.

The authors of the FA used aš-Šaibānī’s ruling as a basis for their acceptance and encouragement of non-Muslim public celebrations in villages and the countryside, noting that “there is no problem if they show the crucifix and ring bells outside the city [...]. This is the opinion of Muhammad [aš-Šaibānī] in as-Siyar”.<sup>77</sup>

Through their reference to aš-Šaibānī, the South Asian jurists thus categorically opposed most of their Central Asian counterparts. However, their reiteration of aš-Šaibānī’s decree merits further attention. Aš-Šaibānī’s condoning of non-Islamic ceremonies

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<sup>74</sup> FA, vol. 2, 250–52.

<sup>75</sup> Ibid.

<sup>76</sup> FA, vol. 2, 247–49.

<sup>77</sup> FA, vol. 2, 251.

in villages does not sufficiently explain the authors' decision to grant this right to non-Muslims in South Asia in general, and to thereby override the Central Asian masters. The reasons for their decision lie in the debate between the masters of Balḥ and Buḥara over aš-Šaibānī's decree:

Many among the masters of Balḥ say that Muhammad's opinion is valid only for the Iraqi villages. Muhammad made this decision concerning the village of Kufa, where most of the population consisted of dhimmi and *rafizi*<sup>78</sup>[...] whereas in our region, they do not have the right to manifest these symbols, neither in cities nor in villages.<sup>79</sup>

In order to distinguish between the circumstances of rural life in Central Asia and Iraq during the respective periods,<sup>80</sup> the Balḥ masters ruled that aš-Šaibānī's permissive decree was only applicable to the region of Iraq (*sawād al-ʿIrāq*). Since the rural population in the region of Balḥ was mostly Muslim, the Balḥ masters denied non-Muslims in rural Central Asia the freedom to celebrate publicly. The disagreement between these two groups of jurists is documented in the *Fatāwā Qāḍīhān*, which states, speaking from the perspective of the Balḥ masters: "We prohibit these actions because the meetings of the Muslims take place in those villages. In these villages live Muslim masters and disciples."<sup>81</sup> This issue was discussed in more detail by as-Saraḥsī who, in his commentary on aš-Šaibānī, explains his decision to allow non-Muslims villagers to celebrate publicly as follows:

Because the matter does not involve the use of a place of worship where the Friday prayer and other religious festivities are being celebrated [...] Several masters from Balḥ argue as

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<sup>78</sup> The term *rafīḍī* is a reference to *Šīʿa Imāmiya*. E. Kohlberg, "Rāfiḍa", in *Encyclopedia of Islam. New Edition*, vol. 8 (Leiden: Brill, 1995), 386–89.

<sup>79</sup> FA, vol. 2, 251.

<sup>80</sup> "They have said: in our region they will be prohibited from doing this, even in the countryside, because the norms of Islam are applicable there, whereas what is narrated by the master of our school concerns the inhabitants of Kufa, who were mostly non-Muslims at that time [the period of the imam]." *Al-Hidāya*, vol. 3, 75.

<sup>81</sup> *Fatāwā Qāḍīhān*, vol. 3, 590.

follows: “[Aš-Šaibānī] gave this response; but he based his opinion on the situation in the villages of the province of Kufa, because there the majority of the population consisted of dhimmi and Shiites [rafīzī], whereas in our region, we prohibit this in both the villages and the cities, because in these villages the Friday prayer is celebrated and the Muslim preachers [wā‘iẓ] and teachers [mudarris] are active.”<sup>82</sup>

The FA employs the same tactic used by the Balḥ masters (namely, emphasising the divergence between the social realities of Central Asia and South Asia) in order to accept aš-Šaibānī’s decree and refute the verdicts of Central Asian masters such as al-Margīnānī. Because the judgment of the South Asian jurists was heavily influenced by the socio-demographic makeup of these regions, the discrepancy between South Asia and Central Asia suggests that similar socioeconomic and demographic conditions prevailed in South Asia and Iraq during the two aforementioned periods. This perception informed the authors’ decision to grant non-Muslims the right to celebrate publicly in South Asian villages.

Methodologically speaking, the strategy of the FA’s authors included drawing comparisons with other works of Islamic law from various periods and regions in order to identify similarities between the legal procedures in their own time and those of formative-era Iraq. This parallel emerges especially through a comparison of the demographic composition of these societies: in both cases, Muslims constituted a minority of the population and non-Muslims, the majority, whereby the latter also represented most of the population of agricultural rural territories. This similarity led the jurists of the Indian subcontinent to favour aš-Šaibānī’s verdict and to reject those of the Central Asian masters. The decision to free non-Muslims in rural areas from the restrictions of Islamic law can be interpreted as reflecting a pluralistic approach.

One can thus legitimately claim that the two contradictory opinions represented in the FA (namely, the decision to limit non-Muslims’ freedom to perform ceremonies in cities versus the decision to grant them this freedom in the countryside) reflect a

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<sup>82</sup> Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 3, 130–31.

tension between pluralist and anti-pluralist sentiments underlying the Islamic conception of non-Muslim life in Islamic territory, as well as fundamental characteristics of the South Asian legal conception of interreligious coexistence.

Both of the above examples (religious buildings and ceremonies) indicate an interest on the part of Muslim jurists to limit the freedom of urban non-Muslims and to encourage them to change their way of life. Non-Muslims in cities were prohibited from erecting temples, reciting scripture aloud and displaying their religious symbols. The fact that these restrictions did not apply to rural settings reflects the desire of Muslim jurists to encourage non-Muslims to move from the cities to villages. Further, the fact that this ruling allowed each community to live separately and freely in a determined space implies that the authors of the FA considered the territory in question as partitioned into two spaces: cities for Muslims and countryside for non-Muslims—a decision which was clearly intended to prevent rapprochement between the two communities.

Let us recall that South Asian society was characterised by a multiplicity of religions and beliefs which coexisted in a process of continuous acculturation. Additionally, there were two versions of Islam: a “lived” Islam, simple and close to other faiths, and a strict and regulatory Islam, whose aim was to reform the former. Because this latter, strict variety of Islam existed in juridical works and was thus largely theoretical, it was relegated to the status of a purely religious phenomenon.

In order to avoid conflicts between the two communities, it was necessary to draw precise legal boundaries between them. Because South Asian jurists could not compel non-Muslims to convert to Islam or to leave the territory because of the sheer size of the non-Muslim population, the offer to grant non-Muslims a free life in the countryside was not considered a coercive measure. It thus becomes evident that the jurists intended to separate the two communities geographically in order to segregate them ideologically and spiritually. Yet was it even possible for Muslim and non-Muslim communities to coexist in an urban environment? How was this issue approached by urban non-Muslims content to

remain in the city or, conversely, by rural non-Muslims wishing to move to the city?

With these questions in mind, we can understand the restrictive behavioural code imposed on the non-Muslim community as a norm that applied only to situations in which the two communities lived side by side. Otherwise, non-Muslims were free to live as they wished, provided that they did not live in a territory controlled by a Muslim ruler.<sup>83</sup> The FA's rulings thus affected Muslims as well as non-Muslims. To illustrate this assertion, the jurists specify that non-Muslims must dress differently from Muslims and prohibit Muslims from dressing as non-Muslims. In this sense, clothing was a mechanism of segregation that emphasised the borders between religious communities.<sup>84</sup>

The issue of the spiritual freedom of non-Muslims reflects a conflict between two Islamic legal principles pertaining to proximity and distance. The first of these is the desire to facilitate conversion to Islam via a simplified conversion process. The second principle defines relations between Muslims and non-Muslims and is linked to identification and segregation. Together, these principles informed the policy of Mughal jurists to divide living space between communities in order to prevent unnecessary contact between them: segregation was designed to ensure peaceful communal life.

In his article on the Pact of Umar and the notion of territorial distinction between Muslims and non-Muslims, Albrecht Noth presents the concepts of "parallelism" and the "division" of living space. These concepts correspond to two strategies employed by Muslim jurists: in situations in which Muslim and non-Muslim communities coexist, the jurists argue for establishing a "parallel society" for non-Muslims. By contrast, communities located at a sufficient distance from each other may live without sanctions or restrictions.

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<sup>83</sup> Noth insists on the Muslim principle of distinction (*ḥālīfūhum*), which figures in a tradition of the Prophet Muhammad. Noth, "Abgrenzungprobleme zwischen Muslimen und Nicht-Muslimen".

<sup>84</sup> FA, vol. 2, 247–49.

In conclusion, the FA reflects the differences between South Asian and Central Asian jurists regarding the spiritual freedoms of non-Muslims. The authors of the FA based their arguments in support of the edicts of the *Zāhir ar-Riwāya* not on purely theoretical principles, but rather on a complex argumentation that proved the validity of ancient opinions in a new epoch.



## **CHAPTER SIX.**

# **THE INDIVIDUAL LIBERTIES OF NON-MUSLIMS**

In this chapter, I will discuss the degree of freedom accorded to non-Muslims by the authors of the FA in the realm of individual liberties; specifically, freedom of movement and freedom of dress. Classical works of Islamic law often address these two points in conjunction, and I will do likewise. After first explaining the viewpoints of the South Asian jurists by comparing the relevant edicts in the FA with those found in other Iraqi Hanafi legal works, I will then examine these liberties in the context of the Islamic approach to non-Muslims under Muslim rule.

The subject of freedom of movement can be divided into two antithetical subtopics: mobility, referring in this case to the movement of non-Muslims from one place to another; and stability, which refers to the residence of non-Muslims in territories under Muslim rule. One central quandary related to the notion of freedom of movement in South Asia in the 17<sup>th</sup> century is what has been called the “palankin problem”: the prohibition imposed by the Mughal authorities on Hindus of traveling in palanquins and on horses. This point has posed a challenge to numerous specialists of the reign of Aurangzeb. An important point of reference in this regard is the work of Zahirudin Faruqi, who considers the assertions made regarding this issue exaggerated or even erroneous. Faruqi relates this matter to the subject of disarmament of non Muslims. He contends that the theory of Aurangzeb’s alleged disarmament of the Hindus reflects an inaccurate reading of

historical facts.<sup>1</sup> Faruqi argues further that the first order prohibiting the use of palanquins was issued in 1693. He uses the argument brought by Sāqi Must‘ad Hān who argues that the sultan decreed that only princes and nobles were allowed to approach the *gulalbar* (the enclosure surrounding the emperor’s living quarters within a Mughal military camp) with a palanquin.<sup>2</sup> Faruqi interprets this royal decree as a security precaution rather than a discriminatory measure, since it applied to the entire population of the Mughal Empire without exception.

A more relevant example is provided by a statute issued by the sultan concerning Hindus (with the exception of the Rajputs), which forbade the use of palanquins for the transport of arms. Faruqi mentions that the date of this provision was the subject of a debate between the two eminent historians of this period, Hāfi Hān and Sāqi Must‘ad, and draws on this discrepancy to illustrate the unreliability of researchers who based their conclusions on the work of these two historians. Faruqi claims that the palanquin was the only means of transportation available for long journeys and that prohibiting its use would have been analogous to forbidding the use of the train in India nowadays.<sup>3</sup> While Faruqi thus challenges the theory of the prohibition of the palanquin, his position appears to have been motivated by a desire to confront Sarkar and other historians with Hindu nationalist tendencies who had used Aurangzeb’s policy as a mean to express their hostility toward Islam.

Regarding this issue, I would like to suggest that Aurangzeb’s prohibitive measures, whether exaggerated or not, were the consequence of the fragile relationship between the Mughal state and its subjects. In a previous chapter, I suggested that non-Muslims can be classified into different groups who, while entitled to reside in *dār al-islām*, were forbidden from carrying weapons or residing in the land of their choice. The supposed ban of the palanquin can thus be understood as a measure aimed at extending

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<sup>1</sup> Zahirudin Faruqi, *Aurangzeb and His Times*, rep. (Lahore: Al-Birūnī, 1977), 176.

<sup>2</sup> *Ibid.*, 176–78.

<sup>3</sup> *Ibid.*

the state's control over its non-Muslim subjects to include their movements as well. The Moghul rulers were concerned that the free movement of non-Muslims would create an imbalance in the demographic distribution of the population of the empire and would cause economic problems for the state regarding the distribution of arable land.

Numerous sections of the FA portray non-Muslims in a permanent state of movement. In the section on taxes, the authors discuss the taxes that non-Muslim merchants were required to pay on their commercial property. The Iraqi jurists upheld the right of non-Muslims to freely engage in trade in or near Muslim cities, indicating that they did not object to this population's movement.<sup>4</sup>

The right to move freely was thus conferred only on non-Muslim dhimmi residing permanently in Muslim territory, while non-Muslim warriors (*ḥarbī*) residing in *dār al-ḥarb* were only permitted to enter *dār al-islām* under safe conduct (*ʿamān*), where they could remain for one year, after which they would be considered dhimmi, in case they don't leave it, and required to pay *ḡizya*. In the sections on property tax, the authors of the FA clearly support non-Muslim peasants, granting them the right to leave their territory and to change their occupation. Thus although freedom of movement was enabled, it was not particularly encouraged by the South Asian jurists, especially since economic sources reveal that this type of behaviour consisting of continuous movement was a tradition within many South Asian communities. Muslim South Asian jurists opposed this habitus because it negatively impacted agricultural production. The section on *ḡizya* in the FA reflects an explicit consensus among Iraqi Hanafī jurists that non-Muslims were to be distinguished from Muslims in the sphere of

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<sup>4</sup> This aspect is related to the prohibition of entrance to the region of the *ḥaram* for non-Muslims. Hanafī jurists were known to be the only Muslim legal scholars to permit non-Muslims to enter and reside in this territory during that period. According to aṭ-Ṭabarī, aš-Šāfiʿī opposed the granting of this permission, stating that “Abu Ḥanīfa and Abu Yusuf allow[ed] the dhimmi to reside in the Muslim states and to trade freely in Muslim markets.” Aṭ-Ṭabarī, *Kitāb Iḥtilāf al-fuqahāʾ*, 233–41.

movement. While the rules concerning the freedom of movement of non-Muslims are often limited to specifications regarding transport animals, the FA also mentions additional aspects. To explain the legal background of this debate, we need to return to the general principles of the Hanafi school.

In his *Kitāb al-Ḥarāğ*, Abu Yusuf puts forth the idea that non-Muslims must distinguish themselves visibly from Muslims in public, but does not specify the nature of this distinction.<sup>5</sup> The two historical arguments he presents clearly demonstrate how this regulation resulted in the degradation of non-Muslims. Abu Yusuf refers first to Caliph Umar I (ibn al-Khattab):

This is how Umar behaved: He ordered his officers to oblige the dhimmis to dress differently [...] so that one could distinguish their dress from that of the Muslims.<sup>6</sup>

Abu Yusuf adds that Caliph Umar II (ibn Abd al-Aziz) added to the edicts promulgated by his predecessor and observes that the regulations concerning the non-Muslim dress code introduced by both caliphs served only to distinguish non-Muslims from Muslims.

With the relocation of the Hanafi school from Iraq to Central Asia, the intention to differentiate the two groups of Muslims and non-Muslims gradually changed so that in the twelfth century, the Central Asian Hanafi scholar Qāḍīḥān suggested that non-Muslims be required to distinguish themselves from Muslims; he understood this as being a form of humiliation.<sup>7</sup> This trend towards a negative attitude vis-à-vis of non-Muslims is intensified in *Al-Hidāya*, which additionally prohibits non-Muslims from carrying weapons,<sup>8</sup> and by al-Kāsānī, the author of the famous *Badā'ī' aṣ-ṣanā'ī'*, who upholds the former decree against non-Muslims by saying that they “are not allowed to resemble Muslims”.<sup>9</sup>

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<sup>5</sup> Abu Yusuf, *Kitāb al-Ḥarāğ*, 127.

<sup>6</sup> Ibid.

<sup>7</sup> *Fatāwā Qāḍīḥān*, vol. 3, 590.

<sup>8</sup> “They are not allowed to ride horses nor to carry weapons.” *Al-Hidāya*, vol. 3, 75.

<sup>9</sup> Al-Kāsānī, *Badā'ī' aṣ-ṣanā'ī'*, vol. 9, 4334. This passage implies that non-Muslims were attempting to resemble Muslims.

In the context of seventeenth-century South Asia, the authors of the FTT and the FA advocated increasing the visibility of these discriminatory measures in everyday life. Both compendia compel non-Muslims to distinguish themselves from Muslims and to adopt distinguishing symbols that were intended to humiliate them, thereby establishing what could be termed norms of humiliation. For example, the FTT states that non-Muslims do not have the right to own horses, but merely donkeys and mules, emphasising that this statute was meant to distinguish them from Muslims and to “scorn” them. The FTT demonstrates further contempt in its decree that “dhimmis should not be allowed to resemble Muslims [and] will be prohibited from riding horses”.<sup>10</sup> Non-Muslims were also forbidden to carry arms—a restriction which could carry fatal consequences in territories such as South Asia, where travellers were often exposed to attacks by bandits. Such a restriction would force them to limit their movements to a certain territory in accordance with the policy of the Muslim authorities.

As far as the FA is concerned, this compendium of Fatwas exhibits two seemingly contradictory tendencies: to limit the movement of non-Muslims to a defined area and yet to allow them to move freely within Islamic territory. While non-Muslims were not considered “foreign entities”, Muslim jurists nevertheless often called for placing restrictions on their movement for security purposes. Thus, dhimmis were forbidden to ride horses, and are only permitted to travel on donkeys and mules. One exception is the integration of non-Muslim into the Muslim army.<sup>11</sup>

The FA states that dhimmis may not move freely since they have their own living space with well-defined boundaries. Therefore, dhimmis were not permitted to live far from Muslim settlements or in areas bordering non-Muslim territory. The jurists were motivated by two fears. Since they were forbidden from

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<sup>10</sup> As in medieval Europe, so in seventeenth-century South Asia horses were considered symbols of honour, and donkeys, of contempt. Mark Cohen has noted the distinctive role of clothing in distinguishing the dominators from the dominated in both contexts. Cohen, *Under Crescent and Cross*, 61, 78.

<sup>11</sup> FA, vol. 2, 249–51.

bearing arms or forming armies, dhimmis residing close to the borders were unable to defend themselves against potential attacks from outside; at the same time, Muslim authorities might have fear of potential collaboration of non-Muslims with invaders. This has led to a kind of limitation in the residence right of non-Muslims: they were permitted to live in Muslim areas provided that their population living there was minimal. Therefore, the coercive measures enabling the constant monitoring of non-Muslims also gave rise to a particular urban configuration: small non-Muslim agglomerations surrounded by Islamic cities where non-Muslims could be identified by their dress, means of transport and houses. Why this configuration was not applicable in Mughal South Asia, despite the will of the state, will become clear when we consider the issue of residence.

The FA clearly restricts non-Muslims' freedom of residence. As mentioned earlier, while the authors encouraged non-Muslims to settle far from Muslim communities for socio-economic and cultural reasons, they allowed non-Muslims to reside in Muslim neighbourhoods provided that the size of the non-Muslim population was limited. This configuration was meant to expose non-Muslims to a positive image of a peaceful Muslim way of life likely to attract converts to Islam. By contrast, a high concentration of non-Muslims was only permitted in a designated area of the city (*miṣr*).<sup>12</sup> Mark Cohen attest that these non-Muslim areas in no way resembled the Jewish ghettos of medieval Europe;<sup>13</sup> in fact, the FA granted non-Muslims the right to enter Muslim markets and neighbourhoods and to conduct business there.<sup>14</sup>

The granting of the right of movement in Muslim cities allowed non-Muslims to establish economic and social relations with all of society, creating an "engine" driving the coexistence of different groups within a common geographical environment. Aware of the need for social interaction between Muslims and non-Muslims, Muslim jurists thus clearly directed their efforts

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<sup>12</sup> FA, vol. 2, 247–49.

<sup>13</sup> Cohen, *Under Crescent and Cross*, 115–16.

<sup>14</sup> FA, vol. 2, 251.

towards fortifying the identity of the Muslim population, yet without resorting to the absolute exclusion of non-Muslims.

In conclusion, while the FA granted non-Muslims the right to travel freely, the sultan reserved the right to relocate them to prevent any perceived betrayal or weakness. Non-Muslims were thus subject to numerous practical restrictions regarding their residence.

### 1. DISTINGUISHING SYMBOLS

The topic of distinguishing symbols has attracted more attention from researchers than any other topic regarding interreligious relations between Muslims and non-Muslims in the premodern era.<sup>15</sup> The dress code is often seen as proof of Muslim discrimination against non-Muslims. Those who support this position often detach these legal norms from their historical contexts and exploit them in order to prove the hostility of Muslims towards non-Muslims. The most relevant texts supporting this tendency are those by Ibn Qaiyim al-Ğauziya (d.1350), his master Ibn Taimiya (d. 1328) and the famous decrees of the Fatimid caliph al-Hakim (d. 1021).

Historically speaking, there was unanimous consensus among Muslim jurists that Caliph Umar ibn Abd al-Aziz was the first caliph to promulgate distinguishing signs or symbols. In his *Kitab al-Ğarāğ*, Abu Yusuf reports that in the Pact of Umar, Caliph Umar I ordered that Muslims be systematically distinguished from non-Muslims.<sup>16</sup> Some contemporary historians, however, date the introduction of this policy of forced differentiation to

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<sup>15</sup> According to Albrecht Noth, the practice of humiliating non-Muslims through dress codes and by limiting their right to ride animals influenced the authors of the Pact of Umar. Noth, "Abgrenzungsprobleme zwischen Muslimen und Nicht-Muslimen."

<sup>16</sup> "Some people told me that several among your dhimmi subjects have withdrawn from the compromise concerning their dress, they gave up their rope [...] if they will be obliged to wear them, they will know who you are." Abu Yusuf, *Kitab al-Ğarāğ*, 127–28.

Umar II.<sup>17</sup> My focus here is less the origin of these policies, but rather their content and purpose. In particular, I will try to establish whether the purpose of these measures was limited to the identification of non-Muslims (as in the case of Umar I) or whether they were meant to achieve other aims, in particular, humiliation (*ṣaġār*). To this end, I will first employ a comparative method to analyse the role of distinguishing symbols in seventeenth-century South Asia. I will then perform a synchronic and diachronic reading of norms embedded in or prescribed by the edicts of the FA and other works to determine whether they reflect an easing or a strengthening of these policies.

In the chapter “On the Clothing of Dhimmis and their Form [*fī libās ahl aḍ-ḍimma wa-zīyyihim*]” of his *Kitab al-Ḥarāġ*,<sup>18</sup> Abu Yusuf presents the standards of the dhimmi dress code. He states that no dhimmi should be allowed to resemble Muslims in dress, riding animal, or the form of his silhouette.<sup>19</sup> However, Abu Yusuf makes clear that these norms are meant not to discriminate against or to humiliate non-Muslims, but rather only to identify them (“so that we can distinguish their silhouettes [*zīyyihim*] from those of the Muslims”<sup>20</sup>). Furthermore, Abu Yusuf insists that Umar II<sup>21</sup> was the first to reinforce the concepts introduced by Umar I regarding the dress code.<sup>22</sup>

The Central Asian jurists, however, distanced themselves from this concept of distinguishing symbols as it appears in Abu Yusuf’s texts; they underline the intensified measures introduced by the Caliph Umar II. As far as the Central Asian approach

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<sup>17</sup> This problem was not related exclusively to the introduction of distinctive signs by Muslim rulers but rather to several aspects of Muslim non-Muslim relations. Similar norms regarding this subject existed already in previous cultures, for example in Byzantine and Roman law. Cf. Cohen, *Under Crescent and Cross*, 61–66.

<sup>18</sup> Abu Yusuf, *Kitab al-Ḥarāġ*, 127.

<sup>19</sup> Cohen, *Under Crescent and Cross*, 63.

<sup>20</sup> Abu Yusuf, *Kitab al-Ḥarāġ*, 127.

<sup>21</sup> Fattal admits that Umar II only reintroduced the norms first introduced by Umar I. Fattal, *Le statut légal des non-musulmans*, 96.

<sup>22</sup> Abu Yusuf addresses the calif directly, calling on him to “apply this norm harshly”. Abu Yusuf, *Kitab al-Ḥarāġ*, 127.



toward the treatment of non-Muslims is concerned, this position was unequivocal; while *Al-Hidāya* can be considered moderate, *Qāḍīhān* reveals a clear discriminatory purpose. This famous jurist from Transoxiana defines the nature of the dress code of non-Muslims and insists that “we should order them to implement all measurements conceived to humiliate them”, adding the point that “they should be prohibited from looking similar to Muslims”.<sup>23</sup>

This intention to intensify distinctive measures is also reflected in South Asian legal works such as the FTT, which even specifies the required material, colour, and dimensions of non-Muslim dress, which was to be plain, made of poor material and displeasing in form.<sup>24</sup> While the FTT stipulates that non-Muslims must have three distinguishing signs, other legal works only require them to display one, such as a hat or a cloak.<sup>25</sup> From this it can be inferred that the measures introduced by the Iraqi jurists were gradually adopted as tools of discrimination in Central Asia and, eventually, in parts of South Asia as well.

The authors of the FA likewise stressed the notions of contempt and discrimination against non-Muslims. For example, they state that the material, colour and shape of the shoes of non-Muslims must not only differ from those of Muslims but above all, must be of poor quality. The terms used to describe these clothes—*ḥašīna* (harsh) and *fāsida* (useless)—further demonstrate the discriminatory nature of these provisions.<sup>26</sup> The authors of the FA confirm this discriminatory tendency even more clearly when they confirm that non-Muslims “should be distinguished by all means available in order to humiliate and subjugate them”.<sup>27</sup>

In order to understand the reasons behind these discriminatory measures, we must bear two things in mind. First, it should

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<sup>23</sup> “They must submit themselves to the norms conceived to humiliate them and they must stop resembling Muslims in their clothing and their riding of horses in Muslim markets.” *Fatāwā Qāḍīhān*, vol. 3, 590.

<sup>24</sup> FTT, vol. 5, 304.

<sup>25</sup> *Ibid.*, 305.

<sup>26</sup> FA, vol. 2, 251.

<sup>27</sup> *Ibid.*, 250.

be noted that the standards of distinction prescribed in works of Islamic law applied only in urban environments in which Muslims and non-Muslims resided together, and not in cases in which the two communities lived far from each other. The FA states that non-Muslims living in the countryside far from Muslim settlements are not subject to the dress code, which applies only in Muslim cities with large non-Muslim populations.<sup>28</sup> Requirements concerning distinguishing indicators are thus only applicable under specific conditions. Second, one must recall the regulations pertaining to religious buildings, religious liberties and in particular intercommunal relations, as discussed in the previous chapter. As I have shown, the authors of the FA insisted on the division of territory between Muslims and non-Muslims by encouraging the latter to live outside of cities and by allowing them to live in cities only under certain conditions. Dress codes were an integral part of the system of limitations put in place to cope with the challenges posed by cohabitation. The FA insists on the limits between various religious communities that were deemed necessary in response to the rapprochement between Muslims and non-Muslims. The greater the proximity between the communities, the more distinguishing measures were required by the jurists.<sup>29</sup>

The FA thus reflects a reaction to a lived reality. This is clear, for example, from the Mughal policy towards the Rajputs. According to historical sources, the Mughal state exempted the Rajputs from several forms of tax and allowed them to bear arms just like Muslims. Like non-Muslims, Muslims were also required to observe standards of dress and behaviour or risk capital punishment. The authors of the FA present a list of acts that constitute apostasy, including breach of conduct, appearance, and neglect of Muslim dress codes. The FA specifies that resemblance to or imitation of non-Muslims by Muslims is considered as an act of apostasy. The penalty for imitating a follower of another religion was thus in fact more severe for Muslims than for non-Muslims, and both Muslims and non-Muslims were subject to discriminatory measures by Muslim jurists. While dress codes were generally

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<sup>28</sup> *Ibid.*, 252.

<sup>29</sup> Eigmüller, "Der duale Charakter der Grenze".

imposed in order to distinguish non-Muslims, to emphasise their subordinate status and thus encourage them to embrace Islam, these measures of distinction were not applied in South Asia during the period under consideration.<sup>30</sup>

Zahirudin Faruqi uses the concept of a distinction between Muslims and non-Muslims to support his thesis of Mughal pluralism. He compares the notion of Islam with other earlier cultures and shows<sup>31</sup> that the *Šahnameh* recounts how King Šāša subdued the Jats (Zuṭ) and the Lohanās by forcing them to walk barefoot,<sup>32</sup> accompanied by dogs.<sup>33</sup> Faruqi goes on to compare this practice of the ancient Persian kings with Aurangzeb's measures, which he qualifies as more lenient vis-à-vis non-Muslims, especially considering that the dress codes outlined in the FA were almost never enforced during the sultan's reign.

In addition, it needs to be highlighted that the medieval period was characterised by the desire of religious and social communities to distinguish themselves from others. The example of the community of the Sikhs illustrates this tendency. After the execution of their leader Tegh Bahadur in 1664 by order of Aurangzeb, Mirsa Rajah Jai Singh, the son of the former and who succeeded him, seeking to give his community a more distinctive and military character, introduced, in 1675, five distinctive

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<sup>30</sup> The only available reference to this subject is mentioned by Lari, who admits that Hussain Ḥān, the sixteenth-century governor of Panjab, forced Hindus to wear distinctive signs and to distinguish their mounts from those of the Muslims. Azad, *Religion and Politics in India*, 61.

<sup>31</sup> Faruqi, *Aurangzeb*, 178.

<sup>32</sup> Cf. Girish Chandra Dwivedi, *The Jats: Their Role in the Mughal Empire* (Bangalore: Arnold, 1989), 13–18. Charles Pellat has also studied the history of the Jats in Arabia, particularly their role in the revolts against the Abbasids, their relation to the Bohemians and their relation to the birth of the literary genre of *maqāma*. Charles Pellat, *Le milieu Basrien et la formation de Ġāḥiẓ* (Paris: Adrien-Maisonneuve, 1953), 37–40.

<sup>33</sup> Faruqi, *Aurangzeb*, 178. The same story figures in Aḥmad ibn Yahya al-Balāḍurī, *Futūḥ al-Buldān*, rep. (Leiden: Brill, 1866), 438.

features of clothing aimed to distinguish the Sikhs from other populations.<sup>34</sup>

Symbolic boundaries are thus only identifiable through insignia, including distinguishing signs or indicators that individuals are required to wear, and which thereby identify and demarcate the boundaries between them. To advocate the wearing of such indicators is thus to advocate the establishment of boundaries between individuals. Monika Eigmüller has argued that the rapprochement of individuals engenders a dissolution of difference which in turn necessarily leads to the establishment of a border. In other words, borders, often absent, appear precisely at the moment they are transgressed.<sup>35</sup> In the context of Mughal South Asia, the development of standards of distinction by the authors of the FA can be understood as an appeal to all societal groups to respect the borders between them.

The positions on individual freedom outlined in the FA tell us much about the relationship between the text and its historical context. Signs of social demarcation were only partially applied; likewise, rules regarding displacement and residence refer more to a political conception of the sultan than to the reality of seventeenth-century Mughal society. At the same time, the edicts of the FA on this subject reveal the singular nature of this work, which reflects what the South Asian jurists believed was a perfect concept of conviviality.

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<sup>34</sup> These distinguishing signs were: *kirpan* (knife), *keshha* (long hair), *kanga* (turban), *kara* (bracelet) and *kachhera* (trousers). Owen W. Cole and Pira S. Sambhi, *The Sikhs: Their Religious Beliefs and Practices* 2, rev. ed. (Brighton: Sussex Academic Press, 2006), 109–12.

<sup>35</sup> Eigmüller, “Der duale Charakter der Grenze”.

## CHAPTER SEVEN.

# THE PERSONAL STATUS OF NON-MUSLIMS

This chapter addresses the topic of marriage and divorce among non-Muslims. In my analysis of the concept of boundary in Chapter 3, I emphasised that conversion, apostasy and marriage should be considered as manifestations of struggle against and a transgression of the borders separating religious and ethnic groups. I further stated that pluralism implies respect for the faith of others. Thus, conversion, though it represents a struggle against borders, would, if performed by force or obligation, constitute an attack on this principle, since it would involve forcing individuals to change their faith and identity. Two issues thus arise. What was the position of the FA on marriage—between non-Muslims on the one hand, and between Muslims and non-Muslims on the other? This issue involves the subject of divorce, which I will also discuss in this chapter. First, however, it is necessary to define the Islamic concept of marriage.

### 1. MARRIAGE AND DIVORCE

Marriage is understood as an institution of acculturation, coexistence and integration. In his *Outline of Muhammadan Law*, Asaf A. Fyzee outlines three dimensions of marriage in Islam: legal, social and religious.<sup>1</sup> From an Islamic legal point of view, marriage is a contract (as opposed to a sacrament, as it is perceived in

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<sup>1</sup> Asaf A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1974), 101.

Christianity), the conditions of which change according to the personal status of the marital partners. The social conception of marriage, meanwhile, is three-fold. As Fyzee observes, Islamic law attributes more value to women after marriage, restricting polygamy and strongly encouraging marital union. From a religious perspective, marriage is regarded as a foundational element of society and in this sense, a sacred contract.<sup>2</sup> The question then arises: if marriage implies a transgression of borders between groups, what does divorce signify?<sup>3</sup> Divorce implies a renunciation of proximity and a return to pre-existing borders. For the present, I will limit my discussion of divorce to the context of conversion, as any marriage contract between non-Muslims is considered annulled if one or both of the partners convert to Islam. According to the FA, Islamic law attributes more importance to conversion to Islam than to apostasy. The unrepentant apostate faces capital punishment as well as a degradation of his social status, which automatically leads to the annulment of all contracts, including, firstly, marriage.<sup>4</sup> Non-Muslim converts to Islam, however, retained these civil rights.

## 2. MARRIAGE BETWEEN NON-MUSLIMS

The differences between the positions of Hanafi jurists (in particular, between Abu Ḥanīfa and his disciples Abu Yusuf and Muhammad) on non-Muslim marriage has been discussed by the Hanafi jurist Abū Zaid ad-Dabbūsi (d.1029). In his *Ta'sīs an-naẓar* (The Foundation of Thought), ad-Dabbūsi observes that while Abū Ḥanīfa accepted all forms of marriage between non-Muslims (based on the argument that their payment of the *ḡizya* gave them the right to marry according to their own laws and traditions), Muhammad and Abu Yusuf rejected this opinion, arguing that the Muslim state should only recognise marriages that are compatible with Islamic law.<sup>5</sup>

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<sup>2</sup> Ibid.

<sup>3</sup> The problem of divorce consists not in clarifying its nature but rather in highlighting its consequences.

<sup>4</sup> Fattal, *Le statut légal des non-musulmans*, 129–37.

<sup>5</sup> Ad-Dabbūsi, *Kitāb Ta'sīs an-naẓar*, 13.

The turning point in this dispute between the masters of the Hanafi school is to be found in as-Saraḥsī's discussion of the origin of the Islamic tradition of recognising non-Muslim marriages. For as-Saraḥsī, the acceptance of certain types of dhimmi-marriage had nothing to do with a Muslim recognition of non-Muslim marriage. Rather, it was based on the dhimma pact, which granted non-Muslims the right to live freely.<sup>6</sup> Drawing on Abu Ḥanīfa's judgments, the FA stipulates that all kinds of non-Muslim marriage are to be recognised by Muslims.<sup>7</sup> This same judgment was reproduced in the FTT, which also recognises marriage between various dhimmi groups.<sup>8</sup>

The Hanafi legal positions on marriage and divorce between non-Muslims were based on the Islamic legal norm of non-intervention in the internal affairs of non-Muslim communities.<sup>9</sup> The principle of non-intervention gave non-Muslims autonomy regarding their personal status. When non-Muslims would seek the advice of Muslim authorities to resolve questions of inheritance or commercial transaction problems, Muslim jurists would send them to consult the legal authorities in their own communities.

Since the authors of the FA declared all non-Muslim marriages valid,<sup>10</sup> they likewise accepted mixed marriages between non-Muslims (for example, between Jews and Christians). The central position of the FA on the personal relationship of marriage or divorce between non-Muslims is thus clearly open positive. Acceptance of the other does not imply belief in the other's religion or way of life. Indeed, the principle of non-intervention grants the

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<sup>6</sup> "We permit them to perform this [marriage without witnesses] because of the dhimma pact, not because we accept their acts. The same applies to idolaters and fire worshippers." As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 5, 38–39.

<sup>7</sup> "Any legitimate marriage between Muslims is also legitimate between dhimmi [...]. If a dhimmi marries without witnesses and they believe in this, our three prominent masters will accept it." FA, vol. 1, 337.

<sup>8</sup> FTT, vol. 3, 126–28.

<sup>9</sup> Ad-Dabbūsī, *Kitāb Ta'sīs an-naẓar*, 13–15.

<sup>10</sup> "Any legitimate marriage between Muslims is also legitimate between dhimmi [...]. Unions that are prohibited between Muslims are of different categories..." FA, vol. 1, 337.

communities the right to live alongside Muslims without having to embrace Islam. This perspective raises the issue of inter-communal relations; in particular, mixed marriages between Muslims and non-Muslims (both dhimmi and non-dhimmi). The first volume of the FA addresses mixed marriage twice, first in the context of prohibited marriage<sup>11</sup> and later in a discussion of non-Muslim marriage.<sup>12</sup>

### 3. MARRIAGE BETWEEN MUSLIM MEN AND DHIMMI WOMEN

Like the Muslim jurists of the formative era, the authors of the FA accepted marriage between Muslim men and non-Muslim women, provided that the woman was a dhimmi (Jewish or Christian). While according to the authors of the FA such marriages had the advantage of leading the non-Muslim wife to conversion to Islam, their disadvantage consisted in the fact that as the non-Muslim woman retained the right to consume products prohibited by Islam, she was likely to influence her children accordingly, leading to a “desecration” of the Muslim household. Although such marriages were possible, Muslim jurists considered them objects of disgust (*makrūh*).<sup>13</sup> In other words, the union between a Muslim man and a non-Muslim monotheistic woman was accepted but not extolled.<sup>14</sup> While the FA drew heavily on the favourable judgments of Qāḍīḥān, to which it added certain reservations,<sup>15</sup> a comparative reading of the two works reveals a fundamental divergence between them regarding unions between Muslim men and “idolatrous” women.

As mentioned earlier, the FA contains a typology of religions in which its authors list the differences between the various local religious communities of South Asia. According to the FA,

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<sup>11</sup> FA, vol. 1, 281.

<sup>12</sup> FA, vol. 1, 337.

<sup>13</sup> Umar ibn al-Ḥattab objected to this kind of marriage out of a fear that it would disequilibrate Muslim society. Friedmann, *Tolerance and Coercion in Islam*, 166.

<sup>14</sup> “It is permissible for a Muslim to marry a dhimmi woman [...] but it would be better not to do so.” FA, vol. 1, 281.

<sup>15</sup> *Fatāwā Qāḍīḥān*, vol. 1, 365.



Muslims may not marry idolatrous women that to say women of non-monotheistic faiths. To explain this typology and to support their opinion, the authors drew on definitions of idolatrous religions.<sup>16</sup> The following passage illustrates their classification of religious beliefs:

Idolaters include those who worship the sun, those who worship the stars, those who worship images [...] the *mu'aṭila* and the Manicheans [*zindiḡ*], the *bāṭini*, the *'ibāḥi* and all other religions that lead to infidelity.<sup>17</sup>

This passage demonstrates that the list of prohibited religions was not exhaustive and that certain beliefs were omitted, either out of negligence or ignorance. Even so, this list paints a rather depreciative picture of non-monotheistic faiths, which testifies to the authors' fear of a possible intermingling between Muslims and members of other religions. Marriage with "idolaters" was thus forbidden. Although this prohibition was also advanced by other jurists (including as-Saraḡsī<sup>18</sup>), its treatment in the FA is significant and embedded in the South Asian context. Although at the time of the FA's composition, most non-Muslims in South Asia were non-monotheistic, the religious communities of the region managed to live in peaceful environment. The FA's approach to mixed marriage therefore involved, first and foremost, identifying differences between Muslims and adherents of non-monotheistic faiths.

The authors of the FA begin by attempting to define the notion of idolatry in order to dispel fear of unknown faiths. Unable to count all the religions that fall into this category, they conclude by defining idolatry as "all religion that leads to infidelity".<sup>19</sup> This implies that the authors were sceptical all forms of proximity between religions, fearing that mixed marriage would lead to a demographic catastrophe within the Muslim community and perhaps even to its dissolution. In addition, the authors also feared the potential social danger posed by such a union: the union of a

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<sup>16</sup> FA, vol. 1, 281.

<sup>17</sup> Ibid.

<sup>18</sup> As-Saraḡsī, *Kitāb al-Mabsūṭ*, vol. 10, 96.

<sup>19</sup> FA, vol. 1, 281.

converted Muslim with a non-monotheistic individual could result in the fusion of their identities, to the eventual detriment of the Muslim community. This helps explain the prohibition of mixed marriage as a defensive action on the part of Muslim jurists.

In conclusion, the Hanafi conception of marriage is characterised by an inherent dichotomy. On the one hand, non-Muslims had the right to live and marry freely, while on the other, some Muslim jurists refused to recognise any kind of mixed marriage. How, then, could the Mughals resolve the issue of marriage between Muslims and non-Muslims in a way that would both conform to Islamic legal doctrine and take into account the social and demographic factors specific to South Asia?

#### 4. THE INSTITUTION OF MARRIAGE

The first Mughal sultans succeeded in exploiting the institution of marriage to resolve political or social issues. Marrying women of non-Muslim religions allowed them to extend their control over their respective communities or groups, to thwart opposition and exploit their expertise and military experience in the interests of the Mughal state. A relevant example is provided by the Mughal Sultan Muhammad Akbar (d. 1605). By marrying women of different religions, Akbar ensured the alliance of various Hindu communities, including the Rajputs, increased the strength of his armies and initiated a process of reconciliation between the peoples of his empire.<sup>20</sup>

Aurangzeb, by contrast, did not promote marriage between Muslims and non-Muslims, but rather encouraged non-Muslims to

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<sup>20</sup> In 1562, Akbar married Harḥa, the eldest daughter of Puṣṭi Marg Vaiṣṇawites, a prominent Hindu. Historians consider this marriage revolutionary in the context of the sixteenth century. According to Lari Azad, while mixed marriages had taken place earlier, they had been forced marriages; the spouses were required to apostatise and embrace Islam. The second such marriage took place in 1570, when Akbar married the daughter of Ranal Har Rai, the governor of Jaisalmer. Azad quotes a Dutch chronologist's observation that "every Raja who had a daughter gave her as a spouse to the king, as a sign of submission." Azad, *Religion and Politics in India*, 47.

convert to Islam in order to marry prominent dignitaries of his court. Marriage with Muslim women was thus a reward for conversion. While producing similar results, these two approaches thus seem antithetical. While Akbar's marriage policy ensured that both spouses retained their identities, the type of marriage advocated by Aurangzeb involved changing the identity of the non-Muslim spouse in order to achieve their social integration via assimilation to Islam.

While the authors of the FA considered religion the determining factor in establishing a mixed marriage, an examination of the context of seventeenth-century South Asia reveals that in fact, political and ethnic factors predominated.<sup>21</sup> The principle of hierarchy as an impetus for social organisation, which played a decisive role in the formulation of these marital rules, was thus as relevant for Hindus as it was for Muslims.<sup>22</sup> Among Hindus, for example, marriage outside the caste was prohibited.

The concept of caste also influenced South Asian Muslims: Ašraf, sayyid and Mughal women were not permitted to marry lower-class Muslim men (however, this rule concerned social rather than religious status).<sup>23</sup> Despite these restrictions, there were several cases of mixed marriage between Hindus and Muslims as well as of marriages forbidden by Islamic doctrine. Thus, in the Mughal territories of Bhaduri and Bhimer, Muslim women married Hindu men and converted to Hinduism, prompting Aurangzeb's father Šah Ğahan to order the prohibition of this type of alliance.

It was thus in response to the marriage of Muslim women to non-Muslim men that the jurists, faithfully representing Islamic dogma, insisted on prohibiting marriage between Muslims and

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<sup>21</sup> The reference is to marriages arranged by the Mughal state in order to win over Hindus to Islam. For example, Aurangzeb promised the Hindu Ranas that if they converted to Islam, their sons would marry Muslim princesses. Likewise, Aurangzeb had one of his sons marry a Hindu woman. *Ibid.*, 228–32.

<sup>22</sup> Imtiaz Ahmad, *Caste and Social Stratification Among the Muslims* (Delhi: Manohar Book Service, 1973), 179–90.

<sup>23</sup> *Ibid.*, 191.

adherents of non-monotheistic faiths. While the authors of the FA expanded this prohibition within the framework of marriage between Muslims and dhimmis, the terminology they used to specify this type of marriage differed from that used by earlier jurists. For example, whereas as-Saraḥsī had used the phrase “it is an object of disgust” (*yukrahu*), the authors of the FA use the softer expression “it would be better not to do it” (*wa-l-awlā an lā yaf<sup>ʿ</sup>ala*)<sup>24</sup> when referring to the marriage of Muslim, Jewish or Christian women.

The conception of marriage as it appears in the FA exemplifies the relationship between Muslims and non-Muslims. The authors accepted and provided for a life of communal coexistence, albeit one governed by strict laws and moral standards: the two communities had to remain separate in order to preserve the religious and social identity of their members.

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<sup>24</sup> FA, vol. 1, 281.

## CHAPTER EIGHT.

# THE ECONOMIC FACTOR

In this chapter, I will present some prominent characteristics of the Islamic conception of non-Muslim economic activity as they appear in the FA, particularly regarding the right of non-Muslims to own property and to engage in commerce. As discussed previously, non-Muslims living under Muslim rule had to sign a dhimma contract with the Muslim state which guaranteed their right to live in the Muslim territory and to own property. As a result, the ownership rights enjoyed by non-Muslims often exceeded those granted to Muslims, since the former had access to products prohibited for Muslims (such as pork and wine). On the other hand, non-Muslims were forbidden to own the Quran or Muslim slaves, or to construct religious buildings higher than those of the Muslims. These tenets defined the property rights of non-Muslims. On this subject, the FA agrees fully with Hanafi doctrine, as its authors reproduced the edicts of the first Hanafi masters without much discussion.<sup>1</sup>

The FA contains two basic economic categories of non-Muslim: the peasant and the merchant, two of the most common professions at that time (in addition to that of the warrior, from

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<sup>1</sup> Comparing the situation of Jews in Europe and the Islamic world, Mark Cohen notes that Jews in medieval Europe were prohibited from owning land and were forced to settle in cities due to the lack of security in the countryside, a situation which resulted in occupational segregation. By contrast, Cohen observes, non-Muslims living under Islamic rule were relatively free to take up various kinds of occupations and to settle in rural areas. Cohen, *Under Crescent and Cross*, 79–82.

which, however, non-Muslims were often excluded). Under Islamic law, while non-Muslims could engage in all kinds of labour, Muslims were excluded from professions that directly or indirectly involved contact with wine or pork or serving non-Muslims—whether as servants in public baths (*hammām*) or as domestic slaves. This prohibition was of a social character, in contrast to the Quranic ban on pork and wine, which is religious in nature. The prohibition of service professions was a social matter, since according to Islamic doctrine Muslims belong to a higher rank and thus may not subordinate themselves to non-Muslims. Despite this prohibition, the authors of the FA specified that as long as the relationship remained strictly professional, Muslims could serve non-Muslims, even in public baths. Only professions that suggested the social superiority of the non-Muslim were forbidden to Muslims. The importance attributed to intention becomes apparent throughout these edicts; indeed, this principle provides the basis for the exclusion of non-Muslims from civil service in several Islamic countries, as we will see in the next following chapters.

### 1. THE NON-MUSLIM PEASANT

References to agricultural activities in the edicts on land tax (*ḥarāḡ*) contained in the FA reveal the importance of the relationship between non-Muslim peasants and the Muslim state. Specifically, in their discussion of the transfer of lands, the authors of the FA consider non-Muslim landowners, yet demand that they be treated fairly regarding taxes. To this we should add that the treatment of non-Muslim peasants by the Mughal state had not changed for centuries and the Mughals were not interested at introducing any change on this. As I will show, since peasants were primarily interested in existential security and in the quality of their land, they were willing to pay a tax in exchange for a guarantee that they would be left in peace.<sup>2</sup> In addition, Moreland has

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<sup>2</sup> “Dhimmis may be transferred from their territories if there is a reason [for doing so, namely] if they are weak, so that we fear the wealth of the enemy against them, or if we fear they will collaborate with the enemy against the Muslims.” FA, vol. 2, 241.

shown that the Muslims of South Asia who conquered new territories preserved the existing tax system, thereby winning the sympathy of the non-Muslim peasantry.<sup>3</sup>

The FA treated non-Muslim peasants as landowners, not as serfs. The authors state that if a Muslim ruler deemed it necessary to relocate non-Muslim peasants living on his territory, he was to compensate them with other land equivalent in surface area and quality.<sup>4</sup> While this ruling benefited the peasants, it was also the only means of filling the coffers of the Mughal state and guaranteeing the prosperity of the empire. In addition, when dealing with the hierarchy of occupations, the FA indicated that agriculture is best morally to other professions such as the military, industry and commerce. Unlike other legal works, the FA contains precise rules regarding agriculture and trade—more precise than those proffered by scholars like as-Saraḥsī, who simply presents the debate, extolling the qualities of agriculture in order to dispel any prejudice against it and to convince the reader that the alleged Prophet's condemnation to of agriculture had been misinterpreted.<sup>5</sup>

Thus, the authors of the FA, aware of the value of agriculture in the South Asian context and of its economic significance for the Muslim authorities, clearly promoted agricultural practice, stating that:

The best way to make [a living] is jihād, then commerce, then agriculture and industry [...]. While some jurists consider commerce superior to agriculture, most of them attribute a dominant position to agriculture.<sup>6</sup>

In order to explain this preference for commerce, some specialists observed that several jurists, including Abu Ḥanīfa and

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<sup>3</sup> W.H. Moreland observes that the Mughals did not significantly alter the Hindu agrarian system, and that the Dharma, the sacred law of Hinduism, admits norms of succession identical to those used since the earliest era of Islam. W.H. Moreland, *Agrarian System of Moslem India: A Historical Essay with Appendices* (Cambridge: W. Heffer and Sons, 1929), 2.

<sup>4</sup> FA, vol. 2, 241.

<sup>5</sup> As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 7, 179.

<sup>6</sup> FA, vol. 5, 349.

Muhammad aš-Šaibāni, were merchants themselves.<sup>7</sup> Therefore, one may infer that the South Asian jurists' promotion of agriculture may have originated, at least in part, from their status as landowners. Here we can discern a distinction between "commercial" and "agricultural" jurists. While the former (namely jurists who were also merchants) developed Islamic trade law, South Asian jurists, who were linked to agricultural activity, joined the ranks of the farmers and distanced themselves from the commercial norms propounded by the first jurists. The FA thus support non-Muslim peasants in their economic activity; they rallied behind the peasants, defending them against any abuse from the state.

## 2. THE NON-MUSLIM MERCHANT

The FA acknowledged the regular movement of non-Muslim merchants between the territory of Islam and the non-Muslim territory and granted them the same rights as Muslim traders, guaranteeing them the security of their property during their sojourn. This freedom of commerce for non-Muslims was linked to their unrestricted freedom of movement. As noted above, non-Muslim merchants enjoyed even more freedom than their Muslim counterparts, since they could trade products prohibited under Islam and employ usury to generate profit.

This assertion is, however, contradicted by certain historical facts. In 1665, in what has been considered to have been a discriminatory measure, Aurangzeb imposed a franchise tax at 2.5 percent for Muslim merchants, 3 percent for merchants with a limited safe conduct (*mu'āhid*) and 5 percent for dhimmis. Two years later, he exempted Muslims from this tax.<sup>8</sup> Yet surprisingly, this seemingly discriminatory policy encouraged cooperation between Muslim and non-Muslim merchants. In order to evade paying the tax, Muslim merchants registered goods on behalf of Hindu merchants, thereby obtaining a zero rating when crossing the border; the partners then shared the resulting gain.

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<sup>7</sup> Cohen, *Under Crescent and Cross*, 89–90.

<sup>8</sup> Sarkar, *Mughal Polity*, 444–46.



Almost two decades later, in 1682, Aurangzeb, convinced he had been betrayed by his fellow Muslims, reacted by re-imposing the 2.5 percent tax on Muslim merchants.<sup>9</sup> According to historical sources from the period, the imposition of these taxes on Hindus and the exemption of Muslims was a result of the influence of Šeiḥ ‘Abdelwahhāb Borah, Aurangzeb’s chief qadi and one of the most prominent merchants of the Mughal Empire. This confirms the existence of conflicts of interest among jurists. However, despite Šeiḥ Borah’s attempt to abuse his religious authority to divide Muslim and Hindu merchants, the practice described above clearly illustrates the role of economic necessity in bringing the two communities together. Collaboration was advantageous for both sides: it allowed Muslim merchants to use their religious privilege to intensify their partnership with Hindu merchants, who in turn could avoid a discriminatory tax.

This example indicates a political paradox. While the Mughal state was meant to bolster and protect the Islamic religion and Muslim merchants, it inadvertently united the two religious’ groups (Muslims and non-Muslims) in economic solidarity. For both communities, therefore, economic criteria seem to have been more important than religious criteria. Both Muslim and non-Muslim merchants aspired to belong to the same commercial entity and rejected the religious classification thrust upon them admitted by the state. Ultimately, non-Muslim merchants were free to establish a commercial alliance with their associates, regardless of the latter’s religion. This issue is linked to the subject of urban versus rural space—more precisely, the discrepancy between urban and village environments.

### 3. CITY AND VILLAGE, CITY DWELLERS AND VILLAGERS

The FA reflects a clear juxtaposition of city and countryside.<sup>10</sup> Its fatwas expose an internal debate within the Hanafi school

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<sup>9</sup> Ibid.

<sup>10</sup> The FA defines *miṣr* as “the place where a mufti and a qadi who implement the norms of the religion are available. The buildings of this place should be comparable to those of the city of Minā”. FA, vol. 1, 145. The culmination of the discussion on city and countryside is to be found in

between the South Asian jurists and their counterparts in Central Asia and Iraq. Regarding the general debate on this subject, Baber Johansen has challenged the thesis accepted in mainstream scholarly thought, that Islamic law ignores the difference in status between city and village, city dweller and peasant.<sup>11</sup> Johansen's argument represents a benchmark for the study of the edicts of the FA and their South Asian context. He shows that there was indeed a difference between the categories of urbanite and villager concerning taxation and religious practice, in particular regarding the Friday prayer.<sup>12</sup> Johansen's analysis is based on the fact that according to Hanafi doctrine, Islamic law favours the city over the village and the peasants, and thus promotes trade and favours the merchant.<sup>13</sup> In contrast to the Hanafi jurists of Central Asia and the masters of the *Zāhir ar-Riwāya*, the authors of the FA

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the debate on the Friday prayer in al-Kāsānī's *Badā'i' aṣ-ṣanā'i'*. Al-Kāsānī presents several definitions of the city based on two factors: the demographic and the economic. The economic definition, which is more pertinent to our discussion, maintains that the city is the only place where one can maintain a single occupation throughout the entire year without interruption and still earn a living. Following a well-known Hanafi tradition, al-Kāsānī limits the Friday prayer to the city center. Al-Kāsānī, *Badā'i' aṣ-ṣanā'i'*, vol. 2, 661–64.

<sup>11</sup> Baber Johansen, "The City and Its Norms: The All-Embracing Town and its Mosques. Al-Miṣr al-ḡāmi'", in Johansen, *Contingency in a Sacred Law*, 77–128. This assumption is based on the idea of the unicity of the divine message, which is addressed directly to the umma, without any distinction between rich and poor city and village.

<sup>12</sup> Ibid.

<sup>13</sup> Elsewhere, Johansen confirms and further develops this observation, arguing the city is favoured over the village and the countryside. Baber Johansen, "Awwāl zāhira wa-awwāl bātina: Town and Countryside as Reflected in the Tax System of the Hanafite School", in Johansen, *Contingency in a Sacred Law*, 129–52. However, contrary to Johansen's assumption, the authors of the FA accepted the performance of the Friday prayer in several mosques in the same city. In this regard, the FA contradicts the Central Asian Hanafi tradition and adopts the opinion of Abu Ḥanīfa as a point reference: "The Friday prayer can be performed in one city in different places. This is the opinion of Abu Ḥanīfa and Muhammad." FA, vol. 1, 145.

placed great value on the village and agriculture, thereby weakening the status of city.

Johansen's interpretation mentioned above, is largely based on the work of the orientalists Henri Terrasse and William Marçais. If, according to Terrasse, "agricultural activities occupied the last place in the ideals of the early Muslim society and agriculture was considered a degrading and servile activity",<sup>14</sup> these notions can be called into question in the South Asian context, where agriculture constituted the basis of human activity and the primary source of state wealth. Terrasse admits that "soon, Muslim cities were no longer founded on the prosperity of the surrounding agricultural life, as had been the case in antiquity and the Christian world".<sup>15</sup> This claim follows Marçais's argument, according to which Islam "testified, from the beginning, to being an urban religion"<sup>16</sup> and considered cities "the only places where the faithful can satisfy all obligations [of the Islamic faith]".<sup>17</sup>

On the other hand, the authors of the FA saw the countryside in a positive light. As most of the population of Mughal society lived in small villages whose main activity was agriculture, and since this activity generated much of the wealth of the state, the first concern of local jurists was to protect peasants from tax collectors (*zamīndārs*).<sup>18</sup> As we have seen, while the authors of the FA limited the freedom of non-Muslims in cities, they granted peasants the right to live freely and to construct religious buildings and did not oppose coexistence between rural Hindu and

<sup>14</sup> Henri Terrasse, "Citadins et grands nomades dans l'histoire de l'islam", *Studia Islamica* 29 (1969): 1–15.

<sup>15</sup> Terrasse bases his ideas on Ibn Ḥaldūn's theory of social life, without, however, considering geographical nuances.

<sup>16</sup> William Marçais, "L'islam et la vie urbaine", in *Articles et conférences, librairie d'Amérique et d'orient*, ed. Adrien Maisonneuve (Paris: Librairie d'Amérique et d'Orient Adrien Maisonneuve, 1961), 59–67.

<sup>17</sup> *Ibid.*

<sup>18</sup> This dependence has also been noted by Shahid A. Rizvi, who goes so far as to claim that life in South Asia before the British was essentially based on small villages independent from the state. Shahid A. Rizvi, "Development of Local Government in Indo-Pakistan from 1688–1958", *Journal of the Pakistan Historical Society* 21 (1973): 109–48.

Muslim communities. Likewise, in the sections on agriculture, the authors drew no strict religious distinction between Muslim peasants and non-Muslims.

As observed above, while the Iraqi jurists who founded Hanafi Islamic commercial law were often merchants themselves and consequently supported trade and merchants, the South Asian Muslim jurists supported peasants and promoted agriculture and small villages. These jurists, particularly the authors of the FA, were landowners and thus had a stake in agricultural activity. The opposition between “merchant” and “peasant” jurists thus highlights the influence of geography or geographical environment on the evolution of Islamic law: the central role of the city in Middle Eastern Islamic conception was not applicable to South Asia, where rural space played a predominant role. The evolution of Islamic law thus shows a clear gap in legal theory regarding the notions of urban and rural. The South Asian jurists had at least two reasons for supporting peasants over merchants. First, they themselves were tax collectors or landowners; secondly, the Mughal economy relied heavily on agriculture. Their support of the village and villagers exposes a classical legal approach to plurality, endowing Hanafi doctrine with a conceptual equilibrium.

#### **4. COMMERCIAL CONVENTIONS**

Conventions pertaining to commerce between Muslims and non-Muslims corresponded to the relationship between Muslim and non-Muslim individuals on the one hand and the relationship between non-Muslims and the Muslim state on the other. While the former concerned partnership and profit, the latter concerned taxation.

#### **5. PARTNERSHIP BETWEEN MUSLIMS AND NON-MUSLIMS**

Abraham Udovitch has described the role of partnership in commercial life as follows:

In the medieval period, the partnership and commenda contracts were the two basic legal instruments for combining financial and human resources for the purposes of trade.<sup>19</sup>

In this section, I will focus on the role of partnership and the credit system (*muḍāraba*) in shaping interreligious relationships in South Asia as portrayed in the FA. I will then compare the results of my analysis with Udovitch's findings regarding the positions of the formative Hanafi jurists. The Iraqi jurists divided the concept of partnership into two categories: partnership of shared goods (*šarikat al-amlāk*) and partnership of contracts (*šarikat al-ʿuqūd*). While the former was completely forbidden between Muslims and non-Muslims, the latter was permitted in either total or partial form. The *šarikat al-ʿuqūd*, which concerned financial and professional partnerships, is of particular importance. Whereas the financial partnership of *šarikat al-ʿuqūd* could be a partial partnership (*anān*) affecting a specific sector or limited to a single product, a total partnership (*mufāwaḍa*) concerned all fields of commercial life. The word *mufāwaḍa* is derived from the Arabic verb *fawwaḍa* meaning "to procure". These two forms of *šarikat al-ʿuqūd* were conducted exclusively via payment in hard currency or jewels (and not via exchange of other forms of property such as land or livestock).<sup>20</sup>

## 6. TOTAL PARTNERSHIP BETWEEN MUSLIMS AND NON-MUSLIMS

In a total partnership (*mufāwaḍa*), which is governed by a contract that encompasses all areas of trade, each party has the right to buy and sell any kind of merchandise, whether prohibited or not, without the other's consent.<sup>21</sup> According to the Iraqi jurists, this form of partnership is subject to certain conditions: the partners must be free, of the same religion and own the same amount of financial wealth. The first condition implies that while this type

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<sup>19</sup> Udovitch, *Partnership and Profit in Medieval Islam*, 170.

<sup>20</sup> For an astute discussion of this topic see *Fatāwā Qāḍīhān*, vol. 3, 611–24.

<sup>21</sup> For a detailed discussion see J.D. Latham, "Mufāwaḍa", in *Encyclopedia of Islam. New Edition*, vol. 7 (Leiden: Brill, 1993), 310–12.

of partnership was forbidden between Muslims and non-Muslims, it was permitted between non-Muslims, whether Jews, Christians or Zoroastrians, all of whom were considered “non-believers” and were thus on equal footing. This traditional Hanafi legal opinion was shared by the authors of the FA, who likewise prohibited *mufāwāḍa* between Muslims and non-Muslims.<sup>22</sup>

The FTT and the FA reflect diverse opinions on the *mufāwāḍa*: Abu Ḥanīfa and aš-Šaibānī oppose it while Abu Yusuf supports it. The FTT ultimately relies on Abu Yusuf’s opinion to justify the acceptance of a *mufāwāḍa* contract.<sup>23</sup> The author of this work also engages the judgement contained in *Al-Hidāya*, which accepts *mufāwāḍa* between Muslims and non-Muslims, comparing it to a partnership between a Hanafi and a Shafi’i.<sup>24</sup> This acceptance is, however, mitigated by a comment that appears following an account of the above-mentioned debate, which observes that “it would be unadvisable for a Muslim to be a partner of a dhimmi”.<sup>25</sup>

The FA, typically, omits any discussion of the topic. Employing strict and concise language, the FA states unequivocally that “if a Muslim signs a contract of *mufāwāḍa* with an apostate men or an apostate women or a dhimmi this partnership is not accepted”.<sup>26</sup> This peremptory judgment differs from that of the FTT, which oscillates between acceptance and condemnation. Moreover, the appearance of this judgment in the FA reflects the authors’ negative position regarding interreligious cooperation and thus advocates the views of Abu Ḥanīfa and Muhammad at the expense of those of Abu Yusuf. The prohibition of a full commercial partnership was thus another means of discouraging proximity between social groups.

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<sup>22</sup> “If a free Muslim enters into a partnership with an apostate, this is illegal.” *Fatāwā Qādīhān*, vol. 3, 619.

<sup>23</sup> “Abu Ḥanīfa and Muhammad judge the partnership between Muslims and dhimmis as illegal, whereas Abu Yusuf considers it legal.” FTT, vol. 5, 425.

<sup>24</sup> “According to *Al-Hidāya*, it is similar to a partnership between a Šāfi’i and a Hanafi.” Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> FA, vol. 2, 307.

## 7. PARTIAL PARTNERSHIP

The FA's position on partial contractual partnerships (*šarikat al-ʿanān*) was largely positive. The authors did not object to a Muslim partnering with a non-Muslim as long as the partnership agreement was for a single product or a single business transaction.<sup>27</sup> This judgement is identical to that found in the FTT.<sup>28</sup> This consent is based on the fact that the limited scope of such a contract allowed Muslims to avoid performing prohibited commercial transactions. This opinion thus promoted interreligious commercial relations within Islamic territory while safeguarding the religious identity of each community.

## 8. PROFESSIONAL PARTNERSHIP

The professional partnership agreement concerns trade. The FA contains no clear opinion regarding such a partnership between Muslims and non-Muslims. The authors neither approve nor oppose this type of convention,<sup>29</sup> which could take the form of either a *mufāwāḍa* or *ʿanān*. While the jurists apparently did not consider this convention essential, it is significant for this study because it may concern craft trades, such as carpentry or sewing, which were practised by Muslims and non-Muslims alike. If their silence on this issue is to be interpreted as a permission, the jurists accepted collaboration between followers of different religions who practiced the same trade. This point is fundamental since professional collaboration necessarily leads to social exchange. Indeed, through this type of cooperation, religious considerations were set aside in favour of economic activity: individuals were identified by their profession rather than their religion.

The authors' stance is once again contradictory: they prohibit total partnership between Muslims and non-Muslims yet accept partial partnership between followers of different religions. The reasons for this lie in the terms of the contracts. As Udovitch

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<sup>27</sup> "This kind of partnership is possible between men and women [...] Muslims and non-Muslims. This opinion figures in *Fatāwā Qādīhān*." FA, vol. 2, 319.

<sup>28</sup> FTT, vol. 5, 445–52.

<sup>29</sup> FA, vol. 2, 328.

observes, “the specified ‘anān concludes with the accomplishment of the purpose for which it was contracted; that is, the purchase and subsequent division or resale of the commodities specified”.<sup>30</sup> The terms of a partial partnership were simple and the contract was strictly economic in nature. By contrast, a total partnership was substantially more difficult to enter, since it involved all areas of the partners’ lives, from the material to the social and private sphere. Hence, the authors of the FA condemned this type of collaboration, which they feared could result in sustained social relations or ethnic intermingling—as opposed to a partial partnership, in which the social boundary between the partners was preserved.

## 9. THE PROFIT

The *muḍāraba* consists of a mutual investment between two individuals; one provides the capital, while the other performs the service.<sup>31</sup> The partners may split the profits or share the product.<sup>32</sup> *Muḍāraba* contracts existed already before Islam under various names (other terms included *qirād* and *muqārada*). While they rejected the *mufāwāḍa*, the authors of the FA permitted *muḍāraba* between Muslims and non-Muslims provided that it was “possible” (*ḡā’iz*); otherwise, it was to be avoided as something “not advisable” (*makrūh*).<sup>33</sup>

Thus the authors of the FA accepted transactions in which a Muslim gave money to a non-Muslim who then used it to buy forbidden products such as pork or wine.<sup>34</sup> This acceptance can be traced back to Abu Ḥanīfa, but differs from the opinions of his disciples Muhammad and Abu Yusuf, who rejected such transactions and saw it as being illegal. Yet at the same time, the FA also

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<sup>30</sup> Udovitch, *Partnership and Profit in Medieval Islam*, 140.

<sup>31</sup> “It consists of a contract of [mutual] benefit between two persons; the first presents the capital, the second accomplishes the work.” FA, vol. 4, 285.

<sup>32</sup> Udovitch, *Partnership and Profit in Medieval Islam*, 170.

<sup>33</sup> “If the Muslim gives his money to a Christian aiming to obtain half of the profit, this is legitimate but not advisable.” FA, vol. 4, 333.

<sup>34</sup> *Ibid.*



states that “it would be better not to do it (*wal-ʿawlā an lā yafʿal*)”.<sup>35</sup> To avoid misunderstanding, the authors presented a solution in the form of “ruse” (*hīla*): a Muslim may give a loan to either a Muslim or a non-Muslim, but must be vigilant about how his money is used. Two types of transaction were permitted: a non-Muslim could borrow money from a Muslim, or a Muslim from a non-Muslim. The Iraqi jurists unanimously accepted these transactions, provided that the capital was used in conformance with the rules of Islam.

The South Asian jurists’ opinion on the two types of profit was based on the notion of the “agent” (*ʿāmil*), who determined whether the jurists would refuse or accept the transaction.<sup>36</sup> In addition, the authors’ position on profit included two judgements. The first, which concerned the transfer of money from a Muslim to a non-Muslim, was debated but finally permitted. The second, which involved the opposite transaction, was accepted without discussion. The authors cite the social factor as the ground for their refusal or acceptance of these conventions. Indeed, the South Asian jurists’ prohibition of commercial relations between Muslims and non-Muslims testifies to their fear of a potential intermingling between the two communities. While the jurists’ interest in preserving Muslim identity increased in cases in which Muslims constituted a minority, their position was often not in line with historical reality. A case in point is the collaboration between Muslim and Hindu merchants against the will of the Mughal state, which demonstrates that although Muslim jurists tried to erect ideological borders between the religious communities, these communities often found ways of bypassing them. The example of partnership and loans indicates the logic employed by the authors of the FA in passing their judgements. While the jurists were certainly in favour of all kinds of commercial agreements between non-Muslims (thus once again respecting the

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<sup>35</sup> Ibid.

<sup>36</sup> This point of view opposes that of Muhammad ibn Idris aš-Šāfiʿī, who stated that the donor (the owner of the capital) should be a Muslim and the agent (who accepts the convention) should be a dhimmi. Udovitch, *Partnership and Profit in Medieval Islam*, 37.

principle of non-intervention in the internal affairs of the communities), they opposed all forms of union between Muslims and non-Muslims, fearing that economic proximity might lead to social proximity.

To conclude, we must return to Udovitch's discussion of partnership.<sup>37</sup> Udovitch cites Levin Goldschmidt's observation that "the grandeur and significance of the medieval merchant is that he creates his own law out of his own needs and his own views".<sup>38</sup> Udovitch goes on to ask whether the theoretical notions relied on by the Hanafi judges were truly the basis of economic relations in the medieval Muslim world, inferring that Islamic trade law was itself a part of commercial law, created by merchants in accordance with their own needs. Likewise, he asserts that Iraqi jurists were sensitive to the conditions of everyday life, as illustrated by their acceptance of the "commanda" transaction, which addressed the needs of merchants on long journeys.<sup>39</sup> Udovitch adds that the right to perform commanda transactions represents the "traders' custom" (*urf at-tuġġār*), which had been part of the Islamic legal tradition since its inception, thereby suggesting a close relationship between reality and theory in the evolution of Islamic law. Moreover, it seems that the trade laws specified in the FA refer not to the specific right of a particular region or ethnicity, but rather to a comprehensive settlement for all. As such, they allow for an interpretation of economic relations in a non-specific framework that extends well beyond South Asia.

## 10. THE ECONOMIC RELATIONSHIP BETWEEN THE MUSLIM STATE AND ITS NON-MUSLIM SUBJECTS

According to Baber Johansen, the Muslim state exercised full authority over its Muslim and non-Muslim subjects in the economic

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<sup>37</sup> While Udovitch observes that the best way to study the relationship between theory and practice in Islamic law is to examine the theory of commerce and compare it with the historical facts, he admits that the lack of historical documents makes such a study difficult. Udovitch, *Partnership and Profit in Medieval Islam*, 3–4.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., 250–52.

domain.<sup>40</sup> The state's financial resources derived mainly from taxation and war.<sup>41</sup> These economic practices concerned non-Muslims as well, since in the event of a conflict, non-Muslim property would be seized by Muslim armies<sup>42</sup> and non-Muslims might be subjected to franchise taxes, the value of which often depended on the relationship between *dār al-islām* and *dār al-ḥarb*.<sup>43</sup> The motivation for waging war on *dār al-kufr* was thus economic as well as religious, since the non-Muslim population of the conquered territory would be required to pay taxes to the state. In another related issue, while there existed a consensus that prescribes that non-Muslim prisoners of war who convert to Islam must be freed, the FA requires that the imam consult the military leaders before freeing the converts, to ensure that their liberation would not lead to an abrogation of the rights of the Muslim soldiers and thereby deprive them of reparations.<sup>44</sup> This example indicates that even in religious matters, economic facets remained of the utmost importance, suggesting that research on interreligious relations must consider economic as well as religious factors. The following sections focus on two aspects of the economic relationship between the Muslim state and its non-Muslim subjects: *ḡizya* and *ḥarāḡ*.

## 11. THE CAPITATION TAX (ḠIZYA)

As discussed in Chapter 4, the *ḡizya* was the mechanism by which, in Islamic legal tradition, non-Muslims acquired the status of *dhimmi*, which allowed them to live under Muslim rule while preserving their material and spiritual integrity. In this section, I will focus on the specificity of this issue in South Asia when compared

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<sup>40</sup> Cf. Johansen, "Amwāl zāhira wa-amwāl bātina", 129–52.

<sup>41</sup> For a detailed discussion of the concept of *ḡizya* see Fattal, *Le statut légal des non-musulmans*, 264–91.

<sup>42</sup> The FA emphasises that non-Muslim property seized during conflict should not be returned. FA, vol. 2, 205.

<sup>43</sup> Regarding taxes imposed on non-Muslims, Johansen insists on the distinction between urban and rural communities. Johansen, "Amwāl zāhira wa-amwāl bātina".

<sup>44</sup> FA, vol. 2, 206.

to the general discussion on the treatment of non-Muslims as reflected in other Islamic legal works.

After briefly discussing the etymology of the term *ġizya*,<sup>45</sup> the authors of the FA outline the practical criteria of this method of taxation,<sup>46</sup> emphasising the special role of the imam in its implementation. As supreme commander of the Muslim armies, the imam made the final decision regarding new taxes or the abolition of existing ones. Did the *ġizya* serve to integrate non-Muslims, as Claude Cahen asserts?<sup>47</sup> Or was it a means of discrimination and extermination, as K. Binswanger and Bat Ye'or propose?<sup>48</sup>

### **Aurangzeb's Imposition of the *Ġizya***

Ishwar Nagar describes the re-imposition of *ġizya* by Aurangzeb as follows:

The scholars, ulema and canon lawyers, considering the religiousness of His majesty, spoke to him about taking of a poll-tax from the non-Muslims, which is necessary and proper according to the Holy Law. So, His Majesty, knowing this tax to be a proper thing, appointed Inayet-ullah Khan to arrange [...] for this business, and issued orders that the tax should

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<sup>45</sup> Muslim legal scholars disagree on the definition of *ġizya* and its implementation. The problem concerns the nature of this tax, which corresponded either to a substitute for military service, a permit of residence in *dār al-islām* or an act of submission to Muslim authority. For an interesting discussion of *ġizya*, see ibn Qaiyim, *Aḥkām ahl aḍ-ḍimma*, 31–33. According to ibn Qaiyim, the *ġizya* could be applied to Hindus even though they were polytheists. Ibn Qaiyim considered the *ġizya* a sign of submission which concerned not only the *dhimmi*s. In this regard, it seems that those who wished to impose the *ġizya* on Hindu populations were aiming to subjugate the latter to Muslim control. This is reflected by the following statement by ibn Qaiyim: “This is clear, his explanation concerns the case where the idolaters consist of a large group and a strong nation such as the Hindus [...] if we cannot defeat them by the sword, we should humiliate them through the *ġizya* in order to show the superiority of Islam.” *Ibid.*, 26–28.

<sup>46</sup> Cf. Fattal, *Le statut légal des non-musulmans*, 264–91.

<sup>47</sup> Cahen, “*Dhimma*”.

<sup>48</sup> Binswanger, “*Untersuchungen zum Status der Nichtmuslime*”, 327–34.

not be levied from the servants of the state, but it should be collected from all other non-Muslims in terms of the Holy Law [...].<sup>49</sup>

It is thus that Ishwar Nagar describes the re-imposition of *ḡizya* by Aurangzeb—as a petition presented to him by the ulama to which he responded favourably. In this passage, Aurangzeb is presented as docile and pious and accepts the ulama’s proposal unreservedly. The lack of discussion indicates the simplicity of Nagar’s interpretation: he narrates a key event of South Asian history in a casual, laudatory tone.<sup>50</sup>

A different historical interpretation, in which the ulama play no role, is presented by Khafi Mustad Khan. In Khan’s version, only Aurangzeb, who is portrayed as a more benevolent sovereign, deems it necessary to impose the tax:

As all the aims of the religious Emperor were directed to the spreading of the law of Islām and the overthrow of the practices of the infidels, he issued orders to the high diwāni officers that from Wednesday, the 2<sup>nd</sup> April 1679, 1<sup>st</sup> *Rabi. A.*, in obedience to the Qurānic injunction “till they pay commutation money (*jazia*) with the hand in humility” and in agreement with the canonical traditions, *jazia* should be collected from the infidels (*zimmis*) of the capital and the provinces.<sup>51</sup>

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<sup>49</sup> Nagar, *Futuhāt-i-Ālamgiri*, 79.

<sup>50</sup> It is worth comparing Nagar’s description with the following episode narrated by Barānī concerning the ulama’s discussion with Sultan Iltutmish (d. 1236), as recorded by Nizami: “Iltutmish asked Nizam-u’l Mulk Junaid to give a reply to the ‘ulama. Referring to the impracticability of the demand, the Wazir said, ‘But at the moment, India has newly been conquered and the Muslims are so few that they are like salt (in a large dish). If the above orders are applied to the Hindus, it is possible they might combine, and a general confusion might ensue and the Muslims would be too few in number to suppress this general confusion. However, after a few years, when in the Capital and in the regions and small towns the Muslims are well established, and the troops are larger, it will be possible to give Hindus the choice of “death or Islam”.’” Nizami, *Religion and Politics in India*, 332.

<sup>51</sup> Khan, *Maāsir-i-Ālamgiri*, 108.

The history of *ġizya* in South Asia goes back to the Sultanate of Delhi<sup>52</sup> where it was first imposed. Then it was abolished definitively by order of Sultan Akbar in 1564. Numerous studies have focused on the reasons that prompted Aurangzeb to re-impose the *ġizya* on his non-Muslim subjects in 1679. These subjects included the Hindus and the Rajputs, the latter of whom had been early allies of the Mughal Empire, while the former had served in the Mughal armies with enthusiasm and dedication. Some researchers argue that Aurangzeb was hostile toward his non-Muslim subjects and explain his re-imposition of the *ġizya* as evidence of this.<sup>53</sup> These scholars see the *ġizya* as an aggressive discriminatory measure by which the sultan sought to subordinate and humiliate non-Muslims,<sup>54</sup> and which contributed directly to the fall of the Mughal Empire.<sup>55</sup>

Yet the scholarly debate on Aurangzeb's re-imposition of the *ġizya* has focused mainly on its date and its connection to other discriminatory measures enacted by the sultan. Zahirudin Faruqi has suggested that the *ġizya* was re-imposed the day after the defeat of the Satnami revolt.<sup>56</sup> This hypothesis seems most probable, since the period in question corresponds to the beginning of the second phase of Aurangzeb's reign, which was characterised by an Islamic euphoria, according to Athar Ali.<sup>57</sup>

Researchers who support the argument that Aurangzeb's policy was non-discriminatory attribute the re-imposition of the *ġizya*

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<sup>52</sup> Nizami, *Religion and Politics in India*, 234.

<sup>53</sup> The Christians of Agra were exempted from paying this tax. Faruqi, *Aurangzeb*, 157.

<sup>54</sup> Sarkar, *Mughal Polity*, 436.

<sup>55</sup> According to the Italian traveller Niccolao Manucci, even the nobles of his court protested the re-imposition of the *ġizya*; Ğahanara Begum sent a petition to Aurangzeb to that same end. Day, *The Mughal Government*, 134.

<sup>56</sup> Faruqi, *Aurangzeb*, 149–58.

<sup>57</sup> Athar Ali distinguishes two phases of Aurangzeb's reign: the first, from 1658 to 1678, he considers a period of tolerance, while the second, from 1679 to 1707, he describes as a period of discrimination, cf. Muhammad Athar Ali, *The Apparatus of Empire: Awards of Ranks, Offices and Titles to the Mughal Nobility (1574–1658)* (Delhi: Oxford University Press, 1985).

to two fundamental factors.<sup>58</sup> On the one hand, the Mughal military treasury had been drained by the cost of maintaining the army, which was continuously active throughout the subcontinent; the *ḡizya* offered the best solution to cope with this financial deficit. On the other hand, the abolition of other taxes by Aurangzeb after his ascent to power resulted in a significant decrease in state revenue.<sup>59</sup> Zahiruddin Faruqi argues that the re-imposition of the *ḡizya* coincided with the rise of the influence of the orthodox ulama in the Mughal court, and that the so-called discriminatory measures, including the *ḡizya*, reflected not Aurangzeb's personality, but rather the stubbornness of the ulama in his court.<sup>60</sup>

Regarding the reaction of non-Muslims to the re-imposition of the *ḡizya*, Jadunath Sarkar and Niccolao Manucci, the Italian historian who visited South Asia under Mughal rule, have argued that many non-Muslims embraced Islam in order to avoid paying taxes.<sup>61</sup> Both for Jadunath Sarkar and Manucci, the re-imposition of the *ḡizya* constituted a serious violation of the social contract between the Mughals and their non-Muslim subjects, especially their Hindu allies the Rajputs. The revolt of the Rajputs against the *ḡizya* was therefore justified. As far as Muslim jurists are concerned, they understood the tax of *ḡizya* as a replacement for military service. Although non-Muslims were exempted from military service, non-Muslims who volunteered to serve were still required to pay *ḡizya*. According to this approach, it was easy to see the imposition of the *ḡizya* as a gratuitous, unjustified act of the Mughal sultan against his non-Muslim subjects. Yet other researchers, including Akram Lari Azad, see the re-imposition of the *ḡizya* as an egalitarian measure. Azad argues that Muslims were obliged to pay many taxes from which non-Muslims were exempted<sup>62</sup> and observes that "after strengthening the Zakāt tax on

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<sup>58</sup> Cf. Azad, *Religion and Politics in India*, 216–21.

<sup>59</sup> Faruqi argues that eighty taxes were abolished by Aurangzeb. Faruqi, *Aurangzeb*, 151.

<sup>60</sup> Faruqi, *Aurangzeb*, 149–50.

<sup>61</sup> Sarkar, *Mughal Polity*, 436.

<sup>62</sup> Azad, *Religion and Politics in India*, 220.

Muslims, Aurangzeb re-imposed the *ğizya* on non-Muslims”.<sup>63</sup> Was, then, the re-imposition of the *ğizya* in 1679 attributable to the teachings of the FA?

The second volume of the FA presents the theoretical background to the *ḥarāğ* and *ğizya*.<sup>64</sup> Considering that the drafting of the FA was completed by 1674<sup>65</sup> and that four years later, the Mughal Empire initiated a campaign of “discrimination” against non-Muslims, it is clear that the FA was directly or indirectly involved in the re-imposition of the *ğizya*.<sup>66</sup> In effect, the plaidoyé of the authors of the FA for the fair application and implementation of the *ğizya*, becomes understandable.<sup>67</sup> The modalities of payment of the *ğizya*, however, requires more clarification. Since the *ğizya* granted non-Muslims dhimmi status and the right to live in *dār al-islām*, payment of the tax could be regarded as a way to strengthen the integration of non-Muslims under Mughal rule. According to the rules of Islamic law of that era, dhimmis could live permanently in *dār al-islām*<sup>68</sup> and were eligible for all other civil, private and commercial rights. For the Hanafi jurists, the *ğizya* was thus a mean to guarantee the rights of taxpayers to having the same civil rights as those of the Muslims. The additional conditions imposed by the FA (including payment terms, the taxpayer’s position and other procedures) suggest that the jurists considered it essential to clarify the differences in status between Muslims and non-Muslims.

In order to explain the opposition between the jurists’ desire to, on the one hand, treat non-Muslims fairly and, on the other, to humiliate them, it is necessary to refer to the notion of the symbolic border discussed in previous chapters. While the authors

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<sup>63</sup> Ibid.

<sup>64</sup> FA, vol. 2, 237–53.

<sup>65</sup> Bazmi Ansari, “Al-Fatāwā al-‘Ālamğiriyya”, in *Encyclopaedia of Islam. New Edition*, vol. 2 (Leiden: Brill, 1965), 837.

<sup>66</sup> The *ğizya* and other similar taxes had existed long before this period and had always been considered signs of submission and humiliation.

<sup>67</sup> FA, vol. 2, 244.

<sup>68</sup> “[...] the dhimmis are citizens of our land and take part in wars to defend Muslim territory [...]” Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 2, 3.



of the FA granted non-Muslims (whom they considered idolaters) the right to live in *dār al-islām*, they simultaneously sought to reduce the sphere of exchange between non-Muslims and Muslims in order to preserve Muslim identity, fearing that the latter would intermingle with their non-Muslim neighbours, who lived under similar social conditions. This last point is implicit in the FA's formulation of the terms of the payment of the *ğizya*, according to which "the non-Muslim must attend personally the ceremony of *ğizya*-payment and perform the rituals of subordination such as he must stand before the Muslim tax collector, who is seated".<sup>69</sup> These terms of payment sage have been interpreted in various ways. While Antoine Fattal argues that Muslim jurists exaggerated in conceiving them, Mark Cohen focuses on the term "humiliation" (*şağār*) and suggests that these rituals constituted a mechanism to socially distinguish—rather than to humiliate—non-Muslims.<sup>70</sup> In order to fully understand the terms of the payment of the *ğizya*, it is necessary to compare the edicts of the FA with other works of Islamic law and to situate them within the social context of South Asia.

The Iraqi Hanafi jurists of the eighth and ninth centuries presented various conceptions of this ritual. In his *Kitāb al-Ḥarāğ*, Abu Yusuf repeatedly emphasised that dhimmi must be shown kindness (*rifq*) during the act of payment: "No dhimmi shall be beaten. Nor shall they be left waiting in the sun."<sup>71</sup> Likewise, Abu Yusuf stipulated that the imam must ensure that the seals used as proof of payment are removed after payment.<sup>72</sup> On the other hand, later legal works such as *Al-Hidāya*,<sup>73</sup> *Qāḍīhān* and the FTT<sup>74</sup> projected an intention to humiliate<sup>75</sup> onto the ritual. In his

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<sup>69</sup> FA, vol. 2, 246.

<sup>70</sup> Cohen argues that individuals who were subjected to *şağār* were marginalised but not excluded from Muslim society. Cohen, *Under Crescent and Cross*, 113.

<sup>71</sup> Abu Yusuf, *Kitāb al-Ḥarāğ*, 123–25.

<sup>72</sup> *Ibid.*, 127.

<sup>73</sup> *Al-Hidāya*, vol. 3, 71–3.

<sup>74</sup> FTT, vol. 5, 299.

<sup>75</sup> Aṭ-Ṭabarī provides a definition of the Arabic term *şağār* and quotes the positive opinion of aš-Šāfiʿī, according to which "if the imam receives the

discussion of the payment ritual, Qāḍīhān refers to a divergence between the jurists, observing that “some of them say he should shake him up, [while] others say he should hold him by the neck”.<sup>76</sup> It is quite interesting to remark that no one among the Iraqi jurist of the era mentioned above refers to humiliation (ṣaġār) when they deal with the rituals of payment of the *jizya*. Rather, they introduced only one act consisting of either taking the dhimmi by the neck, lifting him or hitting him in the neck. In contrast to *Al-Hidāya*, which offers a concise description of the ritual of payment,<sup>77</sup> the FTT provides a precise analysis of its purpose, which is to “humiliate the unbelievers and decise the value of the believers”.<sup>78</sup> In contrast to all other available legal sources, the FA states that the last three acts in the ritual of a payment of the *ġizya* must be undertaken by a non-believer: the dhimmi must be standing and the Muslim seated, such that he can be hit or shaken. This information raises the following question: why did the authors of the FA attribute so much importance to the humiliation of non-Muslims?

The answer to this question requires an even deeper reading of the terms of the payment of the *ġizya*, which, in most cases, took the form of a public ceremony. This ritual allowed Muslims to display their social and religious power and publicly demonstrate the subordinate status of non-Muslims. We can understand this ceremony from a Muslim perspective as being the only occasion in which non-Muslims can be treated on equal terms regardless of their religion or social status; all non-Muslims, whether of high or low caste, had to appear before the Muslim tax officer and perform the same rituals. Notwithstanding, in his discussion of the levying of the *ġizya*, Antoine Fattal emphasises its hierarchical

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*ġizya* from them, he takes it without beating anyone or [speaking] any words of humiliation. *Saġhar* consists in applying the law to them, not in beating or humiliating them.” Aṭ-Ṭabarī, *Kitāb Iḥtīlāf al-fuqahāʾ*, 231.

<sup>76</sup> *Fatāwā Qāḍīhān*, vol. 3, 589: “Some scholars say, he should take away his clothes and shake him strongly [...], others say he should squeeze his neck.”

<sup>77</sup> *Al-Hidāya*, vol. 3, 71–3.

<sup>78</sup> FTT, vol. 5, 299.

character.<sup>79</sup> Fattal notes that there were three categories of payment: for the rich, those of modest income and the poor. While this distribution was intended to ensure proportional equality between non-Muslims, it also highlighted the existing inequality among non-Muslims. This was one of the features of daily life in South Asia dominated by the Hindu caste system.

This appears to suggest that Muslim jurists intended to subject all taxpayers to the same conditions of submission or humiliation in order to render them equally inferior to Muslims. By contrast, Michael Mann, in his reading of the Indian caste system, asserts that the arrival of Muslims on the subcontinent resulted in a substantial change in the caste system, since “only Muslims and Christians were able to exceed the Brahmans by refusing to prostrate before them”.<sup>80</sup> The ritual of the *ġizya* thus constituted an attack on the Hindu caste system, since it dealt equally with individuals of different castes by subjecting them to the same obligations; the superiority of the Brahmans was nullified, since whereas both they and members of lower castes were required to bow before a Muslim, the latter refused to bow before Hindu gods and priests. The ritual of the payment of the *ġizya* thus had two objectives: to ensure equality between the various segments of the dominated population and to emphasise their subordinate status.

In this context, Aurangzeb’s re-imposition of the *ġizya* in 1679 can be interpreted as an attempt to reinforce the boundaries between Muslim and non-Muslim communities. Yet the edicts of the FA were based on egalitarian passages in the texts of the *Zāhir ar-Riwāya*, including those of Abu Ḥanifa, who presented the *ġizya* as a pretext for all prosperous non-Muslims to contribute to the Islamic authority and integrate into the community. The authors of the FA, who were committed to the implementation of Islamic legal doctrine, were aware of the reality that surrounded them, and their insistence on the full implementation of all standards of submission was a cautious reflection of that reality.

The example of the payment of the *ġizya* is significant on various levels. The FA required that the dhimmi be subordinate

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<sup>79</sup> Fattal, *Le statut légal des non-musulmans*, 286–88.

<sup>80</sup> Michael Mann, *The Sources of Social Power*, vol. 2, 348.

to the collector (“The dealer’s hand is low and the tax collector’s hand is high”<sup>81</sup>). Furthermore, the FA prescribes that the tax collector must humiliate the dhimmi so that the latter is aware of his inferiority. To this one may add the aspect of feeling discriminated against or oppressed which clearly resulted from such treatment.<sup>82</sup>

## 12. THE PROPERTY AND LAND TAX (ḤARĀĠ)

The concept of property tax (*ḥarāḡ*) has been the subject of much debate in Hanafi legal scholarship. In his commentary on the *Book of Conduct of Muhammad as Shaybani*, as-Saraḥsī summarizes this debate as follows:

The following was attributed to Ibrahīm an-Naḥʿī: If [a peasant] embraces Islam and remains in his territory, he must pay *ḥarāḡ*, but if he does not remain, he must not pay *ḥarāḡ*. [Saraḥsī’s commentary:] It should be known that the term *ḥarāḡ* signifies *ḥarāḡ* on heads (capitation). We are not satisfied with this, because according to our understanding, the norm is that if an unbeliever from the territory of the peace treaty [*dār al-muwādaʿa*] embraces Islam, the *ḥarāḡ* on heads shall not be imposed on him, regardless of whether or not he remains in his territory.<sup>83</sup>

It goes without saying that Property tax was often the main source of revenue for the Mughal Empire and was usually imposed only on non-Muslims.<sup>84</sup> One may thus legitimately ask whether the South Asian jurists were influenced by the South Asian context in

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<sup>81</sup> FA, vol. 2, 247.

<sup>82</sup> Ibid. Significantly, the FA insists that the taxpayer should be referred to as a dhimmi. This implies that his status as a dhimmi was not relevant to the discussion; more important was the issue of reducing his status vis-a-vis that of the Muslims.

<sup>83</sup> Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 4, 65. Ibn Qaiyim utilises the terms *ḡizya* and *ḥarāḡ* as follows: “The *ḡizya* is the tribute (*ḥarāḡ*) imposed on the heads, while the *ḥarāḡ* is the *ḡizya* imposed on the territories.” Ibn Qaiyim, *Aḥkām ahl ad-ḍimma*, 31.

<sup>84</sup> As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 4, 49–161.

designing this tax.<sup>85</sup> Another topic of interest is the correlation between the edicts of the FA and the tax-related royal decrees (*farmāns*) issued by Aurangzeb, to which I now turn.

### 13. THE *FARMĀNS* OF AURANGZEB

The correlation between the Mughal *farmāns* and the edicts of the FA was revealed by the nineteenth-century scholar Neil Baillie, who translated several of Aurangzeb's *farmāns* on property tax.<sup>86</sup> Half a century later, Baillie's findings were extensively studied by W.H. Moreland, who reviewed Aurangzeb's tax decrees<sup>87</sup> and compared two *farmāns* issued by Aurangzeb with the discussion of the *ḥarāğ* in the FA. Moreland noted a discrepancy between the two *farmāns*: while the first, from 1665, contained local terminology referring to South Asia, the second, issued in 1669, resembled the edicts of the FA in content and form. Based on this comparison, Moreland claimed that the second *farmān* confirmed the Muslim state's policy to abide by and codify the edicts of Islamic law. As for the FA Moreland argues that the authors of the FA had imported their terminology regarding land taxes from other regions of the Islamic world without considering the specificities of their locality.<sup>88</sup>

About fifty years later, Zafarul Islam addressed the same issue in his study of a *farmān* on *ḥarāğ* issued by Aurangzeb to Muhammad Hāšim, the *diwān* (governor) of Gujarat in 1668 or 1669. Referring to Baillie and Moreland, Zafarul Islam demonstrated that the two texts mentioned above were similar, as they addressed similar topics pertaining to the *ḥarāğ*. In light of this similarity, he concluded that the *farmān* was practical and rooted in reality, and that its similarity with the FA reflected an acute awareness of reality on the part of the authors. According to Islam, this similarity in terminology reflected Aurangzeb's desire to reconcile his tax scheme with Islamic legal doctrine. In other

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<sup>85</sup> Mouez Khalfaoui, "Kharaj in South Asia", in *The Encyclopedia of Islam* 3, ed. Gudrun Krämer et al. (Leiden: Brill, 2020), 112–14.

<sup>86</sup> Cf. Baillie, *A Digest of Moohummudan Law*.

<sup>87</sup> Ibid.

<sup>88</sup> Moreland, *Agrarian System of Moslem India*, 132.

words, the *farmān* can be understood as an attempt by Aurangzeb to align the Mughal administration with the norms of the Islamic sharia.<sup>89</sup>

#### 14. THE STATUS OF LANDS ACCORDING TO THE FA

The status of lands was intrinsically linked to the edicts governing warfare between a Muslim army and “non-believers”. According to the FA, lands conquered by force became subjected to *ḥarāğ* if the imam decided to leave them to their original owners. Also, a land was subjected to *ḥarāğ* if it was “acquired” by means of a peace settlement and if its previous owner agreed to pay the *ğizya*.<sup>90</sup> If the imam decided to award the land to soldiers, the land was referred to as *‘uṣṛī*.<sup>91</sup> Arid lands that had been rehabilitated by a Muslim owner acquired the *‘uṣṛī* status as well. On the other hand, if the owner was non-Muslim, the land was considered “land of *ḥarāğ*”. The precept was that the individual (whether Muslim or non-Muslim) who undertakes the rehabilitation of a piece of land automatically becomes its owner. This implies the existence of two types of *ḥarāğ*: *ḥarāğ muqāsama* (*ḥarāğ* of sharing) and *ḥarāğ waḏifa* (*ḥarāğ* of tribute). The former amounted to one-fifth or one-sixth of the value of the land,<sup>92</sup> while the latter

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<sup>89</sup> Islam insists on the notion of the rehabilitation of agrarian territories and argues that the *farmān* indicates that the only factor of prosperity was support of the peasant. Zafarul Islam, “Aurangzeb’s Farman on Land Tax: An Analysis in the Light of Fatāwā-i-‘Ālamgīrī”, *Islamic Culture* 52, no. 2 (1978): 117–26, here 126.

<sup>90</sup> According to the FA, the fiscal status of a fertile territory does not change if it is substituted by another territory of less value but can change as a result of a change in the religious affiliation of its owner. FA, vol. 2, 237.

<sup>91</sup> “The territories are of two types: *ḥarāğī* and *‘uṣṛī* [...]. All land which has been conquered peacefully and whose owner and inhabitants agree to pay the *ğizya* will be treated as a territory of *ḥarāğ*, whereas all land which has been conquered by force and which the imam has divided among the soldiers becomes *‘uṣṛī*.” Ibid.

<sup>92</sup> “The *ḥarāğ* of the lands is of two types: *ḥarāğ* of sharing (*muqāsama*), which consists of either the fifth or the tenth of the value of the product and the *ḥarāğ* of tribute (*waḏifa*), which consists of a sum to be paid for

involved the payment of a lump sum regardless of the value of the land.<sup>93</sup>

The authors of the FA disagreed on the units of land measurement to be used to determine *ḥarāḡ* payments. While the standard unit of measurement was the value of the land designated by Caliph ʿUmar I, the South Asian jurists refused to raise the tax even in cases in which a raise would have been justified by the value of the lands. On the contrary, they lowered the tax in order to alleviate the financial situation of the peasantry. The FA authors claimed that all owners of common lands (*waqf*), without exception, must pay the *ḥarāḡ*,<sup>94</sup> meaning that any owner of *ḥarāḡ* lands was liable to pay this tax. Furthermore, the FA prohibited any settlement of the tax before the end of the harvest, since it considered demanding payment earlier “purely unfair [*ẓulm*]”.<sup>95</sup> Further, the FA prohibited payment before the end of the year or before “the soil matures”.<sup>96</sup> If lands were exposed to a natural disaster, the farmer was exempted from payment, but if the destruction was caused by animals, he was required to pay.<sup>97</sup> Imams could grant farmers financial assistance in order to “rehabilitate” abandoned or depleted land.<sup>98</sup> Moreover, the FA encouraged tax exemptions to be granted by the sultan.<sup>99</sup> However, if the sultan chose to exempt a wealthy individual, he was required to compensate for the loss in state revenue. In addition, imams had no right to own land; rather, the authors of the FA advocated they help landowners exploit their land via financial or material

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the use of the land. This opinion is to be found in *Fatāwā Qāḍīhān*. Note that *ḥarāḡ muqāsama* consists of the product and not of the possibility of using the land.” Ibid.

<sup>93</sup> Khalifaoui, “Kharaj in South Asia”.

<sup>94</sup> FA, vol. 2, 239.

<sup>95</sup> FA, vol. 2, 240.

<sup>96</sup> Ibid.

<sup>97</sup> Islam, “Aurangzeb’s Farman on Land Tax”.

<sup>98</sup> For a detailed analysis of the measures undertaken by the Mughal state in support of the peasantry, see Noman Ahmad Siddiqi, “The Classification of Villages Under the Mughals”, *Indian Economical and Social Historical Review* 1, no. 3 (1964): 73–84.

<sup>99</sup> FA, vol. 2, 240.

assistance.<sup>100</sup> The authors also emphasised that the *ḥarāḡ* tax collector must be a person of integrity, an expert in agricultural matters, fluent in the local language and trusted by the peasants.<sup>101</sup>

### 15. THE TREATMENT OF NON-MUSLIM PEASANTS

The FA granted non-Muslim peasants the status of farmers without placing too much importance on their religion. The authors used the term proprietor (*mālik*) to designate peasants as a socio-economic group, a term which carried no religious connotation. In the passages in which the authors express their support for peasants, they also mention non-Muslims: “[W]hoever owns the land of *ḥarāḡ*, whether he is Muslim or not, must pay this tax.”<sup>102</sup> In addition, the authors demanded that the rights of non-Muslims regarding migration be respected and forbade any unsubstantiated forced migration of dhimmis. If a dhimmi was forced to migrate, for example for security reasons, they insist that Muslim authorities must reimburse him all taxes paid and give him lands equivalent in size and quality.<sup>103</sup> By thus addressing Muslim political leaders, the authors of the FA reproduced a typical Muslim attitude towards non-Muslims that was based on the desire to both support and control the dhimmi populations and which reveals their desire to protect the lives and property of non-Muslims.

The precision with which the authors discuss *ḥarāḡ* issues can be explained by the fact that agriculture played a predominant role in the Mughal economy.<sup>104</sup> In addition, the Mughal state faced financial problems resulting from the abandonment of

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<sup>100</sup> FA, vol. 2, 240–42.

<sup>101</sup> Ibid.

<sup>102</sup> FA, vol. 2, 239.

<sup>103</sup> “If non-Muslims are weak and exposed to the enemy armies, they must be removed from border areas.” FA, vol. 2, 241. In such cases, the imam was allowed to move the dhimmis to a safer area. Khalfaoui, “Kharaj in South Asia”.

<sup>104</sup> Hamida Khatoon Naqvi, *History of Mughal Government and Administration* (Delhi: Kanishka Publishing House, 1990), 161.



agricultural lands.<sup>105</sup> Instead of granting the state the right to appropriate abandoned lands, the authors of the FA encouraged the sultan to conserve and cultivate them until the owner's return, or even to offer payment to the owner. The authors' interest in the development of new agrarian spaces was evidently linked to their wish to help increase agricultural production.<sup>106</sup>

An analysis of the socioeconomic context of the FA sheds light on the arguments employed by its authors in support of peasants and on their tendency to ignore peasants' religious affiliation. In the section on land compensation, the FA addresses Muslim governors, asking them to consider the example of the "Sasanian kings" (*al-mulūk as-sāsāniyīn*), who were of the opinion that "since the peasant is our associate in case of gain, we must share with him the damage in case of loss". The authors then observe that if this was true for Sasanian kings, "the Muslim sovereign must be more generous than this".<sup>107</sup> This shows not only the interest of the FA to maintaining the existing agrarian system but also introducing new rules to standardise agricultural practices. This reflects the importance the authors attach to units of measurement, including Arabic measurement units<sup>108</sup> such as the *ḡarīb*, *ṣāʿ* and *dirāʿ* as means of regulating tax collection.<sup>109</sup> The standardisation of the units of measurement made it possible to punish corrupt tax collectors or zamindars and allowed farmers to calculate their

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<sup>105</sup> Zafarul Islam has compared the position of the FA to that of Aurangzeb's *farmān* of 1668–1669. Islam, "Aurangzeb's Farman on Land Tax".

<sup>106</sup> Cf. FA, vol. 2, 237–244.

<sup>107</sup> FA, vol. 2, 243.

<sup>108</sup> The standardisation of these units of measurement was linked to the Mughal state's policy of agricultural reform. The *New Cambridge History of India* refers to an increase in the peasant population during the seventeenth century. Cf. David E. Ludden, "An Agrarian History of South Asia", in *The New Cambridge History of India*, vol. 4, part 4 (Cambridge: Cambridge University Press, 1999), 133–34. For an overview of the units of measurement used during that period, see Naqvi, *History of Mughal Government*, 167.

<sup>109</sup> A *gaz* is equivalent to one yard, a *bigah* to sixty yards. *Ibid.*

resources and compare them with those of other regions.<sup>110</sup> The FA's presentation of property tax was conventional and drew on the medieval notion of the relationship between serf and kingdom, which involved the payment of a tax in exchange for protection.

On the Indian subcontinent, the *ḥarāğ* was used to divide and administer a *muqāsama*,<sup>111</sup> a form similar to Hindu distribution methods. This similarity was the result of the integration of two systems, the aim of which was to accommodate Hindu as well as Muslim peasants.<sup>112</sup> This echoes W.H. Moreland's suggestion that the Muslims preserved the existing Indian agrarian system<sup>113</sup> because the norms of the Dharma, the sacred Hindu law, were similar to those of Islam:

There is the King in his capital, there is the Peasant in his village; and the relations between King and Peasant give us, at any rate, the skeleton of the system. Hitherto the Hindu King has usually been presented by modern writers as an absolute despot, divine in his person, bound by the Sacred Law, and subject to the influence of public opinion, but untrammelled by any human institutions.<sup>114</sup>

Naqvi and Moreland emphasise a further dimension of interreligious relations during the reign of Aurangzeb. Compared to other aspects of daily life on the subcontinent during that period, the nature of economic relations between the state and the population appears to have been progressive. Likewise, the relationship between Hindu and Muslim peasants appears to have been

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<sup>110</sup> The Mughal term *zamindār* referred to village chiefs who commanded armed forces and who were therefore able to collect taxes for the state. Cf. John F. Richards, "The Mughal Empire", in *The New Cambridge History of India*, vol. 1, part 5 (Cambridge: Cambridge University Press, 1993), 79–93 and 1991–96.

<sup>111</sup> Naqvi, *History of Mughal Government*, 165–67.

<sup>112</sup> Naqvi observes that Hindu peasants tended to accept the Muslim agrarian system, which was relatively favourable to them. *Ibid.*

<sup>113</sup> On the norms of the Dharma, see Ludden, "An Agrarian History of South Asia", 76–87.

<sup>114</sup> Moreland, *Agrarian System of Moslem India*, 2.

peaceful. This harmonious coexistence is reflected by the concept of monetary reward known as *madad-i-ma'āš*.

## 16. THE MADAD-I-MA'ĀŠ

The *madad-i-ma'āš*, a form of financial support provided by the Mughal state to various segments of people, played an important role in reconciling the tensions between peasant communities in Mughal India, especially during the reign of Aurangzeb. Noman Ahmad Siddiqi has defined *madad-i-ma'āš* as the practice of awarding free land to Muslims, especially to saikhs and sayyids, with the purpose of creating centres of influence.<sup>115</sup> According to Siddiqi, prominent Muslims in rural communities who benefited from this policy gained the respect of the local Hindu population, whom they would protect from injustice and oppression.<sup>116</sup> In this way, the *madad-i-ma'āš* reinforced the confidence of South Asian peasants in the Mughal state. Muslims who settled in the interior of the country came into direct contact with the rural population and were influenced by the customs of their Hindu neighbours. Likewise, the Hindu population soon became acquainted with the rites of the Muslims, which they influenced with their own culture. The Hindus eventually understood that Muslims were not “impure”—first step towards building a relationship of cooperation and mutual understanding.<sup>117</sup>

The *madad-i-ma'āš* supports the hypothesis of a fruitful coexistence between Muslims and non-Muslims in Mughal India. The tendency of the Mughal state to treat peasants equally, regardless of their religion, can be explained by the poor economic condition of the Mughal agrarian sector. Yet the significance of the FA's position on this issue lies elsewhere; namely, in the fact that the FA adhered to and reproduced the rulings of the first Hanafi jurists at a time when shifts in theory and in reality were taking place in several regions of the Muslim world.

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<sup>115</sup> Noman Ahmad Siddiqi, *Land Revenue Administration under the Mughals (1700–1750)* (London: Asia Publishing House, 1930).

<sup>116</sup> Siddiqi, “The Classification of Villages Under the Mughals”, 141.

<sup>117</sup> *Ibid.*, 140–42.

## 17. THE EVOLUTION OF THE ISLAMIC LAW ON LAND TAX (*HARĀĠ*)

In this section, I will examine the relationship between the edicts of the FA on land tax and the general Islamic doctrine regarding this issue. To do so, I will rely on Baber Johansen's pivotal analysis of the evolution of the legal conception of the land tax.<sup>118</sup> Johansen argues that, beginning in the twelfth century, the jurists of Egypt and Syria, influenced by their Central Asian colleagues as well as by the socio-political developments in their own societies, gradually changed the norms governing the payment of land taxes. As starting point for his discussion, Johansen refers to the original Hanafi legal norm, which was developed by the first Hanafi masters and governed by the legal maxim of "no land without tax".<sup>119</sup> Johansen argues that under pressure from powerful dynasties and landlords, the jurists approved exceptions to this regulation, which benefited several prominent members of the court and military leaders.<sup>120</sup> Accordingly, this change led to the "death of land proprietors".<sup>121</sup> Until that time, the payment of land tax (*harāġ*) had not been considered rent; rather, it was regarded as proof of ownership of land. Johansen's remarks apply primarily to the regions under Ottoman rule (for example, Egypt and the Fertile Crescent) from the twelfth to the sixteenth century. Via an analysis of various postclassical cases and legal texts, Johansen demonstrates that a substantial change took place in Hanafi legal doctrine, which in turn proves that innovation did occur within Hanafi doctrine after the tenth century. Johansen then uses this discussion to challenge the assumptions of Joseph Schacht regarding the closing of the gate of *iġtihad* after the tenth century.

Johansen's discussion is relevant here to the extent that I will draw on his conclusions in order to compare the South Asian conception of land tax to the Egyptian and Syrian ones. My aim thereby is to ascertain whether South Asian Hanafi scholars were aware of these changes occurring in other regions of the Islamic

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<sup>118</sup> Johansen, *The Islamic Law on Land Tax and Rent*, 7–24.

<sup>119</sup> *Ibid.*, 7.

<sup>120</sup> *Ibid.*

<sup>121</sup> Johansen, *The Islamic Law on Land Tax and Rent*, 80–85.

world. The section on *kharja* in the second volume of the FA raises important questions regarding this matter. In their ruling on land tax, the authors of the FA challenged the position of the Ottoman jurists quoted by Johansen and, instead of adopting the postformative positions of the scholars of Balḥ or Buḥara (who were known to have originated the new doctrine), relied on the original legal reflections of Abu Ḥanīfa and his disciples. The authors of the FA contended that the payment of the *ḥarāğ* tax rested upon the well-established principle of “no land without tax”, according to which “everyone who possesses a *ḥarāğ*-land must pay [*ḥarāğ*], regardless of whether or not he or she is Muslim”.<sup>122</sup> This ruling also applied to the owners of common lands (*waqf*). By insisting on the payment of *ḥarāğ*, the authors thus admit the validity of this measure as a proof of ownership. This contradicts the situation in the Middle East during the sixteenth century as reflected in the works of the famous sixteenth-century Egyptian Hanafi scholar Ibn Nujaym.<sup>123</sup>

Challenging the positions of the Middle Eastern jurists, the authors of the FA extended the requirement to pay *ḥarāğ* to owners of *waqf* territory, who were exempted from the tax in the regions studied by Johansen.<sup>124</sup> While Johansen confirms that a radical change in land and property taxes occurred over the centuries in the Middle East, he does not extend his analysis to the Indian subcontinent. In light of Johansen theory, the South Asian jurists’ adherence to the original Iraqi Hanafi edicts appears to have constituted an exception. In other words, one can assume the existence of different models of development. In order to understand why the authors of the FA departed from the opinions of their Central Asian, Egyptian and Middle Eastern counterparts to use the “old” norms of the Iraqi epoqe, it is useful to compare the text of the FA on land Tax with the legal works produced in Egypt and Syria during the fifteenth and sixteenth centuries.

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<sup>122</sup> FA, vol. 2, 239.

<sup>123</sup> Johansen, *The Islamic Law on Land Tax and Rent*, 85–93.

<sup>124</sup> *Ibid.*

## 18. THE *ḤARĀĠ* ACCORDING TO BABER JOHANSEN'S INTERPRETATION

Baber Johansen approaches the subject of change in Islamic law in the context of the opposition between innovation (*iğtihād*) and reproduction (*taqlīd*). He challenges the interpretation advanced by Joseph Schacht and his successors, according to which there was no innovation in Islamic law after the tenth century. Rather, Johansen sees the systemisation of fatwas on land tax issued by fifteenth and sixteenth-century Syrian and Egyptian jurists, which contradict the *Zāhir ar-Riwāya*, as proof of Islamic legal innovation.<sup>125</sup>

Johansen's thesis is based on a radical shift in Hanafi theory concerning land tax, which he uses as an example to illustrate a fundamental modification of Islamic law. Johansen argues that while the preclassical and classical Hanafi jurists facilitated peasant exploitation, this changed over the course of the period between the eleventh, twelfth and the sixteenth centuries, when a new class of agrarian tenants emerged, whom the jurists supported.<sup>126</sup> Johansen bases his argument on the introduction of this land tax, which implied proof of farm ownership, and notes that Abu Ḥanīfa was of the opinion that this tax should be paid exclusively by the owner, and not by the tenant or the sultan.<sup>127</sup> This payment structure guaranteed freedom to peasants, rendering them proprietors and masters of their own land. However, Johansen emphasises that the principle of "no land without taxes" underwent numerous modifications in later periods, the aim of which was to grant exemptions to nobles or influential figures. For example, in the case of the death of a landowner, the state had the option of either selling the land or awarding it to prominent court officials or soldiers, who were then exempted from the tax.

Based on these exemptions and changes in ownership structure, Johansen identifies a clear shift in the legal conception of

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<sup>125</sup> Johansen, *The Islamic Law on Land Tax and Rent*, 1–6.

<sup>126</sup> *Ibid.*, 7.

<sup>127</sup> For more on this subject, see aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 4, 149–61.

the right of recourse in the edicts of Ibn Nuğaim al-Masrī and other Hanafi jurists. Johansen deduces that the *fuqahā'* of Egypt and the Fertile Crescent in the 16<sup>th</sup> century had been aware of the social changes that were taking place and that their accommodation of and reflections on these changes constitutes an example of innovation in Islamic law. Furthermore, Johansen observes that the judgments of early Hanafi masters such as Abu Ḥanīfa and his disciples were not adopted by fifteenth and sixteenth-century Egyptian and Syrian-Palestinian jurists, since they were regarded as incompatible with lived reality.

### 19. THE *Ḥarāğ* ACCORDING TO THE SOUTH ASIAN JURISTS

It goes without saying that the Mughal economy in the seventeenth century revolved around agriculture to such an extent that Mughal military strategists took care to avoid conducting warfare on agricultural lands, especially since taxes on agricultural lands provided an important source of revenue for many Mughal military and state officials.<sup>128</sup> To this we should add that the Mughal central authority was lying on the tradition of recompensing its employees by giving them the charge of collecting taxes from certain districts or by allocating them some region (*iqtā'*): Both modalities have led to abuses on both sides the Mughal state and the non-Muslim peasants: while South Asian jurists were more likely to support peasant proprietors, tenants were often assisted by the Muslim state.<sup>129</sup> In the chapter on the *ḥarāğ*, the authors of the FA express a substantial support for the peasants. Following the example of Abu Ḥanīfa, they emphasise that the payment of the *ḥarāğ* was incumbent on landowners and that it was through this payment that the latter prove their ownership of the land, at the expense of the tenant. The following excerpt demonstrates the points through which the authors of the FA articulated their commitment to the peasant vis-à-vis the sultan, the tenants and especially the intermediaries:

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<sup>128</sup> Khalfaoui, "Kharaj South Asia".

<sup>129</sup> Johansen interprets the opinion of the authors of the *Zāhir ar-Riwāya* as an example of the Arab aristocracy's support for farmers, since in that region most Arab aristocrats were landowners.

[a] The amount of land tax shall not be raised, but it may be reduced; [b] The imam shall not change the status of a territory from *muqāsama* to *wazīfa*; [c] The taxes shall not exceed the half of the [value of the] product, if the land is a *muqāsama*-territory; [d] The land tax shall be paid for all kinds of territories, including waqf-territories; [e] In case of rent, the tax shall be paid by the tenant; [f] The inhabitants [of the land] shall not be exposed to this tax; [g] Poor citizens may be exempted from this tax, but there shall be no exemption for the rich; [h] If someone replaces a good [i.e., productive agricultural] activity with one of minor value [...] the tax shall be reduced and the peasant shall not be obliged to pay the highest sum [as it used to be the case];<sup>130</sup> [i] He who cannot cultivate his territory shall not lose ownership of it; [rather,] the imam shall cultivate it and pay him a sum after counting all expenses; [j] If someone abandons his territory temporarily, this shall not nullify his ownership. If he returns, the land shall be returned to him; [k] In case of loss or damage, the state supports the peasant and shares the damage expenses with him; [l] The peasant is encouraged to fell parts of the forest in order to create more land surface for agriculture; [m] Only individuals who are familiar with the situation of the people and are prudent shall be employed as *ḥarāğ* collectors.<sup>131</sup>

Baber Johansen posits that the classical Hanafi theoretical notions of the eighth and ninth centuries Iraq were revolutionary in that they considered the peasants as landowners and not as serfs. The standards of the FA likewise emphasise freedom of movement, ownership<sup>132</sup> and agricultural value.<sup>133</sup> The authors of the FA were tasked with reissuing the edicts of the *Zāhir ar-Riwāya* and reconciling them with reality. In this context, their consideration of the

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<sup>130</sup> “He who replaces a good form of agriculture with a bad one without any excuse shall pay the tax considered for the best product among them.” The authors emphasised that this principle should not be applied, out of concern that it may be used by tax collectors to threaten the peasants. FA, vol. 2, 240.

<sup>131</sup> FA, vol. 2, 241–43.

<sup>132</sup> Ibid.

<sup>133</sup> The same principles figure in the FTT. FTT, vol. 5, 284–98.



peasants reveals that religion was a secondary factor in their decision-making process, and that their support for farmers represented, whether directly or indirectly, support for non-Muslims. During the classical period of Hanafi law, the majority of the population consisted of non-Muslim peasants. In view of this fact, we can identify several similarities between seventeenth-century South Asia and classical-era Iraq, which may help explain the authors' reliance on the opinions of the *Zāhir ar-Riwāya*, particularly on those of Abu Ḥanīfa—which, though occasionally out of touch with the reality of his times, contain an egalitarianism that could have eliminated the inequality endemic to South Asian society. By reproducing the edicts of the *Zāhir ar-Riwāya*, the authors of the FA were essentially arguing for the fair treatment of all Mughal subjects, and their advocacy in defence of the peasantry ensured the functioning of the agrarian system. In this sense, the FA includes an additional facet of Islamic law which disproves Johansen's theses regarding the rulings of Egyptian and Syrian medieval jurists.

Johansen links the phenomenon of innovation in Islamic law with the interest that late nineteenth-century jurists took in local issues, which prompted them to develop new, unprecedented measures. Regarding land tax, the authors of the FA, though they represented a later period than that examined by Johansen, adopted the opinions of the *Zāhir ar-Riwāya*, including the opinions of Abu Ḥanīfa. This raises the question of innovation and reproduction in the edicts of the FA.

Johansen interprets the concept of innovation by comparing fifteenth and sixteenth-century legal approaches with those of previous eras and, considering the appearance of new rules, identifies the gap between the two periods as an example of innovation. Although inaccurate, Johansen's deduction is reductive, as it implies an overly simplified definition of innovation as the lack or absence of preceding judgments. According to the criterion of Baber Johansen, the position of the authors of the FA, who consistently drew on the opinions of the first Hanafi masters, must be qualified as repetitive and conservative. Yet my interpretation of the FA suggests that the opposite is the case; namely, that the work of the South Asian jurists (and that of their post-classical

Iraqi counterparts in Egypt, Central Asia and Syria) can indeed be qualified as innovative (*iğtihād*). Innovation is in this sense not about proposing new ideas or solutions or about categorically rejecting established theories. Rather, as Wael Hallaq has shown, innovation in late Islamic law was based on the evaluation-based comparison (*tarğih*) of existing ideas, of which one would be selected to serve as a standard of judgment.<sup>134</sup> This method is a central defining characteristic of the FA. Although the authors drew on the texts of the *Zāhir ar-Riwāya* and repeatedly emphasised the need to refer to the texts of the first Hanafi masters, this was no longer an arbitrary choice or a simple reference to the archetypal and authoritarian function of those masters. By thus returning to the origins of Hanafi law, South Asian jurists took a stand against the corruption of tax collectors and granted peasants freedom and authority. While this taqlid led to judgments that can be described as pluralistic, the new interpretations of post-classical Egyptian and Syrian masters reinforced existing inequalities between owners and tenants. There is no doubt that the reproduction of previous judgements allowed seventeenth-century jurists to achieve innovation, which was then manifested via the reintroduction of their opinions to produce more progressive solutions.

Innovation is measured not only by the degree to which it rejects the past or introduces new thoughts; rather, it is measured within a given perspective. In this respect, the perspective of the South Asian jurists, although it reproduced old opinions, was innovative because it embodied a pluralistic tendency in Islamic law and assured peasants their liberty. Furthermore, the above analysis of the *ḥarāğ* tax reveals a complex relationship between economic parameters and historical reality which suggests that the economic rules of the FA were not conceived solely based on religious norms but took into account factual changes.

Finally, concerning the evolution of Islamic law, an examination of the FA position on taxes has shown that the authors advocated an innovative aspect based on the principle of adapting legal rules to reality, and that the restrictive economic rules for Muslims and non-Muslims that they propounded, which were

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<sup>134</sup> Hallaq, *Authority, Continuity, and Change in Islamic Law*.

justified by the socio-demographic conditions of seventeenth-century South Asia, fully demonstrate the dialectical relationship between Islamic law and reality.



## CHAPTER NINE.

# CIVIL AND POLITICAL RELATIONS

This chapter will focus on the judgements contained in the FA regarding non-Muslims' access to public, civil and military service—factors which fundamentally shaped the role of non-Muslims in South Asian society. Via an examination of the Mughal administrative system,<sup>1</sup> I will demonstrate the criteria for holding public office under Aurangzeb.

### 1. CIVIL SERVICE

As a subject linked to labour rights and implying the right of each citizen to serve his country regardless of their gender, religion or social status, the subject of civil service can be said to belong to the field of “human rights” in the modern sense of this term. Although the modern conception of labour is not applicable to the context of Mughal South Asia, the contradiction between historical facts and the Islamic legal literature is nevertheless puzzling. While legal works of medieval Islamic law from various parts of the Muslim world support the barring of non-Muslims from civil service, this approach is contradicted by other works.<sup>2</sup> Throughout the history of Islam, non-Muslims were permitted to engage in public service. Yet some jurists prohibited non-Muslims from working in Muslim state administrations. While the FA contains

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<sup>1</sup> For a discussion of the Mughal administrative system, see Muhammad Athar Ali, *The Mughal Nobility under Aurangzeb*, 3.

<sup>2</sup> Antoine Fattal provides an overview of these aspects of military and civil service. Cf. Fattal, *Le statut légal des non-musulmans*.

no evidence of such a prohibition, some historians have asserted that the exclusion of non-Muslims from civil service was legitimised on the basis of several Quranic verses and hadiths<sup>3</sup>—a claim which is, however, based solely on historical facts and excludes the study of Islamic doctrine.

Although Hindu civil servants were essential to the Mughal state,<sup>4</sup> they are hardly mentioned in the FA. Since the authors did not hesitate to address more complex subjects, their near silence on the issue of civil service is curious and may indicate their desire to remain neutral in view of the complexity of the social reality of the time. Alternately, they may have felt that this problem required a political rather than a legal solution. If they were to adhere to the rigid Islamic legal position on this matter, they would counteract the lived reality and the usual praxis of their time. But what was the lived reality?

Regarding the number of Hindu officials in the Mughal administration under Aurangzeb, Ram Sharma has shown that at the time of the FA, the number of *mansabdāris* was declining.<sup>5</sup> Sharma's claim was challenged by Athar Ali, who observed that Sharma's list of Hindu officials was incomplete<sup>6</sup> and proposed examining two historical phases of Aurangzeb's reign. The first phase, from 1658 to 1678, saw a growth in the number of non-Muslim civil servants. The second, from 1678 to Aurangzeb's death in 1707, corresponds to the period of the sultan's so-called

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<sup>3</sup> Cf. Ye'or, *Le Ḍimmi*.

<sup>4</sup> Maharaja Jaswant Singh of Jodhpur was the most important noble of the Mughal Empire and held the most important post in the Mughal administration under Šāh Ġahan. The finance minister at that time, Rai-i-Rayan Raghu Nath, was also a Hindu. As military service was more lucrative, Muslims appear to have preferred to serve in the army rather than in other administrative posts, with the result that proportionately more Hindus worked in the administration.

<sup>5</sup> Cf. Ali, *The Mughal Nobility under Aurangzeb*, introduction to the new edition. S.K. Sharma observes that during the reign of Aurangzeb there was no religious discrimination in the recruitment of state functionaries. S.R. Bakshi and S.K. Sharma, "Aurangzeb", in *The Great Moghuls*, vol. 6 (New Delhi: Deep and Deep Publications, 1999), 241–42.

<sup>6</sup> Ali, *The Mughal Nobility under Aurangzeb*.

discriminatory measures and saw a decrease in the number of Hindu civil servants.<sup>7</sup> Ali notes, first, that the recruitment of *mansabs* was a personal concern of the sultan who, in most cases, bestowed this function as a reward.<sup>8</sup> Secondly, he observes that administrative positions were generally obtained either via a personal interview or examination or by submitting an application, and that the mansab was not acquired automatically by inheritance, even in cases in which the Mughal state decided, upon the death of a mansabdārī, to allow a descendant of the latter to inherit the position. The first criterion for a candidate's eligibility was his social status (whether he was a freeman or servant); the second was his administrative experience. For example, an individual who had served in the Safavid, Ottoman or Uzbek state administrations would have a clear advantage over candidates without professional experience.

While these criteria suggest that the Mughal state attributed little importance to a candidate's religion, this should not be taken to mean that the Mughals believed in the principle of equal opportunity for all religions. For the Mughals, race was a determining factor<sup>9</sup> for the settlement of state administrative affairs, particularly via the recruitment of nobles under Aurangzeb. This was especially the case since Mughal public service officials were of diverse ethnic origin and included Central Asian Turanians, Persian Iranians, Afghans, Indian converts, Rajputs, Deccanis, Bijapuris and Hyderabadis.<sup>10</sup> Athar Ali observes that this diversity resulted from the competition between the different ethnic groups represented in the Mughal court. Of all the groups constituting the Mughal nobility, it was the inclusion of the Rajputs as public civil servants that sparked the greatest controversy. This was due

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<sup>7</sup> Ibid.

<sup>8</sup> Muhammad Athar Ali, *The Apparatus of Empire: Awards of Ranks, Offices and Titles to the Mughal Nobility (1574–1658)* (Delhi: Oxford University Press, 1985), xx–xxi.

<sup>9</sup> Ibid.

<sup>10</sup> Ali mentions Arabs, Persians, Turks, Tajiks, Kurds, Tatars, Russians, Abyssinians and Circassians from territories including Turkey, Egypt, Iraq, Persia, Gilan, Mazandaran, Khurasan, Sistan, Transoxiana, Khwarazm, the territories of the Kipchaks and Kurdistan. Ibid., xx–xxix.

to three characteristics that advantaged the Rajput community: their race (by virtue of which they were considered the most qualified to serve in the Mughal army and administration), their religion (they represented the largest non-Muslim community in civil service) and their identity as indigenous Indians.

According to Ali, the recruitment of Rajputs into the Mughal civil service occurred in two phases. While the first phase, from 1658 to 1678, saw an increase, the second, from 1678 to 1707, saw a decrease in their numbers. Ali attributes this decrease not to discrimination, but rather to political change, especially to the mass recruitment of Deccanis and Marathas during the Deccan War,<sup>11</sup> a phenomenon which intensified after the death of the Rajput leader Raja Mal Singh.<sup>12</sup> The diverse ethnic background of Mughal officials was an indication of the racial, religious and ethnic diversity of the Mughal administration. This fact contradicts Ali's claim that the Mughals did not believe in equality and considered race the first criterion of recruitment, drawing into the question the validity of his analysis.<sup>13</sup> Thus, although they clarify certain obscure aspects of Aurangzeb's reign, the approaches of both Ali and Sharma are inconclusive.<sup>14</sup> The silence of the authors of the FA on the complex subject of civil service can be explained by the distinction they make between theory and practice, which emerges from two different concepts of Islamic law: theoretical and practical law. While the former was administered by the jurisconsult and occasionally by the mufti, the latter was applied by the judge or qadi. As discussed earlier, the fatwa or mufti served to mediate between these two functions. The participation of non-Muslims in the civil service in India appears to have been specific

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<sup>11</sup> The Marathas and the Rajputs were the two main Hindu subgroups. Ali distinguishes between Rajput and non-Rajput Hindus. *Ibid.*, xxx.

<sup>12</sup> *Ibid.*, xxii–xxvi.

<sup>13</sup> Ali provides no clarification regarding his criterion of analysis.

<sup>14</sup> The approach of Ali and Sharma has been analysed in depth by Akram Lari Azad, who draws on a wide range of sources. Azad concludes that the factor of religion played no role in Mughal administrative issues, observing that while Aurangzeb was a Sunni, most Mughal state functionaries were Shiites and that all of Aurangzeb's ministers were of Persian origin. Azad, *Religion and Politics in India*, 246–54.



to the South Asian context, as opposed to other Islamic regions such as the Maghreb or Egypt.<sup>15</sup>

The peaceful nature of the relationship between Muslim and Hindu officials in the Mughal administration has been emphasised by Jadunath Sarkar. In his classic study of the Mughal administration, Sarkar describes how

The clerks and other office subordinates of the Mughal empire, both Hindu and Muhammadan, formed a brotherhood and lived on terms of the greatest intimacy and mutual aid, giving feasts and dances to each other. In addition to the tie of service in the same department, they were also united in brotherhood by their love of Sufi philosophy, which formed the common meeting-ground for the Persian-cultured official classes of India in the seventeenth and more especially in the eighteenth century. Their letter-books often end with a collection of Sufistic verses of the munshi's own composition or his favourite author's.<sup>16</sup>

The silence of the authors of the FA on the subject of civil service may be interpreted as a sign of tacit consent. While the opinions of the Iraqi jurists (a central point of reference for the South Asian jurists) focused on the issue of non-Muslim military service, in the Mughal Empire the distinction between civil and military service did not exist, since all state administrative functions were considered both military and civil, as illustrated by the status of mansabs issued by Mughal muftis, qadis and other officials. This meant that a civil servant's salary was based on his military rank. For example, qadis often had the rank of "military judge" (*qadi 'askar*), and as such received a salary of 200 or 300 *zāt*. The fact that the authors of the FA permitted non-Muslims to serve in a Muslim army suggests a parallel between military and civil service. It is in this context that their silence regarding the eligibility

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<sup>15</sup> According to Mark Cohen, in the Middle Ages non-Muslims fared much better under Muslim rule than under Christian rule. Cohen, *Under Crescent and Cross*, xvii–xxi.

<sup>16</sup> Jagadish Narayan Sarkar, *Mughal Administration* (Delhi: Orient Longman, 1935), 154.

of non-Muslims for civil service can be interpreted as a sign of consent.

Muslim jurists in seventeenth century South Asia were clearly more interested in cementing political power than in producing illegitimate legal reflections that did not conform to their historical context. Most schools of Islamic law prohibit non-Muslims from serving in Muslim armies or allow them to do so only under certain conditions. Only the Hanafi school allows for the integration of non-Muslims into Muslim armies<sup>17</sup> and permits Muslim commanders to bring together Muslim and non-Muslim soldiers. Yet despite this consensus,<sup>18</sup> the legal scholars disagreed regarding the modalities of non-Muslim military service.<sup>19</sup> The authors' discussion of this issue centres on two main topics: the conditions of the recruitment of dhimmi and the way of their remuneration.<sup>20</sup>

In contrast to the FA, the FTT allows the military commander (imam) to recruit non-Muslims in case of conflict, provided that a Muslim victory is certain.<sup>21</sup> If, however, the Muslim army is at a disadvantage, non-Muslims are not allowed to fight. This judgment limits the role of non-Muslims to that of auxiliaries. According to the FTT,

The imam has the right to ask the dhimmi for help in the struggle against the ḥarbis, [but] only if he is certain that

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<sup>17</sup> While Mālik and Ibn Ḥanbal confirmed this prohibition, aš-Šāfi'ī allowed non-Muslims to serve in Muslim armies only in situations in which this was absolutely necessary. Fattal, *Le statut légal des non-musulmans*, 232–44; Abu Yusuf, *Kitāb al-Ḥarāğ*, 127.

<sup>18</sup> Abu Yusuf does not refer to this issue.

<sup>19</sup> “They argued: it is more judicious to let them ride only in case of need.” *Al-Hidāya*, vol. 3, 76.

<sup>20</sup> Aš-Šaibānī confirms that non-Muslims have the right to fight alongside Muslims and to be remunerated for their service: “If the commander (imam) says ‘the one who kills an enemy will get his property’ and a non-Muslim does this, he has the right to own his property.” Aš-Šaibānī, *Kitāb as-Siyar al-kabīr*, vol. 2, 24.

<sup>21</sup> Non-Muslims were forbidden to fight against brigands (*al-buğāt*).

Islam is powerful (the victor). In this case, there is no reason not to use them.<sup>22</sup>

The FA, by contrast, insists that rallying non-Muslims to the Muslim side is especially recommended when the Muslims are in a state of weakness or when victory is uncertain, and grants the imam the authority to recruit non-Muslims.<sup>23</sup> Non-Muslims thus constituted a kind of emergency resource for the Muslim army.<sup>24</sup> The role of non-Muslims is summed up by the following phrase used by the authors of the FA: “[T]hat he resorts to their help [*an ista‘āna bihim*] to defend Muslims [*li-ḍ-ḍabbi ‘ani l-muslimīna*].”<sup>25</sup>

Thus, in contrast to the FA, the judgement found in the FTT, while it does not expressly condemn non-Muslim participation, may nevertheless be considered exclusively discriminatory and may be seen as reflecting the attitude of fourteenth-century Muslim jurists toward non-Muslims—an attitude which implies a mistrust of non-Muslims and a fear that they would join forces with the enemy. This fear was nothing new among Muslim jurists<sup>26</sup> and was reflected in the latter’s decision to evacuate non-Muslims from border regions exposed to enemy attack. The divergence between the FA and the FTT can be attributed to their different historical contexts. The FTT, which was written during a period of conflict between Muslims and non-Muslims, at a time when Islam had not yet been firmly established in South Asia, reflects the Muslims’ fear of being forced to leave a newly conquered territory. The FA, by contrast, was compiled at a time when Muslims were in power and Islam reigned supreme in South Asia, and consequently reflects no fear of non-Muslim military action.

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<sup>22</sup> FTT, vol. 5, 227.

<sup>23</sup> “They shall be prohibited to ride horses unless it is necessary [...] If they ride in case of need.” FA, vol. 2, 249.

<sup>24</sup> FA, vol. 2, 233.

<sup>25</sup> Ibid.

<sup>26</sup> Aṭ-Ṭabarī addresses the issue of *dhimmi* or *musta‘min* who worked as spies for non-Muslims. Abu Ḥanīfa and aš-Šāfi‘ī recommend severe punishment for such acts of treason but stop short of demanding the death penalty. Abu Ḥanīfa argues that such an act does not constitute an infringement of the *dhimma* pact. Aṭ-Ṭabarī, *Kitāb Iḥtilāf al-fuqahā*, 58–59.

The rulings concerning non-Muslim military service contained in both works (the FA and FTT) can be understood as elements of a concept of citizenship. Indeed, according to classical Islamic jurists such as Mālik b. Anas (d. 796), the founder of the Maliki madhab, non-Muslims could substitute military service with payment of the *ḡizya* and with offering accommodation to Muslim armies.<sup>27</sup> Despite the disparity between the FTT and the FA regarding this issue, both works are based on an approach according to which non-Muslims were not considered full citizens; their presence in the territory of Islam was contingent on their payment of taxes (despite the fact that according to Islamic tradition, Muslims were required to offer protection to non-Muslims). However, the opinion found in the FA suggests that its authors saw non-Muslims as citizens responsible for the security and development of *dār al-islām*. This opinion is shared by as-Saraḥsī, who noted that the *dhimmi* had “inhabited our territory forever [*wa-hum sakanū dārana ‘alā ta’bidi*]”.<sup>28</sup> According to the FA, non-Muslim citizens of *dār al-islām* were required to defend the territory just like their Muslim neighbours. This judgment treats non-Muslims as loyal citizens regardless of their religion and is based on an understanding of a country as an entity that is shared by all its citizens, who are therefore equally responsible for its defence.

The FA’s silence on non-Muslim employment in military service can be described as a permissive attitude. This judgment can be attributed in part to the socio-political demographics of South Asia, where Muslims constituted a minority, and to the exigences of the Mughal army, which was in constant need of new recruits. The authors of the FA thus preferred not to intervene in this matter, thereby granting Muslim ruler more freedom to accommodate practical needs and freeing him from theoretical norms regarding the concept of the border discussed in Chapter 3. The subject of military service highlights instances of transgression of the religious boundaries prescribed by Islamic law. Thus, in this specific

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<sup>27</sup> Fattal, *Le statut légal des non-musulmans*, 278–80.

<sup>28</sup> According to as-Saraḥsī, people who reside in the territory of Islam are required to contribute to its defence. As-Saraḥsī, *Kitāb al-Mabsūṭ*, vol. 10, 77–79.

context, the nature of the border and the means to circumvent it were determined by the law of necessity: when necessary, Muslim jurists would advocate the enfranchisement of non-Muslims and rely on their support.

Prominent non-Muslims who served in the Mughal army included Maharaja Jaswant Singh of Jodhpur, who was the highest-ranking nobleman in the Mughal army when Aurangzeb came to power, and the Rajput Raja Jai Singh, who led the Mughal army against the Hindu rebel Shivaji.<sup>29</sup> While the example of Jaswant Singh highlights the position of a non-Muslim in the Mughal administration, that of Jai Singh reflects a privileged hierarchical status in the military. The authors' decision to permit non-Muslims to serve in the army echoes their silence on the issue of public service.

In sum, the close connection between military and public service reflects a new conception of the army which was not usual in classical Muslim legal doctrine. The opinion of the authors of the FA, who regarded non-Muslims as citizens eligible for both military and public service, corresponds to a global conception of society. This raises a fundamental question: did Muslims and non-Muslims constitute two distinct societies, or were they two components of a single society?

## 2. THE HIERARCHY OF SOUTH ASIAN SOCIETY ACCORDING TO THE FA

This section examines the relationship between the Islamic conception of society and the social reality of South Asian society in the seventeenth century. The focus will be on the correlation between the edicts of the FA and the Hindu caste system, and on the question whether the authors of the FA conceived of Mughal society as a global entity or as consisting of two parallel, Muslim and non-Muslim communities.

In describing the structure of the Hindu caste system, a point of departure is offered by Wint's definition of a caste as "a group of families whose members can marry each other and can eat in

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<sup>29</sup> Cf. V.G. Khobrekar (ed.), *Tariḥ-i-Dilkasha* (Bombay: Department of Archives, 1972), 44.

other's company without believing themselves polluted".<sup>30</sup> To this definition Taya Zinkin adds that "each of these groups has its place in a hierarchy".<sup>31</sup> However, according to Marc Gaborieau, the focus of the study of castes should be on the criterion of purity rather than on that of the system's function. Gaborieau argues that such a focus can help characterise the hierarchy of the groups concerned.<sup>32</sup> The stratification of the caste system is based on the distinction between the Brahman, Kshatriya, Vaishya and Sudra castes, whose members are permitted to live together in one place. Sylvia Vatuk contributes to this debate by recalling the agency of the objects of study. As she argues,

What is needed is to try to come to better understanding of how South Asian Muslims themselves think about identity and difference, equality and inequality. We need to find out how they categorise themselves in relation to all others inhabiting their social universe, and how they act upon these conceptualisations and draw upon them in designing and enacting their daily lives.<sup>33</sup>

Vatuk's interpretation summarises the scholarly debate concerning the Hindu caste system and its relation to social stratification within Islam. Yet in order to understand this subject it is essential to go beyond theoretical reflections and to examine the opinions of South Asian Muslims on this issue.

The contemporary researchers who have studied the relationship between the Hindu caste system and Muslim social stratification can be divided into two groups. The first group, which posited the existence of two distinct Muslim and Hindu societies

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<sup>30</sup> Cited in Taya Zinkin, *Caste Today* (Bombay: Oxford University Press, 1962), 4.

<sup>31</sup> *Ibid.*

<sup>32</sup> Marc Gaborieau, *Ni brahmanes ni ancêtres: Colporteurs musulmans du Népal*, Mémoires de la Société d'Ethnologie, vol. 4 (Nanterre: Société d'Ethnologie, 1993), 362–84.

<sup>33</sup> Sylvia Vatuk, "Identity and Difference or Equality and Inequality in South Asian Muslim Society", in *Caste Today*, ed. Christopher J. Fuller, Oxford India Paperbacks (Delhi: Oxford University Press, 2001), 227–62 (here 229–30).

in South Asia, based their judgments on theoretical criteria rather than on empirical observation. For example, Louis Dumont asserts that the concept of caste was unique to the Hindu population,<sup>34</sup> ignoring the fact that social stratification existed in the Muslim population as well—a societal resemblance which Louis Dumont has characterised as a psychological similarity.<sup>35</sup>

Dumont defines caste not as an ideology but rather as a function in Indian culture which, by moving from the religious to the social register, ceased to be strictly Hindu. In his *Homo Hierarchicus*, Dumont presents caste as a changing institution that was adapted to confront social risks.<sup>36</sup> While focusing primarily on caste analysis in modern India, Dumont also addresses the Mughal era, highlighting the essential underpinnings of interreligious relations under the Mughals and discussing Muslim conceptions of caste.<sup>37</sup>

Dumont dedicates the first chapters of his work to the lexical definition and history of the term “caste”, thereby inscribing an anthropological reflection onto his project, the goal of which is not merely to describe the “other” as an entity, but to learn from him. After observing that the point of departure for anthropology is a belief in the equality of all cultures and human beings, Dumont begins his discussion of the caste system by challenging the view of caste as a “thousand-year-old institution, a stable form” and the notion that “recent evolutions consist merely of

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<sup>34</sup> The first adherent of this approach was Max Weber. Martin Fuchs, *Theorie und Verfremdung: Max Weber, Louis Dumont und die Analyse der indischen Gesellschaft*, Europäische Hochschulschriften Reihe (Frankfurt am Main, 1988), 38.

<sup>35</sup> Dumont, *Homo hierarchicus*, 254–67. Dumont’s approach was challenged by Gaborieau, who recognised the existence of social stratification among Muslims and observed the similarity between the structure of the Muslim and Hindu caste systems. Gaborieau, *Ni brahmanes ni ancêtres*, 345–57.

<sup>36</sup> For a critical approach to Dumont, see Irfan Habib, *Essays in Indian History: Towards a Marxist Perception*, Anthem South Asian Studies (London: Anthem Press, 2002), 161–79.

<sup>37</sup> Dumont, *Homo hierarchicus*.

degenerations which suffice to redefine the established institution".<sup>38</sup>

Dumont's project has been aptly summarised by Martin Fuchs as a movement "from caste as ideology to caste as a function".<sup>39</sup> In Dumont's approach, caste ceases to be a Hindu institution and becomes an Indian one, a conclusion Dumont reached via a sociological comparison of caste systems among Indian Muslims and Indian Christians. Dumont argues further that Muslims constituted groups in which hierarchical status was well-defined, and the structure of which essentially replicated the Hindu caste system.<sup>40</sup> Dumont makes the following observations regarding Hindu-Muslim relations:

The Hindus [...] have had to accommodate, over long periods and in vast regions, political masters who did not recognise the brahman values and did not consider untouchable even the small groups of Muslims living in villages [...]. Muslims, in turn, made and still make concessions in order to live with others, in various ways depending on the place and time. [...] On the other hand, within Muslim [society], the influence of the caste was strongly felt.<sup>41</sup>

Dumont goes on to explain the stratification of Muslim society based on economic factors:

There are two kinds of Muslims in India: the members of the four noble "tribes", who are considered immigrants although they have local affiliations, are more orthodox, live from territorial taxes and military, administrative and judicial functions and are closely bound to Mughal power; and the mass of the converted small folk, who live in villages and cities in symbiosis with their Hindu counterparts, combining the social and religious habits of both groups.<sup>42</sup>

Dumont then presents a concrete example to prove the existence of a caste system among Muslims. Following previous Western

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<sup>38</sup> Dumont, *Homo hierarchicus*, 254–67.

<sup>39</sup> Fuchs, *Theorie und Verfremdung*, 424–33.

<sup>40</sup> Dumont, *Homo hierarchicus*, 254–67.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*



experts, he confirms the existence of a caste system among the Pathan people of Swat, a society far removed from Hindu influence.<sup>43</sup>

The second group of researchers to address this issue, headed by Imtiaz Ahmad<sup>44</sup> and Marc Gaborieau, posits an absolute similarity between the stratification of Muslim societies and the Hindu caste system. Their main contribution consisted in their ability to clearly and definitively demonstrate the existence of a single South Asian society characterised by social stratification, which Gaborieau refers to as a “global society”.<sup>45</sup> These researchers argue that the term “caste” can be applied to social stratification in both Muslim and Hindu communities in South Asia. The positions of these two groups of scholars serves as a theoretical point of reference for my interpretation of the FA’s position on social stratification, which also draws on the opinions of previous jurists regarding the concept of hierarchisation in Muslim society.<sup>46</sup>

The FA addresses the notion of social stratification in two different sections and regarding three different subjects: financial compensation after divorce (*mut‘a*), equality (*kafā’a*) and discretionary punishment (*ta‘zīr*). based on these texts, I will examine the degree of correspondence between Hindu and Muslim concepts of social stratification.

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<sup>43</sup> Yet Dumont seems reluctant to admit even a superficial resemblance between the Hindu caste system and what would be considered a Muslim caste system, and indeed, this theory was disproven by Dumont’s student Gaborieau.

<sup>44</sup> Ahmad’s point of departure was the question whether a caste system existed within the Indian Muslim community, and if so, whether it was an original Islamic feature or a result of the influence of the Indian caste system. Ahmad concludes that the caste system is a system of social stratification which, although prohibited by Islamic foundational texts, did exist among Muslims in South Asia. Ahmad, *Caste and Social Stratification*, 191–92.

<sup>45</sup> Gaborieau rejects the idea of the existence of two separate societies in South Asia and concludes that “there definitively exists only one unique society.” Gaborieau, *Ni brahmanes ni ancêtres*, 399.

<sup>46</sup> Habib, *Essays in Indian History*, 161–79.

On the subject of compensation (mut‘a), the authors of the FA argue:

The mut‘a consists of three garments: a long knit (Qamis), a coat (milḥafatun) and a veil (miqna‘atu wasaṭin) of medium quality, neither particularly valuable nor particularly poor, this opinion is found in al -Muḥiṭ[...] this is according to the custom of other jurists (‘urfihim), according to our custom, the compensation should be based on our custom (‘urfina). The value of the compensation (mut‘a) depends on her [the wife's] social status...if she belongs to the lowest status (as-Safila), he (her husband) should pay her in compensation cotton clothes (kirbās), if she belongs to the middle status, her clothes should be silk (Qazz), and if she belongs to a higher status (‘ulyā), her compensation would be refined silk garments (‘ibrīsam); This is the best opinion; it is reported in al-Yanābī.<sup>47</sup>

While in the chapter on mut‘a, the authors prescribe three distinct dress codes for women in accordance with their social status, in a section on kafā’a they argue as follows:

If a woman marries a man from a higher class, the guardian [*walī*] has no right to separate them. The equivalence [between them] is based on certain notions, including that of genealogic origin [*nasab*]. The people from the tribe of Quraish are equal to each other, regardless of their reciprocal [social or economic] conditions. Arabs who are not Quraishi cannot be considered equal to Quraishi Arabs [...]. Personal merit [*ḥasab*] [of a person] can be considered equal to the genealogic origin [of another one]. Consequently, a scholar [*faqīh*] can be equal to any individual from a higher class. These statements are narrated by Qāḍīḥān and by al-‘Attābī in his *Ġawāmi‘ al-fiqh*. In al-Yanābī, the status of a scholar [*‘ālim*] is equivalent to that of the Arabs and upper classes. The right opinion [regarding this issue] is that he is not equal to the superior classes, as narrated in *Ġāyat as-Surūġī*. The second condition of equivalence is the conversion of the [individual's] parents to Islam [...]. Another condition is labour. The veterinarian is equal to the perfume seller, an opinion

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<sup>47</sup> FA. vol. I, p. 304.

attributed to Abu Ḥanīfa and narrated in the *Zāhir ar-Riwāya*. By contrast, the opinion of Abu Yusuf and Muhammad [...] shows that practitioners of non-valuable professions such as veterinarians or barbers [...] are not equal to perfume sellers or clothing sellers [...].<sup>48</sup>

In the paragraph on *taʿzīr*, the authors state the following:

According to aš-Šāfi, *taʿzīr* has two degrees. The punishment of the most noble among the nobles, the ulama and the nobles [*ʿulwiyya*], is to be done by warning them [...]. The punishment of nobles [*ašrāf*] who are governors [*ʿumarāʾ*] and lords [*dahhāqīn*] shall be done by warning them and ordering them to appear before the qadi [...]. The punishment of the middle class, representing the people of the market [*sūqīya*], shall be performed by warning them and jailing them. Regarding the punishment of the lower classes [*aḥissa*], this shall be done by any of the above ways, in addition to beating, as narrated in *An-Nihāya*.<sup>49</sup>

These three paragraphs address the issue of social stratification using terms based on two evaluation systems, corresponding to descent and ascent, respectively. In the first text, stratification corresponds to an ascending order, while the second text indicates a descending order. In the first text presented above, stratification is linked to the word “condition” (*ḥāl*), the etymology of which suggests change and transformation. Here, the subject of the debate between the scholars concerns the conditions under which compensation (*mutʿa*) is to be paid to a divorced woman.

These texts mentioned above reveal an opposition between the term *ḥāl* (*condition*), which designates change, and *martaba* (“category”), which designates stability. In addition, the *ḥāl* of the woman mentioned in the first text differs from the caste (*martaba*) of the man who is devalued.<sup>50</sup> In these three texts, the

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<sup>48</sup> FA, vol. 1, 290.

<sup>49</sup> FA, vol. 2, 160.

<sup>50</sup> For a detailed discussion of *kafāʾa*, see Baber Johansen, “The Valorisation of the Human Body in Muslim Sunni Law”, in *Law and Society in Islam*, ed. Devin J. Stewart, Baber Johansen and Amy Singer (Princeton: Markus Wiener Publishers, 1996), 71–112. Al-Kāsānī insists that the

authors of the FA attempt to define each social group and the relations between them. In the third text, on punishment, the authors refer to the “noblest of the nobles” and the middle class “represented by the people of the marketplace”. This interest in defining social groups in a specific context reflects the authors’ struggle with terminology, itself a reflection of the undefined social status in the Muslim community.

While it can therefore be assumed that this descriptive method was intended to refer to the differences between social groups in South Asian Muslim society, the differences between castes in non-Muslim society, especially in Hinduism, were almost precisely clarified and the boundaries between them had been definitively drawn.<sup>51</sup> Significantly, in the last text, the authors do not precisely define the lowest caste (*aḥissa*),<sup>52</sup> a shortcoming which suggests that they were unable to identify the components of this group due to the instability of social conditions at that time.

The authors of the FA carefully observed the reality of the South Asian society, which was developing and was therefore open for the emergence of new Muslim social groups. Specifically, the authors were aware of the problems posed by the social stratification of the Hindu caste system, particularly regarding the criteria of social classification, which questioned Muslim social concepts.<sup>53</sup> These criteria included an individual’s ethnicity, political affiliation, economic status, genealogy and religion. The criterion of religious observance, the cornerstone of social stratification in Islam, thus gave way to others such as political rank, ethnic allegiance and profession.

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concept of equivalence applies only to men. Al-Kāsānī, *Badāʾiʿ aṣ-ṣanāʾiʿ*, vol. 3, 1522.

<sup>51</sup> Gaborieau, *Ni brahmanes ni ancêtres*, 357–60.

<sup>52</sup> According to al-Kāsānī, the term *aḥissa* corresponds to the *safila*: “There exist among our masters those who stratify taʿzīr according to hierarchy and degrees; they argue that there are four categories.” Al-Kāsānī, *Badāʾiʿ aṣ-ṣanāʾiʿ*, vol. 9, 4219.

<sup>53</sup> Gaborieau identifies the difficulty of dealing with the small subcastes within the Hindu caste system. Gaborieau, *Ni brahmanes ni ancêtres*, 345–99.

The criterion of profession plays a prominent role in the FA, especially in the second and the third texts, which discuss the determination of an individual's social status. This phenomenon is thus similar to the stratification criteria of the Hindu caste system.<sup>54</sup> The standards of hierarchisation presented in these three texts all emphasise the criterion of function, which complements the notion of occupation and precedes religious criteria such as piety.<sup>55</sup>

The third text contains a classification of menial trades,<sup>56</sup> whose practitioners are exposed to the highest degrees of *ta'zīr*. The authors use the concept of "purity" to distinguish between different types of trades, a valuation criterion identical to that found in the Hindu caste system. Thus, trades such as those of the veterinarian, barber-circumciser (*ḥaḡḡām*) and cleaner are less "valuable" than those of the clothes merchant or banker.<sup>57</sup> The social stratification discussed in these texts suggests a similarity with the Hindu caste system. The third text, which describes *ta'zīr*, is a useful example. *Ta'zīr* is the only punishment that may be imposed on all citizens of the Muslim state<sup>58</sup> regardless of their religion. Historically, *ta'zīr* was the domain of the *muḥtasib* (market supervisor), who represented the Muslim state.<sup>59</sup> The imposition of this punishment did not depend on the nature of the crime committed, but rather on the status of the offender. The punishments listed in the third text were thus applicable to all members of society. As a result, the authors of the FA attempted to synchronise the Muslim and Hindu social stratification systems in order

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<sup>54</sup> For a detailed discussion of the concept of hierarchy, see Ibn 'Ābdīn, "Al-Ḥāšiya", vol. 8, 286–342.

<sup>55</sup> Robert Brunschvig discusses the substitution of tribal unity with geographical unity in the Hanafi school. Robert Brunschvig, *Études d'islamologie* (Paris: Maisonneuve et Larose, 1976), vol. 2, 119–31.

<sup>56</sup> Brunschvig, *Études d'islamologie*, vol. 1, 145–64.

<sup>57</sup> Al-Kāsānī mentions these same norms of distinction between the professions. Al-Kāsānī, *Badā'ī' aṣ-ṣanā'ī'*, vol. 3, 1521.

<sup>58</sup> Joseph Schacht interprets *ta'zīr* as a proof of innovation within Islamic law. Schacht et al., "Introduction au droit Musulman", 170–71.

<sup>59</sup> Ibn 'Ābdīn provides a detailed overview of the separation between the professions. Ibn 'Ābdīn, "Al-Ḥāšiya", vol. 12, 202–82.

to achieve standards that could be applied to all individuals in the community regardless of their religion.

The importance of the FA's approach to social stratification becomes evident when it is compared to the approach adopted in other legal compendia. I will therefore compare edicts from the FA with other edicts written in South Asia and other parts of the Islamic world in order to determine whether the South Asian context, which saw the codification of a stringent Hindu caste system, had played a role in their development. It is important to bear in mind that the FA is the only work of Islamic law to address the issue of social hierarchy. Although they often draw on interpretations of earlier works, the authors of the FA present concepts that appear to have been influenced by the South Asian context.

The first Hanafi teachers discuss social hierarchy only briefly. For example, Muhammad aš-Šaibānī explains only the characteristics and application of *ta'zīr*, without indicating the social classes affected by it.<sup>60</sup> The same is true of as-Saraḥsī, who, in his *Al-Mabsūt*, returns to the ideas of aš-Šaibānī, without, however, going beyond the general framework of this topic.<sup>61</sup>

In contrast to these "classical" works, the Central Asian *Badā'i' aṣ-ṣanā'i'* describes the *ta'zīr* in more detail. Al-Kāsānī specifies four classes of people subject to four types of punishment, and his judgements are similar to those found in the FA.<sup>62</sup> In the fourteenth century, Kāsānī's outline of the *ta'zīr* was expanded on by Qāḍīḥān, who emphasised the standards of the application of *ta'zīr*, but without specifying its characteristics.<sup>63</sup>

The interest generated in the modalities of the application of this punishment indicates that the concept of *ta'zīr* was of particular interest to South Asian jurists, who focused on the provisions of the punishment and on defining the social groups concerned. For example, the FTT presents a detailed, seven-page description of the punishment, based largely on a reference of Islamic law

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<sup>60</sup> On the difference between *ḥadd* and *ta'zīr*, see aš-Šaibānī, *Al-Jāmi'a ṣ-ṣaḡīr*, 79.

<sup>61</sup> As-Saraḥsī, *Kitāb al-Mabsūt*, vol. 7, 264–65.

<sup>62</sup> Al-Kāsānī, *Badā'i' aṣ-ṣanā'i'*, vol. 9, 1219.

<sup>63</sup> *Fatāwā Qāḍīḥān*, vol. 3, 480.

known as *Al-Ḥulāṣa*. In contrast to al-Kāsānī, who does not quote the sources he drew on in making his judgement, the authors of the FTT refer to *Al-Ḥulāṣa* on several occasions, using the formula “it is found in”<sup>64</sup>—a figure of speech which became a subject of discussion and debate in later works of Islamic law.

The authors of the FTT also criticise the reflections of Muḥammad aš-Šaibānī, who had been careless in his discussion of *taʿzīr* (omitting, for example, the issue of financial penalties).<sup>65</sup> They go on to describe the role of *taʿzīr*, which was inflicted in particular on non-Muslims, and insist that *taʿzīr* applies only to them and that it should not be called “*taʿzīr*”, but simply “punishment” (*ḥadd*).<sup>66</sup>

The difference between these two terms—*taʿzīr* and *ḥadd*—has to do with the fact that *taʿzīr* was meant to purify the soul of the Muslim. Since according to Islamic doctrine, dhimmis were unconcerned with purification, they were subjected to other forms of punishment. *Taʿzīr* was thus qualified differently for Muslims and non-Muslims: for the former it signified a catharsis, while for the latter it was a punishment like any other. In other words, *taʿzīr* was transformed from a strictly “Muslim” punishment into a repressive measure applicable to all subjects of the Muslim state.<sup>67</sup>

Social stratification as described in the FA can thus be said to represent an historical point of reference for studying the criteria of the social hierarchy of Muslim India. Rather than limiting themselves to a theoretical discussion of the problem of stratification, the authors of the FA sought to define a pragmatic system of social stratification applicable to the entire population of the Muslim state.

The aim of this analysis is not to demonstrate the strictly localised aspect of the authors’ conception of society, but rather

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<sup>64</sup> Al-Kāsānī, *Badāʾiʿ aṣ-ṣanāʾiʿ*, vol. 9, 1219.

<sup>65</sup> “According to al-Ḥulāṣa, there are four categories of *taʿzīr*.” FTT, vol. 5, 96–103.

<sup>66</sup> FTT, vol. 5, 96–103.

<sup>67</sup> “‘Punishment’ [*ḥadd*], not ‘*taʿzīr*’, is the appropriate term for the dhimmi. For while *taʿzīr* is meant to purify believers, infidels are not concerned with purification.” FTT, vol. 5, 96–98.

to demonstrate the similarity between the social stratification reflected in the FA and the Hindu caste system. It thereby draws on Gaborieau's argument in favour of the notion of a single South Asian society, which reinforces the idea of interwoven communities in South Asia and reflects the reality of a concrete and pragmatic Islam.

The stratification of South Asian society as reflected in the FA was due not only to the influence of the Hindu caste system but also to notions of stratification inherent to Islamic thought. The Muslim jurists of seventeenth-century South Asia conceived of society as global and composed of distinct social and religious entities which, in order to ensure peaceful coexistence, were required to observe the behavioural codes presented by the authors of the FA as borders between the various groups.

This observation suggests a new definition of the social boundary. According to the FA, the social or symbolic boundary was intended not to exclude but to include the "other" in society, and to ensure communality beyond the borders of the respective communities. This section has demonstrated the influence of the Hindu caste system on the Muslim conception of social hierarchy in the South Asian context, which in turn has allowed us to identify the fusion of the two societal systems—Muslim and non-Muslim—into a single entity, the aspects of which are manifested in the legal conception of punishment. The example of *ta'zīr* demonstrates that Muslim jurists saw society as composed of different ethnic groups, religions and social classes. In response to this diversity, they developed pragmatic criteria which, however, left certain religious puzzles unresolved.



## CONCLUSION

This study has explored the norms of relations between Muslims and non-Muslims in South Asia as reflected in the edicts of the *Fatāwā l-Ālamgīriyya*. This legal corpus, written during the reign of the Mughal sultan Aurangzeb Alamgir, contains judgements made by the Sunni Muslim Hanafi jurists of seventeenth-century South Asia. Via a comparison of permissive, pluralist notions derived from Islamic law with non-permissive, authoritarian and anti-pluralist notions, I have examined various factors that impacted Muslim–non-Muslim relations, such as the economy, the personal and spiritual rights of non-Muslims. The following paragraphs summarise the aspects of these relations discussed in this study.

The first point concerns the corpus of the FA itself. As we have seen, the FA, which belongs to the branches *furūʿ* of Islamic law, established a cohesive connection with reality. The work's primary purpose was to provide jurists with substantive law. Taking into account that in general, the role of the fatwa as a genre was to suggest solutions for new cases, a task which traditionally fell to the mufti rather than the qadi, the FA ensured a close relationship between legal doctrine and the lived reality. Wael Hallaq has qualified this role of the fatwa genre as a “dialectical relationship”, observing that

between legal doctrine and judicial practice there existed not only a state of congruity but also a complex dialectical relationship that [sustained] this relationship.<sup>1</sup>

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<sup>1</sup> Wael Hallaq, “Model Shurūṭ Works and the Dialectic of Doctrine and Practice”, *Islamic Law and Society* 2, no. 2 (1995): 109–34 (here 134).

As I have shown, the FA played a direct, central role in seventeenth-century South Asian society. Despite its theoretical quality, which occasionally suggests a disregard for reality, the FA represents the pinnacle of Islamic law in its seventeenth-century Hanafi incarnation, and can therefore be understood as a theoretical version of Islamic law bolstered by practical cases. While Hallaq considers the sixth and final volume of the FA, which contains passages written in Persian, as the most contextually engaged part of the work, his remark applies to the rest of the FA as well. For example, it is evident that the judgments contained in the chapters on marriage, divorce and apostasy respond to the questions posed by South Asian Muslims of that era in a highly concise manner. These cases, Hallaq observes, reflect the pragmatic quality of the FA and demonstrate the close connection between Islamic Law and reality. Furthermore, to the extent that it reformed Hanafi legal theory via a re-examination of previous legal conceptions supplemented by concrete cases and references to quotidian affairs, the FA can be considered to have been effective in the South Asian context. This effectiveness was a result of the authors' intention to propose pragmatic solutions to religious, social and political problems: they occasionally advocated a return to the origins of Hanafi theory, in particular to the edicts of the school's founding master Abu Ḥanīfa—a demand that was tantamount to a plea to treat non-Muslims according to legal concepts more equitable than the social and political measures previously granted by the Mughal state.

In order to answer the fundamental question of the FA's relationship to reality, it is necessary to compare the notions contained in the FA with the reality of its historical context. This is a complex task, given that the authors did not have the power to apply all their conceptions in reality. However, like any work of law, constitutions, or political theory, the FA presented a conception (in this case, of Islamic law) that comprised legal discourse and took reality into consideration without necessarily reflecting all historical facts. The FA presented a model for coexistence between Muslims and non-Muslims, particularly regarding lived reality. Responding to the specificities of the South Asian reality, which was shaped by intercommunal conflict, the authors of the

FA advocated a guarantee of religious plurality within Islamic law. This stance emerges clearly in passages of the FA that refer to non-Muslims. The effectiveness of the FA lay ultimately in its theoretical quality and its relation to reality, since the dual task of composing legal theory and ensuring its application was the responsibility of the juriconsult. An examination of this double role in the general framework of the Hanafi school of law has confirmed my initial assumptions concerning the effectiveness of the FA. The effectiveness of the FA both in its time and in later eras was due to the fact that it presented a version of Islamic law that summarised the entire body of legal literature relating to interfaith relations and presented a model that was also applicable outside the South Asian context. While the authors' efforts led to a legal reform in the Mughal Empire, it is clear that legal change alone is insufficient to reform a complex society.

This study also examined Sultan Aurangzeb's involvement in the writing of the FA and his relationship to its authors. Aurangzeb's personal commitment to the realisation of the work is clear: he served as patron, author, first reader and director of the project. Aurangzeb's involvement in the writing of the FA constitutes an example unprecedented in Arab-Islamic culture of a political authority intervening in such an enterprise. The authors, who were paid from the Mughal imperial treasury, reported directly to Aurangzeb, who approved their work before it was published. The information provided in the list of authors shows that some of the authors maintained a personal relationship with the sultan, a fact which may call into question the criteria of their choice for participating in the project.

The compilation of the FA was an editorial project unique in the context of the Arab-Muslim culture of that time. The collective work of some forty-five authors over a period of eight years allowed the authors to achieve two objectives simultaneously: to revise most of the Hanafi legal works written between the school's founding and the seventeenth century, and to formulate a new theory of Islamic law at a time when no innovation was expected in this field.

## 1. STANDARDS OF INTERRELIGIOUS RELATIONS ACCORDING TO THE FA

In this study, I have examined the positions of the FA's authors regarding the political, economic and social spheres of communal life in order to establish a comprehensive understanding of inter-religious relationships. My interpretation has revealed that the FA, as a normative work of Islamic law, partially reiterated the edicts concerning non-Muslims contained in the classical legal theory of the *Zāhir ar-Riwāya*. In their presentation of subjects ranging from the boundaries of the Muslim state and the conditions for changing the status of a territory from *dār al-Islām* to *dār al-kufr* (and vice versa) to the rights of non-Muslim residents of *dār al-islām* and standards of conversion and apostasy, the authors of the FA reproduced the edicts of classical Hanafi law by examining their suitability to the South Asian context. This process generated a dialectical relationship between the norms of the FA and reality. My analysis of various issues relating to community life highlights the nature of the authors' notions of coexistence between Muslims and non-Muslims and its modalities. In the following, I will highlight the most relevant aspects of this discussion.

Regarding the spiritual freedom of non-Muslims, I have discussed the authors' perspectives on belief and apostasy. Regarding belief, the authors of the FA composed a typology of religions to determine the standards of conversion from "infidelity" to Islam. For polytheists, Muslim jurists developed a simplified form of conversion. While a polytheist could become a Muslim simply by speaking the Arabic word *allāh*, saying the phrase "I am Muslim" or by praying with Muslims, for monotheist dhimmi (Jews and Christians) access to Islam was more restricted. In this regard, the South Asian Hanafi jurists' understanding of conversion differed from that of their Middle Eastern and Central Asian counterparts, since while the form of conversion most commonly endorsed by the early Hanafi jurists was the verbal conversion (the oral declaration that "Allah is the only God and Muhammad is his Messenger"), the authors of the FA accepted and even encouraged conversion through gestures, especially through the rite of prayer. In this way, the words of conversion (the first pillar of Islam),

gave way to the gestures of the Muslim ritual (especially the second pillar, prayer). According to the FA, simply praying with Muslims, even without uttering the terms of belief (*šahāda*) is sufficient to become a Muslim.

Aware of the strength of the Hindu caste system and of the importance of social stratification, South Asian legal scholars thus gave non-Muslims the possibility to convert to Islam through the rite of prayer, without having to isolate themselves from their original social groups. An individual's social origin thus became the determining factor of the rules of conversion, which thereby ceased to be a matter of individual conscience and became, rather, a collective affair affecting the whole of society. Conversion was thus one aspect of the transgression of the boundaries between religious communities and can be considered a sign of encouragement to individuals to challenge these boundaries. This conception stands in opposition to the idea of apostasy, which revealed the writers' fear of non-Muslims' lack of faith in Islam. The FA discusses two types of apostasy: verbal and factual. My interpretation revealed that factual apostasy (meaning apostasy involving gestures, clothes and attitudes) occupied a prominent place in jurists' imaginations. Expressing one's intention to renounce Islam often counted less than presenting oneself as a "non-believer" or attending non-Muslim religious celebrations. Jurists responded by expressing their fear of apostasy, whereby their austerity on this point contrasts with their permissive approach to verbal apostasy.

In sum, the authors' views on belief and apostasy reveal a contrast between two basic trends in the FA: a permissive tendency that encourages non-Muslims to cross boundaries and turns a blind eye to the establishment of certain bonds between Muslims and non-Muslims, and a less tolerant tendency that threatens Muslims who dare to apostatise with capital punishment. This opposition between permissive and coercive tendencies becomes evident in the sections on non-Muslim places of worship.

In Chapter 5, I addressed the subject of places of worship and freedom of worship of non-Muslims under Muslim rule. The authors' position on this subject testifies to the essential value of the Islamic concept of intercommunality based on territoriality. The

construction of non-Islamic places of worship and the celebration of non-Islamic holidays were permitted in the countryside, where the non-Muslim population was not exposed to Islamic legal restrictions. Like the first Hanafi jurists and in contrast to the jurists of Central Asia of the 12<sup>th</sup> to the 14<sup>th</sup> century, the authors of the FA granted the non-Muslim community this freedom, but only under the condition that the community was far from Muslim population centres and that it complied with border regulations as conceived by the Iraqi jurists. These conditions thus reflect a strict conception of living space.

The willingness of the FA authors to draw a physical boundary between Muslims and non-Muslims was often impossible to apply in reality, since the living space was shared by individuals or groups from different communities. Physical rapprochement was therefore at the origin of the Islamic legal concept of *dhimma*. As a result, while coexistence led to permissive rules, it also contributed to the development of rules that were differentiatory, restrictive or even discriminatory. This tendency of the authors to develop restrictive or even degrading norms can be understood in light of the demographic situation in seventeenth-century South Asia, where Muslims constituted a minority. In order to safeguard the prerogatives of the minority Muslim population, the authors of the FA used all available means to force non-Muslims to submit to Islamic power. The general principle guiding the authors (and thus presumably Islamic legal thought in general) regarding the subject of intercommunity relations can be summed up with the phrase “together but separate”. In other words, the jurists were seeking a way to accept coexistence while preserving boundaries.

In my discussion of the conception of border, I highlighted the subject of the individual liberties granted to non-Muslims through themes of mobility, residence and distinguishing signs. Regarding the subject of mobility, the FA did not advocate restricting the freedom of movement of non-Muslims in Islamic territory and granted peasants and non-Muslim traders the right to keep their property after changing their place of residence. Notwithstanding, the FA speaks of limitations regarding the place of residence of non Muslims. While members of rural communities were not subjected to restrictive measures, non-Muslims residing

in Muslim cities were required to observe strict rules. The FA emphasised that if the size of a non-Muslim community diminished, its members would be permitted to live freely among Muslims—thereby tacitly encouraging them to become more familiar with Islam and to convert. On the other hand, in Muslim cities with large non-Muslim populations, non-Muslims were to choose a place of residence without being confined to ghettos.

In my analysis of individual freedoms, I emphasised the importance of dress code to understanding the relationship between Muslims and non-Muslims and demonstrated the importance of discussing the specific nature and modality of these signs. Specifically, I demonstrated that the dress code was meant to regulate the coexistence of communities of different faiths. Compared to other Hanafi regulations, the edicts of the FA regarding the norms of dress code reveal, in the descriptions of their mode of application, a clear tendency toward humiliation. To explain this tendency, I showed that the edicts of the FA depended on the demographic factor. I came to the conclusion that while the authors of the FA promoted the removal of non-Muslims from Muslim population centres as a guarantee of their freedom, they also advocated restrictive rules within this space.

The authors' positions on individual freedoms are linked to their opinions regarding the individual status of non-Muslims. To illustrate this, I focused on the issue of marriage. Like conversion, marriage represents a transgression of boundaries determined by a dual notion: while on the one hand, drawing on the opinions of Abu Ḥanifa (and rejecting those of his disciples Abu Yusuf and Muhammad aš-Šaibānī), the authors accepted all forms of non-Muslim marriage, whether between spouses of the same religion or mixed unions between monotheists (Jews or Christians), they prohibited, on the other hand, intermarriage between Muslims and non-Muslims. The authors of the FA addressed the subject of mixed marriage according to a typology of religions which determined which religious communities were accessible or authorised for Muslims to interact with them. While marriage to an "idolatrous" woman was prohibited, union with a monotheistic woman (Jewish or Christian) was authorised for Muslim men, albeit regarded with disgust (*makrūh*). The institution of marriage also

impacted the policies of Mughal emperors. This is illustrated by the case of Muhammad Akbar, who used his union with Hindu women to neutralise his enemies (for example, the Rajputs). On the other hand, the available historical information about mixed marriage under Aurangzeb suggests that this type of marriage was blocked by the political authority, with the result that neither Aurangzeb nor his sons “transgressed the borders” thorough marriage.

As for economic relations between Muslims and non Muslims While the FA permitted all types of economic relations within non-Muslim communities, it placed strict regulations on inter-communal relations. My discussion centred on two types of economic convention: the *mufāwāḍa*, which deals with partnership, and the *muḍāraba*, the credit/profit partnership. Regarding the former, the FA prohibited total partnership between Muslims and non-Muslims, referring to the opinion of Abu Ḥanīfa and challenging that of Abu Yusuf. While the severity of the FA’s prohibition found its justification in the social domain, partial partnership and profit were accepted (though subject to restrictions) and covered specific areas limited to a single type of product or transaction. This circumspection on the part of the jurists reflects their concern that commercial relations between the two communities would lead to social rapprochement. Regarding taxation, the capitation tax (*ḡizya*) and property tax (*ḥarāḡ*) clarify the relationship between the Muslim state and its non-Muslim subjects. Here again, it is necessary to stress that the FA, in comparison to other Hanafi texts, imbued the ritual of the payment of the *ḡizya* with a singular aspect; namely, the humiliation of the non-Muslim taxpayer. Regarding this aspect of humiliation, which is also reflected in other Hanafi legal works without any legal justification, I have demonstrated the degree to which the authors’ opinions were shaped by the social and demographic reality of the Indian subcontinent. The degrading ritual of the payment of the poll tax was a means to oppose the Hindu social hierarchy, in which the upper classes occupied a prominent position at the expense of the poor and “untouchables”. The application of an “egalitarian” system via the ritual of payment of the *ḡizya* was thus intended to produce a kind of equality between non-Muslim subjects and the



Muslim ruling class. This ritual of the *ġizya* offered, in the eyes of the authors of the FA, the lower non-Muslim classes a unique occasion to witness the weakness of the upper classes (primarily the Brahmins and Rajputs), the ultimate goal being to encourage the former to embrace Islam. Converts would thus leave a non-Muslim hierarchical system to assume a place in the Muslim social system.

The edicts of the FA on property tax (*harāġ*) reflect the authors' support for non-Muslim agricultural activity. At a time when the jurists of Egypt and the Fertile Crescent opted for new legal measures to support new classes of tenants, thereby distancing themselves from the original Hanafi theory, the South Asian jurists, espousing classical Hanafi theory (especially the opinions of Abu Ḥanifa), supported the landowners by opposing the tenants, the tax collectors and, especially, the hegemony of the *zamindārs*, who were often assisted by the Mughal state. It is in this context that this approach seems avantgarde: it reflects a will to protect the agrarian field from abuse and thus to diffuse any potential motives for a peasant revolt.<sup>2</sup>

The authors of the FA did not distinguish between Muslim and non-Muslim peasants according to their religion or ethnicity. This is illustrated by the sentence: "Whoever owns the land of the *haraj* must pay this tax, whether Muslim or non-believer." This position of the jurists, which may be considered positive and avantgarde, refers to the proximity of the communities, questions notions of difference and challenges the boundaries between these subgroups of Mughal society. The jurists of seventeenth-century South Asia upheld the validity of the standards of the Iraqi school, thereby demonstrating their awareness that the changes introduced by their predecessors had benefited the political class and the new agrarian classes to the detriment of the peasants.

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<sup>2</sup> In South Asia, changes to the agrarian system and the abuse of the rights of the peasants have always led to revolts. The uprising of 1857 is known to economists as the "peasant revolt." Eric Stokes, *The Peasant Armed: The Indian Revolt of 1857* (Oxford: Clarendon Press, 1986), 235.

Chapter 9 addressed the civil relationship between the Muslim state and its non-Muslim population as presented in the FA. In keeping with the positive views of Hanafi jurists on this issue, but in opposition to the point of view of most other schools of fiqh, the authors of the FA permitted non-Muslims to perform military service and allowed for their integration into Muslim armies. In contrast to the *Fatāwā t-Tātārḥāniyya* (FTT), an earlier South Asian Hanafi work, the FA agree that non-Muslims have an active role in the Mughal army. While the FTT limited the service of non-Muslims to ancillary tasks such as spying against their coreligionists for the Muslims, the FA entrusted them with major missions such as fighting alongside Muslim soldiers and rescuing them.

The comparison of these two works revealed that the reasons for integrating these populations into the military differed according to the strength or weakness of the Muslim forces. In contrast to the FTT, the FA clearly states the need to appeal to non-Muslims in cases in which the Muslim army is at a disadvantage and its victory uncertain. This positive opinion reflects a developed conception of the relationship between Muslims and non-Muslims, especially if approached via the modern notion of citizenship. The historical reality in South Asia under Aurangzeb was that a significant part of the Mughal military consisted of non-Muslim soldiers, including Hindu military leaders, who occasionally found themselves fighting their coreligionists. Non-Muslims were no longer seen as foreigners, but rather as full members of the Islamic community, and as such responsible for the defence of its territory.

The FA reveals a similar attitude regarding non-Muslim access to civil service. The silence of the South Asian Hanafi jurists on the issue of civil service suggests their tacit consent to the enlistment of non-Muslims. In Mughal society, the army and the civil service were inseparable, so much so that the ranks of Mughal administrators corresponded to military ranks (*mansab*). For example, the position of chief qadi was a military rank before it became a civilian status; the qadi was named “military qadi” (*qāḍī ‘askar*). As institutions, the military and the civil service were most useful in public life. In comparison to their Hanafi

counterparts in other parts of the Muslim world, the attitude of the authors of the FA towards these two institutional bodies was positive. Because the authors approached these two domains as an environment open to all residents of the Muslim territory regardless of their religion, their position can be considered a concrete example of a pluralistic attitude.

This analysis also involved a comparison between the Hindu caste system and notions of social stratification in the Islamic legal conception. Despite its egalitarian aspect, the social hierarchy of the FA resembles the Hindu caste system in several respects. For example, in the section on discretionary punishment (*ta'zîr*), the authors refer to four classes of individuals that recall the four categories of Hindu caste.

The FA' conception of society was based not on the notion of two communities but rather on the idea of a single global society composed of all subjects of the Mughal state. This concept was reflected in a new legal system that considered the individual according to social rather than strictly religious criteria. In order to avoid conflict between the two communities, Muslim jurists frequently evoked the notion of border, which, however, they considered not as an external limit but an internal boundary within the society. In this way, they allowed individuals of different religions to coexist while preserving the boundaries between them. This interreligious relationship was based on a contradiction between the two underlying themes of my research: pluralism and plurality. These notions correspond to various understandings, including those guaranteeing the existence of non-Muslims under Muslim rule, those calling on Muslims not to intervene in the internal affairs of non-Muslims and those advocating coexistence between Muslims and non-Muslims. The anti-pluralist norms were manifested in the restrictive and repressive measures imposed on non-Muslims.

The contradiction between pluralism and anti-pluralism does not correspond to an opposition of two mutually exclusive elements, but rather to a form of complementarity, as reflected in the authors' willingness to regulate the relationship between Muslims and non-Muslims by forcing both communities to respect the

norms of coexistence. This position is reflected primarily in the coercive and even anti-pluralistic notions found in the FA.

My analysis of the FA's positions on issues such as apostasy, conversion and dress codes demonstrated that the Iraqi jurists obliged Muslims and non-Muslims to observe distinct dress codes, to behave differently and, above all, to observe physical or symbolic boundaries that were meant to guarantee their coexistence—the hallmark of a pluralistic society. The norms and values governing community relations appear in a section of the FA on the rights of non-Muslims, through which a sort of “manifesto on interreligious relations” emerges.

## 2. THE MANIFESTO ON INTERRELIGIOUS RELATIONSHIPS

In a section on prohibitions regarding community relations, the authors of the FA present the laws concerning the dhimmis as follows:

[There is] no sorrow in buying a belt [*zunnār*] from a Christian and a hat [*qalansuwa*] from a Zoroastrian, as narrated in *as-Sirāḡīya* [...]. Concerning Christian wives of Muslim men, *Al-Qudūrī* says that she shall not show the crucifix in his home. But she can pray wherever she wants, according to *al-Muḥīṭ* [...]. Muhammad [*Al Šaibānī*], God's blessing on him, says, “Whatever I prohibit for Muslims I also prohibit for non-Muslims; the only exceptions are wine and pork.” This opinion figures in *Al-Muṭṭaqāṭ* [...]. *Al-Ḥakam al-Imām ‘Abd ar-Raḥmān al-Kātib* is known to have said that if a Muslim finds himself obliged to eat with non-Muslims, there is no sorrow in this, but it should not become a habit; this figures in *al-Muḥīṭ* [...]. There is no sorrow in Muslims inviting non-Muslims even if they have not known each other for long time. This opinion figures in *al-Muṭṭaqāṭ* [...]. There is no sorrow in making transactions between Muslims and non-Muslims if necessary. This opinion appears in *as-Sirāḡīyya* [...]. There is no sorrow in a Muslim checking the hand of his non-Muslim neighbour after he returns from a journey. It is advisable to do this [...]. There is no sorrow in visiting Jews and Christians if they are ill. [...] If a dhimmi enters the house of a Muslim,

the latter should stand up to greet him [...], hoping that the non-Muslim will see in this the kindness of Islam.<sup>3</sup>

This passage contains, in condensed form, most of the judgments discussed in this study. Although this section of the FA deals with restrictions, its edicts are permissive in tone and reflect a tendency towards proximity between Muslim and non-Muslim communities. This passage also summarises the values of interreligious relationships and re-examines the concepts of the border discussed in this study. Moreover, it allows us to draw certain conclusions regarding intercommunal relations in seventeenth-century South Asia.

The repetition of the phrase “there is no sorrow [*lā ba’sa*]” is of central importance in this passage. Mohammad Khalid Masud has observed that while this phrase had a derogatory connotation for early Islamic jurists (the first teachers of the *fiqh*),<sup>4</sup> it carried a positive meaning in later texts, where it designated consent on the part of the jurists. In the FA, the expression *lā ba’sa* expresses the authors’ authorisation of commercial and social relations between Muslims and non-Muslims<sup>5</sup>—a permissiveness that extended to all spheres of daily life.

The FA’s position on prohibition reveals a close relationship between their ideology and reality. Individuals, whether Muslim or non-Muslim, are considered in their human dimension, regardless of their religion. The authors presented the communities in a peaceful context characterised by social and commercial cooperation, emphasising the notions of solidarity and collaboration between individuals (as illustrated by the example of a sick non-Muslim who may be visited by his Muslim neighbour).

In each situation referred to in the passage, the authors of the FA encourage the Muslim to cross the boundaries separating him from the non-Muslim. This is particularly evident in the opinion that “it is advisable” for a Muslim to “check the hand of” (that

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<sup>3</sup> FA, vol. 5, 346–47.

<sup>4</sup> Muhammad Khalid Masud, *Fatāwā ‘Ālamgīri: Mughal Patronage of Islamic Law* (unpublished, 1996).

<sup>5</sup> *Lā ba’sa* means literally “there is no harm” and is synonymous with the legal term *mubāḥ* (accepted).

is, reach out to) his non-Muslim neighbour returning from a journey. This benevolence was paralleled in the economic domain, since the authors of the FA called to judging the economic relations between Muslims and non-Muslims through the norm of need and necessity and thus accepted a transgression of rules only when this was deemed necessary. These permissive values advocated by the Muslim jurists regarding interreligious rapprochement were thus likely to overshadow the restrictive and discriminatory standards advocated by the same authors in other passages of the FA. The essential quality of this passage—namely, its theoretical aspect—is characteristic of the FA as a whole and gives it an atemporal dimension beyond the context of seventeenth-century South Asia. In addition, it provides a useful example through which to summarise the concepts of interreligious relationship expressed in the FA.

The first concept regarding interreligious coexistence is that of the border. On the existential, individual level, the boundary is understood by the FA, in a religious sense, as a limit between oneself and others. This notion is relevant to the issue of identity. The idea of a frontier, whether physical and visible or theoretical and invisible, exists in all spiritual conceptions and consists of an obvious and a latent aspect.

This study has focused on two aspects of the Muslim conception of coexistence, which I have referred to as “pluralism” and “anti-pluralism”. The concept of pluralism is characterised by a dichotomy. While the authors of the FA elaborated permissive rules regarding non-Muslims (especially concerning their right to reside in Muslim territory and to engage in commerce), in other cases they established restrictive or even degrading measures. An analysis of this anti-pluralistic tendency has demonstrated the determining influence that social, demographic, economic and political circumstances had on the logic of the Muslim jurists, whereby “anti-pluralism” implies not a desire to repress non-Muslims but rather the wish to oblige them to respect rules while preventing them from intermingling with the Muslim community. My analysis of the method of intertextuality and my comparison of three Hanafi legal theories from different regions and eras suggest that the FA reflects a return to the origins of Hanafi

doctrine—in other words, a return to the Hanafi theory of the formative era of Islamic law in Iraq.

The three theories discussed include the Iraqi doctrine of the classical period embodied in the texts of *Zāhir ar-Riwāya*; the central Asian theory (which represents a conceptual deviation from the first Iraqi theory); and the Islamic legal theory of seventeenth-century South Asia have shown that the authors of the FA returned to the edicts of the first Hanafi masters and rejected the opinions of the Central Asian masters. In composing their texts, the authors of the FA reproduced the texts of the first two theories, comparing and evaluating the judgments of the masters of these two regions in order to select the most appropriate judgment for cases or issues from seventeenth-century South Asia. My analysis revealed a similarity between Iraqi and South Asian Hanafi doctrines which is presumably rooted in the socio-economic circumstances of these two regions.

The opinions of the first era which the authors of the FA chose to integrate into their work consisted of permissive opinions on coexistence which contrasted with the restrictive judgments of the Central Asian jurists, which represent a more severe phase of Hanafi theory and reflect political rather than legal thinking. The aim of this observation is not to draw an equivalence between eighth-century Iraq and seventeenth-century South Asia.

In order to reintroduce the judgments of the Iraqi masters in seventeenth-century India, the authors of the FA resorted to analogy. This analogical method ensured that lawyers in later periods would be able to apply earlier opinions and thereby bring about legislative innovation. Innovation in Islamic law is thus not about creating new solutions, but rather about reintroducing, with modifications, already known solutions and assigning to the opinions of contemporary jurists the argumentative force of the masters of the Islamic legal schools.

In this study, I have examined the relationship between Muslims and non-Muslims in seventeenth-century South Asia through the lens of the Islamic legal norms presented in the FA. My analysis revealed that the Hanafi legal conception regarding non-Muslim communities consists of two types of legal rules. On the one

hand, permissive or “pluralistic” rules grant non-Muslims the right to exist, progress and strive. On the other hand, restrictive rules limit the freedom of non-Muslims and are categorically anti-pluralist. In cases where the two communities are geographically distant, Muslim jurists allow non-Muslims to live according to their own religious norms. The focus of this study was on interpreting the non-pluralistic aspects of the relationship between Muslims and non-Muslims in order to understand the Muslim jurists’ reasoning regarding both concepts. The analysis of the historical, religious, social and political spheres of Mughal society revealed both differences and similarities between the treatment of non-Muslims by South Asian jurists and their counterparts in the rest of the Islamic world.

The general principle of religious coexistence as presented by the authors of the FA can be summed up with the phrase “together but separate” or “community in difference”. By “community” I mean the consent of Muslim jurists to allow a plurality of cultural entities to coexist. By “difference” I mean their wish to preserve the distinctions between these communities. The principles of coexistence and the autonomous organisation of groups are essential for an interpretation of the nature of Muslim–non-Muslim interaction in general.

By interpreting the edicts of the FA and comparing them with other rules from other regions of the Hanafi school of law, I reached the conclusion that in the seventeenth century, a time when anti-Muslim discrimination was to be expected (by analogy with the rules of dhimma as presented by Rudi Paret), Islamic legal authors in fact produced texts that reflect a consistent tendency toward rapprochement, as well as a desire, among both Muslim and non-Muslim communities, to cross borders and create what I have referred to as a “global society”. This desire for proximity was a motto of everyday life in seventeenth-century South Asia.

According to this interpretation, the FA represents an effort on the part of Muslim jurists to organise a global society. Having understood the futility of attempting to separate the two communities, the South Asian jurists proceeded to strengthen the symbolic boundaries between social groups.



In Islamic law, the relationship between Muslims and non-Muslims was not governed by rigid rules. Rather, the religious and theoretical norms characterising this relationship were developed according to a positive dimension of reality. My analysis has shown that understanding and collaboration were central and essential values of interreligious coexistence. The relationship of Islam to other faiths thus reflects, in all its dimensions, fruitful relations between Muslims and non-Muslims, even during times of conflict.

The relevance of the legal standards discussed in this study is not limited to the context of seventeenth-century South Asia. These norms are still applicable today and may even be reformed and performed in the future; their adoption could help create the religious pluralism so sought after today. The purpose of this study was not to dispel a misunderstanding about Islam nor to advocate the reintroduction of the norms of the FA. Rather, my goal was to show that it is indeed possible to speak of a modern global society in which followers of different religions, including Muslims, coexist.



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