IBN HALDUN UNIVERSITY
ALLIANCE OF CIVILIZATIONS INSTITUTE

PH.D. THESIS

HOW DOES ISLAM TREAT PEOPLE OUTSIDE THE ABRAHAMIC RELIGIONS? BETWEEN ÂDAMIYYAH AND IBRÂHIMIYYAH

TAREQ SHARAWI

THESIS SUPERVISOR: PROF. RECEP ŞENTÜRK

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by

TAREQ SHARAWI

A thesis submitted to the Alliance of Civilizations Institute in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Civilization Studies

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ÖZ

HOW DOES ISLAM TREAT PEOPLE OUTSIDE THE ABRAHAMIC RELIGIONS? BETWEEN ÂDAMIYYAH AND IBRÂHIMIYYAH

Yazar: Sharawi, Tareq

Medeniyyet Araştırmaları Doktora Programı

Tez Danışmanı: Prof. Dr. Recep Şentürk

Ekim 2020, 236 sayfa

Bu tezde, İslam'daki İbrahimî olmayan din geleneklerine bağlı olan toplulukların hukuki statüsüne ilişkin farklı görüşler ele alınmıştır. Tezde, bahsedilen toplulukların temel aksiyomatik haklarının dokunulmazlığına odaklanılarak bu konuyla ilgili çeşitli İslam hukuku ekollerinin (fıkıh mezheplerinin) genel olarak kabul görmüş görüşleri analiz edilmektedir. Filolojik araştırmalar ve İslam hukukuna ait birincil kaynaklarının analizini yapmak, epistemolojileriyle yakından ilgilenmek, konuyla ilgili yorumların ve ikincil kaynakların yanı sıra benimsedikleri görüşlerin gerekçeleri sınıflandırılmaya çalışılmak üzere bir analiz gerçekleştirilecektir. Bu tez, birbiriyle ilişkili olmak üzere üç bölüme ayrılmıştır. Birinci bölümde, bu toplulukların statüsünün teorik çerçevesi ele alınmaktadır, ki bu statüden genellikle İslami metinlerde fıkıh mezheplerine göre *ahl al-kitāb* olmayan olarak bahsedilmektedir. Bölümde, bu görüşü anlayabilmek için Müslümanların gayrimüslim tebaalarından talep ettikleri bir ödeme, yani *cizye* üzerine tartışma ele alınmıştır. Tartışmalarla, evrensellik konusunda bir fark ortaya koyulmaktadır. Bu bağlamda iki görüş ana hatlarıyla belirtilmiştir: İbrahimî olmayanlar da dahil olmak üzere tüm insanların, insan oldukları için dokunulmazlık çemberinin içine dahil edilmesini kabul eden ve Müslümanlık egemenliği altında haklarını garanti eden ‘Adamiyyah’ (ademmiyet) görüşü ve İbrahimî geleneklerden olan din topluluklarının, dokunulmazlığa dahil olmasını ve *cizye*yi kabul etmesini kısıtlayan ‘İbrahimiyyah’ görüşü. İkinci bölümde, İran, Kuzey Afrika ve Hindistan'ın Müslümanlık egemenliği altında İbrahimî olmayan toplulukların kapsanması ve dokunulmazlığı ile ilgili üç örnek sunulmaktadır. Bu bölümde, bu toplulukların kapsam içine alınmasının altında yatan önemli bir gerekçenin hukukçular tarafından oluşturulan çerçeve olduğu ortaya çıkmaktadır. Üçüncü bölümde, Adamiyyah geleneğinin çağdaş dünyadaki sürekliliği ve dini toplulukların hakları ile ilgili tartışmalardaki geçerliliği vurgulanmaktadır.

Anahtar Kelimeler: Fıkıh, İbrahimî, Evrensel, Komünalist, Dokunulmazlık, İslam ve İnsan Hakları

ABSTRACT

HOW DOES ISLAM TREAT PEOPLE OUTSIDE THE ABRAHAMIC RELIGIONS? BETWEEN ÂDAMIYYAH AND IBRÂHIMIYYAH

Student Name: Sharawi, Tareq

PhD in Civilization Studies

Thesis Advisor: Prof. Dr. Recep Şentürk

October 2020, 236 Pages

This thesis demonstrates the divergent positions on the legal status of the communities adhering to non-Abrahamic religious traditions in Islam. The thesis analyzes the generally accepted positions of the different schools of Islamic law on this question, with a primary focus on the inviolability of the basic axiomatic rights of these communities. This will be carried out by philological surveying and analyses of primary sources of Islamic law, engaging with their epistemology, and attempting to classify rationales of their adopted positions, in addition to commentaries and secondary sources on the topic. The thesis is divided into three interrelated sections. The first section deals with the theoretical framework of the status of these communities, generally referred to in the Islamic texts as non *ahl al-kitāb*, according to the schools of Islamic law. It uses the discussion on the *jizya* payment, a payment Muslims required from their non-Muslim subjects, as a key to understand this view. The discussions reveal a divergence on universality. Two positions are outlined in this context: the position of Adamiyyah, which accepts the inclusion of all human beings, including those who are non-Abrahamic affiliates, in the circle of inviolability by virtue of their humanity, and guarantees their rights under the Muslim rule; and the position of Ibrahimiyyah, which restricts the inclusion in inviolability and the acceptance of the *jizya* to the religious communities belonging to the Abrahamic traditions. The second section provides three examples of inclusion and inviolability of non-Abrahamic communities under the Muslim rule of Iran, North Africa, and India. The section shows that a vital underlying rationale for this inclusion is the framework established by the jurists. The third section highlights the continuity of the Adamiyyah tradition to the contemporary times and its validity to discussions of the rights of religious communities in today's world.

Keywords: Fiqh, Abrahamic, Universalist, Communalist, Inviolability, Islam and Human Rights

Acknowledgements

Have you not seen how God sends water down from the sky and that We produce with it fruits of varied colours; that there are in the mountains layers of white and red of various hues, and jet black; that there are various colours among human beings, wild animals, and livestock too? It is those of His servants who have knowledge who stand in true awe of God. God is almighty, most forgiving.

(Qur'an 35: 27, 28)

First and foremost, all praises and gratitude are to Allah, the creator and sustenance giver of all creation. '*and everything goes back to Him*' (Qur'an, 11:123). All Peace and Blessings be upon His Messenger, the Seal of all the Prophets before Him. May Allah's mercy, blessings and rewards be bestowed upon the scholars and jurists mentioned in this thesis, and others like them whose restless efforts constructed this remarkable tradition.

I would like to thank my teacher and mentor, Professor Dr. Recep Şentürk, for his continuous support for me in times of ease and difficulty, for his kind words of encouragement, and for his embodiment of the scholarship that is rooted in our tradition. I would like to greatly thank my teachers and thesis committee members, Professor Dr. Alparslan Açıkgenç and Professor Dr. Mürteza Bedir, for their valuable comments and feedback all through my work process. I pray that they are given the best of rewards in this world and the hereafter. My thanks and sincere gratitude are likewise extended to Professor Dr. Heba Raouf, Professor Dr. Emad El-Din Shahin, and Dr. Önder küçükural for their valuable comments and constructive feedback.

I would also like to thank the distinguished professors and scholars with whom I met and greatly benefited from during my research visit to India; Dr. Amin Usmani (Islamic Fiqh Academy, India), Prof. Tahir Mahmood (Amity University), Prof. Mohammad Rafat, Prof. Nishat Manzar, Prof. Junaid Haris, Prof. Mohammad Ishaque, and Prof. Nuzhat Parveen Khan (Jamia Millia Islamia), Mr. Gauhar Iqbal and Mr. Afzal. I thank them all for being very generous and welcoming, and for all the support which substantially informed my research.

To my beloved mother, Khulood, for her prayers and wishes, I express my deepest of thanks, and to my dear father, Ismail, for his encouragement and for being immeasurably supportive, as he has always been. And to my wife and companion in this journey, Hiba, for without her support I could not have gone through it the way I did, I am forever grateful.

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Arabic script	English symbol	Arabic script	English symbol
ء	ʿ	ض	Ḍ
ا ، آ	Ā	ط	Ṭ
ب	B	ظ	Ẓ
ت	T	ع	ʿ
ث	Th	غ	Gh
ج	J	ف	F
ح	Ḥ	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dh	م	M
ر	R	ن	N
ز	Z	هـ	H
س	S	و	ū or w
ش	Sh	ي	ī or y
ص	Ṣ	ة	a or t

Introduction

The world we live in is a display of a vast religious diversity, and has been so in the past. Recent statistics show (Pew Research Center, 2017b) that, in 2015, around 31.5% of the world's population identified as Jews or Christians. Populations classified under the category of non-Abrahamic religions, such as Buddhism, Hinduism, and Confucianism, make up around 44.5% of the world's population, around 3.3 billion people. This percentage includes those who identified as unaffiliated to a religion, they are also included in the wider non-Abrahamic circle, according to the Muslims, as they do not affiliate with a divinely revealed scripture as do the Jews and the Christians. Though it is difficult to arrive at a percentage for non-Abrahamic communities among the world's population in the past, we can safely assume that it was also a substantial one. The proselytism of Christianity and Islam, and the increase of their followers over the centuries through conversion from other religions in Asia, Africa, the Americas and elsewhere, may lead to the assumption that the percentages of the adherents of the other, non-Abrahamic, faiths could have likely been higher. Thus, the percentage of the followers of non-Abrahamic religions among the population of the world has been significant in the present and the past. One can assume that the majority of the human population were non-Abrahamic at some point, before Christianity and Islam proliferated considerably and reached the high percentages that are seen in the world demographic today.

These statistics demonstrate the significance of examining how Islam views these non-Abrahamic populations. The importance of the question of how Islam has approached the rights of these communities, in theory and in practice, is evident not only as a historical inquiry, but also to further the understanding of the overall Islamic worldview towards the other. Islam, particularly through its legal tradition, regarded addressing the rights, protection, and general status of non-Muslim communities an important quest, which led to various social and judicial consequences for these communities. Muslim and non-Muslim scholars have attempted to answer this question with competing narratives and explanations, ranging between a universalist view towards all other religious communities to deeming the Islamic view as utmost

exclusivist towards non-Muslims. Within this spectrum, examples can be found of narratives (Zuhaili, 1989; Qardawi, 1992) which acknowledge a different degree of regard of the non-Muslims based on the Abrahamic or non-Abrahamic nature of their affiliation, indicating the significance of this division line in the Islamic scholarship. This thesis will focus on this question, drawing a comparative picture of the existing levels of divergence on the status of non-Muslims, and non-Abrahamic communities in particular, in Islamic law. Moving from this comparative discussion, the thesis will employ the central concept of the *jizya* payment – which Islam required from non-Muslim subjects – to point to the line of divergence regarding the non-Abrahamic communities and highlight the distinguished positions on the status of the non-Abrahamic peoples in Islamic law, in both the theoretical legal scholarship and in the historic practice of the Muslims who ruled different territories in the world. The main focus of the thesis will be to explore this divergence on the status of the non-Abrahamic people in Islamic law and practice, and to demonstrate that the acknowledgement of the rights and inviolability of these communities was theoretically represented and supported by a formidable school, which translated into a widespread historical practice. The thesis will also demonstrate the continuity and validity of this universalist paradigm in today's social circles.

The question of how Islam approached the status of the non-Abrahamic communities was as central in the past as it is in today's world. Recent events where reference to religious law is made tend to direct the public and – at times – scholarly opinions to framing it as a merciless penal code when it comes to responsibilities, or placing it in an exclusivist framework when it comes to rights. Laws related to, or derived from, religion which can be related to social norms, cohesions, and protection of rights tend to be understood as laws that inherently guarantee the wellbeing of the adherents of those religious, expelling other people from any benefits that may be incurred by them. In this sense, these laws are seen to include or exclude humans from the guarantee of rights, among which what could be labelled as basic and axiomatic, on the basis of their religious affiliations. In the works concerned with theorizing a framework of social inclusion in modern societies, a basis of facilitating difference, rather than its oppression, can be considered essential to establish (Witcher, 2006). This is important, not only in economic and social considerations, but also in the context of religious diversity management. Religious inclusion, in this framework, allows difference and

does not oppress it. It accepts its existence within the otherwise cohesive religious mainstream while acknowledging, at the same time, it being 'different' in nature. In this, religious, cultural, ethnic and other consideration overlap. This framework, as this thesis shows, is essential to understanding how the Muslim jurists formulated the legal positions regarding the inclusion of non-Muslims under the Muslim rule of different regions in the world. In this light, this work embarks on exploring the questions: What are the rules of inclusion and exclusion in Islamic law regarding non-Abrahamic communities? Why did some Muslim jurists adopt an inclusive perspective towards these communities while others adopted an exclusive one? and how did each of the positions justify their arguments? In the course of discussing these questions, the practical implementation of the universalist inclusive approach will aid the theoretical and legal discussions.

Recent political instabilities and militant resurgences have encouraged these public misconceptions and anxieties. As a result of these events, some longstanding religious minorities inhabiting Muslim-majority countries have witnessed persecution or violation of necessities as basic as life and shelter. Starting in 2014, members of the Ezidi religious community found themselves the target of genocide, and were effectively exiled from their ancestral lands in Northern Iraq by the terrorist group called the Islamic State of Iraq and the Levant (Daesh), in what has come to be known as the Sinjar massacre. In this unfortunate event, Daesh, as do other similar groups identified with different religious affiliations, appealed to distorted rulings which enforce the conviction that communities such as the Ezidis are freely violable based on their religious affiliation. Remarkably, such rulings are usually claimed to have originated from the body of Islamic law and interpretations of religious texts. Similarly, while the presence of Islam in Mali has historically been tolerant and cooperative towards other faiths (Handloff, 1990), recent reports show that, after some groups' adaptation of *sharī'a* rule in 2012 in the northern parts of the country, Mali came to be listed high in the rate of Christian prosecution, describing these ratings as alarming (DW.com, 2013). Likewise, contemporary Islamic movements that are dominant in some Muslim majority countries, such as Wahhabism, continue to adopt mindsets of social and political exclusion for non-Muslims in general and non-Abrahamic communities in particular. For me, these examples reflect, above all, a lack of the fundamental understanding that the social inclusion of these communities in the

fabric of what Marshall Hodgson calls the Islamicate[i] does not necessarily mean the endorsement of their theological dogmas. The peripheral stance that seems to exist behind the ideologies of those supporting such movements tries to avoid social inclusion in fear of losing an aspired purity of religion or an imagined state of religious cohesion.

At the same time, such recent events have directed the attention towards the scholarship of Islamic law for investigation. Some have accused the scholarship as being inherently exclusive, while even Muslim thinkers thought the classical scholarship had a mentality of seeing the other as a potential subject for war, and not for inviting to Islam ('*da'wa*'), as they criticized the classical division of geographies into the abode of Islam and the abode of war. Others claimed that, when it comes to religious communities, only the Christians, Jews, Magians, Samaritans, and Sabians were 'entitled to the privilege' of living under the Muslim government in a status of protection (Williams, 1971: 5). These and other trends imply that a return to the formative and classical sources of Islamic law, represented in the works of the major scholars of the different schools of law, is imperative. It is particularly in this scholastic tradition, this thesis argues, that formidable frameworks of social and religious inclusion can be found. Returning to these frameworks provides rich and remarkable views on the rights and protection of religious communities. The existing literature on the question of the status of non-Muslims in Islamic law varies in time period, location, and situation in terms of academic discipline, but it is noticeable that the larger part of this literature tends to focus on non-Muslims who are affiliated to Abrahamic religious traditions, that is the Jewish and Christian communities. Notable scholars who wrote on the rights and protection of non-Muslims in Islam, such as Qaradawi (1992), Amarah (2003), and Badawi (2015) focused on the status of the Christians and the Jews as major representation of the non-Muslim communities that Muslims have dealt with. This could be due to the proximity between Abrahamic religions in the eyes of the Muslims from the early period, which was referred to earlier. This trend can even be found in some of the literature dealing with the status of non-Muslims in

[i] A term used to denote civilizational contexts and regions in which the Muslims are culturally dominant, but not specifically Islamic in the theological sense. Marshall Hodgson is believed to be the creator of this term, distinguishing between it and the term "Islamic", which describes something more directly religious.

geographical locations where the majority of the non-Muslims do not belong to the Abrahamic group. An example of which is the Indian subcontinent, where the focus of some major Islamic texts like the *Fatawa-i Hindiyyah*, or works of more contemporary writers such as Maududi (1980), are based mainly off the legal opinions of the scholars of the Muslim lands to the West of India, which primarily focused on dealing with the status of Jews, Christians, and Zoroastrians, a community of a particular proximity to the early history of Islam. However, those texts could be, and were, taken by analogy to reflect the status of the majority-comprising Hindu subjects of the Muslim rule. The previous stream of thought recognizes a general status of protection and inviolability of the non-Muslims in Islamic law. Another stream of thinkers, such as Ibn Baz (2004) and the majority of the modern Wahhabi stream, seem to adhere to the paradigm that non-Muslims from non-Abrahamic religious affiliations may not be naturally entitled to the inviolability of rights which the other position recognizes.

The works of Qaradawi (1992) and Amarah (2003), both among the well-respected scholars of Islamic thought, tend to focus on the literal citing of Qur'anic verses and the Prophetic narrations in their discussion of the status of the non-Muslims in Islam. This trend, namely focusing on the philological analyses of the sources rather than how the texts manifested in the traditional scholarship, is commonly found in their and others' writings. On the other side, many examples within the literature dealing with the question of how Islam views the status of people from non-Abrahamic religious affiliations adopt a direct historical approach. Writers such as Annemarie Schimmel discuss (1982) the status of one of the biggest non-Abrahamic communities in the world, the Hindu community, under the Islamic rule of the Indian subcontinent using historical examples and incidents, with less focus on the theoretical grounds present in *fiqh* and other Islamic disciplines. In this area, Muhammad Aziz Ahmad points out (1949) the influences that individuals – primarily rulers but also religious leaders – had on the status of non-Abrahamic communities under the Muslim rule, showing that the character of the ruler was – at times – the most effective factor in determining their status. The same suggestion was demonstrated by Prima Bari (2000) in North and West Africa, were the practice of rulers, traders, and scholars was shown to have a notable effect on the way Muslims viewed the non-Abrahamic inhabitants of the lands.

In contribution to this issue, Recep Şentürk (2001; 2013) writes about the inviolability ('*iṣmah*') of all human beings as a concept that is central and established in the Muslim legal tradition. He classifies the two positions on the inclusion of the non-Muslims in the inviolability according to Muslim jurists of respected schools of Islamic law, the fault line in the divergence being the basis upon which humans can be considered inviolable: on one side, the virtue of humanity itself, on the other side, the virtue of religious affiliation or covenant. Building on this binary divergence, this thesis takes the debate a step closer to the Abrahamic – non-Abrahamic divergence in terms of the religious affiliations of the non-Muslim communities, and the implications this has on the debate regarding their inclusion in inviolability.

Discussing the status of, particularly, the non *ahl al-kitāb* communities in this thesis, stemming from the divergence in Islamic law which Şentürk presents, comes to complement the existing scholarship that deals with the status of non-Muslims in Islamic law, and the status of the non-Abrahamic communities under the Muslim rule. The contribution this thesis proposes to the existing literature also comes in presenting notable historical case studies situated within the aforementioned theoretical framework of the status of non-Abrahamic communities, rather than focusing on the historical narrative of how the Muslims (primarily the Muslim rulers) viewed the status and inviolability of these communities. It demonstrates the continuity of the theoretical legal tradition of inviolability through its influence on the practice of the Muslims governing non-Abrahamic communities in different parts of the world. In addition to that, one cannot discuss the issue of the status of non-Muslims in Islam in this day without resorting to the discussion around religion and human rights. Witte and Green (2012) write on religion and human rights, attempting to consolidate the position that the various religious traditions are able to provide ground for the universality of human rights, including the religious other. Many, including Şentürk (2006), An-Na'im (2012) and others, challenged the notion that only secular or Western traditions offer ground for universal human rights. This thesis comes in conformity with this position, demonstrating – through intertwining theory and historical practice – the solid ground within the Islamic legal tradition for affirming the inviolability of life, religious belief, and other rights for the religious other.

Law is an integral component in Islam which has active and dynamic involvement in the daily matters of individual Muslims, and among its primary functions is to shape the guiding principles of the conduct of the Muslims as a collective body, or *umma*. From the earliest years of Islam, Muslims have recognized the vital importance of studying and codifying the law and developed juristic traditions for this purpose. The study of Islamic law and legal matters has been served by the discipline of *fiqh* (lit. 'understanding'), which scholars interchangeably refer to as Islamic Law or Islamic Jurisprudence. In this thesis, this interchangeable reference will be maintained. While jurisprudence is generally a reference to the underlying principles that all legal verdicts rely on, the use of the term Islamic law could be taken in, a wider sense, to mean the encompassing component that includes all that is related to legal matters and legal conduct in Islam, as understood by the Muslim jurists. The study of *fiqh* in Islam is generally divided into *'uṣūl al-fiqh* (lit. 'the sources of *fiqh*') and *furū' al-fiqh* (lit. 'the branches of *fiqh*'). It is generally believed that Muḥammad ibn Idrīs al-Shāfi'ī, the founder of one of the four schools of Sunnī Islamic law, has laid the foundations of *'uṣūl al-fiqh* as a discipline. *'Uṣūl al-fiqh* is concerned with the theory of law and the methodological grounds on which the rulings are based, which led Bernard Weiss to refer to it as "theoretical jurisprudence" (2006: xi). *Furū' al-fiqh* (simply referred to as *fiqh*) is the more "practical" discipline and is concerned with articulating the legal opinions and verdicts by referring to the sources of the law. From the dawn of Islam, Muslims have turned to the Qur'an and the Prophetic transmissions as primary sources from which legal matters could be derived in the process of *ijtihād* ('exertion or doing one's utmost'), a process by which qualified jurists exert their intellectual ability to derive a legal verdict on a specific matter from the sources of the law. These sources primarily include the Qur'an and the Sunna, the Prophetic tradition, but also include methods such as analogy ('*qiyās*'), public interest ('*maṣlaḥa*'), customs ('*'urf*'), and other methods that differ in weighted importance between different schools of law and methodologies in Islam. The whole body of the law is commonly referred to as the *sharī'a*, which contains the verdicts, opinions and guidelines to which Muslims are required to adhere, both on the individual and collective levels.

The cultivation and development of Islamic law as a discipline unfolded over many decades following the early advent of the message of Islam. As far as modern Western scholarship is concerned, the periods that followed the time of Prophet Muhammad

and the first conquests are seen to be the most decisive in the formation of the Islamic law (Weiss, 2006 :4). This does not negate the connection between this period and the periods before, as the legitimacy and source of this formation can unmistakably be traced back even to the Prophet himself at times. The periods that followed, though, witnessed more in terms of the cultivation of the Islamic law and the evolvement of its different schools. Scholars have attempted to construct a periodization of the Islamic law tradition to help understand the development of its legal thought, among other things. Muhammad al-Tha'alibi argues (1995: 2: 184) that the dividing line between "old" and "new" in the scholarship of *fiqh*, or between the early ('*mutaqaddimūn*') and late ('*muta'akhirūn*') scholars, happens at the end of the 4th century in the Islamic calendar (around the beginning of the 11th century). A more contemporary periodization of formative - post-formative periods (Hallaq, 2005) is one that distinguishes them in terms of the formulation and maturation processes. The formative period of Islamic law, extending from the 7th to the 10th century, witnessed the establishment of the major schools of Islamic Law ('*madhāhib* (sing. *madhhab*)'). Wymann-Landgraf (2013: 507) confirms that the genesis of the four major schools of Islamic law 'constitute *the* pivotal development of the formative period', which sets the stage for the later developments of the post-formative, or 'classical' period of Islamic law. For Spectorsky (2009: 143), the formation of the *madhāhib* was what marked the classical period. As the formative period was characterized by an 'informal activity' of the scholars to articulate the legal system, this was replaced by a formal and doctrinal system of learning rooted within each school of law in the classical period and developed by their respective jurists ('*fuqahā'* sing. '*faqīh*'). Primary sources from both periods will be used throughout the thesis, though usage of classical sources will be more weighted, as it is the period where the more formal ideas of each *madhab* were developed and cultivated by the jurists formally following the schools.

The majority of Muslims in the world today belong to the Sunnī group, who refer to themselves with the phrase *ahl al-Sunna wa al-jamā'a* ('People of the Tradition and the collectivity') (Williams, 1971: 28). Differences in methodologies in *ijtihad* or working with the sources of law resulted in the development of parallel schools of Islamic law. The major schools of Sunnī Islamic law that have prevailed since the past are four schools, their eponymous founders being important figures in the formative period of Islamic law. The first and most prevalent school in Muslim majority societies

is the Ḥanafī school of *fiqh*, which assumed the name of its founder Abū Ḥanīfa al-Nu'mān (d. 767). This school is one that is thought to be inclined to rationalistic reasoning ('*ra'i*') as a method of deducting the legal verdicts that serve to regulate the Muslims' lives and conduct. This school continues to be prevalent today in Muslim majority countries such as Turkey, Iraq and Pakistan as well as parts of Syria, Egypt and India (Calder et al.). The second school is the Mālikī school, named after its founder Mālik ibn Anas (d. 795). This is a school that has famously prioritized the conduct of the people of Madina ('*'amal ahl al-Madīna*') as a weighted consideration in the process of arriving at the legal opinions. This school is considered the most widely expanded in terms of geographical coverage, which, aside from areas in Arabia, Iraq, and Egypt, includes most of North and Western Africa, in addition to areas in the middle parts of the continent. The third is the Shāfi'ī school, founded by Muḥammad ibn Idrīs al-Shāfi'ī (d. 820). Whose inclination towards the textual evidence is apparent and is famously quoted for the statement 'if the Ḥadīth proves sound, it becomes my *madhab*' (Nawawi, 2010: 1: 63). The Shāfi'ī school of Islamic law is spread over different areas of the Middle East, Egypt, as well as South East Asia. The fourth school is the Ḥanbalī school, named after its founder Aḥmad ibn Ḥanbal al-Shaybānī (d. 855). The geographical stretch of this school is less than that of the other three, as it is mostly limited to parts of the Arabian Peninsula, Syria, and Iraq. Other schools, like the Ẓāhirī school and the school of Sufyān al-Thawrī, had a wide prevalence during some periods in Islamic history, yet ceased to be regarded as an official school of Islamic law the way the other four are to this day[i].

Islam emerged in a cosmopolitan society in the Arabian Peninsula, a society with diverse religious communities and social fabric. This has created the need for Islamic law to formulate legal opinions that determine the status of those groups in relation to life, property, religious practice, civil laws, and all other possible regards from the earliest periods. As the geography under the Muslim rule expanded, new communities and peoples from various religious and cultural backgrounds were increasingly

[i] The academic heritage of these Imams and their students is alive to this day. This heritage covers areas of *Fiqh*, *Ḥadīth*, and theology. Examples of Abū Ḥanīfa works are *Al-Fiqh al-Akbar* and *Kitāb al-Āthār* – narrated by his disciples Muhammad Ibn al-Ḥasan and Abū Yūsuf. The works of Mālik ibn Anas include the celebrated *Muwaṭṭa'* and *Mudawwanah*, which are regarded as major sources of Mālikī law till this day. Imam Shāfi'ī's works include *Al-'Um* and *Al-Risālah*, among numerous other texts. Aḥmad ibn Ḥanbal's works include *Al-Musnad*, which is a collection of Prophetic narrations, and *Kitāb al-Masā'il* which includes many entries in *Fiqh*.

included within the Islamicate fabric, or under the rule of Islamic law, in a relatively short period of time. Although the theoretical development of Islamic law as a systematic doctrine and discipline was continuous and dynamic, it was inevitable that the issues related to the legal status of these communities, and how the Muslims ought to see, treat, and coexist with them, are clarified by *fiqh*, more so as things relate to *furū' al-fiqh*. Both the Muslim population and the ruling authorities looked towards *fiqh* to answer the questions related to the status of these communities, what rights they should be guaranteed under the Muslim rule, what responsibilities they ought to upkeep towards the Muslim rule, what protections they deserve, and similar questions which demanded answers from the jurists. This has created the need for Islamic law to formulate legal opinions that determine the status of those groups in relation to life, property, religious practice, civil laws, and all other possible regards.

Muslims encountered different religious groups in the course of their expansion. As a monotheistic religion that belongs to the Abrahamic tradition, Islam has a general classification of the people based on their religious affiliations. Perhaps the most referred to group in the *fiqh* scholarship is that of *ahl al-kitāb* ('the people of the book'), who share with the Muslims their relation with a divinely-revealed scripture and their acknowledgement of God as the creator and worshipped external deity. Some of the prime legal opinions and rulings regarding this group are clarified in the Qur'an and the Sunna, and the extent of the difference in opinions between the jurists on their status was relatively limited. The Muslims, however, encountered people outside of this group, people with no divine book or people who did not acknowledge God as the supreme deity. Zoroastrians, pagans, animistic peoples, Hindus, and Buddhists are examples of peoples which the Muslims encountered. Some of these communities, like the Zoroastrians, had been in contact with the Arabs before Islam (Hourani, 1991: 11), yet when the conquests of the Muslims at the time of the second caliph Omar reached the Persian plateau, the question on the legal status of the Zoroastrians was evidently not as clear to the Muslim community as that related to the Christians and the Jews, who belonged to the Abrahamic tradition. As *fiqh* entered the formative and classical periods, and the major schools of law became more defined and evolved, the Muslims led more conquests and expansions, opening new frontiers with new religious communities and demanding answers to inquiries of higher complexity related to these communities.

Hallaq remarks (2005: 151) that, contrary to the prevailing tone of much of the current scholarship, the doctrinal differences between the *madhāhib* were far from trivial. This is true and evident in the case of the main concern of this thesis; which is to explore the differing opinions on the legal status of the non-Muslims, particularly the communities outside the *ahl al-kitāb* circle, according to the Islamic law and under the Muslim rule. In dealing with this problem, the different schools of Islamic law adopted positions that can easily be described as contrasting or competitive explanations. Further, in matters related to the topic of enquiry we examine in this thesis, the opinions and rulings of the jurists seem to generally belong to the school of law these jurists belong to. Surveying primary sources that pertain to different *madhāhib*, a prevailing view seems to be commonly adopted by the *madhhab* and accepted by its jurists. This is true even when comparing the opinions from both the formative and the classical periods, little difference appears between the opinions of the jurists within one *madhhab* along these periods or from the opinions of the founders of the *madhāhib* themselves, if they had articulated opinions of the status of the non *ahl al-kitāb* communities.

At the same time, the thesis will attempt to go behind the opinions and statements of the individual jurists and attempt to form an explanatory model that enhances the understanding of the positions and probes the vision behind their production. It is true that a high degree of influence on the majority of the formative and classical jurists was reserved to the general position of the school they belonged to. Individual agency, the social and political imagination[i], and other factors, nonetheless, still had

[i] The term 'imagination' is of significance in this context. In works of political theory, political imagination is seen as a concept with a capacity of helping both the ruler and the ruled understand their position in the broader social and political milieu (Flinders, 2015). Its task is seen as enabling individuals (and jurists in the context of this thesis) to make sense of their position and their societies in the world and in relation to the political other. In the study of nations and nationalism, the concept of 'imagined communities', introduced by Benedict Anderson (1983), depicts nations as imagined constructs by the people who see themselves as part of it. The inclusion or exclusion of the social and political other can be influenced by how the ruler, jurist, or the community in general imagine their nation. An imagination that is constructed on ideas of purism and exclusiveness does not facilitate inclusion of other communities. C. Wright Mills writes about the 'Sociological Imagination' (2000) as a term that enables the person to understand the dynamic relation between their personal troubles and issues and the public issues of the social structure. In anthropological studies, Gilbert Durand speaks about the imaginary in anthropological structures, where he proposes the imaginary as a structured set governed by relationality and a logic of difference, which gives rise to, and is influenced by, narrative (Chambers, 2001). In geography, the scope of geographical imagination covers an array of areas,

considerable influence on the classifications, positions, and legal verdicts that these jurists issued. The discussions will reveal a tension in the mind of the Muslim jurists which produced a divergence of opinion on their view towards non-Muslims and non-Abrahamic communities in regards to their inviolability. The tension appears to be between considering the positions that facilitate the social and political inclusion of these communities as an unacceptable form of acknowledging their false beliefs, or considering it a legal act of governance for legitimizing their inclusion to the Muslim rule. This tension is reflected in many discussions regarding the thesis question, among which the discussion around the acceptance of the *jizya* payment and in the contemporary approaches towards the status of non-Muslim communities in Islamic law.

As mentioned earlier, the stance of these schools on this matter was highly important for both the Muslim communities and the ruling authorities, many of whose subjects were non-Muslims and, at times, non *ahl al-kitāb* communities. This prompts the question of the relationship between the authority of the ruler and that of the jurist in this regard. The development of the *fiqh* stance and divergencies on the legal status of the non *ahl al-kitāb* communities may very well be confined to theoretical domains unless the power to implement these laws and policies functions in the same way. The dynamics between the rulership and the legal scholarship had certainly undergone different modes throughout the course of Islamic history. What this thesis shows, however, is that the spectrum of difference between the rulers in the way they implemented (or disregarded) what the *madhāhib* articulated in this question, was significantly wider than that of the jurists pertaining to those *madhāhib*. For example, the official stance the Ḥanafī scholars in the Indian subcontinent took in relation to the legal status of the Hindus was the same in the face of the widely contrasting policies of the Mughal emperors Akbar and Aurangzeb, known to have extremely different positions towards the Hindu population, which were reflected in their policies and decrees.

including they way the world is envisioned, experienced and reshaped (Daniels, 2011). All the previous terms and concepts touch upon the questions under focus in this thesis from different angles.

In the first sections of his book *al-Aḥkām al-Sulṭāniyya*, usually translated as 'The Ordinances of the Government', which is regarded as one of the most cited texts in the literature of Islamic political thought and governance, the prominent jurist Abu al-Ḥasan al-Māwardī (d. 1058) confirms the inseverable bond between political rule and religious duties. He establishes the priority of the religious duties as an intrinsic part of the essence of leadership in the Islamic narrative, as he states in the first chapter of the book that 'the purpose of the existence of rulership is to succeed Prophethood in the duties of protecting religion and governing political issues' (1989: 3 [own translation]). It can be seen that the religious nature and responsibility of leadership preceded the political nature according to this view, suggesting a congruence between religious and political or administrative responsibilities in Islamic law. 'Political issues' is an area whose conduct regulation and standardization falls upon the *fiqh*. Indeed, one cannot assume that the establishment of all the Islamic states had this legitimacy as the sole force to claim rulership. Many political, social, economic and other factors come together to form the bases to constitute governments throughout Islamic history. Nevertheless, this extremely brief discussion on the nature of the relationship between Islamic law and rulership is crucial to the following examination of the Muslims' administrative conduct during their rule in the lands where communities from outside the *ahl al-kitāb* circle lived. In addition to that, it is useful to keep this consideration in mind when analyzing the dynamics between the rulers and the jurists on different issues regarding dealing with non-Muslims. For the most part, the rule of law seems to come out prevalent over the inclination of the rulership, likely because of the consistency of the Islamic legal scholarship over the years relative to the personal views of a particular ruler. With that, it seems true that, in most disagreements between the *fuqahā'* and the rulers, it was usually the rulers who lost (Williams, 1971: 34). Still, when discussing the law as dictated by the *fuqahā'* and as administered by the rulers, Stanely Tritton (2008: 4) argues that, starting from the 9th century, the enforcement of laws in Muslim-ruled domains, although mostly based on the work of the jurists, frequently depended on the temperament of the political leadership of the time.

Medhat al-Laithi presents (2015) a remarkable account on the relationship between the legal and the political in the thought of the Muslim jurists. He analyses in his work on what came to be called *al-fiqh al-siyāsī* ('political *fiqh*') the way the Muslim jurists

dealt with the political questions that the actual world matters gave rise to and which needed the guidance of *fiqh* as the Islamic legal tradition. By using examples of prominent Muslim jurists like Mawardi, Juwaini, and Ibn Taymiyyah, he attempts to draw a general methodology for the treatment of the political situation among the Muslim jurists. Laithi highlights the dynamic relationship between what is dictated by the sources of law in Islam and what is imposed by the real world in which all human interactions and activities occur, be they political, social or economic. He shows, theoretically, how the dependence on the textual sources of Islamic law, fundamentally the Qur'an and the Sunnah, provides a basis from which the jurist moves into understanding the matters of the actual world in their light, as these sources provide a rather generic view on the rulings of Islam in such matters (2015: 34-36). In other words, the jurist bases their dealing with issues like the status of non-Muslims – or non-Abrahamic peoples, at the focus of this thesis – on their understanding of the religious textual sources in addition to their concrete involvement in the issues of their time and geographical location. The interrelation between the two can be seen in the methodology of this thesis, where the theoretical formation of the opinions of Muslim jurists – and, collectively, the schools of Islamic law – were associated with their views towards the non-Abrahamic communities they practically knew or lived with.

In discussing the inviolability of the non-Muslims in Islamic law, the vision of the *faqīh* towards the political reality points to a relationship between the religious (legal and theological) and the political. Laithi surmises (2015: 42-53) four characteristics of this vision; that its main focus is to formulate laws and legal opinions. That is, taking the start point of the legalist in dealing with the political reality; its continuation through history by means of narration and study; combining the theoretical with the practical; and the religious nature of this vision. These characteristics, as articulate and encompassing as they are, are present when we try to understand the way the jurists approached the question of the status of non-Muslims in the Islamic law and rule. The laws and opinions that they formulated, being associated with chains of legal scholarship, had a non-mistakeable religious nature, where the jurist deals with the political issues from the viewpoint of Islam and the revelation on which the religious principles are based. It is remarkable that, through this religious viewpoint itself, many jurists see the Muslim human differently from the non-Muslim on matters based on theological standards, while stating their opinion regarding the inclusion, inviolability,

and equality of all humans based on considerations of humanity, which they also base within the religious worldview. The jurists who opposed the latter opinion, this thesis argues, seemed to have understood the purely theological standard to be essential in their religious obligation as jurists when it came to the question of the inclusion of non-Muslim and, particularly, non-Abrahamic communities.

The main purpose of this thesis is to provide an examination that serves the question of the legal status of the communities of non *ahl al-kitāb* religious affiliations under the Muslim rule. This will be carried out by analyzing the generally accepted positions of each of the different schools of Islamic law on this question, primarily focusing on the protection and inviolability of the basic axiomatic rights of these communities. This will be carried out by philological surveying and analyses of primary sources of *fiqh* in their original Arabic, engaging with their epistemology and attempting to classify rationales of their adopted positions, in addition to commentaries and secondary sources on the topic.

To attempt to reach this purpose, I structured the thesis by grouping its chapters into two main sections and one additional section. The first section engages with the topic on a rather theoretical framework. That is, it attempts to answer the question of the status of the people from non-Muslim and non *ahl al-kitāb* religious affiliations according to the *fuqahā'* of the four major Sunnī schools of Islamic law that were previously mentioned. The section begins with chapter one, which commences by discussing the concept of universality of the rights and protection of humans, as well as the human agency in Islamic law. It proceeds to examine the morphology of the terms that are used to refer to these rights in Islam. The main purpose of the chapter is to present different debates and divergent positions on the theoretical discussion of laws and rights in jurisprudence and in the scholarship of Human Rights as divergencies that share parallel with the divergence within the Islamic legal tradition on the issue of the protection of humans and its universality, as the thesis argues. These divergences are namely between the legal positivist and the naturalist schools of jurisprudential thought and between the universalist and particularist positions in Human Rights studies. This is followed by a chapter that focuses on the view of Islamic law towards non-Muslims. It starts by laying the ground for the following discussion by examining the methodological classification of the non-Muslim communities

according to the Muslim jurists and theologians. This will result in a classification that is based on religious affiliation together with geographical residence to serve as a module for the examination to which the sections that follow are devoted. The chapter then dives into the divergent paradigms within the Islamic legal tradition around the status and inviolability of the non-Muslims. This includes a deeper analysis of what it entails to be included or excluded from the *ahl al-kitāb* circle, and the implications this creates on the legal status of the said community. The primary method will be discussing hermeneutics of the primary sources of Islamic law, Qur'anic exegeses, and other narrations. The chapter will build on a vital divergence in the scholarship of Islamic law; the universalistic school is the position in this divergence represented mainly by the Ḥanafī *madhhab*, which sees humanity as the virtue by which inviolability – or a level of inviolability, to say the least – is a guaranteed right for all humans, regardless of their religious affiliation. The other side of the debate, the communalistic school, takes a more specific view, seeing creed and conventions as the deciding factor, and excluding those who do not belong in each from the circle of inviolability (Şentürk, 2006). The thesis will place this divergence as a link between the previously mentioned debates in law and human rights and a divergence that takes these legal opinions in the direction of non *ahl al-kitāb* groups.

Chapter three is central to the main argument of the thesis as it uses the concept of the *jizya*, the payable sum that Muslims collected from their non-Muslim subjects on a yearly basis, as a key to confirm the eligibility of a religious community for inclusion in *dhimma*, or inviolability under the Muslim rule. It begins by presenting the meanings associated with the concepts of *dhimma* and *jizya*, noting the various meanings that the latter has in Islamic legal scholarship and exegeses. Discussing the differing propositions of the schools of Islamic law around the purpose of the *jizya*, we come to the argument that the meaning and purpose of the *jizya* is closer to being a symbolic payment to signify the dominance of the Muslim rule rather than a payment in exchange for the inviolability of life. Still, acceptance of this payment from a certain religious group is, essentially, an affirmation of the potentiality of including that group in the circle of protection and inviolability. Denying this payment, conversely, signifies that said group does not qualify for inviolability or protection in the eyes of the jurists. By surveying major primary works pertaining to all four schools of Islamic law, a compilation of the positions of the *madhāhib* towards accepting the *jizya* from

different religious groups is developed. This key will be used as the dividing line between a further comparative reading which is central to this thesis. This is between what the thesis calls the Adamiyyah paradigm, which accepts the inclusion of all religious groups – including people of non *ahl al-kitāb* religious affiliation – in the circle of inviolability, and the Ibrahimiyyah paradigm, which only accepts groups from Abrahamic religious traditions, or *ahl al-kitāb* communities. I propose this categorization and analysis of different positions on *jizya* as a method to support to the paradigm of Adamiyyah, as it strengthens the position that human axiomatic rights – particularly lives – are inviolable regardless of their religious affiliations.

The second section of the thesis examines chosen historical cases of Muslim presence and rule in areas where the inhabitants the Muslims encountered were of non *ahl al-kitāb* religious affiliations. The section attempts to highlight the status of these communities under the Muslim rule in relation to the theoretical framework constructed by the scholarship of *fiqh*. Additionally, it examines the dynamics between the scholarship and the rulership in this regard. The section begins with chapter four, which focuses on the status of the Zoroastrians of the Persian plateau according to the Muslims. This case was chosen for different reasons. It is particularly interesting as the encounter between the Muslims as new rulers of Iran occurred relatively early in Islamic history, before the maturation of the tradition of *fiqh* and the systematization of its study. It also represents a case where a Prophetic narration was taken as justification for the inclusion of the Zoroastrians in the *dhimma* status, and consequently in the protection and affirmation of the inviolability of their livelihood and religious practices under the Muslim rule. Chapter five takes the pagans and the animistic peoples of the Northern and Northwestern parts of Africa as the second case. Although the resources on this geographical area proved to be extremely challenging to find, I chose this case because of the insight it offers on the status of the non *ahl al-kitāb* populations according to the Mālikī and the Ẓāhirī schools of *fiqh*, which, for the most part, had an accountable influence in these areas.

The last chapter in the section is the case of the Hindus under the Muslim rule in the Indian subcontinent. As the system of *madhāhib* was well-established by that time, this case, I propose, provides considerable potentiality to aid our understanding of the status of the non *ahl al-kitāb* communities according to Islamic law, as well as the

degrees to which the ruling authority had an effect in the implementation of the rulings of the law pertaining to this status. Studying the Muslim rule of India, we come to see three major trends in dealing with the problem around the status of the Hindus under that rule: what can be called 'theological approximation', the resort to syncretism, and the tradition of *fiqh*. The chapter concludes that staying loyal to the scholarship of *fiqh*, represented in the chapter by the celebrated Ḥanafī encyclopedic work, the *Fatawa-i Hindiyyah*, which was compiled at the request of the Muslim Indian ruler Alamgir, suffices to establish the inviolability and eligibility of the Hindus to be included in *dhimma*, without the need to resort to the other trends. The case also serves in exploring the dynamics between the rulers and the jurists at some points in the history of the Muslim presence. Written accounts, as well as personal interviews I conducted with scholars of history and religion in India, suggest the scope of the ruler's personality was prevalent in their governance of the Hindus. This case continues to be relevant, I believe, as the Hindus continued to be a majority until this day, where the Muslim rule is no longer the case in India. A brief discussion on the implications of this tradition on contemporary thought will conclude this chapter.

The third and last section highlights the continuity of these debates in contemporary times. Four Muslim scholars have been chosen to represent different positions pertaining to the previously discussed paradigms and the answers they provide for some of the questions the thesis deals with, such as the *jizya*, the inviolability, and other issues. To demonstrate this continuity, the chapter will present the following contemporary jurists and scholars: Wahba al-Zuhaili, Abdul Aziz ibn Baz, Abdul Karim Zaydan, and Hüseyin Kâzım Kadri. Each of the previously mentioned scholars represents a varying approach to the said questions, ranging from adhering to either side of the Adamiyyah-Ibrahimiyyah debate, to adopting a slightly different narrative and dealing with the concepts of human rights and citizenship in today's world.

A Note on Methodology

In the course of discussing the divergent positions that are represented in the tradition of *fiqh* regarding the questions at its focus, this thesis touches upon the disciplines of Islamic law, political history, legal philosophy, and human rights in Islam. Numerous existing studies offer discussions on the status of non-Muslims in Islamic law by relying on the examination of primary religious texts or descriptive historical narrations. This study tries to highlight the divergence within the Islamic jurisprudential tradition on the inclusion of non-Abrahamic religious communities and its implications on the history of the Muslim rule of these communities, thereby situating it as a historical inquiry in the field of comparative political sociology.

This study relies primarily on canonical texts that pertain to known schools of Islamic law. It follows the arguments articulated by notable jurists and situates them in the divergence mentioned earlier, the dividing lines of which, to a great extent, can be found around the different schools of Islamic law. Therefore, the methodology followed throughout the thesis, particularly the first section, presumes that the given opinions of the scholars in the formative, classical and post-classical period were formulated in light of a school of thought, a jurisprudential tradition that informed their view of the question. The only exception, perhaps, would be the founders of these schools of law. It is for this reason that one can see general characteristics shared throughout the views of scholars who belong to the same *madhab* regarding the non-Muslim and non-Abrahamic communities. At the same time, the existence of this jurisprudential tradition as a background does not deny individual agency for each of the scholars. The thesis will follow the positions and reasonings of individual scholars taking into consideration their agency. In other words, despite the scholar pertaining to a school of law, their opinions my very well be influenced by their own views, reasoning, or other surrounding factors. Different scholars belonging to the same jurisprudential tradition may display different approaches to the questions under the focus of this study, and may – as will be shown throughout the next chapters – arrive at conclusions that are different from the general position of the schools they follow. The thesis, as a result, attempts to keep both modes of analysis within its methodology. The relationship between the theological and the political realms in the thought of the Muslim jurists is present throughout the discussions on the status of the non-

Abrahamic communities under the Muslim rule. This dynamic relationship has had profound implications on the way the Muslims viewed the status of these communities, and, therefore, has a central place in the study of the nature of the Islamicate.

Of course, the meaning of a text or the language used by an author is influenced and informed by the social factors and context in which they are situated. This applies to the Muslim scholars, whose expressions are bound by time and space even when they relate to the understanding of the Qur'an or other religious texts (Omari, 2008). Projecting this to the area of inquiry relevant to this thesis, we can assume that the legal opinions, positions, and even the language used by the scholars of Islamic law in reference to certain religious groups may have also been informed by this context. Therefore, a synchronic mode of analysis is required. Dispersed throughout this thesis, I have attempted to extend the analyses beyond the narrated rationales that exist behind a certain position and attempt to discuss the underlying assumptions and considerations that may have shaped these positions.

Section One

The Status of Non *Ahl al-Kitāb* Communities: Islamic Legal and Theological Paradigms

Chapter One

Debates on Human Rights and the Nature of Law

Prior to engaging with the debate on the status of non *ahl al-kitāb* communities in Islamic law, it is imperative that we begin with a chapter that lays the ground for the following discussions and sets up central key terminologies and discussions around human rights in general and in Islamic thought. This chapter provides a discussion on the rights of humans, focused around two central terms. The first of which is the universality of these rights over all human beings, the second is the question of morality, which are considered two bases for what has come to be described as the set of Human Rights. The second section will then engage with the terms in the Islamic scholarship that denote the rights and protection of human beings, such as *'iṣmah al-ādamiyīn*. These discussions are necessary to understand the foundations and the classification of the rights of humans in Islamic thought.

The last two subtitles in this chapter explore two levels of divergence when it comes to law and rights: the first is the Positivist – Naturalist debate within theoretical jurisprudence, and the second is the Universalist – Relativist debate in the literature of Human Rights. The sections will discuss these parallel divergences and will demonstrate how the first divergence offers a theoretical basis for the second. The latter, in turn, offers parallel similarities with the divergence within the Islamic legal scholarship on rights and inviolability.

1.1 A Question of Morality and Universality

Discussions around universal human rights occupy the forefront of many of the legal, moral, sociological and political debates of today's world. Yet, as Donnelly notes (2011: 494), even less than a century ago, the issue of human rights was not seen as a legitimate concern on the international level. Nation states adopted agendas that prioritized constitutionalizing and protecting the rights of their own citizens. At the

same time, any treatment that could be considered inhumane which may have been conducted on behalf of a state against its own nationals – an incident that could be seen as a violation of human rights nowadays – was viewed strictly within the umbrella of the sovereignty of that named state. How a government of a particular state opted to treat its own citizens was a question of the jurisdiction of that state and primarily a matter of national – rather than international – concern. Simultaneously, an attempt by another state to rectify or influence this treatment was seen as an unacceptable interference and a breach of the national sovereignty of that state. One of the basic theoretical issues that lie at the root of this consideration is a question of universal morality; namely, what constitutes or defines an 'immoral' exercise towards citizens? For some, an exercise that is considered immoral or inhumane according to one culture, nation, or state might not be considered as such according to another (Rachels, 2014: 54, 55). The tension intensifies, however, considering that different answers to that question potentially lead to the creation of a global setting in which a particular political entity cannot be held accountable for immoral, unethical, or any form of mistreatment towards humans that fall under its jurisdiction, based on the assumption that that conduct might not be seen as immoral nor unethical according to this entity's cultural or national viewpoint. Even when issues of morality and human rights were addressed internationally, they were usually discussed in a discrete fashion that was intellectually placed in an ethical rather than a legal framework. This framework lacked both the sense of global unity in adopting and adhering to human rights laws and the power to enforce such a commitment whenever basic human rights were violated on the international level. Universal human rights had a nature of being recommended rather than required.

The horrors that the two World Wars brought to the surface of the international attention had a significant role in moving the human rights debate to the realm of legal and jurisprudential inquiry and introducing it in a more persuasive manner to the international community as an arena where the power of law should be prevalent. On December 10, 1948, the United Nations Third General Assembly adopted the Universal Declaration of Human Rights, making it clear that it was born out of the experiences of the War (Morsink, 1993: 357). This declaration marked a historical milestone in the adoption and placement of the human rights issue as a critical concern on the international level. Two important assumptions could be derived from the

declaration which are core and decisive values in the discussion around the rights of humans and their protection. As the term suggests, it is the *human* that is the subject of law in this area, and all the proposed rights that fall under this family apply particularly and inclusively to the human agent. In other words, the rights are supposed to be applicable and relatable to the human individual. Secondly, the use of the term 'universal' in the declaration of human rights stresses the fundamental and necessary universality of those rights, meaning that it is a family of rights that views *all the humans* in the world as worthy agents for their applicability.

Many classical texts of legal theory and Islamic jurisprudence addressed the issue of the human agency as the subject of the law. In *Al-Mustaṣfā*, the major work of Uṣūl al-fiqh authored by the prominent Muslim scholar, philosopher, and theologian Abū Ḥāmid Muḥammad al-Ghazālī (d. 1111), the foundational point of the human agent being the subject of the law was affirmed. Ghazālī states that it is the human who is the subject upon which God's commissioning ('*taklīf*') falls, and that being a legally responsible creature is a consequence of this commissioning. Ghazālī establishes this principle simply by linking the human agent being the subject of the law to its ability to receive and comprehend God's discourse ('*khiṭāb*') (1993: 67). The linkage goes as follows: the discourse of God, with the laws, commands and prohibitions that it entails, essentially requires obedience ('*ṭā'a*') and compliance ('*imtithāl*') from the receiver's side, this cannot actualize unless the receiver is able to have an intention for compliance with that discourse, which can only result from an ability to receive and comprehend it, as the intention to obey requires a knowledge of what is to be obeyed. It becomes obvious that this applies to the human being as opposed to objects and other living things, who might be able to hear but not to comprehend the discourse. Since the sane human being is the only subject that could receive and potentially understand the *khiṭāb* of God then it follows that the human being *is* the subject of the divine law, including the laws that dictate protection, freedom, penalties, and other families of laws.

1.2 *'Iṣmah al-Ādamiyīn* as a Term in an Islamic Legal Context

As for the second principle that lies at the core of the discussion on the rights of humans, one cannot fail but notice that the universalism which Islam adopts as a religion and the human contexts that are addressed by the Islamic law go hand in hand when it comes to the applicability of rights. The basis that assumes the 'human', as opposed to only the Muslim or the citizen of the abode of Islam, as an agent for these rights automatically results in making the rights 'universal'. To begin with the phrase itself, the term which is used in Islamic sources – particularly the classical ones – to denote the term 'human rights' is *ḥuqūq al-ādamiyyīn* (Ibn Nur al-Din, 2012: 3: 279; Jassas, 1994a: 2: 516), which can be literally translated as 'the rights of the children of Adam'. A translation of the Arabic word *ḥaq* (pl. *ḥuqūq*) which is directly related to this thesis is 'right'. According to Muslim legal scholars, rights are generally classified into the rights of God ('*ḥuqūq Allāh*') and the rights of the servants or persons ('*ḥuqūq al-'ibād*') (Hamwi, 1985: 4: 160). The rights of God are seen as the obligations that are required from humans to their God and, in penal terms, what is related to transgressing against what God has forbidden. Jurists attribute to the term *ḥuqūq Allāh* what is related to the general right, or what is public in nature rather than individualistic, such as transgressing against the rule of abstaining from hunting at times or places where hunting is forbidden. On the other hand, he term *ḥuqūq al-'ibād* denotes what is related to the individual person, such as their property and what is related to its violation. Of course, in many cases, one can notice both the right of God and the right of the servants in the same case, this has resulted in the scholars acknowledgement of a classification of what includes both rights ('*ijtimā' ḥaq Allāh wa ḥaq al-'abd*'), such as what relates to the transgression of slandering ('*qadhf*') according to the Ḥanafī school (Ibn Maza, 2004: 8: 200). Muhammad Zuhaili has classified (2006: 1: 482) what is related to what is not exclusively that of God or the servant into two subcategories: that which entails both rights, but has the right of God more considerable, and that which entails both right but has the right of the servant more considerable. An example of the first category the *qadhf* according to the Ḥanafīs as mentioned, and an example of the second is the penalty of *qiṣāṣ* ('retaliation in kind'). The majority of Shāfi'ī scholars tend to place the element of the right of the servants on a higher level of consideration than the right of God in these subcategories,

stemming from the ground that the servants are more needy for justice and that God does not have any need for compensation, retaliation, or restoration of right or dignity like humans do.

The term *ḥuqūq al-ādamiyyīn* demonstrates the intrinsic characteristic of universality in the usage of the word 'human' ('*ādamiy*') as to denote all the descendants of Adam, who, according to the Islamic as well as other religious traditions' belief, is the father from whom all humans are descended. The term also inherently entails the assumption that the human agent is the subject of the laws concerning these rights. It is useful to mention, however, that the use of the term *ḥuqūq al-ādamiyyīn* in the Islamic classical texts of law and in the various Qur'anic exegeses mostly refer to the rights of the humans in a 'penal code' context, sometimes put in a textual compartment that is adjacent to and immediately following the rights of God ('*ḥuqūq Allāh*'). *Ḥuqūq al-ādamiyyīn* refers to, as a term used in that penal context, the set of the rights of the human that duly require a penalty or a punishment in case they were violated. Violations such as homicide, stealing, or backbiting fall under this category. These and other violations induce a right of a human agent, the offended, to befall on another bearer human agent, the offender, who becomes required to compensate for this right, whether in this world as a penalty or the next as a punishment from God.

The term that is used to denote the protection of these rights in the classical Islamic legal scholarship is *'iṣmah al-ādamiyīn*, which could be translated as 'the inviolability of the children of Adam'. It can be suggested that this term also encompasses the connotation of the set of human rights being both universal to all humans and subject to a form of penalty in the case of violation. Thus, it could be said that, for both terms *ḥuqūq al-ādamiyīn* and *'iṣmah al-ādamiyīn*, the point of view that is taken by the Islamic jurisprudence is that these set of rights are human rights in the sense that they are inviolable for the children of Adam, and that some form of punishment or consequence is due if any violation of these rights takes place. This can be understood from the first term by the context of which it has been used in classical sources, and for the second by the literal morphological analyses of the term itself, bearing in mind that the Arabic term *'iṣmah* can be translated into 'protection', 'sanctity', and 'inviolability'. The concept of *'iṣmah* is one that indicates a general sense of protection, the term is used in Islamic contexts to denote more than one concept, but

all can be seen to have the element of protection or inviolability present in them. One connotation is the protection from fallacy or major sin, a trait Muslims belief attributes to all the prophets and messengers of God, as is mentioned by Abū Ḥanīfa in his theology text *Al-Fiqh al-Akbar* (1999: 37-39). Other connotations of this term include protection from harm and the marriage bond which protects the married couple from falling into sin or the woman to be allowed other men, which is apparent in the common description of a married woman to be in the *'iṣmah* of the man. In *fiqh*, the formulated term *'iṣmah* has come to connote the basic rights of human beings, a connotation that includes meanings of protection, sanctity, or inviolability, in comparison to the formulation of the term 'human rights', which is used in the circles of International Relations (Şentürk, 2001: 137). The term itself carries the meaning of *ḥurma*, which can be translated as sanctity or unlawfulness, deeming the consequence of violation of what is deemed a right for a person in that sense.

Muslim jurists classified these rights under two categories: the inviolability the violation of which causes sin, such as backbiting, and the one the violation of which calls for penalty, such as murder, which can be enforced by the state. The concept of inviolability, in its two types, will be discussed later in this thesis with more detail. These set of inviolable rights are put in comparison with the rights of God because, in various cases, their penalties could be more difficult to implement, as what relates to God is easily defined and could – at the same time – be forgiven by God.

1.3 Human Rights and Islam

As the modern Human Rights movement is believed to have been established as an interdisciplinary discourse, as well as a professional practice by organizations, during and after the 1940's (Cargas, 2019), tracing its origins to 17th century Europe, a pressing question arises on the relatability of the Islamic system of *ḥuqūq* or the principle of *'iṣmah* to the doctrine of Human Rights the way it is known and referred to in modern times. Naming the Islamic set of inviolable rights as 'Human Rights', and identifying the notion of protection in Islam as such, may suggest inadequacy according to some. This thesis will attempt to tackle this legitimate question by offering a systematic comparison between the two systems, suggesting similarities and

arguing that '*iṣmah al-ādamiyīn*' is a more suitable term to denote the protection of rights in the Islamic tradition.

Many definitions exist for 'Human Rights' in academic circles, of particular relevance to this thesis is the definition presented in the Stanford Encyclopedia of Philosophy (Nickel, 2003). Human rights are described as the 'norms that aspire to protect all people everywhere from severe political, legal, and social abuses.' This definition is relevant as carries the meaning of inviolability, sanctity, or protection which was discussed earlier in relation to the term *'iṣmah*. Nickel also notes (2003) that this definition highlights that human rights are, by nature, universal. The trait of universality is seen to be a defining factor for human rights, which have to necessarily belong to all persons. Another characteristic of human rights which distinguish them from other rights of the people is urgency and carry a sense of priority to them. In *The Law of Peoples*, John Rawls states (1999: 79) that human rights are 'a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.'. This sense of urgency and priority seems to place human rights in a context of protection from prosecution rather than enrichment of the human experience. In any case, it is clear that the term denotes a level of basic necessity and priority, all the while maintaining that these rights transcend state borders and political boundaries to encompass all human beings, not as privileges, but as necessary rights.

For the purposes of International Relations disciplines, the term 'Human Rights' tends to roughly mean the set of rights which have been elaborated by the principal international treaties of human rights: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Convention on the Rights of Persons with Disabilities (2006), International Convention for the Protection of All Persons from Enforced Disappearance (2006) (Donnelly, 2011 :496, 497). The literature on human rights in

this framework is focused on these constitutionalized set of efforts that are all relatively modern in time. This is not to deny in any way that literature on the rights of human beings had existed in preceding times in history before those declarations came into formation, but it appears to be the case that the term has been accepted to be pointing out these constitutional international efforts, especially at the levels of political scholarship and academia.

As was shown before, the term *ḥuqūq al-ādamiyīn* in the classical Islamic scholarship is the closest term that can, literally speaking, connote human rights. In fact, it is this term that the normal Arabic speaker would consider to mean 'human rights'. This term, however, appears to almost always come in the context of the rights of the human agent that should be fulfilled or should not be violated by other humans, and not exactly the general rights of a human regardless of that context. In other words, when a *ḥaq* ('right', singular form) of a person is mentioned in a text of Islamic law, it is typically to indicate a right of that person upon another person or another group; that either this right has to be fulfilled, like the rights of parents upon their children or the right of a money lender to be paid back their money by the borrower; or/and that this right should not be violated in ways such as murder or theft. Both considerations are intertwined, as a right of an individual in an Islamic legal sense is attached with a penalty in case of violation, be it worldly (executed by the state) and/or a matter left to the hereafter (judged by God). What is also fundamental to this approach to human rights is that two or more human agents are always involved in the *ḥuqūq* system; one can always notice the existence of more than one agent to formulate the rights system: the person whose right is in question and the person(s) upon whom falls the responsibility to fulfill this right, or to respect and not violate it in any way. It could be said that, in this view, each of the rights is 'supported' by two or more human agents. *Ḥuqūq al-ādamiyīn* in this context is mentioned often in legal distinction to *ḥuqūq Allāh* ('the Rights of God'). In some matters, especially criminal law, it is noticed that the Islamic legal system places enormous vitality on fulfilling the rights of humans particularly. The reason for that is that repentance ('*tawba*') from a sinful deed is believed – in most cases – to be accepted by God and therefore fulfills the right of God by itself, whereas the rights of humankind have to be fulfilled by action or punished by the appropriate penalty. An example of which is the penalty of mugging bandits ('*al-ḥirāba*') that is mentioned in many classical sources of Islamic law. There

exists a consensus among the jurists that repentance from this act, even without being punished by the authorities, is accepted. According to all the major schools of Islamic law, the rights of God are considered fulfilled by this repentance, as it ought to be assumed that the repentance is accepted by Him, but the rights of humans ('*ḥuqūq al-ādamiyīn*') are not (Ibn Nur al-Din, 2012: 3: 133). Thus, the affected persons have to be compensated in a suitable way before their rights can be considered fulfilled. Another important consideration is that the rights of God are understood by the jurists to be based on forgiveness and ease ('*mabniyya 'ala al-taysīr wa al-musāmaḥa*'), while the rights of humans are based on restriction and need ('*mabniyya 'ala al-muḍāyaqa wl al-mushāḥḥa*') and, therefore, call for strictness in terms of value and punishment (Maqdisi, 2002: 2: 181 [own translation]).[i]

Ibrahim al-Marzouqi presents (2000: 139-142) a classification of the rights (*ḥuqūq*) according to what he calls the right-holder, or the bearer of the right as divided by Muslim jurists. In this classification, the rights are divided into 1- Allah's rights, which are public rights in nature and are viewed as obligatory for the Muslims to fulfill, as not fulfilling them is considered harmful to the society, 2- Joint rights, which are common between Allah and humans, and the breach of which is seen as a threat to both the public and the private interests, such as unchastity allegations ('*al-qadhf*'), which is seen as a breach of both God's and the human victim's rights, 3- Private rights, which includes the individual's rights to their own property, and leaves space for the person to demand or waive it if it has been violated by another agent.

The thesis will now provide a brief discussion of the term *'iṣmah al-ādamiyīn*, which, as mentioned before, could be translated into 'the inviolability of the children of Adam', not just as another way to denote human rights in Islam, but also as a better Islamic alternative term to point out to the rights that are basic to every human, particularly those necessary rights that are ought to be protected. In the Islamic *fiqh* literature, the term *'iṣmah al-ādamiyīn* itself is not commonly used. Instead, we find terms like *'iṣmah al-dam* ('the inviolability of blood (life)), *'iṣmah al-nafs* (inviolability of the soul/self'), *'iṣmah al-māl* ('the inviolability of property'), *'iṣmah*

[i] For more on the nature of the rights of God and the rights of humans, see Abdullah ibn Yusuf al-Juwainī's (d. 1047) celebrated work of *'uṣūl al-fiqh*: *Al-Jam' wa al-Farq*, also known as *kitāb al-furūq* (2004), vol.3, pp. 483-490.

al-dīn (‘protection/inviolability of religion’), and such terms that can collectively formulate the generic term *‘iṣmah al-ādamiyīn*. In some writings this is substituted by terms such as *ḥurmat al-dam*, which can be translated to ‘the impermissibility of [violating the] blood (life)’ but, even so, it remains generally used to denote a similar meaning to that of *‘iṣmah*. It could be suggested that this term is the most adequate Islamic legal counterpart to that of ‘human rights’ which is used in modern international discussions, while not suggesting that the connotations of both systems are necessarily congruent. This term, similar to *ḥuqūq al-ādamiyīn*, indicates ‘rights’ that are assigned to humans and are given a state of legal and/or moral protection, a state of being forbidden to breach or violate. What makes it different from the other term, however, is that it does not assume the ‘right’ to be ‘supported’ by more than one human agent. It rather affirms the inviolability of the basic human rights in a more generic way, a way that attaches this status of inviolability to these rights for the individual human without, and prior to, any other human agent(s) coming into the equation. Thus, it could be said that, from an Islamic legal perspective, the *‘iṣmah* is a status that is affirmed *a priori* of any other human contact or interaction, whereas an individual’s *ḥaq* is usually a status that is actualized *a posteriori* of an interaction with other human agents, the agents that become legally and/or morally responsible for that right. The term *‘iṣmah al-ādamiyīn*, however, applies to the rights that are protected by necessity for human beings, it relates to the ‘axiomatic’ rights, such as the right for the protection of life, property, family, religion, and expression, a set of rights that can include many other rights as subsequent to them.

Drawing from the previous discussions, this thesis argues that the term *‘iṣmah al-ādamiyīn* is the most suitable Islamic *fiqh* counterpart to denote major aspects carried by the modern term ‘human rights’ – aspects which are shared by the Islamic view of rights as necessary and inviolable. As mentioned before, *‘iṣmah al-ādamiyīn* entails, in its terminology, the inviolable nature of the basic rights for the person, it points out to the rights of human beings from the viewpoint of these rights impermissibility to be violated or stripped out from a person, as we have shown before, it transcends the necessity of another human agent to be considered as the duty bearer, and it also notes the feature of universality as it literally ascribes the inviolability to ‘the children of Adam’, a category that includes all the humans belonging to any gender, race, color or religious tradition. Therefore, this term encompasses the necessary basic elements of

a term to denote human rights, includes the characteristics of the sanctity and the universality of the rights, and – at the same time – could be terminologically authentic and loyal to the Muslim classical legal scholarship without the risk of attributing a modern concept to a classical tradition or equating a vast classical tradition to a modernly-developed discipline without complete intellectual legitimacy.

1.4 The Basis of the Rights of Humans: The Positivist - Naturalist Debate

The debate on the legal basis of the human rights set of laws is rooted within an original theoretical debate in the field of jurisprudence and the nature of law in general. In the following section the thesis will offer a humble overview of the debate between two of the most influential schools of thought in jurisprudence and draw the connection between it and the debate within the scholarship of Human Rights in the modern world. This will be a part of a bigger scheme to relate to the Islamic jurisprudential debate in the classical texts of Islamic law as philosophically similar to this timeless debate.

Positivism, also known as empiricism, is a wide-spread philosophical method that seeks to understand fields of inquiry by empirical observation and verification in a scientific method. Legal positivism is a school of thought in jurisprudence that derives principles from, and is similar in many ways to, philosophical positivism, as the name suggests. It is, according to legal scholars, the most influential school of thought in jurisprudence (Ratnapala, 2009: 21). A major intellectual characteristic of this school is that it defines law as what is in reality dictated by the authorities or as actually practiced by the courts. In other words, if the legal opinion is to be given according to the positivist school one has to regard and understand the law as it actually is, as opposed to what the law ought to be. Law is seen according to this school as a 'social fact' (21), it is the human lawgiver that is placed at the center of the legal system and it is the institutions of the society that the lawgiver creates, such as parliaments, courts and police forces, that practice and enforce that system. Law is not considered law if it is not declared so by this authority or practiced by the legal institutions, and that notion consequently does not consider norms, customs or other human values as 'law' unless they are officially adopted by that authority, i.e. stated in a constitution or issued in a way by the lawgiver. Legal positivism places little or no regard to morality as a

basis for dictating the law, instead emphasizing social facts, and deeming, in the words of the English jurist John Austin, the existence of the law 'one thing; its merit and demerit another' (1995: 157). Surely, morality and the law can often be found conjoint, but this does not indicate, according to this school, that it is morality and not the law itself that dictated such 'morally-righteous' legal verdicts or articles. Distinguishable from all other types of social norms and values, '[l]aw is law irrespective of its moral standing' (Ratnapala, 2009: 9), and the logical bases of the rules of law may as well be separated from those that moral or social rules of conduct could be based on. This school has gained momentum in modern times in many parts of the world.

As opposed to the positivist school, which believes that law has no necessary connection with morality, the natural law tradition holds that law and morality are inseparable. The school derives its name from the belief that such law exists independently of human will (2009: 119) and, as such, it is perceived as natural rather than 'proposed' by a human agent. One can suggest that this school views law as a phenomenon that transcends the rulings and verdicts of bodies and institutions of legislature in the society such as courts and parliaments, and that it views law as a moral code that derives its legitimacy from it being the medium to instate, and even the manifestation and embodiment of, moral values. This school assumes the existence of a higher law that is morally perfect and takes it as a benchmark to bring the human laws closer to in order to achieve morality and justice. Natural law in this sense relates to what ought to be done (or not), deriving its considerations from moral values that transcend the human propositions for what should or should not be done. According to this school, the governing law in any human society ought to embody moral rulings that may be deemed by the positivist school as being 'laws improperly so called'. That is, the social norms and the religious teachings which place morality as a consideration above other social considerations are seen as what the 'law' ought to be, unlike the previously mentioned school, which holds no regard for morality in comparison to what the law is actually dictated by the lawgiver. A key concept in this tradition is the concept of justice, itself being a highly regarded moral value and an aspiration that is almost readily assumed to be present in morally-advanced human societies. For the most uncompromising naturalists, St. Augustine's proclamation - *Lex injusta non est lex* (law that is unjust is not law) sums the way they perceive the relation between law and justice (119). Another important aspect of this school is that it bases its claims of

the existence of natural rights for all human beings is that there are life sustaining conditions that human existence, in its basic forms, depends on, which leads its philosophers to maintain that humans are endowed with certain natural rights and liberties 'simply by virtue of being born' (121), an argument that, in spite of difference in the starting point than this case, one may point out, has been held by grand schools in Islamic law, represented by prominent jurists and judges within the tradition of *fiqh*, as will be shown later in this thesis.

The natural tradition, with moral law at its focus, is described in legal texts as the 'higher' moral law (Finnis, 2007). The use of the term 'high' in this context is not to indicate intellectual superiority of this school to the positivist school, but to indicate that the nature of this tradition is, in a way, connected to what human beings perceive as high values. Another aspect of the 'high' nature of this law lies within this perception that is evident in religious thought across various different religious doctrines and traditions in human history. It is a general trait in religions to view morality as something that the deity wants and commands, a manifestation of the human dignity that the laws of religion seeks to protect. It is in this way that the moral law could be said to be given a 'high' and God-given status in religious thought. This is not only evident but is a central creed in the Judeo-Christian doctrines as seen in the writings of thinkers such as St. Augustine and Thomas Aquinas (2009: 119). It also has a central place in the Islamic belief and jurisprudence, where one cannot fail to notice that the laws and codes that are applied in the society have a strong connection to morality.

In the literature of the natural law theory, one of the great questions that are imposed is how can the natural law be discovered? (2009: 122). This methodological question poses a problem and offers a gate at the same time; it clearly exposes the limit of human capability to arrive at universal, morally-perfect laws that could be regarded as the ultimate benchmark towards which all other systems of law are ought to be pushed. Yet, the other side of this challenge is an affirmation for religious traditions to claim their superiority in this issue. If natural law transcends the human agent's ability and is assumed to be of a 'higher' level, the religious narrative of a law decreed by the divine, who created the humans and gave them their intellect in the first place, is, to a great extent, the most acceptable narrative according to the followers of those religious

traditions. Religion adopts a degree within natural law that is undeniable and considerably effective, and it could be suggested that the jurists and legal thinkers of a religious tradition that acknowledges its connection with a divinely revealed scripture would find themselves considerably more aligned towards the naturalists' side of the debate.

Following this assumption, one can assume that it is more the case that the Islamic jurisprudence and legal theory in Islam share with the naturalists their view of the law. This is true. For, among all the schools in Islamic jurisprudence that have diverse opinions on many verdicts regarding issues, the general view is this: the law is, in its theoretical form, God's will as understood by the jurists. It is believed to be the decree of God ('*ḥukm Allāh*') regarding all issues of human life, perhaps 'brought out' to the attention of the Muslim community by the jurists and legal scholars. Thus, it is clear that the human factor – whether in the individual sense or represented as legal institutions – does not assume the place of the 'lawgiver' as is the case in the positivist school. The word *al-shāri'*, literally translated as 'the lawgiver', is frequently used in *fiqh* to indicate God and the Prophet Muhammad, who are considered to be the lawgiver of the whole body of the Islamic law, its proper understanding, proper implementation or proper enforcement, however, is where the human institutions become in charge. There is undoubtedly a 'high' nature that is bestowed upon the law itself following that belief. Another point is that all the major schools of law assume a connection between law and morality. The *sharī'a* is believed to be merciful, just and constructive in its entirety and without exception (Raysuni, 1992: 342). It can be stated that the notion that the law in Islam is viewed as inseparable from morality does not entail any difficulty to be adopted by the jurists and the public since the source of the law is the source of morality in the Islamic creed. God, the Most Benevolent and the Manifestation of what is good and moral, is the creator of the law, and He calls upon humankind to adopt what is good, refrain from what is evil, and live their lives upon the rules of morality. The law is, according to Muslims, therefore, the way that morality can be achieved and protected. Justice is a central notion in Islamic law and civilization and the same is applied to it; it is inseparable from the law, central to its application, and the most important requirement in its application. It is from these premises that the argument that the Naturalist tradition is the one that relates to Islamic law arises.

Within the Islamic tradition, which can be described as naturalist in terms of legal theory, different approaches existed which reflect noteworthy lines of thought in relation to reason, morality and the determination of the natural law. Anver Emon (2010) talks about two different models of natural law theory within the Islamic tradition, stemming from different standpoints relating primarily to how the Muslim jurists saw the authority of reason in Islamic law, and how morality can be determined. He calls the two models Hard Natural Law and Soft Natural Law. The first model, which Emon mentions can be seen in the works of the prominent Muslim scholar Abū Bakr al-Jaṣṣāṣ (d. 981) in addition to other scholars, assumes the theological standpoint that God – who is the Source of the law – only does good. The intention this model assumes is that everything was decreed for the benefit of humanity as God only does what is good and beneficial for the creation. Therefore, the law is seen as naturally good *because* it originates from God. Of particular interest in this model is that justice is viewed as connected to benefit in the eyes of its scholars (2010: 26). What is seen as a creation not beneficial, or which cause pain and suffering for people regardless of their behavior, is unjust, and consequently not possible to exist, as 'God is only just'. From this premises, this natural law model assumes that the human reason is able to develop norms of law and order that can be discerned from this just and beneficial creation.

The other model, Soft Natural Law, was developed by the Voluntarist jurists, who criticized the Hard Naturalist position for limiting God's omnipotence by implying that God cannot do evil. The Voluntarists, on the other hand, held that the nature of what is good or bad is determined by what is decreed by God. In other words, anything that is good is deemed so because God wants it. One of the epistemological conclusions this model proposes is that Sharī'a cannot be deduced solely from reason, but has to be clarified by the religious texts and revelation. Depending solely on reason and subjecting the natural order to it, this model argues, in itself obliges God to enforce the rules of law, punish and reward according to human rational inquiry. Instead, qualified humans must endeavor to understand the rules from the texts and sources of the law to determine the will of God, which is congruent to, and the determinant of, what is good and right, and without which no divine obligation falls upon the humans. Ontologically, good is that which God wills and bad is that which He prohibits. A

prominent example of a Muslim scholar whose thought aligns with this model is Abū al-Ma'ālī al-Juwaynī (d.1085), who acknowledged the ability of humans to make judgements about what is beneficial and what is harmful for them, but that these judgements cannot be equated with identifying the ruling of God ('*ḥukm Allāh*'). We can still describe both Hard and Soft positions as naturalist as they both hold the principle of the existence of a higher moral law that is transcendent to human considerations and which acknowledges what is inherently good and what is inherently evil.

The Muslim jurists, as will be demonstrated in the upcoming discussions, perceived law, first and foremost, as the 'higher' Will of God. The responsibility of the jurist is, as established by the works of *uṣūl al-fiqh*, to expend their utmost intellectual capacity to understand and formulate the legal verdicts which reflect the Will of God in any issue which has not been outwardly articulated in the textual sources, the Qur'an at their forefront (Jassas, 1994b: 4: 11, 12). The jurists and judges throughout the history of Islam have collectively held this principle that puts the law of God, as opposed to the law as dictated by the human lawgiver institutions, at the center of their judicial and political imagination. This context has recurrent effects on the way Muslim jurists viewed and dealt with different legal and political questions, including that of the status of the non-Muslims in Islamic law.

1.5 The Universalist - Relativist Debate in Human Rights Disciplines

The debate between universalists and the relativists in the Human rights field is another binary division that – according to the framework of this thesis – relates to the Islamic cleavage regarding the status of the non-Muslims in the Islamic law. The previously mentioned positivist – naturalist debate, however, relates to the cleavage within Islamic law than in a different fashion than this debate; the former is concerned with the intrinsic nature of the Islamic law while the latter highlights the cleavage itself through pointing to similarities in different attitudes adopted towards the question of the universality of the affirmation and protection of the necessary rights of human beings.

As the name suggests, universalists believe that human rights are essentially applicable to every individual regardless of any racial, religious, or other considerations. Their position stresses the foundational principle that one is entitled to a certain set of human rights by virtue of being born human. The aforementioned 1948 Universal Declaration of Human Rights and the subsequent covenants are seen according to this position as key documents that ought to apply to all humans without any national or cultural hindrance. In other words, the subject of the law in this case is the whole body of humanity which is wider than, and transcendent to, smaller entities such as local governments or nation-states, whose say in this matter should be of little or no value.

The other side of the debate, the relativist position, views the matter of human rights as primarily relative to each particular cultural or national atmosphere. The advocates of this view are also referred to as particularists or cultural relativists. Although cultural relativism, in its original connotation, assumes different attributes to norms and ethics between different societies (what can be deemed good or ethical may not be as such in another society) and, therefore, display cultural sensitivity towards non-Western societies (Renteln, 1988: 66-67), it can be noticeable that the major trend was for relativists to direct their critiques towards the West with its norms and influence, which many viewed as being imposed over other societies. Cultural relativists tend to share the view that human rights basically conform to the cultural ideal that is adhered to by the West (Afshari, 1994: 246). Also, the position takes a stance against promoting human rights 'if their implementation might result in a change in a particular culture', as culture in this case is seen as 'the supreme ethical value' (Howard, 1993: 319). The latter position is part of what is referred to as the absolutist argument, which is associated with the idea that the indigenous cultures of a society are superior as socially good over universal norms, including those of human rights.

As is noticeable form the previously mentioned and other sources, the ground from which this position springs is laid by the argument that the set of human rights that have been declared in the Universal Declaration are based on the system of rights acknowledged by the Western civilization and does not necessarily apply to other civilizations. The basis for this claim is that other civilizations have their own distinctive historical and cultural formations and different social structures than those of Western societies. Issues like individualism, which has been deemed by many as a

characteristic of Western societies (Hofstede, 1980) and a key concept in the scholarship of Human Rights as we know it today, pose a point of divergence according to relativists, as they question the possibility of the declared set of universal human rights being applicable to other societies that are not historically characterized by a culture of promoting liberal individualism as such, and, hence, those human rights cannot be labelled as 'universal'. More critical streams on the spectrum of this side of the debate (Aziz, 1995) often view such declarations of human rights as a display of the Western powers' tendencies to propagate their influence and hegemony over other non-Western cultures and societies through the medium of advertising the protection of human dignity and freedom. Such declarations and covenants that back the universality of human rights are also seen by some of the relativists as a way of meddling in the sovereignty of the nation-states, who, as said above, could very much have different views to what consists a human right or not when it comes to their own citizens or members. Scholars like Edward Said discussed (2003) the relationship between the question of the universality of what came to be known as human rights, and ideas such as Western colonialism. This stream of criticism for the Western-laid human rights came from many different intellectual origins, three of which were introduced by Michael Ignatieff (2001: 104): 'the Marxist critique of the rights of man, the anthropological critique of the arrogance of late-nineteenth-century bourgeois imperialism, and the postmodernist critique of the universalizing pretentions of Enlightenment thought'. As is clear from the identification of those currents, these examples show that the universalist – relativist division exists within the Western thought itself.

Yet Ignatieff identified (102) 'resurgent Islam' as one of the main sources of the intellectual cultural attack on the universalist position. He viewed the Islamic political thought to be incompatible with the norms and freedoms that are articulated in the Universal Declaration of Human Rights (103). This argument rises mainly from the premises that the set of human rights included in the Declaration reinforce norms of individualism and personal freedom and that they are not considered desirable by the Islamic thought. In this thesis, I will focus on the axiomatic rights of human beings and demonstrate that there are legal as well as practical evidence to support the conclusion that there are major streams in the Islamic legal tradition that maintain the universality of these rights and affirm their protection to the people of non-Abrahamic

beliefs – a group which is considered by the Muslims to be of less religious similarity than the Abrahamic religions. In Islam, the divergence that exists in this arena is similar in nature to this universalist-relativist divergence. Each side of the debate on both levels differ on the matter of universality; whether or not the rights are applicable to each and every human, regardless of their religious belief and cultural background. On one hand, it is the set of human rights agreed upon by an international assembly; on the other, the basic rights that are derived from divinely-given and sacred texts which are considered the sources of Islamic law.

Moving from discussions on human agency, the universality, morality, urgency, and bases of human rights, this chapter discussed the term *'iṣmah al-ādamiyyīn* and demonstrated how it represents a more coherent term that can be used to discuss the set of rights and protections that Islamic law acknowledges for humans. The discussion around human rights assumes many frameworks. Within these frameworks is the discussion on the basis of these rights and the grounds on which they stand. The positions that exist manifest in the Positivist – Naturalist debate in the scholarship of jurisprudence, which show parallelism and resemblance with the views in Islamic law towards the rights of humans, namely naturalism viewing a high source of morality as the basis for the inclusion of all human beings. The chapter connected this debate with the Universalist – Relativist debate in the modern discourse of Human Rights. The latter also displays parallelism with the other debates on many grounds and justifications.

The chapter sets the stage for the more focused discussion on the rights and protection of human beings in Islam, particularly non-Muslim communities. The divergence between Positivism and Naturalism, Universalism and Relativism pave the way to a third divergence which relates to the question this thesis attempts to answer: the divergence between the Muslim jurists on the status of the non-Muslims, particularly those of non-Abrahamic religious affiliations. To move into that discussion, the view and classification of the non-Muslims according to Islamic law must first be discussed.

Chapter Two

Paradigms on the Status of Non-Muslims in Islamic Law

The Islamic rule expanded to dominate a geographical area of enormous size in a relatively small period of time. Few other civilizations in human history displayed a similar rapid expansion. Naturally, this expansion introduced new questions on all fronts which the Muslims had to deal with; questions that relate to social, political, and cultural matters including critical questions about the status of those adhering to different religious beliefs. The Muslims encountered people from other cultures and religions whom they previously had very limited contact with. The relationships that were primarily based on trade exchange were widened to other aspects and the interactions became more frequent and more profound in nature. All of this eventually called for societal integration between the Muslims and affiliates of other religions in many cases. Of remarkable interest in this thesis is the demand that arose due to these developments to address the subject of the legal status of the non-Muslims in the eyes of Islamic law under the Muslim rule. The scholarship of *fiqh* has been a decisive factor in determining how the Muslims perceive and deal with people from other religious backgrounds. Many works, classical and modern, share the conviction that it is necessary to define the status of the non-Muslims in Islam and to outline the way the Muslims ought to conduct governance had they been the rulers of a multi-religious society.

This chapter aims to discuss the theoretical paradigms that exist within the Islamic legal scholarship regarding the status of the non-Muslims in Islamic law. The first subtitles in the chapter will introduce key concepts that are essential to understanding these theoretical paradigms; concepts such as *dhimma*, *ahl al-kitāb* as well as other common references. This calls for a discussion on the categorization methods which the Muslim jurists developed for non-Muslims and the different territories in the world. These methods display remarkable significance in the discussion that follows, as the categorization of different religious groups proved a decisive factor in the placement of said groups within different statuses. This evolved into the formation of two schools

of thought which were exhibited by the scholarship of *fiqh* when it comes to non-Muslims: the universalistic school, the position of which was that of inclusion of all humans in the circle of rights and inviolability, and the communalistic school, whose position remained restricted to people on the basis of their status in relation to Islam. The chapter will link this divergence with the previously mentioned divergences, and will present the arguments and explore the theoretical rationales that each of two schools rested their arguments on.

2.1 Methods Used by Muslim Jurists to Categorize Non-Muslims

In the question of dealing with non-Muslims, many Muslim scholars believe (Qardawi, 1992: 6) that the general guideline in determining the Muslims' relationships with other religions' adherents according to the Islamic law is encapsulated in the Qur'anic verse

﴿ لَّا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُم مِّن دِيَارِكُمْ أَن تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ ۚ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴾

> God forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for God loveth those who are just. (60: 8). (Abdullah Yusuf Ali, 1946: 1534).

The verse clearly establishes two fundamental principles the Muslims ought to observe when dealing with other communities which adhere to other religious traditions. The first of which is kindness in conduct ('*bir*'), and the second is justice ('*qiṣṭ*'). Both of the terms mentioned in the verse. Scholars believe that Muslims should maintain these principles as a general rule as long as no persecution against the Muslims or hostility towards their faith is displayed by the non-Muslim communities. In his respected work of Qur'anic exegesis ('*tafsīr*'), Muḥammad ibn Jarīr al-Ṭabarī (d. 923) listed (2000: 23: 321 - 323) the different opinions that existed among the Muslim scholars in relation to who the verse refers to. Two of those opinions specified the people the verse referred to as those who resided in Mecca at the time, ranging between accounts arguing those

intended where Muslims who remained in Mecca and did not migrate to Madina, to others arguing that the verse points to the disbelievers among the resident of Mecca. Ṭabarī himself, however, sides with the argument that the people the verse refer to are all non-Muslims, regardless of their religious affiliations (323). In other words, the verse requires the Muslims to treat with justice and kindness those among the non-Muslims who do not exhibit acts of aggression or drive the Muslim out of their homelands. Additionally, Ṭabarī rejects the opinion that the verse has been abrogated and replaced by the obligation to fight those who disbelieve. He maintains that, unless there is harm upon the Muslims, they ought to treat others with kindness and justice. Another prominent scholar, Abū Bakr al-Jaṣṣāṣ, mentions in his book of *tafsīr* that this verse includes the permission to visit and maintain relationships with one's non-Muslim relatives, be they not militant (1994a: 3: 583). He also highlights the point that the discussion around the abrogation of the verse should be understood in terms of the permissibility to abstain from fighting with the non-Muslims, which is allowed according to Jaṣṣāṣ, as opposed to the indefinite prohibition of fighting them, which, according to the jurists, was abrogated (1994a: 2: 278).

From the early years in the formation of Islamic law, it was evident that the Muslims placed high importance on the classification of the non-Muslims into different groups. Grounds on which this classification was based included three main determinants; the primary of which was rooted in theological elements and represented by the nature of the religious affiliation of the non-Muslim communities in question, the other was rooted in territory, the geographical location of residence of the communities in relation to the Muslim dominated areas, and the third was the political and military relationship with those communities, ranging between alliance, neutrality and militant enmity. The reason for this classification was to place each of the communities in their respective legal frameworks, an important premise to understand the status of each community in terms of rights, obligations, protection and other legal matters in Islamic law. In other words, the legal status of a non-Muslim group in the Muslims' point of view is determined by the classification of that group based on its religious affiliation and residency. The legal implications of a certain group being included or excluded from certain covenants, for example, depended on the classification of that group in terms of religious affiliation or territory. As will be shown later in the following chapters, for some legal positions within the Ḥanafī school (Kasani, 1986; Sarakhsi,

1993) the classification of non-Muslim communities and their legal status depended in actuality on their territorial status, as the concrete deciding factor of inviolability turned out to be more whether or not the communities resided in the abode of Islam than the nature of the religious affiliation of these communities. For other legalists, however, it was the religious factor that was more effective. Yet, the whole body of Islamic legal scholarship outwardly addressed the matter of religious affiliation as a primary consideration when it came to this issue. Even if the actual deciding factor of the legal status depended on the place of residence in relation to the abode of Islam, the nature of religious affiliation of a certain non-Muslim community always occupied the forefront of the discussion on the inviolability and the legal status. Thus, it becomes imperative that these classifications be studied and understood that one may understand the status of the non-Muslims in Islamic law.

The prominent theologian and Ḥanbalī scholar Ibn Qayyim al-Jawziyya (d. 1350) mentions (1995: 1: 335, 336) an encompassing classification of the non-Muslims that many other jurists have based their legal opinions on. This classification differentiates between the non-Muslims on the grounds of their place of residence in addition to their political stand towards the Muslims in terms of alliance or enmity. He begins by dividing the disbelievers, referring to all non-Muslims, according to their political and militant position in relation to the Muslims, into those who are in a state of war with the Muslims (‘*ahl al-ḥarb*’) and those who are involved in a type of contract with the Muslims (‘*ahl al-ʿahd*’). The latter category is further divided into three subgroups, bringing into consideration the place of residence of the groups. The first of which are those who reside within the abode of Islam, and are governed by the Islamic laws as per a covenant of protection with the Muslims, they are called *ahl al-dhimma* (‘the people of covenant’ singular: *dhimmī*). This group will be central in the discussion of the following chapters. The second group are those who live in their own abode outside of the land ruled by the Muslims, and who have an agreement of peace with the Muslims. The name given to this group is *ahl al-hudna* (‘the people of treaty’ singular: *muhāden*). This group is not expected to abide by Islamic law, but is required to stay on peaceful terms with the Muslims. The third group is called *ahl al-amān* (singular: *musta’men* (‘safety seeker’)), this group consists of a variety of peoples who enjoy a protection from the Muslim rulership within the abode of Islam without being residents of it and is typically temporary in nature. This can include asylum seekers, traders,

ambassadors and other non-Muslims. While Ibn Qayyim al-Jawziyya places this subgroup within the people of contract category, he also states that individuals from warring non-Muslims could also be within the abode of Islam under a temporary status of *musta'men*. This may include ambassadors or other individuals who can be peacefully present in the abode of Islam and can potentially return to their warring abodes where they can be re-classified as *ahl al-ḥarb* (1:336). A distinction between the classification of *ahl al-dhimma* and the other classifications is that the covenant in the case of *dhimmī*s is obligatory upon the Muslims to uphold and is permanent for the non-Muslim ('*lāzima mu'abbada*'), whereas the other classifications, the *Muhāden*, the *Musta'men*, and even the *ḥarbī*, are temporal and left in most parts to the judgement of the Muslim ruler or bodies of law. Numerous jurists, among them jurists adhering to the Shāfi'ī and Ḥanbalī schools, in addition to the other schools of *fiqh*, believe that it is permissible for the Muslims to issue a treaty of *hudna* or *amān* to non-Muslims that is not time-bound (1: 336, 337). In practical terms, issuing these permanent treaties with non-Muslim communities places them in a position of legal status that is comparable to that of *ahl al-dhimma*, particularly regarding the inviolability of their lives and property, and their freedom of religious practice.

As the categorization of the political stand of the non-Muslim communities is closely associated with the territory of residence, the discussion on territory evolved into the categorization of geographical abodes according to the Muslim jurists. A binary categorization of *dār al-Islām* ('the abode of Islam') and *dār al-ḥarb* ('the abode of war') is found in many texts of *fiqh* (Kasani, 1986: 7: 130; Zuhaili, 1989: 6343; Sarakhsi, 1993). Muhammad al-Ghazzi mantions (2003: 10: 733) this divergence in the discussion around the ruling of the abode ('*ḥukm al-dār*'), which is determined, according to the *fuqahā'*, by the nature of the rule that is dominant in it. As the foundation for this ruling, he quotes the rule mentioned by the prominent Ḥanafī jurist Abū Bakr al-Sarakhsī, which states that 'the determinant in the ruling of the abode is the apparent and dominant rule' ('*al-mo'tabar fī ḥukm al-dār howa al-ṣulṭān fī dhuhūr al-ḥukm*') (Sarakhsi, 1971: 1: 1703), which he takes as a basis for considering an abode either an abode of Islam or otherwise an abode of war. In other words, if the dominant ruling authority in an abode is that of Islamic adherence, and is generally governed by the laws of Islam, it is considered an abode of Islam. For the abode of war, this means that it is an abode where the ruling authority and legal system is one that is other than

Islamic. This conforms with the opinion stated in the celebrated book of Ḥanafī law *Badā'i' al-Ṣanā'i'*, where Abū Bakr al-Kāsānī states (1986: 7: 131) that the dominant jurisdiction – whether it is that of Islam or that of apostasy – in the abode is the deciding factor of it being considered an abode of Islam or an abode of war. Books of Ḥanafī *fiqh* mention that the school founder Abū Ḥanīfa understood the determinant in terms of the question of religious security, meaning that if Muslims are able to practice their religion safely and securely in their place of residence, then it can be regarded an abode of Islam, even if the ruling system is not Islamic (Kasani, 1986: 7: 131). This is referred to as the determinant of *amn* ('safety') and *khawf* ('fear/concern').

A number of critiques and thinkers have attempted to study this binary categorization. Some, pursuing little beyond the literal wording of 'the abode of war', arrived at an understanding that the 'Law of Nations' according to Islam is formulated through the lens of continuous, expansionist militancy in the abodes that lay outside of its own (Abel, 2012). Other scholars have maintained fidelity to it by demonstrating that it is time bound to a certain historic environment with a different nature of international relations[i]. Others have proposed a third category to the division, based on the term *dār al-'ahd* ('the abode of truce') introduced by the Muslim jurists (Mawardi, 1989: 178), as well as what is evident by the Islamic practice, which did not suppose a warring status over all abodes other that the abode of Islam. names that have been given to this category were the abode of safety ('*dār al-amn*') and the abode of calling/invitation ('*dār al-da'wa*') (Black, Esmaeili and Hosen, 2013: 42), as well as the abode of treaty ('*dār al-ṣulḥ*') and the abode of courtesy ('*dār al-mowāda'a*') (Kuwaiti Fiqh Encyclopedia, 2006: 20: 201 [own translation]). Another categorization places both the abode of war and the abode of treaty within the category of the abode of disbelief ('*dār al-kufr*'), which is based on the previously mentioned categorization of non-Muslims according to Ibn Qayyim al-Jawziyya (1995: 1: 335, 336). Contemporary scholars like Ahmet Özel reject the idea of carrying these concepts to our world scene without considering the international affairs of the modern times and the differences

[i] See Zuhaili, Wahba (1998) Āthār al-Ḥarb fī al-Fiqh al-Islāmī, Third Edition, pp. 192 – 194. Zuhaili's defense of the binary division of the abodes in the texts of Islamic law will be discussed with more detail in the last section of the thesis.

they impose on such concepts, as well as the situation of the Muslim communities residing in different parts of the worlds (2012: 51).

Yet, the contemporary Moroccan scholar and philosopher Mohammed Abed al-Jabri saw no need to expand this binary categorization. His understanding was that the way orientalists – as well as many other Muslims – understood the category *dār al-ḥarb* had been somewhat limited. He argued (2008) the category did not simply imply the existence of enmity or war between the Muslims and its residing communities, but rather a *possibility* of war or aggression, unlike the abode of Islam, where an eruption of war against its residing communities – whether Muslim or not – is deemed forbidden. Jabri, interestingly, places the abode of treaty within the category of the abode of war, following the rationale that the eruption of war in those territories is theoretically possible, that is, if the said treaty was terminated for any reason. The concept of *dār al-ḥarb*, after all, was used by Muslim jurists to denote 'abodes that are outside the abode of Islam', even if it carries the meaning of abodes with a militant or warring relationship with the abode of Islam (Özel, 2012: 44). This suggests that the inclusion of the third type (the abode of treaty) within this concept is valid and may represent a way that conforms in the framework developed by the earlier scholars.

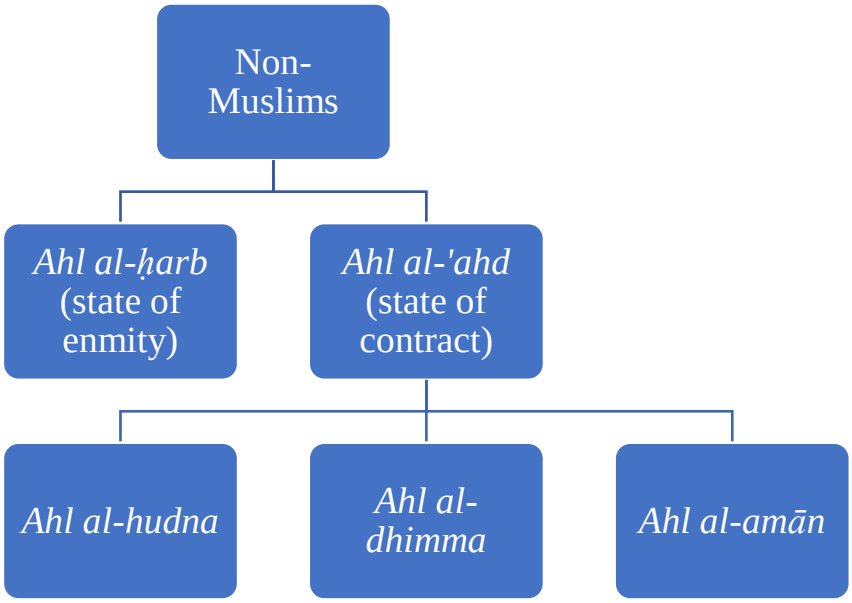

Figure 2.1: Classification of non-Muslims in terms of political stance with the Muslims, as articulated by Ibn Qayyim al-Jawziyya

Another basic and commonly referred to classification is one that differentiates the non-Muslims on basis of the nature of their religious affiliation (Shahrestani, 1975: 1: 36). Muslims adhere to the conviction that Islam, together with Judaism and Christianity, belongs to the family of Abrahamic religions (Helm, 2018). Adherents of Islam view their tradition as a continuation of the Abrahamic religious tradition. As adherents of an Abrahamic religion, Muslims worship the God of Abraham, believe in the prophecy of Abraham ('*Ibrāhīm*'), and proclaim intellectual descendance from Abraham and his prophetic lineage. The other Abrahamic religions that existed before Islam, as is widely known and accepted among the Muslims, are Judaism and Christianity. In the texts of Islamic law, these communities are commonly and interchangeably referred to as '*ahl al-kitāb*' ('people of the book'). This reference indicates an established relationship of those communities with divine scriptures, which are believed to be associated with the prophets belonging to this Abrahamic intellectual lineage.

Figure 2.2: Classifications of non-Muslims on the basis of religious affiliation. The categories 'Abrahamic' and '*ahl al-kitāb*' are congruent according to most jurists

2.2 *Ahl al-Kitāb* and the Status of *Dhimma*

The theological similarities that exist between the three Abrahamic religions are numerous, and the likeness extends to the religious laws and the issues related to the way these religious traditions organize and guide the worldly conduct of their adherents. Reading through the classical sources of the Islamic legal schools displays

this proximity, not only in the religious legal thought of these Abrahamic religions, but also in the way the Muslim jurists and judges viewed them. The adherents of Abrahamic faiths, *ahl al-kitāb*, had been legally treated – in many cases – with reverence the same extent of which was not given to people adhering to other non-Abrahamic traditions. In some cases, the preference of Abrahamic over non-Abrahamic communities was translated to a considerable distinction in the practice of calling them to Islam, according to certain schools of Islamic law, as will be shown later on the course of discussing the topic of *jizya*. As the contemporary Muslim theologian Yūsuf al-Qarḍāwī rightly notes (1992: 6), the Abrahamic communities evidently had a special standing in comparison to adherents of non-Abrahamic faiths in the eyes of the Muslims.

This preference was plainly stated in many books of Islamic law and jurisprudence, and it can mainly be traced to the reverence that the Muslims hold to the fact that the Abrahamic religions share with them the belief in the same God, the God of Abraham and the nations that followed him and the prophetic tradition which descended from him. On many occasions the preference for the Abrahamic communities was justified by the respect that the Muslims maintain for the prophets the Abrahamic peoples follow and the divinely-revealed books that they maintain their relationship with. Ibn Qayyim relays the statement that, while both groups are considered disbelievers in the Islamic view, the disbelief of the non *ahl al-kitāb* peoples, whom he refers to as idolaters, is deeper and more substantial than that of *ahl al-kitāb* communities. This is based on the assumption that the latter group have 'elements of monotheism and remnants of prophets the likes of which are not found among idolaters' (1995: 1: 24, 25 [own translation]). Further, he states that *ahl al-kitāb* communities believe in the afterlife and adhere to and are familiar with the scholarship of prophethood. Among different elements, those theological based differences between the two groups were taken as crucial points to establish the closer proximity of the affiliates of Abrahamic religions in comparison to others. Other religions, which hold substantially different beliefs than the Muslims in relation to the Divine, the prophethood, resurrection, and other theological topics were evidently, almost always, looked at as faiths that are placed on a further stand from Islam.

The legal status of the non-Muslims who were classified as *dhimmī*s allowed them to live in the abode of Islam safely and to maintain their financial livelihoods by engaging in trade and having the rights of ownership of their goods and wealth. Many historians affirmed that, in the Muslim ruled domains, the *dhimmī*s were given those rights and protections, in addition to the protection under which they were allowed to practice their religious rites and beliefs as well as the possibility for them to serve on the highest levels of administration in the Muslim state. It is true, however, as the British historian and Arabist Arthur Tritton enounces (2008: 23-27) in the course of studying the non-Muslims subjects of the Muslim caliphs, that the degree to which the *dhimmī*s were allowed to serve in high level administrative positions and places of public service depended to a great extent on the personality and disposition of the Muslim ruler at the time, as well as on the local situation and the popular temperament of the Muslims towards the non-Muslim residents in the abode of Islam. This is evident through historical narratives of the status of *dhimmī*s as holders of public service and political positions in different times in Islamic history. While many notable *dhimmī*s served in such positions on different levels, with historical examples of Christians and Jews reaching the level of viziers under some rulers, it is narrated (Ibn Qayyim, 1995: 1: 166-182) that caliphs like 'Umar ibn Abd al-'Azīz (d. 720), Abū Ja'far al-Manṣūr (d. 775), Al-Mahdī (d. 785), Hārūn al-Rashīd (d. 809), Al-Ma'mūn (d. 833), Al-Mutawakkil (d. 861), and many other Muslim rulers who belonged to Umayyad, Abbasid, and other dynasties took harsh measures towards preventing *dhimmī*s from assuming public service offices in which they enjoyed authority over the issues of the Muslim population, particularly when it came to finances and economic policies. Most of these measures occurred after a negative popular sentiment towards the authority of the *dhimmī*s rises among the Muslims. Examples of such sentiments included complaints that rose from the Muslims after the Jewish *dhimmī*s furthered their control on public affairs at the time of the Fatimids, or the resistance that Muslims showed under the Abbasid dynasty as the Christian religious leadership confiscated lands owned by the Muslims in Egypt. It can be argued that many of these incidents were associated with economic hardships that the Muslims felt were the consequence of this control by the non-Muslims. Responding to these examples of sentiment, nevertheless, was, to a great extent, influenced by the personal temperament of the political leadership, which, in turn, have been influenced by the Islamic legal scholarship on many occasions.

It is also evident from the same sources that the harsh measures taken by some Muslim rulers towards non-Muslim at such instances in history extended to aspects other than their assumption of public service positions. As some measures – which usually followed a wave of discontent by the population – extended to other matters such as clothing styles and building of new houses of worship (Tritton, 2008: 6-11). The latter issue was a centre of debate among the Muslim scholars. According to some Muslim scholars, the establishment of houses of worship for the non-Muslims in Major Muslim cities was seen as an unwanted proliferation of religious practices which the Islam calls to abolish. By the 200th year of the Hijri calendar, it was recognized that the building of churches in the towns of Muslim majorities was to be limited. This was backed by the Shāfi'ī opinion on the matter, for example, which was inclined to limit the establishment of new houses of worship for the *dhimmīs* in the abode of Islam, yet to allow building houses of worship, conducting prayers, and celebrating religious occasions as they pleased in other towns, including towns primarily inhabited by non-Muslim communities **(**Shafi'i, 1990: 4: 218).

<table>
<tr><td></td><td colspan="4">In terms of religious affiliation</td></tr>
<tr><td rowspan="4">In terms of residence (in relation to the abode of Islam)</td><td></td><td colspan="2">ahl al-kitāb</td><td colspan="2">Non ahl al-kitāb</td></tr>
<tr><td>Within the abode of Islam</td><td>Dhimmī kitābī</td><td rowspan="3">Mustamen (within the abode)</td><td>?</td></tr>
<tr><td>Outside (peaceful stance)</td><td>kitābī Muhāden</td><td>Non-kitābī Muhāden</td></tr>
<tr><td>Outside (warring stance)</td><td>kitābī ḥarbī</td><td>Ḥarbī</td></tr>
</table>

Table 2.1: A classification on the Non-Muslims based on territory and religious affiliation. The unfilled category is the category under the main focus in this thesis, in addition to the 'non-*kitābī Muhāden*' category as a secondary focus

2.3 The *Ahl al-kitāb* – Non *Ahl al-kitāb* Duality

To be able to address how the Muslims theorized the issue of dealing with non-Muslims, be they *ahl al-kitāb* or other communities, a distinction needs to be drawn between the people of different religious affiliations in the Muslim legal point of view. The need to understand the nature of '*ahl al-kitāb*' connotation becomes important in this regard.

Classically, Islamic legal thought tends to categorize non-Muslims in the context of religious affiliation into two broad groups that are derived literally from the Qur'anic verses. Those two groups are *ahl al-kitāb* ('people of the book') and the *mushrikīn* (the polytheists, literally 'the ones who associate'- referring to their associating other deities aside the one true God). Numerous verses in the Qur'an refer to these two groups using this classification. Examples of theses verses are:

﴿ لَمْ يَكُنِ الَّذِينَ كَفَرُوا مِنْ أَهْلِ الْكِتَابِ وَالْمُشْرِكِينَ مُنفَكِّينَ حَتَّىٰ تَأْتِيَهُمُ الْبَيِّنَةُ ﴾

> Those who reject (Truth), among the People of the Book and among the Polytheists, were not going to depart (from their ways) until there should come to them clear evidence (98: 1). (Abdullah Yusuf Ali, 1946: 1767).

﴿ مَّا يَوَدُّ الَّذِينَ كَفَرُوا مِنْ أَهْلِ الْكِتَابِ وَلَا الْمُشْرِكِينَ أَن يُنَزَّلَ عَلَيْكُم مِّنْ خَيْرٍ مِّن رَّبِّكُمْ ۗ وَاللَّهُ يَخْتَصُّ بِرَحْمَتِهِ مَن يَشَاءُ ۚ وَاللَّهُ ذُو الْفَضْلِ الْعَظِيمِ ﴾

> It is never the wish of those without faith among the People of the Book, nor of the Pagans, that anything good should come down to you from your Lord. But God will choose for His special Mercy whom He will – for God is Lord of grace abounding. (2: 105). (Abdullah Yusuf Ali, 1946: 46).

As is noticeable from the translations of the two verses, the translator uses the term 'polytheists' to denote the *mushrikīn* group in one of the verses, and word 'pagans' in the other verse to denote the same group. At the same time, examining respected books of Qur'anic exegesis in their original Arabic, the term in both exemplary verses is

taken to denote those who associate others with God in worship (Tabari, 2000: 2: 470; 24: 539; Ibn Kathir, 1998: 1: 258; 8: 438), deeming it a matter of different translations of the term *mushrikīn* which are used interchangeably. The issue rises from the root '*shirk*', which carries the meaning of 'association' and 'sharing'. This will be discussed in more detail in the following pages.

The term *ahl al-kitāb* indicates the presence of a scripture which, according to the Islamic belief, must come from God by means of a messenger to a group of people. The books that belong to this description are the same holy books that are regarded and associated with the prophets of the Abrahamic communities, even though, by definition, any book that is proved to be divinely-sourced and has been brought by a messenger of God qualifies to fit in that group. The existence of these books as a connection to the Abrahamic tradition positions the community of believers in that book within the *ahl al-kitāb* classification. For this and other reasons, the terms '*ahl al-kitāb*' and 'Abrahamic' have been used interchangeably throughout the Muslim legal discourse in reference to these religious communities.

In defining the circle of *ahl al-kitāb*, it is natural to assume that the groups that are included in this circle are the religious groups who are affiliated to divine scriptures that were revealed to their prophets. The books that were revealed by God to humanity which are mentioned by name in the Qur'an are the *Zabūr*, which is often interpreted as the Psalms and was revealed to Prophet David, the Torah (*tawrāh*), which was revealed to Prophet Moses, the Gospel (*injīl*), which was revealed to Prophet Jesus, and the Qur'an, which was revealed to Prophet Muhammad. Two other scriptures are also mentioned in the Qur'an but are generally not as defined as the previously mentioned books. These are the *Ṣuḥuf* ('the scrolls') that were vouchsafed to Prophet Abraham and to Prophet Moses. In the Islamic tradition, the two books that are held today by religious communities with definitive ties and affiliation to their prophets are the Torah and the Gospel, their communities being the Jews and the Christians. All other mentioned scriptures are either lost or not vouchsafed within a remaining religious community according to the majority opinion in the Islamic scholarship. Consequently, it is the most widely held belief in Islam on this matter, on the intellectual and the common levels, that the term *ahl al-kitāb* refers exclusively to the Jews and the Christians, with no inclusion of other religious communities who might

have a scripture of certain divine connotations. In his pertinent work of exegesis and law, *Aḥkām al-Qur'ān*, the Ḥanafī scholar Abū Bakr al-Jaṣṣāṣ (d.942) includes (1994a: 3: 118) an evidence to support the argument that '*ahl al-kitāb*' is an identification that is exclusive to the Jews and the Christians among the non-Muslim groups. Jaṣṣāṣ explains that the Qur'anic verse (6:156), which states 'Lest you should say: "The Book was sent down to two Peoples before us, and for our part, we remained unacquainted with all they learned by assiduous study'' (Abdullah Yusuf Ali, 1946: 336, 337), restricts the number of communities with relations to a divine scripture to two. Had the Zoroastrians or other polytheist religious groups been included in *ahl al-kitāb*, he states, the verse would have specified more than two communities before the Muslims who had ties to divinely revealed scriptures.

In the previously mentioned position, Jaṣṣāṣ deliberately states the example of the Zoroastrians because different opinions existed on their status in relation to the *ahl al-kitāb* circle. There are accounts in the classical scholarship that indicate that the Zoroastrians might have been qualified as a 'people of the book' nation had they not lost their divinely vouchsafed scripture. It is narrated from 'Ali ibn Abī Ṭāleb (d.661), the cousin and son-in-law of the Prophet Muhammad and the fourth caliph of Islam, that he declared the Zoroastrians to having previously possessed a divinely revealed book, which they lost, or had been made to lose (Baghawi, 1999: 2: 336), in support to the historical narration that blames the loss of many Zoroastrian sacred scripture to the conquests of the lands by Alexander III of Macedon. The narration of Imam 'Ali has created a debate on the nature of the Zoroastrian faith and its relation to the acceptance of *jizya* – the monetary amount taken from non-Muslims under the Muslim rule – from them. Shāfi'ī states (1990: 4: 182-184) his opinion that, since the Zoroastrians had had a divine book at a certain point in history, they can be described as people of *a* book. Yet, what appears to be the opinion under consensus in the classical Islamic scholarship (Gharnati, 1999: 5: 400) is that the Jews and the Christians are the communities that exclusively occupy the circle of '*ahl al-kitāb*', while other communities might be described as having had a certain divinely revealed book without being placed in that group. Since the other defined circle of non-Muslims is the circle of *mushrikīn*, the other religious groups were classically grouped in that circle. The 'people of the book', in this sense, is, together with Islam, a categorization that is analogous with 'monotheists', or what is also referred to as the Abrahamic

religions, since the other circle inherently means ‘those who associate (other false deities with God)’ i.e. polytheists as the name suggests. This is evident in the way the jurists state their legal opinions in many of the texts that will come in the course of this thesis, as, generally, it will be understood from the narrative that the *ahl al-kitāb-mushrikīn* dualism is the one accepted in classical *fiqh* and can also be expressed as monotheism-polytheism, or Abrahamic - non-Abrahamic religions, dualisms.

The other group that is referred to in Islamic legal discourse is the *mushrikīn* (in another grammatical form: *mushrikūn*). While discussing this term, it is obvious that, although the term means ‘polytheists’ in the theological sense, it is popularly referred to as ‘idolaters’ in the socio-religious sense. In many verses of the Qur’an, M.A.S Abdel Haleem chose to use the word ‘idolaters’ as a translation for *mushrikīn* in reference to a social connotation for the polytheists with the ones in Arabia at the time of Prophet Muhammad (2:105; 2:221; 98:1; 98:6) as they used to associate idols in worship with God. In the Qur’anic exegesis offered by Muḥammad ibn Jarīr al-Ṭabarī (d. 923), which is one of the most prominent and widely used works in Qur’anic studies, the verse (9: 28), describing the *mushrikīn* of impurity:

﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْمُشْرِكُونَ نَجَسٌ فَلَا يَقْرَبُوا الْمَسْجِدَ الْحَرَامَ بَعْدَ عَامِهِمْ هَـٰذَا ﴾

> O ye who believe! Truly the Pagans [*mushrikūn*] are unclean; so let them not, after this year of theirs, approach the Sacred Mosque.” (Abdullah Yusuf Ali, 1946: 446, 447).

is clearly considered by Tabarī to point towards the idol worshippers of Mecca (2000: 14: 193-195). Still, when it comes to ideological terms, any association of another deity in worship with God is also referred to as *shirk*, the source noun of the adjective *mushrikīn*. This is true even when the deity being associated is not represented by the form of an idol or an icon as in the case of the Arabs at the time of the Prophet. An example of such denotation is found in the Qur’an:

﴿ إِنَّ اللَّهَ لَا يَغْفِرُ أَن يُشْرَكَ بِهِ وَيَغْفِرُ مَا دُونَ ذَٰلِكَ لِمَن يَشَاءُ ۚ وَمَن يُشْرِكْ بِاللَّهِ فَقَدِ افْتَرَىٰ إِثْمًا عَظِيمًا ﴾

> God forgiveth not that partners should be set up with Him; but He forgiveth anything else, to whom He pleaseth; to set up partners with God is to devise a sin most heinous indeed. (4: 48) (Abdullah Yusuf Ali, 1946: 195).

In this instance, Ṭabarī's exegesis clarifies that the *shirk* referred to by the verse is the association of any deity with God in worship (2000: 8: 451), without specifying idol worship as the form of association. Further, another Qur'anic verse (3:64) calls *ahl al-kitāb* to 'common terms as between us and you: that we worship none but God; that we associate no partners with Him' (Abdullah Yusuf Ali, 1946: 139) uses the term *shirk* in a discourse that is targeted towards groups which have been referred to, in the same verse, as *ahl al-kitāb*. This shows that the term *shirk* at this level is used to point out an act and a concept rather than a term that labels a group of people's religious affiliation. It is established in the Islamic tradition, as exhibited by the *'ulama* through the understanding of multiple *ḥadīth*s, that the act of *shirk* is not exclusively analogous to worshipping other deities beside or instead of God, but also extends to include acts such as believing that a person or an object possess an attribute in the way that it is attributed to God. Believing that a human being is omnipotent the way God is omnipotent is considered *shirk* according to the Muslims, other divine attributes also are similar in this regard. Texts of Islamic theology and of Sufism particularly elaborate on the deeper meanings that are associated with *shirk* (Ghazali, 1985).

As mentioned before, in the language of the classical jurists, all non-Muslims were either classified as *ahl al-kitāb* or as *mushrikīn*. However, underneath the religious iconic representations of the different polytheist religions, it is evident that some of these religions acknowledge the God of the Abrahamic traditions as the true divine power. At the same time, while some Islamic law schools extended the circle of *dhimma* – the non-Muslims living under the Muslim rule within a protection contract – to people of numerous religious affiliations, the circle of *ahl al-kitāb* was – as shown before – limited to the Jews and the Christians. Regardless of the differing religious creeds about God which belonged to other traditions, they were all viewed as

mushrikīn by the classical jurists. It was shown before that the description '*mushrikīn*' does have more than a single connotation in the Qur'anic and Prophetic texts, and this chapter will further demonstrate that this label, which was given to all non-Abrahamic religions, has actually not been used – in itself – as an indication of a certain group's polytheist creed by the Muslim *fuqahā'*, but rather as a customary categorization. In other words, the Muslim intelligentsia have used this categorization without a direct intention to classify the creed of the non-Abrahamic religions' adherents, but mainly to denote their position as opposed to the *ahl al-kitāb*, who, without ambiguity, worship the same God the Muslims do.

The description of *shirk*, which outwardly means to associate partners with God, has been used in the Qur'an to describe acts that are committed by some of the *ahl al-kitāb* themselves:

﴿ اتَّخَذُواْ أَحْبَارَهُمْ وَرُهْبَانَهُمْ أَرْبَابًا مِّن دُونِ اللّهِ وَالْمَسِيحَ ابْنَ مَرْيَمَ وَمَا أُمِرُواْ إِلاَّ لِيَعْبُدُواْ إِلَهًا وَاحِدًا لاَّ إِلَهَ إِلاَّ هُوَ سُبْحَانَهُ عَمَّا يُشْرِكُونَ ﴾

> They take their priests and their anchorites to be their lords in derogation of God, and (they take as their Lord) Christ the son of Mary; yet they were commanded to worship but One God. there is no god but He. Praise and glory to Him: (Far is He) from having the partners they associate (with Him). (9: 31). (Abdullah Yusuf Ali, 1946: 448).

Clearly, the association of one of the fundamental religious elements of Christianity with *shirk* (mentioned in the verse as 'associate') did not result in transferring them from the *ahl al-kitāb* circle to the *mushrikīn* circle from a *fiqh* standpoint. This means that this classification is more of a socio-religious categorization than a purely theological one. This is pointed out by Mālik ibn Anas himself (Ibn al-Arabi, 2007: 4: 116 [own translation]). Mentioning the *ḥadīth* on the issue of the Zoroastrians, Mālik declares that 'there is no doubt that for us they are considered *mushrikīn*', he then presents the belief that the Jews and the Christians, despite being associated with *shirk* in the verse (9: 31), are not *mushrikīn*. The rationale he offers for this is that the classification of *mushrikīn* is a *customary* ('*wāqi' fī al-'urf*') designation to indicate the communities other than the Jews and the Christians. This customary categorization,

therefore, is not used to judge the polytheism of the non-Abrahamic religious traditions, but to categorically separate the Jews and the Christians from the adherents of other religions, and it follows from this that when the classical jurists use the term *mushrikīn*, it simply means 'non *ahl al-kitāb* communities.'

Yet, it appears that the works of Shāfi'ī show a tendency to specify the *mushrikīn* group further as '*ahl al-awthān*' ('people of the idols') when speaking about non *ahl al-kitāb* communities (1990: 4: 192 [own translation]). This is a position that does not seem to be aligned with the previously explained position which views the term *mushrikīn* as a customary categorization for religious groups which do not belong to the *ahl al-kitāb* group as traditionally perceived. In this sense, Shāfi'ī also refers to *ahl al-kitāb* as a subgroup of *mushrikīn,* assumedly in the sense that they display beliefs and acts of *shirk*, as was discussed before. It is found in the sources authored by him (1990) that he sometimes subdivides the *mushrikīn* into two groups: *ahl al-kitāb* and *ahl al-awthān*. The advantage of *ahl al-kitāb* being that the maintain their connection with a divinely revealed scripture, which places them in a higher status than the idol worshippers. This status difference is evident in the legal positions of the Shāfi'ī school of law when it comes to their inviolability, their religious freedom, and the way Muslim armies should deal with them in a state of war. This does not mean, however, that the Shāfi'ī school was not aware of the existence of other religious communities who were not idol worshippers but were also not affiliated to the People of the book. On other occasions, Shāfi'ī explains (4: 252 [own translation]) that the *mushrikīn* from non *ahl al-kitāb* communities, aside from *ahl al-awthān*, also includes 'those who worshiped a deity they had favored'. This group includes the religions who worshipped deities that were not represented by idols. These communities were put in an equal status to the idol worshippers according to this school. Abū al-Ḥasan 'Alī al-Māwardī (d. 1058), known in some western sources as Alboacen, was a prominent jurist and judge who belonged to the Shāfi'ī school and authored many texts on *fiqh,* governance and legal theory. He summarizes the types of non-Muslims in a way that can arguably be considered the most comprehensive within the Shāfi'ī school. He refers to all non-Muslims using the term *mushrikīn,* understandably under the conviction of their *shirk*-related practices that are associated with *ahl al-kitāb* as mentioned before. He further states (1999: 9: 220 - 224) that they can be divided into three categories: the first category is *ahl al-kitāb,* those who are a people of a book, the Jews and the Christians.

The second category is those who do not have a divinely revealed book. This category is a very wide category which includes idolaters, those who worship fire, celestial bodies, any deity of their choice or no deity at all. The third category consists of those peoples about whom exists legitimate suspicion of a relationship to a divinely revealed scripture. This category includes three religious groups who have been a topic of debate among the jurists as to their classification: the Sabians (‘*al-ṣābi’ūn*’), Samaritans (‘*al-sāmiriyyūn*’) and Zoroastrians (‘*al-majūs*’).

As for the first two groups, it has been a commonly held view among the jurists to view the Sabians in close proximity to the Christians and the Samaritans in close proximity to the Jews. Hence these two groups were almost always considered to be an attachment to *ahl al-kitāb* and, as a consequence, are subject to the same legal status of that group, even according to the opinion of Shāfi’ī. In Abū al-Fatḥ al-Shahrestanī’s *Al-Milal wa al-Niḥal*, which offers an encyclopedic study of the world’s religious traditions, philosophical streams of thought, as well as sects known to Shahrestanī at the time, both groups are accounted for in some detail. The Samaritans (‘*Al-Sāmira*’) are described by Shahrestanī (1975: 2: 23) as being a sect of Judaism which believes in the prophethood of Moses (‘*Mūsā*’), Aaron (‘*Hārūn*’), and Joshua (‘*Yūsha’ bin Nūn*’), but deny any prophethood that follows except for one prophet which the Torah had spoken of. They are described (2: 24) to hold Nablus and the areas around as more sacred than Jerusalem, which distinguishes them from the other Jewish peoples. In their short allocation in the source, Samaritans are undoubtedly considered a group of the Jewish people. The Sabians (‘*Al-Ṣābi’a*’), however, are described in the same source in a considerably higher level of complexity. Shahrestanī accounts for the original Sabian philosophy as one that is dependent on spiritualism, opposing the *Ḥanīfiyya* which believes in the presence of human prophets as carriers of the divine messages (2: 63). The same source, however, mentions that the ‘first’ Sabians were followers of prophets *Ādam* and *Idrīs* (2: 62), indicating the complexity and vastness of the Sabian philosophy and the different sects it includes. Today, communities that identify as Sabians include the Mandaean (‘*mindā’yya*’) community in modern day Iraq. This community is a gnostic monotheistic one, it maintains a connection with the early prophets, and adhere mostly to John the Baptist (‘*Yaḥyā*’) as their prophet. However, many critical scholars believe that the Sabians which are mentioned in the Qur’an three times alongside the Jews and the Christians are not the Mandaeans but

rather the Manichaeans. The latter is a group mentioned in Shahrestanī accounts under the title *Al-Mānaweyya*, a subtitle of *Majūsiyya*. They are described (2: 49) as a sect which follows Mani, a figure who acknowledged the prophethood of Jesus but not that of Moses. Mani's philosophy, as Shahrestanī shows, appears to be still rooted in that of the Zoroastrianism. He upholds the concept of the duality of light and darkness as the eternal matter from which all existence came into being. In conclusion, the link that the Sabians have with the prophets, particularly Jesus and John, as well as their mention in the Qur'an in proximity to *ahl al-kitāb*, could have been a factor by which the Muslim scholars considered them in the same circle.

Ibn 'Aṭiyyah al-Andalusī (d.1146) conveys in his Qur'anic exegeses (2001: 3: 22) that it is the opinion of the majority of the scholars in the Muslim *umma* that these two groups are positioned within the *ahl al-kitāb* circle. The founder of the Ḥanafī school, Abū Ḥanīfa, in addition to Ḥanbalī scholars have even labelled the Samaritans and the Sabians plainly as *ahl al-kitāb* (Zuhaili, 1989: 9: 6657). This was on the premises that these groups are closely affiliated with the Jews and the Christians, respectively, and that the Sabians recite and acknowledge the *Zabūr* ('Psalms'), which is held by the Muslims to be a divinely-revealed scripture to the Prophet Dāwūd ('David'). The two groups were almost always viewed and treated as the Jews and the Christians in the question of inviolability, protection, rights and policies under the Muslim rule.

Examining this divide and the various categorizations which were proposed by prominent Muslim jurists and scholars is of a high importance for the purposes of this thesis. As will be shown later, there were positions within this divide that regarded the legal status, and even the affirmation of the basic inviolability of the non-Muslim individual, was – to an extent – a product of this classification. It could be said that this classification served as a tool by which the legal status of the non-Muslims in Islam was determined, and from this point stemmed the major divide on the matter of inviolability of the non *ahl al-kitāb* people according to Islamic law.

2.4 Which Groups are Entitled to Inviolability Under Islamic Law? The Universalistic – Communalistic Divide

Islamic law – both in theory and in application – generally aims to preserve five necessary fundamentals of the human existence as is the commonly held belief among the Muslim jurists and scholars of law. These fundamentals are known as *maqāṣed al-sharī'a*, which can literally be translated into the 'intents' or the 'purposes' of Islamic law. They are also referred to as *al-'uṣūl* ('the fundamentals') or *al-ḍarūriyyāt al-khamsa* ('the five necessities'). These fundamentals, as is generally evident through the Islamic *fiqh* scholarship, are viewed as the basic elements which are necessary for the sustainability and progression of the human life and which the Islamic law sees as impermissible to breach and necessary to maintain in order for the human life to progress and thrive. These *maqāṣid* are the life/soul ('*al-nafs*'), the religion ('*al-dīn*'), the property ('*al-māl*'), the mind/intellect ('*al-'aql*'), and the procreation/family ('*al-nasl*'). Scholars and jurists instate that the entirety of the legal verdicts and opinions that belong to the scholarship of *fiqh* can be traced back to at least one of these fundamentals as a basis and rationale, hence they are called *maqāṣed*. For example; the prohibition of consuming intoxicants is rooted in the necessity of the preservation of the mind for humans, the justification for the prohibition stems from the fact that consuming intoxicants proposes a violation to the sanctity of the mind, which the *sharī'a* has been instated to preserve as one of the five necessary fundamentals of human existence. In the same manner, the legal verdicts within Islamic law are rooted and justified in relation to these five necessities.

Undoubtedly, many more sub-categories of legal rights and inviolable necessities can be placed under those main fundamentals. In his comprehensive work *Human Rights in Islamic Law*, Ibrahim al-Marzouqi presents (2000: 142-153) a classification of the 'Fundamental Human Rights' in the Islamic jurisprudence in three levels. The first level is the five fundamentals which were mentioned before, with extensive detail pertaining to each necessity. The second level is the category of 'the Fundamental needs' ('*al-ḥawā'ij al-aṣliyya*'), which stem from the five necessities and are considered vital for achieving those necessities. They are seen as rights by which a person's life can be deemed agreeable and meaningful and not merely livable or existent. This category includes the rights for foraging and obtaining food and shelter,

which are based in the *ḥadīth* that 'All Muslims are partners in three: in water, herbage and fire' (Abu Dawud, no date: 3: 278). The author sees that, in the Islamic law, this *ḥadīth* applies to all the people as well and not exclusively the Muslims (2000: 146), as guaranteeing access to food and shelter is a necessity for the preservation of life, which is a conclusion that applies to all human beings. Other rights that are believed to be included under this level are the rights of exemption from many religious duties in the cases of illness, travel, or other known causes that exempt the bearer from the obligation or the liability in some cases according to the Islamic law. The third level of rights that Marzouqi presents is what he calls The Right to Common Benefit and Luxury ('*al-taḥsīnāt*'). These are the set of rights that are not essential for the sustainability of the human existence but are advantages used to develop life to a level that is higher than that of a basic life which is based on necessities alone, an aspiration which almost every person tries to achieve. These include the rights to better food, dress, education and other elements that the jurists have shown to be supportive of a decent quality of life. Verses in the Qur'ān that direct the believers to enjoy the blessings of life (foods, clothes and accessories ('*zīna*')) are seen as the bases upon which the justification for instating this level of rights rests. In this and the previous set of rights categorized by Marzouqi, the transition from the level of protection and sanctity ('*ḥurma*') to the level of wellbeing and dignity ('*karāma*') is demonstrated. As will be shown in the second section of the thesis, this point was evident throughout the history of the Muslim rule of different areas, where the protection of the basic rights was transcended to a higher level of dignity and benefit. Examples of which include the practice of giving some non-Abrahamic communities in Africa a semi-autonomous governance, and the inclusion of Hindu officials in the highest administrative positions throughout the Muslim rule of the Indian subcontinent. The language of the jurists might have been more concerned about the protection of the basic rights of life, property and religion when it came to those communities, but the non-Muslims were guaranteed substantially more in their daily lives than the mere protection from death or forceful conversion.

It is a matter of unanimous agreement among the jurists that the preservation of all the five necessary fundamentals applies to all Muslims in the normal circumstances. That is, unless a Muslim commits a crime that is punishable by Islamic law and, therefore, be caused to lose their inviolability of one of these fundamentals. A Muslim who

commits intentional homicide, for example, can be sentenced to death and, hence, their inviolability of life is exceptionally nullified on the basis of their violation of another person's life. The inviolability of these five fundamentals stands as the typically natural state of things for a Muslim, and the whole system of *fiqh* is looked upon to uphold these fundamentals and is seen to be designed to maintain them for the preservation of life.

On the other hand, scholars of Islamic law adopted different positions on the application of these fundamentals on non-Muslims. Questions arose whether or not the 'natural state of things' for non-Muslims is the protection and inviolability of these necessities, whether there is a difference between those among non-Muslims who reside within the abode of Islam and those who live in territories ruled by other than the Muslims (Shafi'i, 1990: 4), and whether some sort of approval in the form of a given covenant or arrangement should be made to affirm or legalize their inviolability in the eyes of the Muslims. Other questions could be proposed for research and investigation as well. Questions that, despite being discussed in the formative and classical periods of Islamic law, still matter to this day in arenas like religious freedoms, rights, and diversity management in a community that includes people of different religious beliefs.

In this and the next chapters, we will draw lines between the previously mentioned dichotomy of natural and state-given rights laws and the divergence of the Muslim scholars' opinions on the matter of human inviolability. It will explore, in the following pages, the theoretical discussions on the rights of non-Muslims, and will demonstrate the difference of views that exists within the classical Islamic law in that context, extending them to another dichotomy on the status of the communities that belong to religious traditions other than *ahl al-kitāb*. The aim is to present the different opinions and the division that relate to the rights and protection of non-Muslims and non *ahl al-kitāb* communities and attempt to open discussions on the inclusion of non *ahl al-kitāb* religious groups which had been accepted in classical *fiqh* but are often commonly and sometimes intellectually thought to have been otherwise.

2.4.1 The universalistic school

Recep Şentürk explores (2006: 24-49) this division on the inviolability, *'iṣmah*, of non-Muslims in classical Islamic jurisprudence. He demonstrates (34) that there have been two divided positions on this matter: the first position is represented by what he calls the universalistic school, led by the Ḥanafī scholars and also including scholars who belonged to other schools of Islamic law, such as the Mālikī school. This school represents the position that the inviolability of humans is attainable by virtue of humanity, *Adamiyyah*. The other position is represented by what he calls the Communalistic school, led by the Shāfi'ī scholars, whose point of view is that inviolability can only be attained by virtue of adhering to the Islamic faith, *īmān*, or by virtue of a covenant of security with the Muslims, *amān*, a term which is literally translated as: 'security'. The universalistic school, as Şentürk shows, begins with Abū Ḥanīfa, the eponymous founder of the Ḥanafī school of *fiqh*, himself. This inclusive legacy continued down through the works of notable Ḥanafī scholars, jurists, and theologians. By stating that in this universalistic school, the subject of human rights law is humanity (35), theoretical links between this school and the natural theory of law are to be found. All humans are covered by the inviolability of the basic fundamental, necessary rights according to this school, and this naturally includes people from all religious affiliations; Muslims, adherents of Abrahamic religions, adherents of non-Abrahamic religions, and even the people with no religious affiliation. Basic human rights such as the inviolability of life, property, religious belief and other rights are axiomatic, natural, and justifiable only by belonging to the circle of humanity.

A prominent example of a Muslim scholar whose ideas adhere to and support this school was Abū Bakr Muḥammad ibn Aḥmad al-Sarakhsī (d.1090). Sarakhsī was a jurist and a scholar of *usūl* and *furū'* of *fiqh* who belonged to the Ḥanafī school of law and whose contributions to the field were so significant and far-reaching that he became traditionally known as *shams al-a'imma*, ('the sun of the imams'). In his *Usūl*, one of the most cited books in Islamic legal theory, Sarakhsī defends the fundamental belief that inviolability for the children of Adam is the natural, original case ('*al-'iṣmah li al-ādamiy aṣl*') (Sarakhsi, 2004: 2: 344). This is the case *de facto* unless a valid cause leads it to cease to be active. He likens the state of inviolability for humans

to the state of health, which is the natural case unless sickness occurs, or the state of life, which precedes as the natural state until death occurs. This clearly shows this positions conviction that the state of inviolability is the original state of all human beings, unless other circumstances determine the suspension of this inviolability, such as a case of waging war against the Muslims (‘*al-ḥirāba*’) for example (Ibn Humām : 10: 204).

Sarakhsī addresses the issue of the legal personhood of human beings, without specifying a necessity for a certain religious affiliation or cultural heritage for them to adhere or belong to in order for their personhood to be recognized. He affirms that the legal personhood, which allows human beings to receive their rights and be requested to perform the rights upon them, is linked to rationality. Following that he states that, in order for the humans to be capable of performing those rights, God has affirmed their inviolability (‘*al-’iṣmah*’), freedom (‘*al-ḥurriyya*’), and property (‘*al-mālikiyya*’), which are guaranteed to humans from the moment they are born, and which stay with them regardless of their sanity or age (2004: 2: 334). These affirmations are necessary for the humans to exist and thrive so that they could fulfil the purpose that is to be able to successfully perform the duties that are requested from them, which include the rights of God and the rights of other human beings upon them. The three previous pillars that Sarakhsī mentioned (inviolability, freedom and property) are attained by birth, and by virtue of being human. Therefore, it is safe to argue that Sarakhsī’s ideas are well situated within the assertion that basic human rights are axiomatic, natural and God-given.

In his analysis of the thought of Burhān al-Dīn al-Marghīnānī (d. 1197), Şentürk points out the types of inviolability that are mentioned in Marghīnānī’s work (2013: 300). Marghīnānī is one of the most prominent Ḥanafī scholars and is the author of *al-Hidāya*, which is ‘the most frequently used and referenced canonical textbook of the Hanafi School of law’ (2013: 299) and has numerous commentaries by many other scholars and jurists. Marghīnānī points out the distinction between two types of inviolability: the one the violation of which causes sin (‘*al-‘iṣmah al-mu’aththima*’), and the one the violation of which calls for penalty (‘*al-‘iṣmah al-muqawwima*’). It is noticeable that this distinction is grounded on what the violation of the *‘iṣmah* would, or should, result in. The *‘iṣmah al-mu’aththima* is the type of inviolability that cannot

be punished by law due to reasons pertaining to their nature or due to the impossibility of enforcing the punishment required by the law in territories that are not governed by Muslims. Violations such as backbiting or speaking ill of a human is almost always difficult to prove and punish by a measured procedure. Yet the humans still have this inviolability and, therefore, even if the law cannot enforce a legal measure, the violator will be responsible for their violation in front of God in the form of a sin. The same applies to violations such as killing and stealing outside the territories where Islamic jurisdiction applies. Both are violations of the *'iṣmah* of life and of property, and are punishable by God as major sins, yet they take place outside the areas where Islamic law can be applied. The second type of inviolability, *al-muqawwima*, is one that can be both implemented – as it occurs in the territories which the Islamic jurisdiction can be implemented in – and has a measured penalty for the damage that was caused. Violations that call for legal punishment which occur within the abode of Islam are the example of this type.

Marghīnānī states that the inviolability the violation of which causes sin is a right for all humankind ('*al-'iṣmah al-mu'aththima bi al-ādamiyya*') (Marghinani, 1970: 2: 398). The reason he provides for that is that the children of Adam have all been created with the responsibility to fulfill the obligations which God commanded them to fulfill, which can be done only if their life and property are prohibited for others to violate, a protection that is known among the jurists as '*ḥurmat al-ta'arruḍ*'. While this type of inviolability applies to all humans, Marghīnānī states that the other kind, *al-'iṣmah al-muqawwima*, is restricted by location and only applies within the abode of Islam because it is where the laws of Islam can be enforced and implemented. Hence, while the legal basis by which non-Muslims attain their *mu'aththima* inviolability is their humanity, the legal basis by which they attain their *muqawwima* inviolability is grounded in their presence in the abode of Islam, which the jurists refer to using the phrase '*al-iḥrāz bi al-dār*' ('protection within the abode'). Moreover, the distinction between the two types of inviolability according to Marghīnānī flows to the axiomatic right being violated: because property can generally be measured and countable, it can be amounted to a certain volume if violated, and therefore it is the main element in the *muqawwima* inviolability, and the inviolability of life follows in this matter. However,

because life is not measurable and, however punished, the violator will not be able to compensate for it, it is the main inviolability in the *mu'aththima* type, and in that regard, it is the inviolability of property that follows.

The discussion on the two kinds of inviolability offers a revealing understanding of the often quoted *ḥadīth* that was mentioned in many sources; "I have been ordered to fight the people until they bear witness that there is no god except Allah, and that Muhammad is the Messenger of Allah. If they do that, their lives and wealth are protected from me save by the rights of Islam. Their reckoning will be with Allah.". According to Ibn Humām 's (d. 1457) *Fatḥ al-Qadīr,* his respected commentary on Marghīnānī's *al-hidāya,* the inviolability that is mentioned in the *ḥadīth* (their lives and wealth are protected from me) is the highest form of inviolability; which is an inviolability that is both *muqawwima* and *mu'aththima* (6: 28). This inviolability which comprises of both inviolability types is the one that offers protection that both calls for penalty and sin if being violated. This is the inviolability that both the Muslims, and the non-Muslims who reside inside the abode of Islam, have the right to, according to this position. As was previously mentioned, the idea that all humans in the world are inviolable by the *mu'aththima* inviolability does not deny those who live in the abode of Islam from attaining the other kind of inviolability as well. For this school, it is either Islam or *al-iḥrāz bi al-dār* that will guarantee both kinds of inviolability. Ibn Humām, therefore, states that the *ḥadīth* declares the transformation of the type of inviolability for the people mentioned in it to a full inviolability comprising of the two types by bearing witness to God and the message of Prophet Muhammad. This indicates that the original case for people is that they naturally enjoy the *'iṣmah mu'aththima*, unless a specific reason causes its suspension, or a reason causing it to be 'transformed' into a full inviolability as Ibn Humām mentions. That is because, he confirms, *'iṣmah mu'aththima* is originally guaranteed by *Adamiyyah,* and not by being a Muslim. 'Perfecting' the *'iṣmah,* however, is what demands additional requirements for the human to be fulfilled (6: 29).

2.4.2 Justification approaches for universalism

Surely, no argument in Islamic law can be considered legitimate unless it is justified through the sources of *sharī'a*, at the forefront of which is the Qur'an and the Sunna, as well as being formulated in the context of logical and intellectual arguments. By surveying classical sources of law adhering to this school of thought, this thesis suggests that the justification for this inclusion of all human beings in the circle of inviolability can be put in two main approaches. The first approach has theological and spiritual connotations and it is situated within the notion of human dignity in Islam. The second approach has legal and proselytizing connotations and it is situated within the notion of *da'wa*, the proselytism of Islam, displayed by calling non-Muslims to convert to it.

The first approach stems from the Islamic belief that all human beings, or 'the children of Adam' as often referred to in the Qur'an, the *ḥadīth* collections, and other textual sources in Islam, are creatures that are endowed with dignity and that the source of this dignity is their Creator. The Qur'an clearly states:

﴿ وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُم مِّنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَىٰ كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا ﴾

> We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our creation. (17: 70). (Abdullah Yusuf Ali, 1946: 714).

In Islamic terms, the term '*karāma*' is used by the scholars to denote this dignifying aspect that all human beings are bestowed with. This *karāma* is both divine – in the sense that it originates from God's creation of humans, and shared between all human beings, because it originates from the sole basis of being human, created by God as described in the Qur'an. The theological connotations in this regard include, aside from the honored creation of the human race by God's own Hands (Qur'an 38: 75), the belief that the human race has a mission on Earth as decreed by God: to fulfill the position of *khilāfa* ('succession, viceregency') on Earth (Sarakhsi, 2004: 333). As this

viceregency was given to Adam and his descendants according to the Islamic belief, it becomes natural to assume that all the human beings' lives should be naturally inviolable in order to respect this God-given dignity and not disrupt the God-commissioned viceregency. In other words, the human beings' *karāma* and *khilāfa* require and mandate their inviolability.

Spiritual connotations support and assist the theological connotations of the first approach. As is seen from the concept of human *karāma*, God favored the human race and bestowed upon it qualities that reflect His own greatness and grace. Seeing this divine reflection in each and every human is a trait that the Muslim Sufis, such as Jalal al-Din Rumi and Farid Attar, repeatedly encouraged and spoke of in their celebrated texts (Rumi, 2004; Attar, 2011: 6-10). It is often noticed that a Muslim presence in a given geographical and political system is generally more prone to be accepting of the other if the predominant nature of that said Muslim presence is one of Sufism and spirituality. In such cases, the spiritual connotations of the human support the inclusion of non-Muslims in the circle of inviolability. As for non *ahl al-kitāb* communities, the historical examples in Islamic rule of different territories demonstrate that, not only according to the Sufis or scholars, but also according to the general populations, non *ahl al-kitāb* communities' acceptance and inclusion was more easily facilitated in environments which could be described as spiritual in nature. This will be demonstrated with some detail later throughout the following chapters of this thesis.

The second approach to justify the inclusion of all human beings into being inviolable is the approach that is based on the obligation that is understood by the *ummah* to carry out *da'wa* ('invitation') itself considered an important aspect of the Islamic faith. As previously mentioned, this approach has legal connotations pertaining to the inherent Islamic duty of conveying the message of Islam and spreading its teachings reflected as an obligation upon Muslims as a group. *Da'wa* is a fundamental concept in Islam and is considered by most to be a duty that has to be carried out by at least some groups in the *ummah*. One practical application of this concept is what is referred to in Islamic sources as *al-amr bi al-ma'rūf wa al-nahy 'an al-munkar* ('advocating what is good and advising against what is evil'), which is applicable to both Muslims and non-Muslims. Another application of the *da'wa* – which is of particular interest in this area – is the calling for the non-Muslims to learning and accepting the message of Islam.

The classical jurists belonging to the universalistic school found evidence for their position on the grounds that spreading the message of Islam and performing one's duties towards God can only be possible when the natural state of human life is inviolability (Şentürk, 2013: 296).

The rationale of this approach arises from the belief that God has commissioned human beings with adhering to what is good and refraining from what is evil. This commissioning ('*taklīf*') cannot be fulfilled if the life of the person is not at least protected from violation. Since it is the duty of Muslims to do their best to ensure the message of Islam is conveyed to the other, this duty has to be ensured and held doable by the availability of the subject humans and the guarantee that their lives – and even livelihoods – are protected in the eye of the Islamic law. It seems obvious that viewing the other as a potential adherent to the truth of Islam and as a violable being is not free from contradiction. In theory, this call becomes even more compelling if the subject humans were even further away from the circle of Islam and belonged to the non *ahl al-kitāb* traditions. Also, the trust of viceregency which God has entrusted to humanity cannot be fulfilled if the protection of life and wealth is not guaranteed. Therefore, the inviolability of a person is seen as a prerequisite for both conveying the message of Islam to that person, and for the person to be able to carry the trust of Islam and fulfill their duties towards God. This notion was stated by the Ḥanafī scholar Abu al-Ḥasan Burhān al-Dīn al-Marghīnānī, who reiterated that humans are created with the burdens of their duties towards God ('*a'bā' al-taklīf*'), the fulfillment of which can only happen if they were protected from violation ('*ḥurma al-ta'arruḍ*') (1970: 389 [own translation]). *Da'wa* is the way their duties towards God can be communicated to them. The position sees that if the lives of others were not inviolable, then the *da'wa* cannot be carried out the way it should be. The *da'wa* will not actualize if the safety, wealth, or the life itself of the subject human to whom the work of inviting to Islam is directed are prone to be violated in some way. Additionally, a vital requirement of this aspect of Islam towards the other is the affirmation of free-will. Surely, it is inherent in the very literal concept of *da'wa* that it is a calling to embrace the teachings of Islam, and not a compulsion to adhere to, and believe in, them. In the absence of free-will the adherents of other religions will be either forced to join a religion they did not willingly choose, or have their lives violated, none of which is acceptable, be they Abrahamic or non-Abrahamic religious faiths. This leads to the assumption that the mind and the

choices made by it, including the choice of religious affiliation, must also be inviolable for all human beings regardless of their religious orientation (Şentürk, 2006: 37).

Since this school does not differentiate between humans on the basis of religious affiliation with regards to the right of *'iṣmah*, we can assume that, in matters of the inviolability of the five axiomatic rights, there is no distinction between *ahl al-kitāb* and non *ahl al-kitāb* communities. Both communities are within the circle of humanity ('*ādamiyya*') and, hence, the inviolability is the natural case for them. The description 'universal' for this school captures this meaning. Subsequently, the literature of this school that deals with the rights and status of non-Muslims can be extended to be addressing the non-Abrahamic religions' adherents, unlike the other school, which will be shown with more detail later. It would be helpful to note that this approach had specifically been effective and apparent in the way Muslims treated non *ahl al-kitāb* communities during the Muslim presence and rule in the Indian Subcontinent (which will be explored with some detail later in this thesis). Chapters five and six of this thesis will demonstrate that *da'wa* has been a consideration that always manifests itself in the Muslim rule, both among the public and the leadership of Islamic movements, in dealing with non *ahl al-kitāb* communities such as the Hindus, who constituted the majority of the inhabitants, as well as the other religious groups in India.

2.4.3 The communalistic school

The other school is what Şentürk calls the communalistic school. This school is analogous to the previously mentioned particularist position in the modern human rights diversion which believes that the matter of inviolability is primarily a matter of citizenry or belonging to a certain social group or body. Unlike the universalistic school, which affirms inviolability by virtue of humanity, inviolability is granted, according to the law as viewed by this school, by virtue of adherence to Islam, or by a covenant of security with the Muslims ('*al-'iṣmah bi al-īmān aw bi al-amān*') (2006: 39). Humans have to gain the right to inviolability or be granted this right by the law of the Muslim state as understood by the jurists, contrary to being entitled to the right of inviolability by birth. According to this understanding, inviolability is not the natural status of humans but has to be "earned" with virtues other than simply being

human. The most prominent qualifier is the virtue of being Muslim. The Shāfi'ī school of *fiqh* assumes the major proponent position of this school. Abū al-Ma'ālī al-Juwainī (d. 1085), a prominent Shāfi'ī jurist and theologian, and a scholar who is called upon as "the Imam of the two holy cities (Makkah and Medina)", states this accepted view among the Shāfi'ī scholars (2007: 12: 248). The position that belonging in the circle of Islam (in particular as a belief system) is the natural qualifier of inviolability has led Shāfi'ī scholars such as the prominent jurist 'Abdul Karīm al-Rafi'ī al-Qazwīnī (d. 1226) to include in their works the statement that the inviolability of life and property is by virtue of Islam ('*'iṣmah al-dam wa al-māl bi al-Islām*') (1997: 11: 122).

According to the communalists, if a person accepts Islam, they are given the full extent of inviolability, which is comparable to be given both the *'iṣmah al-mu'aththima* and the *'iṣmah al-muqawwima* in the sense of the universalistic school. The same is given by law to the non-Muslims who reside in the abode of Islam by a contract of *dhimma*, which will be explored in the next chapter. A *dhimmī*, a person who is included in that contract, is given inviolability by virtue of their presence in the abode of Islam while declaring their submission to the Islamic law and rule. In this case, it is unanimously accepted that Islam cautions from violating the rights of the people of *dhimma* and considers violating any of those rights a major sin. The Islamic law also requires the Muslim government to enforce a penalty for such violation, making the inviolability of the *dhimmī*s, who could, in a sense, be referred to as citizens in comparison to today's nation-state setting, one that entails both types of *'iṣmah*. A non-Muslim who does not reside in the abode of Islam, on the other hand, enjoys neither *muqawwima* nor *mu'aththima* inviolability according to this school.

In his magnum opus, *Al-Mabsūṭ*, Sarakhsī addresses the issue of fighting non-Muslims in the case of military action (1993: 10: 30). He states the obligation of calling the warring opponent to Islam before resorting to military action and argues that, if the Muslims executed the attack before doing so, no compensation is mandatory upon the Muslims for any caused damage, with the confirmation that this remains a big sin. At the same time, he includes the view of Shāfi'ī, the founder of the Shāfi'ī school, on the same matter, which is that Muslims should compensate for the damages caused in case of such an attack. This is because, according to Shāfi'ī, the inviolability of the non-Muslims is nullified by their refusal of the call of Islam. The permission to fight them,

however, only becomes confirmed after their outward rejection of the call to Islam. As mentioned before, the *'iṣmah* that these opponents have, according to the universalist school, is the *mu'aththima*, the one the inviolability of which causes sin and not penalty, which is the *de facto* state of the opponents and all other humans. This means that no compensation can be enforced by the state upon the Muslim army if they attacked non-Muslim opponents in that way.

The line of disagreement in this point reveals an interesting observation in the communalistic school's view of the other. According to the school that Shāfi'ī represents, *'iṣmah* is nullified by apostasy or disbelief, while according to the universalistic school, it is nullified by *muḥāraba* ('warring, antagonism, and militancy') (Sarakhsī, 1993: 10: 30 [own translation]). However, in the view of Shāfi'ī, the absence of the element of Islam in the opponent does not automatically represent a permission for the Muslims to violate their lives. Namely, the absence of *'iṣmah* in their case does not mean that fighting them before they openly reject the call to Islam is permissible by any means. As Sarakhsī states:

> Shāfi'ī – may Allah bestow His mercy upon him – said that they [the army] should compensate [the damage] because the inviolability and abstinence from blood remains until refusal is shown from the enemy's part, and this does not actualize until the call to Islam reaches them. But we say: the *muqawwima* inviolability is attained by *'iḥrāz*, and that does not apply to them [the military opponents (because they do not reside in the abode of Islam)]. If inviolability was due to religion, as the other party claims, then this, also, does not exist in the enemy's case. Fighting is either due to antagonism, as our scholars argue, or to disbelief, as the opponent argues, which exists in their case, but is restricted by the condition of permissibility, which is offering *da'wa* to them. (1993: 10: 30 [own translation]).

The previous excerpt offers an entry into a critical question about the legally correct conduct of the Muslims in the course of their interaction with other non-Muslims who, according to this view, are not unconditionally inviolable. On a practical level, a quick conclusion might be that, since the 'other' is not unconditionally inviolable (more so if the other belonged to a religious tradition other that the ones recognized as *ahl al-kitāb*), then the natural state that the Islamic law dictates would be a state of enmity and violent interaction between them and the Muslims. This is a perception that is evidently and commonly held today by many in different parts of the world. Yet, analyzing the aforementioned position of Shāfi'ī reveals a view that is altogether

different from that commonly held perception. Namely, that the absence of an unconditional inviolability that is attainable by birth or adherence to Islam does not necessarily mean the complete absence of any form of protection for the lives or property of the non-Muslims as the natural state.

The position of Shāfi'ī discernably distinguishes between the existence of inviolability of human beings in general, and the permission to engage in fighting against them. Although the *de facto* status for non-Muslims is not inviolability according to this position, it still does not mean *violability*. The absence of *'iṣmah* does not suggest that the Muslim army has an unconditional permission to engage in military action even against an opposing army of non-Muslims of any Abrahamic or non-Abrahamic affiliation. There still remains a restriction to fight them until they are properly offered *da'wa*, and reject it, only in which case fighting becomes permissible. An example in this regard, and one that is frequently cited in *fiqh* and Qur'anic exegesis texts, is the case of the women and the children of the non-Muslims, who are typically not fighting forces and, therefore, should not be violated by the Muslim army as a general rule. This, however, does not mean that they enjoy inviolability according to the communalistic school the way they do according to the universalistic school, but rather an impermissibility to be violated. In addition to that, this distinction in the point of view of Shāfi'ī does not mean that the position of this school is identical with the *mu'aththima* type of inviolability. The Muslim army – as Shāfi'ī states – is not allowed to violate neither the lives nor property of the non-Muslims residing outside the abode of Islam, but this verdict applies as long as they have not been offered the *da'wa*. Therefore, there are two cases that apply to the non-Muslims who reside outside the abode of Islam (Shāfi'ī, 1990: 1: 301); if the call to Islam has somehow reached this non-Muslim community then their lives and property are not considered inviolable. If the call has not reached them then it is not permissible to violate their lives or take their property until *da'wa* is offered, either to adhere to the Islamic faith or submit to the Muslim rule as *dhimmī*s or *muhāden*s. In the case of acceptance of the call to Islam by the opposing party, the inviolability is confirmed as permanent, as they become Muslims or, in the case of *ahl al-kitāb* communities, citizens under the Islamic rule. However, in the case that the *da'wa* is rejected, then what can be referred to as their 'temporary inviolability' is terminated, and a permissibility of fighting takes its place. This point leads us to suggest that, according to this school, in addition to inviolability

being attained by virtue of faith or by a covenant of *amān*, another kind of inviolability of the life and property applies in the case of non-Muslims who have not been called to Islam. This inviolability is, however, temporary and conditional; it is conditional on the reach of the *da'wa* to the non-Muslim community, and it is only maintained as long as it takes for the *da'wa* to be offered in the case of war.

Although some resemblance might come to mind, this position is different than that of the universalistic school which guarantees inviolability to non-Muslim communities by virtue of humanity alone as the natural state, and only suspends it in the case of hostility and militaristic action against the Muslims. The Shāfi'ī position can indeed be described as the less inclusive position among the two within this debate, as it does not believe in the extension of inviolability to all humankind as a natural, *de facto* state. Yet, at the same time, this does not mean that by adhering to this position this school encourages the Muslims to perceive the lives and property of non-Muslims as free and available to be taken or violated in any way. In fact, it does only encourage, but also clearly obligates the propagation and proper deliverance of *da'wa* before resorting to that action against any community. Again, the vitality of the proselytizing work in Islam is manifested within this school as is the case for the universalists, this time regarding it as a critical condition that determines the permissibility to engage in military action or to confirm inviolability.

2.4.4 The diversion within the Mālikī school

As the Ḥanafī school of Islamic law appears to assume the lead proponent position of the universalistic school and the Shāfi'ī school of law the lead proponent position of the communalistic school, the Mālikī school of Islamic law seem to have related to this question in a different context. By surveying Mālikī *fiqh* sources, this thesis argues that two main approaches were taken by its jurists to discuss the issue of inviolability, resulting in revealing points of view.

As a first approach, it appears that the Mālikī school jurists who have elaborated on the concept of the *'iṣmah* of life did so mostly through the discussions on homicide penal laws and retributive justice ('*aḥkām al-qiṣāṣ*'). These discussions pave the way

to elaborating on the status of the person involved in the crime so as to reach the proper verdicts to construct the penal law according to the Mālikī school. In other words, the way the jurists see the punishment inflicted upon the perpetrator is influenced by the inviolability status of the person whose life was violated. Thus, through discussions in this area, the Mālikī scholars took the position of either of the aforementioned schools regarding the status of non-Muslims in regards to inviolability. In some accounts of Mālikī *fiqh*, the opinion that the conditions of *'iṣmah* are either *īmān* or *amān* can be found (Kharshi: 8: 4, Dusuqi: 4: 239), in resemblance to the Shāfi'ī school position. The payment of *jizya*, a payment that signifies the entrance into a covenant of inviolability under Islamic rule, is seen by some Mālikī jurists to be a third separate condition (Kharshi, 8: 4). In other Mālikī accounts, *jizya* as a consideration is enveloped as part of the *amān* condition of attaining inviolability for non-Muslims (Dusuqi: 4: 239). In this framework, since the issue of inviolability is looked at from the lens of retributive law, it is clear that the kind of *'iṣmah* that is being referred to is analogous with the *muqawwima* type of inviolability which was elaborated by the Ḥanafī scholars mentioned earlier in this chapter, the inviolability the violation of which causes penalty. Therefore, it is safe to assume that the mentioned Mālikī jurists affirmed a particular side of the position of Marghīnānī, Ibn Humām and other Ḥanafī scholars; that the inviolability which requires adhering to Islam or a covenant of *amān* is the *muqawwima* inviolability.

The other approach that can be found in the Mālikī accounts points to the presence of the person in a certain location as an important angle to look at the issue of inviolability. This question in Mālikī sources offers an insight on the view of the school's scholars towards the aforementioned concept of *iḥrāz* (residence in the abode of Islam), in particular, and its relation to inviolability. Though, at times, the issue being discussed was the issue of Muslims living under non-Muslim rule. Aḥmad ibn Yaḥyā al-Wansharīsī (d. 1508) was a Muslim theologian and Mālikī jurist around the time of the fall of the Nasrid kingdom of Granada, which is considered to mark the completion of the Christian conquest of Spain after being governed by the Muslim Umayyad rule. Although his works came long after the Mālikī formative and classical periods were well established, they are known to be preeminent works especially on the issues of Iberian Muslims living under the Christian rule of Spain and the issue of Muslims living under non-Muslim rule in general, a topic which seems to have

gathered attention at the time of the fall of the Islamic rule in the Iberian peninsula. His legal opinion on the matter was that it was obligatory for Muslims living in Christian conquered Spain to emigrate to other Muslim lands, as well as for all Muslims in general till the end of time (1986: 25).

The discussions around the presence of Muslims outside the abode of Islam and their status provides insight on how the Mālikī jurists viewed the inviolability and the bases on which it stands. Discussing the issue of the inviolability of the Muslim and the basis that supports it, Mālikī collections of *fatāwā* such as Wansharīsī's *Al-Mi'yār al-Mu'rib* narrate (1981: 1: 129) that the opinion of the founder of the school Mālik ibn Anas is the same as the opinion of Abū Ḥanīfa regarding the consideration of residence in the abode of Islam a premise of conditional inviolability in general for the Muslims and non-Muslim residents. Wansharīsī affirms that this position is the most known ('*al-mashhūr*') to represent the founder of the school, as well as the one maintained by notable Mālikī jurists such as Aṣbagh ibn al-Faraj (d. 840), and later narrated by Ibn Rushd (Averroes) (d. 1198). Yet, Wansharīsī mentions (1: 129) that Ashhab al-Qaysī (d. 820) and Saḥnūn al-Tanūkhī (d. 855), who are considered among the most prominent jurists of the Mālikī school, maintain the opinion of Shāfi'ī on that the basis upon which the inviolability of the Muslim individual stands is their adherence to the Islamic religion, regardless of the presence outside the abode of Islam. Regarding the inviolability of property, Wansharīsī demonstrates (1: 120, 121) that, in the discussion around Muslims residing outside the abode of Islam, a similar divergence exists, where the Shāfi'īs see Islam as the guarantee for the inviolability of property as is the case with life, placing both in the circle of penalty in case of violation. The renowned Mālikī jurist and judge Abū Bakr ibn al-'Arabī (d. 1148), however, sees Islam as a guarantee for the inviolability of life, while the residence in the abode of Islam as a guarantee for the inviolability of property. Therefore, if, according to this position, the wealth of a Muslim who resides outside the abode of Islam is damaged or violated, no penalty or reimbursement is enforced on any other party. This approach, although focusing in some parts on Muslims' residence abodes, offers insight on the weight that the Mālikī scholars placed on different grounds for affirming inviolability in relation to scholars of other schools of Islamic law.

This chapter presented key concepts that relate to the study of the status of non-Muslims in Islamic law, and the positions adopted by the schools of Islamic law regarding the basis of inclusion of the non-Muslims in the circle of inviolability. The chapter demonstrated that the universalistic school, represented mainly by the Ḥanafī scholars, distinguished between the *muqawwima* and the *mu'aththima* inviolabilities, deeming the residence in the abode of Islam ('*al-iḥrāz bi al-dār*') a key determinant in their consideration. On the other hand, the communalistic school, led by the scholars of the Shāfi'ī *madhhab*, sees belonging to Islam or being protected by a covenant as the determinant factor in including a non-Muslim into the circle of inviolability. Yet, the chapter clarifies that this attitude towards non-Muslims does not mean outwardly deeming non-Muslims naturally violable, as the reach of *da'wa* comes as a decisive consideration in this area.

Both of the positions' arguments revolved around the status of non-Muslims in general. And while the divergence presented represents the division in the scholarship, the following chapter takes a step further within this divergence to examine the implications the nature of the religious affiliation of a community of non-Muslims have on their status. Namely, how is the divergence in Islamic law when it comes to non *ahl al-kitāb* communities?

Chapter Three

The *Dhimma* Contract and the *Jizya* as Keys to Understanding the Status of Non *Ahl al-Kitāb* Communities in Islamic Law

The purpose of this chapter is to take the previously elaborated divergence around the inviolability of non-Muslims a step further into a narrower scope that integrates the *ahl al-kitāb* - non *ahl al-kitāb* duality into that divergence. In other words, the question regarding the inclusion of non-Muslims in the circle of inviolability will be specified to address how each of the previously discussed schools view the status and inviolability of the communities of non *ahl al-kitāb* religious affiliations. To achieve this, a crucial concept will be used as a gauge for each of the two religious groups. The possibility of inclusion in *dhimma*, which is manifested by the payment of the *jizya*, will be used to test the acceptance of each group in the circle of inviolability according to each position. The result will be yet another divergence. This divergence relates to the previous universalist-communalist school divergence but is situated around the nature of the religious affiliation of the non-Muslim communities. The first of which is the Adamiyyah paradigm, which is parallel to the universalist school in viewing the virtue of humanity as a sufficient qualifier for inviolability, and extends this view to non *ahl al-kitāb* communities. The other paradigm is given the name Ibrahimiyyah, as it sees only *ahl al-kitāb*, or Abrahamic, communities as eligible for inclusion in *dhimma* and payment of *jizya*. Interestingly, even when this divergence revolves around the nature of the religious affiliation of the non-Muslim groups, it shares aspects with the previously discussed divergence between the communalist and universalist schools.

The structure of the chapter will be based on three steps; firstly, the chapter will discuss the key concepts of *dhimma* and *jizya*, which will be used to highlight the difference of opinion between the two paradigms. Secondly, the chapter will present a discussion around the meaning, purpose, and significance of the *jizya* payment. It could be argued

that the meaning of *jizya* and the purpose it serves provide an understanding of the underlying assumptions regarding the non-Muslim community at which the question of *jizya* is directed. Thirdly, the two paradigms will be elaborated, focusing on their views towards non *ahl al-kitāb* communities.

3.1 *Dhimma* and Legal Personhood: Abū Bakr al-Sarakhsī

The Arabic word *Dhimma* translates to 'covenant' or 'guarantee' (Ansari, 1993: 12: 221 [own translation]). Among the Muslim jurists, a common understanding of the *dhimma* covenant entails it being a contract between Muslims and non-Muslims, based on which the state of war between them is suspended, and the non-Muslims thence enjoy protection under Islamic rule to practice their own religious ceremonies and attend to their livelihoods under the Islamic political, and, to a degree, social governance. Another element of this contract is the payment of a certain amount of money, usually in the form of gold or silver coins, called the *jizya*. This is a requirement that appears inseparable from the contract of *dhimma* as understood by the Muslim jurists. The non-Muslim communities who take part in this contract with the Muslims are referred to as *dhimmī*s or *ahl al-dhimma* ('the people of the covenant'). This indication is the one most commonly referred to when using the word *dhimma*. This is indicated frequently by the scholars of Islamic law in particular, and almost always by the common Muslims in general. Yet the word "*dhimma*" has another indication which is also of importance to this thesis; *dhimma* is a term used to denote the setting where the power of the law falls in a person, the legal personhood. This important indication has been mentioned in many classical sources of Islamic theoretical jurisprudence ('*usūl al-fiqh*').

The prominent Ḥanafī jurist Sarakhsī, for instance, mentioned in his *Usūl* (2004: 2: 333 [own translation]) that *dhimma* is the 'setting of obligation' ('*maḥal li al-wujūb*'). This indicates that a prerequisite for the power of law to take its place of authority in a human subject is for that subject to maintain this legal personhood. From this philosophical stand point, it becomes understandable that, according to *fiqh*, the reason why animals or other creatures are not required to maintain the laws that humans are obliged to is the fact that they do not have this "capable responsibility" to be able to

take on the trust of fulfilling the law, which Sarakhsī calls *al-dhimma al-sāliḥa*. One crucial aspect of this understanding is that this kind of capable responsibility is not dictated by a person's religious affiliation, according to the school Sarakhsī belongs to. It is an inherent feature of humanity, attained by birth, and is not determined by religious or nationalistic belonging. Originating from this *dhimma* is the *ahliyya*, or what can be translated as the capability itself. Sarakhsī elaborates (2: 333) on the matter by explaining that the embryo in its mother's womb does not enjoy the *dhimma al-sāliḥa* until it is born, yet it enjoys the potentiality of becoming a *nafs* ('self, being') with a full *dhimma* as it comes to life and therefore it enjoys the rights affirmed *to* a human being, such as the rights of inheritance and will. After birth, the newborn comes to having the *dhimma al-sāliḥa* and, therefore, becomes a vessel for receiving the rights *upon* a human being, such as the obligation to compensate the destruction of someone else's property. Such is the distinction of the entitlement of rights and laws according to this position. Sarakhsī – and many other scholars who belong to the universalistic school that was discussed earlier – see this as a natural entitlement for any newborn human being regardless of the choice of religious affiliation later in his/her life. Sarakhsī affirms that this legal personhood, which allows a human to receive their own rights and to be responsible for performing the rights upon them, is linked to rationality. Together, *dhimma* and *'aql* ('rationality') are elements that God honored the human race with so that they would be capable of carrying out the divine trust which they were created to carry. These two elements are, for Sarakhsī, what make humans able to receive the legal obligations to fulfill the rights of God upon them (2: 334 [own translation]).

It is a commonly held belief in Islam that Prophet Muhammad was sent to all mankind and not only to the Arabs in particular. This point – that the divine call is addressed to all humankind – provided the basis for Sarakhsī's argument that the right of legal personhood ('*ahliyya*') is a universal right for Muslims and non-Muslims alike (Şentürk, 2013: 297). In the understanding of the Muslims, this divine call to all humans represents a trial for them, which in turn requires them to possess the ability to choose freely whether or not to adhere to that call. For this divine call to be fulfilled, the free will of the humans must be guaranteed as a prerequisite, as well as the freedom for them to use that free will to determine how to respond to this call. This offers a ground for the assumption that the universality of the message of Islam paves the way

to the universality of the rights and protection for human beings. From one aspect, the discussion on this universality is rooted in the concept of legal personhood, from another it is associated with *da'wa*, an obligation which supported the approach mentioned in the previous chapter as a justification of the inclusion of all human beings in the circle of inviolability.

3.2 The *Jizya* Payment and the Status of Non *Ahl al-Kitāb* Communities

The *jizya*, commonly recognized as the poll tax Muslims used to impose upon their non-Muslim subjects, remains an issue that is surrounded by controversy to this day. The meaning, the intended purpose, and the issues that surround the implementation of the *jizya* collection were and remain a center of debate in classical and modern scholarship for various reasons. It is a practice that has been conducted by the Muslims for centuries and, as books of *fiqh* and exegeses point out, has its legal basis on the Qur'anic verse 9:29. Yet, as is clear from the variation in the translation of the verse, the understanding of the Muslim scholars of this payment had been variant, different opinions originated on different aspects of the *jizya*, based on variable understandings of the Qur'anic verse:

﴿ قَاتِلُوا الَّذِينَ لَا يُؤْمِنُونَ بِاللَّهِ وَلَا بِالْيَوْمِ الْآخِرِ وَلَا يُحَرِّمُونَ مَا حَرَّمَ اللَّهُ وَرَسُولُهُ وَلَا يَدِينُونَ دِينَ الْحَقِّ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ حَتَّىٰ يُعْطُوا الْجِزْيَةَ عَن يَدٍ وَهُمْ صَاغِرُونَ ﴾

> Fight those who believe not in God nor the Last Day, nor hold that forbidden which hath been forbidden by God and His Apostle, nor acknowledge the Religion of Truth, (even if they are) of the People of the Book, until they pay the *jizya* with willing submission, and feel themselves subdued. (9: 29). (Abdullah Yusuf Ali, 1946: 447).

> Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice, until they pay the tax promptly and agree to submit. (9:29). (Muhammad Abdel Haleem, 2004).

3.2.1 The Adamiyyah and Ibrahimiyyah paradigms

This thesis will attempt to categorize and assess the main arguments related to the ontology and the purpose of the *jizya*, leading to taking the divergences mentioned in the previous chapter a step further: a divergence within the Muslim legal scholarship on the inclusion or exclusion of the communities classified as non *ahl al-kitāb* from the status of inviolability of the axiomatic rights of the humans. Exploring the different arguments for the meaning and the purpose of the *jizya* offers useful insight into the question of the inviolability of the other in Islam, particularly the question of the status of non *ahl al-kitāb* communities in the viewpoint of the Islamic law. In this relation, and having the *ahl al-kitāb*/ non *ahl al-kitāb* dichotomy as the basis of comparison, two legal paradigms emerge within the scholarship of Islamic law. The first paradigm sees all humanity as subject of potential inclusion in a fulfilled status of inviolability. This is demonstrated through the acceptance of the *jizya* payment from said communities and, consequently, including them in the covenant of *dhimma*. This paradigm will be given the name "Adamiyyah", since it qualifies all the children of Adam for potential accommodation within full inviolability. It may be clear that this paradigm in aligned with the universalistic school mentioned earlier in the thesis. The other paradigm is one that does not qualify all communities for the acceptance of the *jizya* payment ad restricts that to the communities which are classified as *ahl al-kitāb*, in addition to exceptions among other communities. Hence, non *ahl al-kitāb* communities, according to this paradigm, cannot be accommodated in the inviolable circle of *ahl al-dhimma*. As this paradigm sees the affiliation to an Abrahamic religious tradition a condition for the option of *dhimma*, it has been given the name "Ibrahimiyyah" paradigm, which is the equivalent of "Abrahamic" in the language of the Muslim jurists.

This chapter will explore the discussions on *jizya* in two parallel approaches. The first approach has the ontology of *jizya* at its focus, it discusses and compares the different positions on the meaning of *jizya* and uses this discussion as a key to validate the inviolability of the non-Muslims in *fiqh* through the meaning of *jizya* itself. The second approach focuses on the applicability of *jizya* and uses this basis as a key to validate the protection of the axiomatic rights for non-Muslims, particularly the extension on

this protection to non *ahl al-kitāb* communities. In this approach, the assumption would be that, since the *jizya* signals the inclusion in the *dhimma* covenant, which, in turn, signals the protection of the necessary rights mentioned before in this thesis, then the extension of the circle of *jizya* to non *ahl al-kitāb* communities indicates the inclusion of those communities in the protection of those rights by Islamic law. To illustrate more, the plan this chapter intends to take is propose *jizya* itself as a tool in a two-step hypothesis testing process. The first step is to discern the ontology of *jizya* through texts of *fiqh* and discuss the nature and purpose of this payment according to the jurists. The hypothesis is that if the *jizya* payment is a payment that is primarily intended for the inviolability of life, then life is not naturally inviolable prior to this payment. If *jizya* had other connotations and meaning, then we can assume that room can be left to other justifications for the inviolability of life of the non-Muslims, which, for the universalistic school and Adamiyyah paradigm scholars, is the virtue of humanity. For the school which believe *'iṣmah* to be by virtue of *ādamiyya*, this payment must mean something other than a life tax. The second step is to explore *jizya* in terms of applicability. For the majority of scholars who see the duty of the Muslim state to affirm *and protect* the inviolability of those who pay the *jizya*, extending this payment to non *ahl al-kitāb* communities appropriately means the affirmation of the axiomatic rights of their members and their protection by Islamic law. Conversely, restricting this payment to people of Abrahamic religious affiliation excludes the non *ahl al-kitāb* communities from the possibility of inviolability and the protection of what the other school sees as their axiomatic needs and rights.

3.2.2 The implications of inclusion in *dhimma* and the payment of *jizya*

Giving assent to the covenant of *dhimma* and offering the annual *jizya* is the second option of a three-staged systematic offer that, according to the Muslim scholars, non-Muslims have to choose from in case of military confrontation with the Muslims. Before resorting to an armed conflict, the non-Muslim combatants are first offered to accept the message of Islam and therefore enter in a state of brotherhood with all the Muslims worldwide, and have their lives and property inviolable. In this case the conflict should be immediately rescinded. The second offer is to accept the covenant of *dhimma*, which entails that they remain adherent to their religious traditions while

submitting to the Muslim rule. Usually, this includes offering an annual payment, the *jizya*, which signals their submission to the rule of Islam. This will also affirm their inviolability, as the covenant obliges the Muslim governing authority to offer military and political protection for these communities and guarantee their rights of life, property, religious freedom, and other basic rights under the Islamic patronage. Only if these two offers are rejected a military action commences and the resort to violence is authorized. The inviolability of life and other basic rights for the non-Muslims is, therefore, nullified only in the case of the rejection of the mentioned first two options. In this light, *jizya* can be interpreted in a way that is different than the widely used interpretation of it being a poll-tax in exchange of permanently living under the Muslim rule. Rather, the covenant of *dhimma* can be seen as a ground upon which the inviolability of life and the inviolability of religious freedom are fused together, and, thence, *jizya* can be regarded as a payment that accompanies this system. Surely, the inviolability of all humans is affirmed by the universalist school in the *fiqh* tradition, as demonstrated before. However, even for those who do not acknowledge humanity as the ground for inviolability, the aforementioned system is a way whereby the non-Muslims can retain their inviolability of life, property, religious practices, and other axiomatics under Islamic patronage. Viewed from that perspective, the *jizya* payment can be seen as an opening possibility that Islam offers the non-Muslims to retain their inviolability. Arguably, *dhimma* is the sole system by which the concept of the Islamic invitational duty ('*da'wa*') and ideological expansion can practically exist side by side with the wish to accommodate for religious freedom and the reverence and sanctity that the religion of Islam has for the human life.

Offering the payment of *jizya* and adhering to the covenant of *dhimma* has many results and implications upon the non-Muslims. It is not only a way to secure inviolability, but it also extends beyond that. An outcome which is under consensus among the Muslim scholars of this status is that, through this system, the Muslim state becomes responsible for the security and protection of the people of the *dhimma* both from outside threats and from injustice that may befall them within the abode of Islam. The maintenance of these rights becomes a religious obligation ('*wājib*') upon the Muslim government, as is stated by the Mālikī jurist Shihāb al-Dīn al-Qarāfī (d. 1285) (3: 24). In his commentary on Qarāfī's text *Al-Furūq*, the Mufti of the Mālikī school in Mecca, Sheikh Muḥammad ibn Alī (d. 1948) states (3: 24) that the consensus of the scholars

of the *umma* is that it is an obligation upon the Muslims to protect and fight on behalf of the people of the *dhimma* if any outside threat targets them, regardless of the life costs that may be incurred during this fight. The obligation for protecting the non-Muslims under *dhimma* contract is maintained even if they are semi-autonomous in their residency, or if they live exclusively in lands that belong to the rural geography of the abode of Islam. The second kind of protection, ensuring no injustice falls upon them inside the Muslim lands, is as crucial as the first. Injustice and abuse in any sort are forbidden towards non-Muslims, hate speech and backbiting are seen by the Muslim jurists of all schools as violations of the *dhimma* covenant which God and His Messenger honored and guaranteed (3: 27). Muslim scholars acknowledge that the covenant of *dhimma* was provided as a means for the non-Muslims who reside in the abode of Islam to enjoy inviolability and protection so that – in the context of inviolability – 'their blood becomes like our bloods and their property becomes like our property' (Kasani, 1986: 6: 281 [own translation]). This consensus is shared by the scholars and jurists from all Islamic schools, including those who can be classified in the previously discussed communalistic school. The covenant of *dhimma* is of paramount reverence according to the Muslims, because the '*dhimma*' is understood to be the covenant of God and His Messenger ('*dhimmat Allāh wa rasūleh*'). It stands as a guarantee on behalf of the Prophet himself towards the people of *dhimma,* and, as a result, if Muslims maltreat those communities, they would be breaking this guarantee. Such violation of the guarantee is perceived as having demonstrated misbehavior towards the Prophet himself, which is a perception strong enough to deter the Muslims from doing so.

As for the right of inviolability of property that the people of the *dhimma* have, it includes the types of property that is considered to be 'property' according to them, but not according to the Muslims, such as swine livestock and alcoholic beverages (Qardawi, 1992: 15). The protection and guarantee of the rest of the five axiomatics also come as results of the covenant of *dhimma* according to the communalistic school, in contrast to the universalist school which believes that they are guaranteed by the virtue of humanity. The protection of the honor of *ahl al-dhimma* involves the prohibition to verbally abuse them and considering their backbiting as sinful an act as if it was inflicted towards Muslims. The protection of the religion of the people of *dhimma* is also a fundamental requirement that is maintained by their adherence to this

contract inside the abode of Islam. Forcing *ahl al-dhimma* to adhere to the Islamic faith is a violation of one of the main elements of the covenant of *dhimma* itself. Other religious practices and laws that do not violate these five axiomatics are left to the religious groups to decide for themselves on their applicability and implementation, such as the laws of marriage, family court, and other personal matters which Islam leaves to each of the different religious communities to manage as internal affairs.

3.2.3 The meanings associated with the payment of *jizya*

Jizya has been understood to represent more than one meaning or one purpose. One of the most commonly held understandings is that the *jizya* is a tax that is offered in exchange of the inviolability of life of the non-Muslims living in the abode of Islam. This understanding, that *jizya* is a tax in exchange for life, is arguably the most wide-spread understanding among the Muslims and non-Muslims nowadays, and many – especially non-Muslims – believe that to be the sole purpose behind the system of *jizya* in Islam. Some Muslim thinkers, such as Muhammad Amarah, a notable member of al-Azhar's Academy of Islamic research in Cairo, tend to emphasize the hypothesis that the *jizya* is offered in compensation of the military and political protection that the Muslims guarantee towards non-Muslim communities residing within the abode of Islam, that *jizya* is actually a compensation in place of military service (2003: 15). This is supported by the fact that, on some historical incidents, the *jizya* was actually refunded to the non-Muslim communities which the Muslims failed to protect militarily (Qaradawi, 1992: 38). This might induce the suggestion that the *jizya* can be viewed as a means to secure the inviolability of the life of the non-Muslims residing in the abode of Islam in the face of external threats rather than being an inviolability from the Muslims themselves. Still, there are other explanations offered by the *'ulama* on the rationale and ground on which the *jizya* is situated.

In his encompassing *Aḥkām Ahl al-Dhimma*, Ibn Qayyim al-Jawziyya explores the legal issues and debates surrounding the rights and status of the *dhimmī*s. Naturally, being an integral part of the covenant of *dhimma*, the *jizya* and the issues that surround it are the first topic that is presented in the book. In this section, the Ḥanbalī jurist explores the debate between the scholars who perceive the *jizya* as being in exchange

of the inviolability of life (‘*iṣmah al-dam*’) and the scholars who argue that it is a symbol of depreciation for the non-Muslims and a means to signify their submission to the Muslim rule (1995: 1: 28 [own translation]).

It is only natural to assume that those among the supporters of the first position, which views the *jizya* as the means to guarantee the inviolability of life, who also argue against the Adamiyyah paradigm can bring these two positions to a complimentary status; those who are in the *ahl al-kitāb* category enjoy the potentiality of *‘iṣmah and* of the *jizya*. To that group, *jizya* is both a matter-of-fact cause of inviolability and a result of the potentiality of inviolability. In other words, the payment of *jizya* causes the *‘iṣmah* of the lives of those who pay it, and those who pay the *jizya* do so because they are eligible to attain *‘iṣmah*. Ibn Qayyim presents the added statement that, for the advocates of *jizya* as a tax facilitating inviolability, the claim that the *jizya* makes the lives of *ahl al-kitāb* inviolable does not mean that it can also make the lives of other religion’s adherent inviolable as well. For them the *ahl al-kitāb* group is one with less deviation from the truth than the *mushrikīn* group. Hence, according to this position, *jizya* is a minor tilting factor in favor of *ahl al-kitāb* and should not be extended to include other religious groups, which are far more deviated in their beliefs than the People of the Book.

The second position argues that the real purpose behind the *jizya* is to signify the dominance of Islam and the submission and capitulation of the non-Muslims to the Muslim rule. According to this argument, *jizya* can be seen as a symbolic ‘punishment’ (1995: 28) for the non-Muslims and a display of the humble compliance of them to the Islamic law and rule. What is particularly remarkable is that this position, as Ibn Qayyim notes, extends this sign of submission to religious groups beyond the *ahl al-kitāb* group. This thesis argues that this position on the meaning and purpose of the *jizya* is the one that is more compatible with the Adamiyyah paradigm, and is the proper context to place the virtue of humanity at the core of inviolability. As the *jizya* is believed to be predominantly a display of the upper hand of Islam over the other religions, then it follows that it is not a requirement for the *‘iṣmah* of the non-Muslims, and since, according to this position, there is no limitation to it to the *ahl al-kitāb* communities, then the possibility of *‘iṣmah*, on the least level, extends towards all non-Muslims. The *jizya* being a display to project the dominance of Islam over the

adherents of other religions is also more compatible with the fact that, throughout Islamic history, the *jizya* was generally a rather small amount that did not suggest a considerable revenue for the Muslim state. Multiple *ḥadīth*s and narrations of the early Muslims indicate the payments were at very low levels (such as a few silver coins or one gold coin a year (Qurtubi, 1964)) which could not have been considered as forms of income to the state the way the land tax, *kharāj*, was seen, for example. The times when the Muslims demanded the *jizya* from their non-Muslim subjects were times when the state was financially strong, therefore unlikely to depend on this payment as a source of financial revenue. 'Tax' appears to be an inaccurate description of the *jizya* in this light, as taxes are generally looked upon as some of the main financial tributaries to the state treasuries. What, additionally, supports this position is the fact that the verse related to the *jizya* (cited earlier in this chapter) specifies the agreement to a state of submission and inferiority that is expected from the payers.

The Ḥanafī jurist Ibn Humām explains (6: 53-56) why the *jizya* should be regarded as, primarily, a symbolic punishment and not a compensation tax. He affirms the position of the prominent Ḥanafī scholars, such as the school founder Abū Ḥanīfa, that the *jizya*, as its name indicates, is theoretically a penalty ('*jazā'*') for non-Muslims residing in the abode of Islam for their persistence on disbelief and not adhering to the Islamic faith. His statement that the *jizya* is primarily and 'purely a penalty' ('*'uqūbah maḥḍah*') for disbelief is accompanied by his argument against it being a tax to guarantee inviolability, as, he states, that it is guaranteed for all human beings as a natural state by virtue of humanity. He comments on understanding the *jizya* as a compensation for residing in the abode of Islam by affirming Marghīnānī's counter-argument that the people of *dhimma* live in their own properties which they enjoy full ownership of, and, hence, there appears to be incoherence in regarding the *jizya* a compensation as such. On the other hand, viewing the *jizya* as a compensation for military protection can go in hand with viewing it as a penalty for disbelief in this point of view, the reason for that is that disbelief itself is what prevents a non-Muslim from participating in the protection of the abode of Islam, so the *jizya* is taken as a compensation for that protection, which, subsequently, constitutes a protection for the *dhimmī*s themselves. *Jizya*, according to this view, is still taken for the reason of disbelief in the first place. In this light, we can argue that this position on the meaning

and purpose of the *jizya* is the most compatible with the Adamiyyah paradigm, as it presupposes, by necessity, the inviolability of the lives of all humans and views the *jizya* in this light as a payment that neither hinders nor initiates this inviolability.

The meaning and purpose of the *jizya* can be multi-faced and can be seen from different points of view. Many meanings have been understood by scholars belonging to various schools, with each understanding offering different trails to investigate dealing with non-Muslim communities under the Islamic rule. *Jizya* might be understood as an inviolability of life tax, the absence of which nullifies the *'iṣmah* of life according to some scholars. It could be understood as a payment against securing religious freedom, therefore indicating that the jurists who uphold this argument see the inviolability of religion as one that is dependent on the virtue of the covenant of *dhimma*. It could, as well, be seen as a tax offered for attaining the right of inhabiting the Muslim territories, as some Shāfi'ī scholars argue, an understanding that resembles today's taxes which are based on residency in a country. *Jizya* could have also been seen as an incentive for the non-Muslim communities to embrace Islam, and although the amount of it was generally small, paying it was seen as a possibly degrading act which the communities might aspire to avoid. This links to the meaning of the *jizya* that underlies the latter view and represents a commonality that settles within all the other mentioned meanings: that it is a symbol of Islamic dominance and a display of the submission of the non-Muslim communities to the Islamic rule. This meaning of the *jizya*, as this thesis argues, is both an underlying meaning that is manifested through all the other views, and the meaning that offers a better inclusive stance towards other religions than viewing *jizya* as a life, residency, or religious practice protection guarantee. These understandings are held by both scholars of Islamic law and by the common Muslims, and more than one of these understandings can come together to form a bigger overview of what the *jizya* means.

It is a place of general agreement among the jurists of the four Sunni schools of Islamic law that the payment of the *jizya* is not required from women, men with mental or physical disabilities, or children (Ibn Qayyim, 1995: 48). It is also not required from elderly men who are not as able as younger ones. Although the major Ḥanafī scholar and judge Abū Yūsuf (d. 798) states his opinion that the elderly men are required to pay the *jizya* if they possess the financial ability, the general opinion of the scholars is

that these groups of the society are all exempt from it. The reason behind this is that these are the groups of the society who are not normally able to physically take part in battle and military disputes against the Muslims. This has led some scholars to argue that the *jizya* is a payment that is offered by *ahl al-dhimma* against military service in the Muslim army (Qaradawi, 1992: 37), since they would not be required to participate in military activities defending the abode of Islam and since only those who are able to fight are required to pay it. *Jizya* appears to be imposed on grounds of the ability to initiate or participate in military conflict, and, since the previously mentioned groups were generally not participants in war activities, they were exempt from this payment. This point offers support for the argument that the *jizya* is not principally a tax to secure the religious freedom of the non-Muslims inhabiting the Muslim lands, because women and children of the non-Muslims are guaranteed their religious freedom without offering a payment, the same consideration applies to residency in the Muslim lands; while these groups of society inhabit the lands, no payment is required from them since they were not considered as people of physical military ability. The conclusion that follows is that the ontological meaning of the *jizya* as a sign of Islamic dominance is the one that fits the most to this consideration, as it is the men who are able to fight whose submission to the rule of Islam will signify the submission of the non-Muslim community as a whole to the Islamic rule. It appears safe to conclude that – as it is evident from the type of groups who are required to pay it – the *jizya* represents a meaning beyond the commonly-held outward ontology of being a *tax*, it is a purposeful requirement directed at certain groups and aimed to signify and display the power of Islam over them. One might also be led to thinking that, since all groups other than the physically able men are exempt from paying the *jizya* and are carefully avoided during military clash, it could be said that they are actually inviolable in the natural state. Since no payment is required of them to secure their inviolability of life – that is, according to the position that believes that securing inviolability is the actual purpose of *jizya* –, their lives could be assumed to be naturally inviolable.

3.2.4 The non-Muslim communities who are eligible to perform *jizya* according to the schools of Islamic law

A question of particular interest to this thesis is: who are the religious communities whom *jizya* can be accepted from? In other words, what was the opinion of the jurists regarding who among the various religions' adherents can be eligible to be treated with the covenant of *dhimma*?

In *Al-'Um*, the renowned work of Shāfi'ī *fiqh* authored by Shāfi'ī himself, he explains (1990: 4: 182; 4: 252) his position on the communities from whom *jizya* can be taken, depending on understanding the Qur'anic verse (9: 29) and the previously mentioned *ḥadīth*; 'I have been ordered to fight the people…'. Shāfi'ī states that what is meant by 'the people' in the *ḥadīth* are the '*mushrikīn*, those who worship the idols' (4: 181 [own translation]). By application of what is mentioned in the *ḥadīth* it becomes clear payment of the *jizya* cannot be accepted from these communities, as the *ḥadīth* clearly offers them only one option to attain inviolability: to embrace Islam. While the Qur'anic verse (9: 29) specifies *ahl al-kitāb* in the course of mentioning the *jizya*, and, hence, offers them this option to attain inviolability and allows them to continue practicing their faiths if they offer the payment. This has led Shāfi'ī to conclude that the *jizya* can only be accepted from *ahl al-kitāb* and not the other religious groups, who should not be allowed to reside in the abode of Islam and continue practicing their apostate beliefs under an Islamic rule. Shāfi'ī's position seems to take a more literal stand in approaching the sacred texts which mention the issue of *jizya*. He maintains that both the verse and the *ḥadīth* each pertain to different cases and different resorts in dealing with different non-Muslim groups. His position is maintained even when discussing (4: 183) the other religious communities whom the *jizya* was taken from according to the prophetic tradition. As some narrations testify that the Prophet Muhammad accepted *jizya* from groups from Yemen and Najrān, which included Arabs among them, and were perceived by some to have been non *ahl al-kitāb* groups. Shāfi'ī insists, in this regard, that these communities had belonged to the People of the Book since after Islam came into being and, therefore, only the People of the Book are eligible for *jizya*.

The importance of this question arises from its being a key to understanding the different positions of the schools of Islamic law towards the non-Abrahamic religious communities. As with many issues retaining a level of complexity, this issue was the center of debate among the Muslim jurists, who adopted different standpoints towards accepting the adherents of non-Abrahamic religions and exhibited a spectrum of different degrees of inclusiveness or exclusiveness towards these non-*ahl al-kitāb* communities. Accepting the application of the *jizya* on non-*ahl al-kitāb* communities is akin to consigning them the status of *dhimma*, hence accepting them into the fabric of the Muslim political unit. The question gains a momentum of cruciality as it follows that accepting the *jizya* from a community, and treating them as *dhimmi*s under the Islamic rule, signifies approving their religion and religious practices to continue within the abode of Islam. It could be argued that some of the tension and reluctance felt by the scholars regarding this issue was due to this consideration, as deciding on the matter of *jizya* had exceedingly important implications on the political and social levels for the abode of Islam. One of the main objectives – perhaps the most important – of the spreading of Islam was to introduce the people to the Truth and nullify the other false and distorted versions of it, and allowing such versions – represented particularly by non-Abrahamic religious traditions – to exist and thrive under the Muslim patronage and protection was a possibility that many of the classical jurists saw as contradictory to the Islamic mission. Accepting the *jizya* and the inclusion in *dhimma* for the non-Abrahamic communities seemed to be thought of as an act of legitimization for their religious beliefs in the minds of the jurists who held this position. Following their language in regards to the inclusion in *dhimma* as well as the categorization of non-Muslims, one can see their conviction that this acceptance poses a danger of distorting the religious righteousness that Islam seeks, especially when their view towards non-Abrahamic communities revolves around their being categorized with terms like *ahl al-awthān*. As such, it would appear justifiable to the scholars who saw the *jizya* as an exclusive privilege of *ahl al-kitāb* to pertain to the 'minimum' that was required in the Qur'an and Prophetic tradition and deny other religious communities from entering into *dhimma*. The jurists that are committed to the disapproving side of the debate, i.e. those who argue that non-*ahl al-kitāb* communities cannot be given the choice of paying the *jizya*, leave them the sole option of converting to Islam in order to attain the inviolability that the *dhimmī*s enjoy in Islamic law.

The variations in the translations of the Qur'anic verse 9:29 that mentioned the *jizya* is a reflection of the variations in understanding this verse among the Muslim scholars, which had consequently produced various legal opinions on the subject. The difference arose from variations in interpreting the meaning of the preposition *min*, which has more than one indication in the Arabic language (in the verse it comes as '*min al-ladhīn ūtū al-kitāb*'); if it is to be understood as 'from' or 'among' then it will mean that only those among the People of the Book whose description comes later in the verse should be fought till they pay *jizya*; it can also be a preposition used to denote a kind, that the people meant by the verse are the People of the Book, therefore all of the *ahl al-kitāb* are included in the verse; Yusuf Ali's translation reflected (1946: 447) a different understanding, which, in fact, represents how entire schools of law approach the issue in question: '(even if they are) of the People of the Book', what follows is that the fighting and the *jizya* are – according to this understanding – not restricted to the People of the Book, but applies to other communities beyond that circle.

An extension that is generally accepted in Islamic law in the area of the acceptance of the *jizya*, with all what it entails, is found in the case of the Zoroastrians, referred to in the sources of *fiqh* as the '*Majūs*'. Zoroastrian communities existed mainly in the Persian Plateau, which is adjacent to the Arabian Peninsula, but numerous Zoroastrian communities also existed in areas within the Peninsula, including areas of Bahrain and modern-day Saudi Arabia. The Zoroastrians were included in the religious communities which are eligible to be encompassed in the covenant of *dhimma* and the payment of the *jizya* based on a *ḥadīth*. In their case, the prophetic tradition provided clear justification for their inclusion. The narration entails that the second caliph of the Muslim community, 'Umar ibn al-Khaṭṭāb (d. 644), consulted his companions on the issue of the inclusion of the Zoroastrians in *dhimma*, to that, Abdul Raḥmān ibn 'Awf, a companion of the Prophet Muhammad, answered that he witnessed hearing the Prophet commanding to follow the example of *ahl al-kitāb* with them; to treat the Zoroastrians in the way *ahl al-kitāb* are treated, ("*Sunnū bihim sunnat ahl al-kitāb*"). In response to that, 'Umar accepted the *jizya* from the Zoroastrians of Persia (Kasani, 1986: 7: 110; Shafi'i, 1990: 4: 183; Malek, 1994: 1: 529 [own translation]). Another narration includes the addition *"ghair nākiḥī nisā'ihim wa lā ākilī dhabā'iḥihim"* ('except for marriage (with them) and the consumption of their slaughtered meat')

(Marghinani, 1970: 1: 188; Kasani, 1986: 5: 45; Baghawi, 1997: 5: 377 [own translation.]). This latter narration was taken as a further evidence that the Zoroastrians are not considered as People of the Book, because it is established in Islamic law that marrying women from the People of the Book, as well as eating from their slaughtered meat, is generally permissible for the Muslims. There are narrations that indicate that the Prophet himself accepted *jizya* from the Zoroastrian community who resided in the area of *hajar* in the Arabian Peninsula (Baghawi, 1999: 2: 336). This has led to a consensus among the companions of the Prophet (1999: 2: 335) and later among the scholars of the major schools of law (Balkhi et al., 1893: 2: 193; Gharnati, 1999: 5: 400) that *jizya* can be accepted from Zoroastrians, and consequently their right of religious practice under the Islamic rule. It is remarkable that this *ḥadīth* is narrated by Mālik ibn Anas and al-Shāfi'ī, who are both included in the chains of different narrations of the same *ḥadīth*. They are founders of different major schools of *fiqh* which adopted different legal opinions on the inclusion of non *ahl al-kitāb* communities in the payment of the *jizya*.

The Shāfi'ī position on this controversy argues that the original case of the acceptance of the *jizya* is determined by what is stated in the Qur'an and the *Sunna,* which, according to their understanding, specify that it only applies to the *ahl al-kitāb* communities (Shafi'i, 1990: 4: 176), that is, the Jewish and the Christian peoples, with the addition of the Zoroastrian peoples as clearly indicated in the aforementioned *ḥadīth*. Any other religious community is outside this application, and, therefore, cannot be included within the Islamicate fabric unless they embrace Islam. Other than that, there is no possibility for these communities to live permanently within the Muslim territories while remaining faithful to their traditions and observant of their religious practices. In the case of military clash between Muslims and non *ahl al-kitāb* forces, they are not offered the option of *jizya* (unless they are Zoroastrians), only accepting Islam as a religion could stand between them and battle. In that case, embracing Islam becomes the sole means for their inviolability.

A notable Shāfi'ī scholar, Al-Ḥusayn ibn Mas'ūd al-Baghawī (d. 1122), utilizes a functional text analyses methodology to justify the Shāfi'ī school's position that restricts the acceptance of *jizya* to *ahl al-kitāb* communities and the Zoroastrians. He analyses (1999: 2: 335) the verse 9:29 by stating that all of the Jews and the Christians

under Muslim rule, who are mentioned in the verse as the People of the Book, are required to submit to the rule of Islam and provide the *jizya* as long as they remain adherent to their distorted beliefs. As for the Zoroastrians, he demonstrates (1999: 2: 336 [own translation]) that the fact that 'Umar ibn al-Khaṭṭāb abstained from accepting the *jizya* from the Zoroastrians until he was given the *ḥadīth* as a response signifies 'a proof that the opinion of the companions was that it [the *jizya*] cannot be taken from any polytheist ('*mushrik*'), but is only taken from *ahl al-kitāb*.'. According to him, the basis of the Shāfi'ī school denying the inclusion of non *ahl al-kitāb* communities from *dhimma* was the conclusion that the companions' initial judgement, based on their knowledge of the verse, was to limit the circle of *dhimma* to the communities that the Qur'an specified. Another scholar, Abū Isḥāq al-Tha'labī (d. 1035) presents another rationale for the limitation of the acceptance of the *jizya* to the Jews and the Christians (2002: 2: 89); that the fact that they are connected to divinely revealed scriptures gives them an advantage to inviolability of life. However distorted and altered these scriptures may be in the Islamic point of view, they still contain parts of the truth. This acceptance in the *dhimma* category is a time of indulgence in hope that they would study their scripture and arrive at the truths in them which would offer them guidance. The *mushrikīn*, on the other hand, do not possess this method of guidance and, thus, allowing them to persist with their affiliations will only result in deeper apostasy and error. Hence, no *jizya* is accepted from them and the only way for them is to accept Islam. Again, the caution that the inclusion in *dhimma* is, in effect, a way of legitimizing unacceptable forms of disbelief under the Muslim rule can be seen in the thought of Tha'labī. Following this conviction, he professes the preference of *ahl al-kitāb* communities over other non-Muslims as the distortion they adhere to is of less severity to be included in inviolability.

The position of this school suggests a favoring view towards *ahl al-kitāb* in relation to non *ahl al-kitāb* communities. Many scholars who belong to the Shāfi'ī school of law offered rational arguments to support this preference, in order to stand as arguments on the side of their main evidence; the understanding they offered for the Qur'anic verse on the *jizya* and the *ḥadīth*s from the prophetic tradition. In Māwardī's work of Shāfi'ī law *Al-Ḥāwī al-Kabīr* ('The Grand Container'), he offers (1999: 8: 432 [own translation]) the following rational explanation for favoring *ahl al-kitāb* communities over others; That the People of the Book are distinct from other non-Muslims by

having a maintained relation with divinely-revealed books, which were vouchsafed to them through venerated Prophets of God (1999: 9: 222). This gives them a higher status than that of non *ahl al-kitāb*. He also states that although *ahl al-kitāb* of that day (after the advent of Islam) were theologically astray, according to the Muslim belief, their forefathers had once been adherent to a truthful tradition. Stemming from a sense of respect for these previous adherents' sanctity ('*ḥurma*') as having been true believers, their later counterparts have enjoyed this sanctity which resulted in being able to maintain their religious practice – however distorted in the eyes of the Muslims – as long as they are in the status of *dhimma*. The abrogation of parts of the content of their books, and their laws, by the laws of Islam does not necessarily mean the abrogation of the sanctity of their books. As it is a commonly understood notion in *fiqh* that some verses in the Qur'an abrogates other verses, it does not mean, Māwardī states, that the sanctity of those verses are ever possibly abrogated (1999: 9: 222).

The founder of the school, Shāfi'ī, acknowledged the existence of communities with religious affiliations other than those communities that were in contact with the Muslims at his time. In the course of speaking of *da'wa*, which is the condition that represents the deciding factor in granting a temporary *'iṣmah* to non-Muslim communities as was shown earlier in this thesis, Shāfi'ī proposes (1990: 4: 253) a context by which the non *ahl al-kitāb* communities that are beyond the Arab idolaters can be treated as argued for by his school of Islamic law. According to his view, as mentioned in a previous chapter, receiving the *da'wa* is a condition that determines the permissibility of the Muslims to levitate the temporary inviolability of the non-Muslims' lives and property that had been in existence before the *da'wa* reach them. This can be either a call to accept Islam as a faith, in the case of dealing with non *ahl al-kitāb*, or an offering of either Islam or paying the *jizya* and attaining the status of *dhimma*, in the case of *ahl al-kitāb* communities. If the *da'wa* has reached a certain community, then their inviolability is terminated. Shāfi'ī believes that the *da'wa* has reached all religious communities that were in contact with the Muslims at that time, with the exception of the religious communities who are situated beyond the communities that were situated in close proximity to the Muslim territories, such as the Turks, Khazars, those beyond the Romans or any other community or civilization that the Muslims did not encounter on a large scale or had very limited exposure to at the time. The *da'wa* might have not reached such communities. Taking this into

consideration, they maintain their "temporary inviolability" until they receive the *da'wa*, and are treated according to their religious affiliation in the *ahl al-kitāb* / non *ahl al-kitāb* system that the Shāfi'ī school takes as a position; if the *da'wa* reaches them and they are found to be adherents of a religion other than that of *ahl al-kitāb*, then they do not enjoy inviolability, and the payment of the *jizya* cannot be accepted from them in order for them to keep their religious practices.

The Shāfi'ī school does not differentiate between Arabs and other races when it comes to *jizya*. The rule they undertake in this area is that the *jizya* is based on religious affiliations ('*adyān*' sing. *dīn*) and not on races or lineages ('*ansāb*' sing. *nasab*). Accordingly, if it is the school's position that *jizya* can be accepted from a certain religious group, no consideration will be given to the group being Arab or not. Likewise, their exclusion of the *mushrikīn* from acceptance applies to the Arab *mushrikīn* – whom most other opinions excluded – as well as the non-Arab *mushrikīn*, whose group includes Hindus, Buddhists, and all other non *ahl al-kitāb* communities that exist in the world then and these days.

The proponents of the Adamiyyah paradigm, as mentioned before, acknowledged the potentiality of inclusion for non *ahl al-kitāb* communities into the *dhimma* covenant, although their inviolability, also as mentioned before, did not necessarily depend on it, as the affirmed inviolability by virtue of humanity. Their affirmation of this inclusion was historically evident, as will be shown in the following chapters, as well as in their responses to the issue of the consideration of races when looking at the question of accepting *jizya* from a particular community. While the Shāfi'īs did not see race to be a cause of any distinction in terms of *jizya*, other schools of law acknowledged this distinction. The Ḥanafī school's general position on the *jizya* is that it can be accepted from the non-Arab *mushrikīn*, be they of Indian, Persian or any background, but it cannot be accepted from the Arab idol worshippers (Abu Yusuf, 1979: 58). For them, this is evidenced by a narration in which the Prophet limited the acceptance of *jizya* from idolaters to the non-Arabs among them (Nasafi, 1998: 1: 674). Multiple Qur'anic verses ordered the Muslims to fight against *mushrikīn* (29:5), and, as the Muslim jurists pointed out, the verses did not indicate that these communities are eligible to pay *jizya*. They are, therefore, not allowed to continue in their non-Abrahamic religious practices under Islamic patronage. This issue represents a major

line of division between the schools, and has had an effect in the way their exclusionist/inclusionist division has developed; where the Shāfi'īs took the position that the verses did not include *mushrikīn* in the circle of *dhimma,* the Ḥanafī and Mālikī scholars understood that the community who was being signaled in the verses is the *Arab mushrikīn*, who were the people with whom the Muslims clashed in the beginning periods of Islam. According to their understanding, it was the Arab *mushrikīn* who were the ones who could not be given the covenant to continue in their idolatry and therefore had to be fought if they refused to accept Islam as their religion. It could be said that this exclusion of the Arab idol worshippers is due to the enmity of the Meccan Arabs to the message of Islam in its early days, the importance of the message of Islam covering all of the Arabian Peninsula, as some *ḥadīth*s suggest, and that the Arab idol worshipping community was the first to diminish among the other polytheist communities in the world, making Ḥanafī sources that were authored in the post-formative periods of Islamic law place more focus on non-Arab non *ahl al-kitāb* communities, who proposed a more pressing question regarding *jizya*, *dhimma,* and inviolability.

Abū Yūsuf, who is one of the major jurists and judges of the Ḥanafī school and a direct student of its founder Abū Ḥanīfa, has a distinct opinion regarding the acceptance of the *jizya* payment from non-Muslims. His position was entirely based on race, much to the contrary of the general Shāfi'ī position. Abū Yūsuf's opinion on this matter was that *jizya* cannot be accepted from the Arabs, regardless of their religious affiliation, and can only be accepted from the non-Arabs, be they from *ahl al-kitāb*, from non *ahl al-kitāb*, or any other religious affiliation (Abu Yusuf, 1979: 66; Baghawi, 1999: 2: 335).

The position of the Mālikī school of *fiqh* was similar to the position of the Ḥanafī school as being inclusive of non *ahl al-kitāb* communities. Moreover, Mālik ibn Anas, the founder of the Mālikī school stated that the *jizya* can even be accepted from Arab *mushrikīn* (Ibn Abd al-Barr, 1980: 1: 479). Mālik's position was that *jizya* can be taken from any non-Muslim, be they following an Abrahamic or a non-Abrahamic religion, or not following any religion at all. This includes the Arabs and the non-Arabs, the fire and idol worshippers, and every other non-Muslim with the exception of apostates who desert Islam (Qurtubi, 1964: 8: 110; Baghawi, 1999: 2: 335; Gharnati, 1999: 5: 400

[own translation]). Although the position of the school founder was the most encompassing of all, many scholars who belonged to the Mālikī school maintained the exclusion of the Arab *mushrikīn* from the acceptance of the *jizya*, suggesting this as a more common theme across different *madhhab*s. Mālikī scholars like Ibn al-Qāsim (d. 806), who was a direct student of Mālik, the Egyptian *muftī* Ashhab (d. 820), the Andalusian scholar Ibn Ḥabīb (d. 853), and the prominent Qayrawān city *faqīh* Saḥnūn (d. 855), took a standpoint that was aligned with the dominant opinion of the other schools of *fiqh* in rejecting the Arab idolater's possibility of offering *jizya* and attaining the status of *dhimma* (Ibn Atiyyah, 2001: 3: 22). However, one notable scholar, Mālikī jurist, and judge of Ceuta 'Iyāḍ ibn Mūsā (d. 1149) stated (2011: 1278) his opinion that, excluding the Zoroastrians, who were specified in a Prophetic narration, non *ahl al-kitāb* communities under Islamic rule should not be permitted to practice their religions. This opinion places 'Iyāḍ's position, though known to a resolute Mālikī himself, in closer proximity to the position of the Shāfi'ī school of law.

As for the fourth school of Sunni Islam, the Ḥanbalī school, it is narrated that the most known opinion of the school's founder, Aḥmad ibn Ḥanbal, is that of the Shāfi'ī school, which is the more exclusive position. However, it is found in another narration that Aḥmad states this opinion that *jizya* can be accepted from non-Arab affiliates of other religions, and that only Arab *mushrikīn* are outside this circle (Jawzi, 2001: 2: 250). This last narration is the one stated by the prominent Ḥanbalī scholar Ibn Qayyim al-Jawziyyah (1995: 20). Based on that it appears safe to assume that the founder of Ḥanbalī school's position can be aligned to the inclusive side of the debate, together with the Ḥanafī and the Mālikī schools, although Ibn Qayyim al-Jawziyyah himself aligns his position with the position of the Shāfi'ī school (1995: 25).

As the proponents of the Ibrahimiyyah side of the diversion appear to view the acceptance of *jizya* and the inclusion in *dhimma* as an act of legitimization of their distorted religious beliefs, the Adamiyyah paradigm reflects a perception of this inclusion as an act of governance. The *jizya*, in this system of governance, can be imagined similar to the taxation that communities belonging to a rule are subject to. This rather practical approach seems to have existed in the thought of the scholars of the territories where the Muslims ruled large numbers of non-Abrahamic communities, such as the Indian subcontinent. In such cases, the thesis will show that the inclusion

of the Hindu communities into the governance of the Muslims was attainable through their inclusion in *dhimma*. The *jizya* payment was professed by many jurists to be that of symbolic importance, denoting the dominance of Islam as a ruling authority, but it did seem to be the key by which a status similar to that of modern-day citizenship was given to the Hindus. In the vision behind the production of the legal positions in the Adamiyyah paradigm, therefore, there is an apparent consideration for the facilitation for fair governance of the non-Abrahamic communities. As scholastic traditions develop in the regions where non-Abrahamic communities are under the Muslim rule, facilitating governance becomes necessary for the political and social inclusion of those communities. This is not to say that this was the driving force behind the acceptance of the *jizya* payment by the jurists who did, as they followed rigorous evidencing through the traditional methods of *fiqh*. However, this suggests that, behind the positions each of the two paradigms adopted, a tension seems to exist between the political and the religious, the function of inclusion in *dhimma* as a form of governance and a caution of this inclusion being a form of religious legitimization of communities whose beliefs are essentially opposed to Islam.

On another front, exploring the Shī'a legal tradition shows more similarity with the Ibrahimiyyah position from the Sunnī schools' side. In *al-Kāfī*, arguably the most prominent collection of *Ḥadīth* for the Twelver Shī'a school by Abū Ja'far al-Kulaynī (d. 941), narrations can be found which specify that *jizya* can only be accepted from *ahl al-kitāb*, and cannot be accepted from the non *ahl al-kitāb* communities, including the Arabs alongside those from other origins, and that it is not permissible for them to be allowed to continue with their religious practice under the *dhimma* of the Muslims (2000: 5: 10, 11). As for the Zoroastrians, the exception that the Prophetic narration was understood to bring is also held, with numerous narrations that indicate the Zoroastrians relation with a lost divinely revealed scripture, also similar to some opinions mentioned earlier (Kulayni: 2000: 3: 566-568; Qummi: 1986: 2: 53, 54). This position is mentioned in the collections *al-Kāfī* and *Man Lā Yaḥduruh al-Faqīh*, both among the 'four books' of the Twelver *madhhab*, which are considered the most prominent early works of the school.

This leads to the conclusion that the opinion surrounding the issue of accepting non *ahl al-kitāb* in the Islamic *dhimma* system is divided in two standpoints: the Ḥanafī-Mālikī-Ḥanbalī standpoint and the Shāfi'ī standpoint. The first group of schools stand for the inclusion of most non *ahl al-kitāb* communities in the *jizya* payment, which leads to guaranteeing their rights of religious affiliation and practice inside the Muslim lands, in addition to placing their protection under the responsibility of the Muslims. In other words, inclusion in the *dhimma* transfers their inviolability from the *mu'aththima* type, the violation of which causes sin, to a complete inviolability that includes both the *mu'aththima* in addition to the *muqawwima* type, the violation of which causes penalty, a penalty that the Muslim state is responsible for enforcing upon Muslims and non-Muslims. The Shāfi'ī standpoint stands for excluding non *ahl al-kitāb* communities from this incorporation, and therefore from offering them patronage, protection, and inviolability inside the abode of Islam, based on a viewpoint that rejects affirming their deviated beliefs.

		Ahl al-kitāb		Non *ahl al-kitāb*			
		Jews and Christians		Zoroastrians		Other religions	
School	Jurist	Arabs	Non-Arabs	Arabs	Non-Arabs	Arabs (idolaters)	Non-Arabs
Ḥanafī	Imam Abū Ḥanīfa, Nasafī	Accepted	Accepted	Accepted	Accepted	Not accepted	Accepted
	Abū Yūsuf	Not accepted (payment of tax instead)	Accepted	Not accepted (payment of tax instead)	Accepted	Not accepted	Accepted
Mālikī	Imam Mālik	Accepted	Accepted	Accepted	Accepted	Accepted	Accepted
	Ibn al-‘Arabī, Ibn al-Qāsim, Saḥnūn	Accepted	Accepted	Accepted	Accepted	Not accepted	Accepted
	Al-Qāḍī ‘Iyāḍ	Accepted	Accepted	Accepted	Accepted	Not accepted	Not accepted
Shāfi’ī	Imam Shāfi’ī, Māwardī	Accepted	Accepted	Accepted	Accepted	Not accepted	Not accepted
Ḥanbalī	Imam Aḥmad	Accepted	Accepted	Accepted	Accepted	Accepted according to the strongest narration	Accepted according to the strongest narration
	Ibn Qayyim al-Jawziyyah	Accepted	Accepted	Accepted	Accepted	Not Accepted	Not Accepted
Other Sunnī schools	Imam Awzā’ī	Accepted	Accepted	Accepted	Accepted	Accepted	Accepted
	Ibn Ḥazm al-Andalusī al-Ẓāhirī	Accepted	Accepted	Accepted (considered among *ahl al-kitāb*)	Accepted (considered among *ahl al-kitāb*)	Not Accepted	Not Accepted
Twelver Shī’a	Kulaynī, Qummī	Accepted	Accepted	Accepted	Accepted	Not Accepted	Not Accepted

Table 3.1: the general map of acceptance of the *jizya* according to the schools of law, after surveying selected works of their jurists.

This chapter presented the core division between the Adamiyyah paradigm, which – parallel to the universalist school presented in the previous chapter – views that non *ahl al-kitāb* communities are eligible to be included in *dhimma* by virtue of their humanity, and the Ibrahimiyyah paradigm, which sees the Abrahamic peoples, in addition to the Zoroastrians, as the only groups that are eligible for that status. The chapter concludes that, notwithstanding this difference, the exclusion of non *ahl al-kitāb* communities from the circle of *dhimma* according to the Ibrahimiyyah paradigm does not mean an invitation for the violation of their rights of life and property, or even religious practice. The issue is governed by other considerations, including militancy and the reach of, and response towards, *da'wa*. The chapter also argues that understanding *jizya* as a symbolic payment that is presented by the non-Muslims in recognition of the authority of Islam is both articulated in the classical scholarship of *fiqh* and harmonious with the view that guarantees the status of inviolability to all human beings regardless of their religious affiliation.

The following section will highlight three historic cases of the Muslim rule in territories that had been inhabited by predominantly non *ahl al-kitāb* communities, focusing on facets of the status of the inhabiting communities, the affirmation of their rights and protection, and the underlying governing principles of this status. The aim is to examine how the theoretical discussions discussed in this section apply to the Muslim practice in different locations and religious atmospheres. This, in turn, will hopefully provide a coherent view of how the Muslims see the status of non *ahl al-kitāb* communities, both theoretically and practically.

Section Two

The Status of Non *Ahl al-Kitāb* Communities: Cases of Muslim Rule of Non *Ahl al-Kitāb* Peoples

Chapter Four

The Case of the Zoroastrians in the Persian Plateau

The people of the Arabian Peninsula had been in contact with the Persian plateau and its inhabitants long before the rise of Islam. This contact went beyond mere livelihood matters of trade and other daily transactions. As historians such as Marshal Hodgson conclude, the contact between the people of the Nile to Oxus region included religious tensions and influences of ideas on the nature of the deity and spiritual consciousness that figures like Zarathustra (Zoroaster) put forward (1974: 1: 114-117). As the expansion of Islam gained momentum later in history, it was natural that these Iranian lands would be among the first to be affected by it. The geographical location of the Persian plateau, being immediately adjacent to the northern parts of the Arabian Peninsula and Syria (the area collectively referred to as the *shām*), naturally poses an important element in the encounter between Islam and the non-Muslims of Iran. The neighbouring Zoroastrian community, understandably, became one of the first communities that the Muslims encountered, and the Muslims faced an early need to develop legal opinions and a religious stand towards it.

This chapter will commence the second section of the thesis by examining the case of the Muslim conquest and rule in the Persian plateau, and the way the status of the Zoroastrian communities was perceived according to the Muslims. The case is the first to be discussed in this thesis following the historical chronology of the conquest of the Persian plateau, as well as the proximity of the geographical location of the plateau to the Arabian Peninsula. The particular nature of this case will be demonstrated. As will be discussed with more detail; the underlying ground upon which the Muslims shaped their view towards the Zoroastrians was a clear prophetic narration. The implications of this basis will be discussed. The chapter will begin by offering a brief account of the Muslim presence in the Persian plateau before getting into the core discussion on their status and inclusion in the circle of inviolability.

Of course, the Persian plateau was not home only to people of Iranian racial descent. Other communities, which can be traced to different racial backgrounds, inhabited the land. Similarly, although Zoroastrianism was, by the time of the Muslim conquest, the official religion of the then Sasanian empire, other religions were naturally present and practiced by the population. Some even continued to be present after the Muslim rule of the land. This, at times, created confusion among some tax collectors as to the categorization of such communities (Daniel, 2011). For the purposes of this thesis, the focus in this chapter will be maintained on the main group which represented the biggest religious and cultural weight of the Persian plateau at the time, which is Zoroastrianism – the religion that Muslim Arabs commonly referred to as '*al-majūsiyya*'. The people of the Persian plateau will generally be referred to as Persians or Iranians, primarily because these are the people who were mainly present in and who embodied the social fabric of the land, and secondly because the Muslim scholars, in their written works, have generally opted to generalize the inhabitants of the land under the term *furs* ('Persians') or *majūs* ('Zoroastrians').

4.1 Early Encounters Between Muslims and Zoroastrian Communities

The relationship between the early Arab Muslims and the Persian Zoroastrians was intriguing in many aspects and displayed a level of cultural and social complexity. The closeness and proximity between these two peoples can be sensed from the way the Zoroastrians were favored by many scholars to the rest of non-Abrahamic religions' adherents, or from the fact that the Persian language was placed by notable scholars like Aḥmad al-Sirhindī (d. 1624) in a level right after the revered Arabic language of the Qur'an, and as superior to other languages (Mirani, 2016). Naturally, the relationship between the two sides evolved within a wide range of sentiment – and not only a positive one – as can be seen from various texts of Arabic literature referring to the *furs* ('Persians') or *bilād fāris* ('Persia').

Because of the existence of this relationship between the Arabs and the Persians, information about the Muslim-Zoroastrian encounter at the early stages of the expansion of Islam can be found within the classical texts and the treatises that chronologically narrate the life of the Prophet ('*sīra*'), and in the books of the

conquests (‘*maghāzī*’). What particularly distinguishes the Muslim-Zoroastrian relation is that the encounters between them began at the time of the Prophet himself, which made it possible for the Muslims to apply an undoubtful, unquestionable legal verdict in their conduct with the Zoroastrians regarding many critical issues. Not much room for speculation, legal inference, or scholarly and political debate was left when it came to the establishment of the legal status of the Zoroastrian communities that were encountered in the early stages as being eligible to inviolability. Yet, at a later stage, a few opinions arose addressing some details within the framework of the rights and status of the Zoroastrian communities based on different understandings of the Prophetic narrations and conduct. Hence, legal opinions had to be formulated for the purpose of dealing with details regarding the treatment of Zoroastrians in some issues, such as the permissibility of intermarriage between them and the Muslims, the permissibility for the Muslims to consume the meat that is butchered by Zoroastrians or according to Zoroastrian rites and rituals, and the Arab/non-Arab Zoroastrians dichotomy when it comes to accepting the *jizya*, which was previously explored in the third chapter of this thesis.

The earliest encounter between the Muslims as a dominating and expanding power and the Zoroastrians, according to narrations, occurred only eight years after the migration of the Prophet Muhammad to Medina, which was around the year 629. The Muslim commander Al-‘Alā’ ibn ‘Abdullāh al-Ḥaḍramī (d. 635) was sent by the Prophet to carry the message of Islam to the province of Bahrain, which was, at the time, a kingdom governed under Persian patronage. Ḥaḍramī was given a message that calls the governor and people of Bahrain to Islam, as well as the Zoroastrians in the area called *hajar* (modern day east Arabian Peninsula and Bahrain), represented by their local leaders. Historical narratives state that the Arabs and many non-Arabs of that area accepted Islam, including the governor and the Zoroastrian community leader, while the local Jewish, Christian, and some Zoroastrian communities agreed to enter a covenant with the Muslim commander in which they were to offer the *jizya* payment (Baladhuri, 1988: 85). Remarkably, the position on accepting the *jizya* from the Zoroastrians thereupon was given legitimacy by the Prophet himself in his letter to the people of Bahrain, the discourse of which included all the people, and explicitly indicated the Zoroastrians by ordering that they should hand over their fire houses of worship should they accept Islam (1988: 85). A similar case occurred in the region of

Oman at the time of the Prophet, where the kings of Oman agreed to embrace Islam while the *jizya* was accepted from the local Zoroastrian community of that part of the Arabian Peninsula (Tabari, 1967: 3: 29).

Zoroastrian communities were settled in many different places, both adjacent and distant from the lands where the Muslims ruled. This makes it difficult to analyze all the encounters that the Muslims had with them. Modern day Iran, the eastern parts of Iraq, the areas of *Ṭabaristan* and *Jurjistan*, which were inhabited by the Deylem communities, central Asia, and even areas in North Africa were mainly inhabited by Zoroastrian communities. The Muslim conquests of the land inhabited and dominated by Zoroastrians continued thence in a rather rapid manner. It was at the time of the second caliph, 'Umar, that the eastern parts of Iraq, the *sawād*, and the Iranian highlands were reached by the Islamic expansion. As explored before in the thesis, historical narrations demonstrate that 'Umar had doubts about the way Muslims ought to perceive the status of Zoroastrians. This was clarified by the Prophetic decree concerning their status, which was to accept them as *dhimmī*s in a similar manner to how the Jews and the Christians would be accepted. Evidently, the Zoroastrian communities continued to practice their religious rites and worship, and were affirmed their inviolability of life, property and all the other axiomatic rights under the Islamic rule.

The encounter of Islam with the Sassanian empire, with Zoroastrianism as its official religion, was marked by a relatively rapid diminishment of the latter. After a multiple centuries-long powerful dominance over the land, the Persian tradition seemed to rapidly melt down in front of the Muslim conquest. The Zoroastrian culture largely receded accompanying this political diminishment, with numbers of Zoroastrians continuing to decrease as the centuries of Islamic presence passed on. Inevitably, occurrences of violent clashes and military forceful resolutions were recorded, tilting in the favor of the Muslims. Yet, historians state that, as the Muslims entered Iran and moved from one city to another, the masses largely and willingly accepted Islam. Those who did not were included in the covenant of *dhimma* in what has been described as a fairly tolerant manner (Stepaniants, 2002: 163). Some attribute this fast expansion of Islam at the cost of the Sasanian empire to prior years of weakening processes that placed the empire in a more fragile situation, while some tend to focus

on the effects of the Sasanian-Roman rivalry on the fragility of the former (2002: 164). In all, it appears that the empire was struggling from within long before the Muslim expansion, and that its people were not content with the way the Zoroastrian clergy and the political rulership used their powers. All these factors foreshadowed an eventual decline of Zoroastrianism in Iran, in addition to a political one. This led to the conclusion that, '[i]n short, the victory of the Muslim invaders over Zoroastrian Iran was primarily the triumph of a stronger state, with its superior military power, over a weaker one.' (2002: 165). According to Stepaniants, many factors helped actualize this rapid overcome of one the ancient world's most powerful empires by Islam. Most notably among these factors was the social structure that Islam calls for – which is more egalitarian than that of Zoroastrianism, its disapproval of discrimination – as opposed to Zoroastrianism differentiating between levels of the society, the accommodating nature of Islam to new converts – as opposed to the exclusive stance of Zoroastrianism towards people other than Iranian, the simplicity of Islam's rituals – as opposed to the overflow of ceremony in Zoroastrianism, and the capacity for cultural assimilation that is inherent in the message of Islam being addressed to all humanity and its Prophet being the seal of prophets. The purpose of this thesis is not to examine further the reasons behind this rapid and dramatic crumble of the Sasanian empire and its officially adopted religion, but to highlight some of the general characteristics which marked the encounter between Islam and Zoroastrianism, an encounter that signified facing a religion that was non-Abrahamic and, at the same time, not as familiar to the Muslims as the idol worship that was practiced in the Arabian peninsula.

4.2 Theological Considerations in Muslim Writings about Zoroastrians and their Place in the *Ahl al-Kitāb* – non *Ahl al-Kitāb* Categorization

The religions of the Persian plateau where various and had differing theological assumptions. We find, however, that the Muslims opted to use the term '*majūs*' as a term that encompasses the entirety of those religious traditions. Scholars noted that the Arabs used this term to cover all dualistic and other-than-dualistic Iranian religions (Glassé, 2003: 495). Although the term primarily indicates the communities that adhere to Zoroastrianism – as will be assumed throughout the chapter –, it appears to

be also a generic term which the Muslims used to signal out the religious communities that were neither Abrahamic nor idolaters. Yet, it can be safely assumed that, when the term '*majūs*' was used in traditional Islamic texts, it primarily referred to the followers of the teachings of Zoroaster who inhabited the Persian plateau and the lands to the east of the *shām* (Ibn Hazm, 1903: 1: 37).

To stay within the primary methodology followed in this thesis in relation to sources, which is to survey the primary formative and classical sources for answers to the main questions posed, such sources will be utilized to provide a short overview of how the Muslims viewed the religious beliefs and practices of the Zoroastrians in times that accompanied the formation and the following periods of Islamic legal thought. Abu al-Fatḥ al-Shahrestānī (d. 1158), a Muslim historian and theologist who is famously associated with the book *Al-Milal wa al-Niḥal*, an encyclopedic text providing treatise and details on numerous religions, religious groups, spiritual beliefs, and sects within religions, mentions Zoroastrianism and provides a lengthy treatise on its various sects which existed at his time. In Shahrestānī's account of the Zoroastrian faith (1975: 2: 36, 37), he draws a connection between the Zoroastrians and the Prophet Abraham. At the same time, he differentiates them from the Abrahamic *ḥanīf* traditions, which can be regarded as the genuine Abrahamic heritage in the eyes of the Muslim scholars. He distinguishes them as a system that believes in divine duality as opposed to the unification or oneness of the worshipped ('*tawḥīd*'), which is deemed as the core characteristic of the Abrahamic religions. He enounces their beliefs in the dualism of light and darkness, good and evil, as both being able divine forces which shape and modify the universe in which we live. The aspired salvation is that of light from the darkness, or the good prevailing over the evil. This cosmic struggle between good and evil, light and darkness, justice and injustice, is something that Zoroaster and his successors called every individual to take part of, ultimately striving for good to prevail over evil. Shahrestānī continues to explore (1975: 2: 38-46) the various creeds that are held by the different sects of the Zoroastrians, their belief in the duality, their recognition of an omnipotent divine being, and what their prophet, Zarathustra/Zoroaster, called for them to believe.

The position of Zoroastrians in relation to a divinely reviled tradition, and therefore the discussion around their inviolability, was affected by factors such as their reverence of fire. Many Muslims correspond Zoroastrianism with fire worship. This is also apparent in some classical texts that refer to the fire of the *majūs* in a way that is comparable to the idols that the Arabs used to worship and present offerings for. Shahrestānī indicates (1975, 2: 59) their reverence to fire by mentioning the fire houses that existed in different locations and periods of Islamic rule without deeply delving into the theological implications of this reverence. He explains (2: 60), though, that their reverence of fire stems from many reasons, including its being an honored substance, that by reverence they would be saved from the punishment by fire in the afterlife, and the possibility that this practice can be traced to the fact that fire has not affected the Prophet Abraham when he was cast into it, an incident included in the Qur'an. The last reason confirms Shahrestānī's assertion of the connection between the *majūs* and Abraham, which may be seen as an attempt to connect the Zoroastrians to the Abrahamic prophetic tradition, as faintly as it may seem. He concludes by stating that the fire represents 'a direction, orientation ('*qibla*'), a medium ('*wasīla*'), and a sign ('*ishāra*')' for the Zoroastrians. However, this aspect of Zoroastrianism is mentioned in considerable brevity in comparison to the belief in the creed of dualism, for example, which Shahrestānī describes as the key theological ground of the Zoroastrians, despite the fact that the *majūs* are generally referred to in the books of *fiqh* as fire-worshippers.

Shahrestānī concludes that the Zoroastrian faith is one with a *sharī'a* (1975: 2: 63), a divinely-connected religious law, and a tradition that is based on divine-affiliated sources, effectively placing them in this context with the Jews and the Christians, who believe in divine law but not in the Islamic *sharī'a*. The book that Zoroastrians regarded as their primary sacred text was the Avista, which was written – at the latest – at the end of the Sasanian era (6th century CE)[i]. The Gathas are regarded as the part of the Avista that was composed by Zoroaster himself. The status of the Avista to the Zoroastrians as a divinely inspired book was (and still is, according to Zoroastrian

[i] Two versions exist today of the Avista, the sacred book of Zoroastrianism: the Vendidad-sade and the Zend-avista. The first is an original "Avistan" language text of the Vendidad, the Visparad and the Yasna, without translation or commentary. The second includes commentaries and translations in Pahlavi that were attached to the Avista in Sassanid times.

communities currently in India) similar to that of the Qur'an to the Muslims or the Torah and Gospel to the *ahl al-kitāb* communities (János, 2005: 295). This connection that the Zoroastrians established with a book, however, was not accepted by the majority of Muslim jurists and theologians as a sufficient justification to categorize them with the Jews and the Christians as *ahl al-kitāb* communities. This could be attributed to the previously mentioned conviction that the Zoroastrians' creed was based on dualism while the Abrahamic faith is based on oneness, which has given the religious traditions that are attributed to it the general monotheistic nature. Examples of the conviction mentioned above can be found in the ideas of influential Muslim scholars. Aḥmad ibn Ḥanbal, the founder of the Ḥanbalī school of Islamic law, opposed the idea that the *majūs* could be referred to as *ahl al-kitāb*. He rejected that the notion that they allegedly had been in relation with a divinely revealed scripture could impose any consequences in creed or any theological proximity to Islam (Khallal, 1994: 397-399). He held that the *ḥadīth* which ordered the Muslims to treat them in a way similar to that of *ahl al-kitāb* represents the sole basis upon which the second caliph, 'Umar ibn al-Khaṭṭāb, and the rest of the Muslims, depended to affirm their status. For Aḥmad, it was solely by virtue of that narration that the *jizya* was accepted from the Zoroastrians.

On the opposing side, some Muslim scholars considered the assumption that the Zoroastrians had an affiliation to a religious book as a justification to argue that they should be categorized as *ahl al-kitāb*. The prominent jurist and judge Ibn Ḥazm al-Andalusī (d. 1064), who was among the most prominent jurists of the Ẓāhirī school of law, states (1903: 1: 92; 4: 8) the position of his school and himself that they regard the Zoroastrians as a group that belongs to *ahl al-kitāb* communities. As was mentioned in the first section, it was narrated that the Zoroastrians had previously been in possession of a divinely revealed scripture, which had later been lost. Ibn Ḥazm states that this was the position of many of the Prophet Muhammad's companions, including 'Ali ibn Abī Ṭālib and Ḥudhaiyfa ibn al-Yamān, in addition to many other scholars of Islamic law. His evidence to considering them as *ahl al-kitāb* is based on a literal, exterior understating of the Qur'anic verse (9: 29) which was mentioned before. It centralizes around the understanding that the verse limits the acceptance of the *jizya* to *ahl al-kitāb* and this, effectively, prohibits accepting it from non *ahl al-kitāb* communities. Since it is known with certainty that the Prophet and the early caliphs

accepted the *jizya* from the Zoroastrians, then the only conclusion that would be acceptable – according to Ibn Ḥazm – is that they belong to the *ahl al-kitāb* category. This position marks an intrinsic characteristic of the Ẓāhirī school of law – its name coming from '*ẓāhir*' which means the 'apparent' or the 'outside form' of something, which is the tendency to insist on primarily maintaining the outward, apparent indication of a verse or a religious text in the course of determining the legal verdicts that are deducted from them. The conclusion on considering the Zoroastrians as *ahl al-kitāb* is clearly built upon the strict conviction that the *ḥadīth* that established the acceptance of the *jizya* from the Zoroastrian communities could not have been an exception that specified a verdict outside the apparent literal scope of the Qur'anic verse. Ibn Ḥazm continues to explain that, since the Zoroastrians are considered to be *ahl al-kitāb*, then it is both necessary and certain beyond doubt that a prophet was sent to them by God (1903, 4: 8). In regards to this connection to prophethood, he mentions (1903, 1: 91) Zoroaster ('*zaradusht*') by name, recounting that many Muslim scholars regard him as a prophet sent by God to the community that later became known as the Zoroastrians.

As a third opinion on the legal status of the Zoroastrians, Shahrestānī recounts (1975: 2: 13) the classification of the *majūs* in what can be called a middle group which is situated somewhere between *ahl al-kitāb* and non *ahl al-kitāb*. He explains that, according to this opinion, they belong to those under what we called quasi- *ahl al-kitāb* earlier in the thesis, those who are under suspicion of a relationship with a divinely revealed scripture ('*man lahum shubhat kitāb*'). From the way the religious communities are classified in his account, it is clear that Shahrestānī himself is aligned with this opinion. What appears to be the case for the Zoroastrians, according to this classification, is the belief that, had their book not been lost, they would have been considered an *ahl al-kitāb* religious community. Moreover, according to Shahrestānī, it is by virtue of being so that they were considered *ahl al-kitāb* when it comes to the *jizya*, and it is by virtue of their book having been lost that they divaricate from *ahl al-kitāb* when it comes to inter-marriage with the Muslims or the permissibility of their butchered livestock (Khallal, 1994: 377). In any case, along the reasoning of Muslims' accounts of Zoroastrians in relation to other *ahl al-kitāb* religions, it appears safe to assume that, despite the fact that the Jews and the Christians share fundamental

religious principles with the Muslims, in a social framework the Zoroastrians were viewed as the closest religious community to the early Muslims.

4.3 Zoroastrians and their Inviolability in Islamic Legal and Historical Contexts

In his published article 'The Four Sources of Law in Zoroastrian and Islamic Jurisprudence', Jany János comparatively explores the four sources of law in Zoroastrianism and investigates the effects they might have had on the Islamic counterparts during the encounter between the two traditions. Although the methods of formulating legal opinions demonstrate a level of similarity, János argues that a direct form of exchange between the jurists from both traditions is not possible. This is because the formation of *uṣūl al-fiqh* occurred after the diminishment of the Sasanian empire (2005: 319). He speculates that it was also unlikely that the Muslim jurists, developing their solid schools and mechanisms, would have sought to learn from the remaining Zoroastrian sages and communities the mechanisms and methodology of their legal system. Likewise, it was not likely that the Zoroastrians, who, despite being left intact, found themselves as a minority and sought to protect their tradition against Islam, would have shown willingness to influence the scholars of Islamic jurisprudence in Iraq (2005: 320-323). The second possibility that he offers is the influence of the Persian culture through the converts that accepted Islam as a faith and were incorporated within the legal, political or scholarly circles, considering the fact that a substantial percentage of the non-Arab Muslim scholars who were developed thence were of Iranian descent. Although the possibility of such an influence exist, he states that the language barrier, as well as the affiliation of these Persian scholars with the then newly established schools were stronger than to claim such a big influence of their Iranian culture into the field of the Islamic sciences, let alone Zoroastrianism as an influence.

The encounter between these two traditions displayed traits that went beyond a one-sided, dominant influence of Islam. Many studies have shown that there has been an effect of the Persian methods of governance over the methods of the Muslim Arabs, though it would be misleading to denote these influences as being 'Zoroastrian'. As mentioned before, the Zoroastrian elements of influence upon the Islamic

jurisprudence were limited as was the tradition itself after the Muslim conquest. The influences on the administrative and political levels, however, are traceable. Studies show (János, 2005: 230-232) that the Persian families who administered the provinces in the late Sasanian period continued to do so at the beginning of the Islamic dominance in Persia. These families incorporated many methods in administration into the Muslim governance in the region. Many of the Iranians accepted the Islamic faith and became prominent scholars and political theorists, and many of the later theorists in the Islamic rule were of Iranian origin, such as the well-known 'Abdullah ibn al-Muqaffa' (d. 759), who translated from Persian into Arabic many texts including the celebrated *Kalīla wa Dimna* and other texts in which he articulated his political thought.

As is the pattern that is displayed during shifting the paradigms of peoples when it comes to religion, the conversion of the people of the Persian plateau was achieved gradually over many decades. It can also be suggested that the Islamization of Iran was affected by social and political factors other than merely religious or dogmatic. Studies show (Daniel, 2011) that during the early caliphate, as well as the Umayyad rule, fewer Persians embraced Islam. Some of whom were elite families looking to secure their status under the new ruling system, and others soldiers whose embrace of Islam was a means of joining the ranks of the Muslim armies. The Abbasid assimilation to power, however, caused an apparent increase in the Persians embracing Islam as a faith that, by the end of the Abbasid era, more than eighty percent of the inhabitants of Iran were Muslim. The rule of the Abbasid dynasty witnessed a bigger assimilation of the people of the Persian plateau into Islam. Yet, in either case, during the rule of the Umayyad and the Abbasid dynasties, many of the Zoroastrians embraced Islam, such as the Deylem communities around the Caspian Sea, which occurred around the middle of the ninth century CE, as historical narratives show. All this affirms that the conversion process of the Zoroastrians was not enforced and was conducted voluntarily, as it unfolded through centuries within the Muslim rule of the land. Members of the same originally-Zoroastrian Deylem communities remained Zoroastrian, as some of them are recorded to have embraced Islam as late as the eleventh century, hundreds of years after the fall of the Sasanian empire (Arnold, 1913: 162). The gradual and evidently peaceful conversion that was displayed in the case of Islam's encounter with Zoroastrianism stands as a practical evidence that the inviolability of religion was

upheld as an axiomatic right for the non-Muslim communities. Zoroastrianism as a belief system was definitely not favored by the Muslim scholarship, who viewed it at times a dualistic creed system that deviated from the core Abrahamic fundamental belief of *tawḥīd*, and at other times as a legal system that allowed for intolerable conduct, such as incestuous behavior between fathers and daughters (Ibn Qayyim al-Jawziyyah, 1995). *'Ismat al-dīn* was a right that was preserved for the adherents of Zoroastrianism in spite of the fact that the Muslims, who were the dominant ruling authority, both on the scholarly and the common level, did not approve of such a belief nor practices.

The Umayyad rule is described by many to be one that favored the Arabs through many of their policies (Tritton, 2008: 1, 2). The Zoroastrians at that time, who had been all of descent other than Arab (predominantly Persian), had been faced with episodes of discrimination that resulted from that tendency of favoring the Arabs and the Umayyad process of Arabization of the non-Arabic speaking Muslim communities. It is for this reason, as the anonymous *Akhbār al-Dawla al-'Abbāsiyya* narrates (1970: 285), that the Zoroastrians as well as the Muslim Persians participated and represented themselves as helping factors in the Abbasid rising against the Umayyads. The Abbasid's point of origin in their call against the Umayyads happened to be Khorasan, a city in the Persian plateau. The Abbasids demonstrated more tolerance towards the then influential Zoroastrian communities. Some families that left Zoroastrianism and embraced Islam assumed high positions in the court of the caliphate, an example of which is the Barmakī family which was an elite Persian family that later came to occupy high administrative positions in the Abbasid court and influence the Abbasid history in many different ways.

The Zoroastrian community, despite being small in number, had continued to be an influential minority even by the ninth century under the Abbasid rule. Historians argue that, around that period, the Zoroastrian community started facing persecution, which was manifested by having their sacred-fire shrines demolished and their *dhimmi* status revoked (Stepaniants, 2002: 166). What Stepaniants refers to might be linked to the disturbances that occurred in the rule of the Abbasid caliph Hārūn al-Rashīd (d. 809) and the rulers that succeeded him in dealing with the new movements that were traced – in a way – to Zoroastrianism. The Barmakī family, after their conversion from

Zoroastrianism to Islam, assumed high positions in the Abbasid court as viziers, and had even been in a position where the matters of the state had been entrusted to them in a manner of delegation. Although some sources indicate that their rulership proved to be politically successful and economically prosperous, Muslim historians and scholars had claimed that they have shown inclinations to advocate policies with Zoroastrian tendencies. For example, at the time of Hārūn al-Rashīd, they have been reported to having encouraged the caliph to install an incense burner inside the Ka'bah, and that the caliph understood this as an attempt to turn the Ka'bah into a shrine of the sacred-fire. Sources indicate that the Muslim scholars saw in this an attempt to naturalize the existence of fire in what the Muslims believe to be the holiest house of God. Alongside this attempt, Muslim historians claim that the Barmakīs advocated changes in the application of Islamic law that had Zoroastrian traits. These attempts are considered by many Muslim historians to be among the factors that lead to the persecution of the Barmakī family by the Abbasid caliph al-Rashīd in such a swift manner after having granted them a state of high official power in his court (Baghdadi, 1977: 270; Isfarayini, 1983: 142). The Abbasid caliphs that succeeded al-Rashīd faced ideological movements that opposed many Islamic ideas and some of them caused disturbance in the Muslim state. Some of these movements were traced to ideas that were grounded in Zoroastrianism. As an example, they persecuted the movement of the *zanādiqa* (sing. *zindīq*) that was viewed to oppose core Islamic beliefs and was associated by many scholars to Manicheans and Zoroastrians, the morphology of the term itself originating from Persian roots. The Muslims in the Abbasid period, particularly surrounding the ninth and tenth centuries, perceived the communities that were previously Zoroastrian, or connected to Zoroastrianism in any way, with suspicion and distrust. It could be suggested that these movements and turbulences strengthened the conviction in the Muslim intelligentsia that some groups in the Muslim fabric were operating as 'secret Zoroastrian societies', advocating beliefs that are alien to Islam, promoting Zoroastrian, Manichean, and other Iranian cultures. This has apparently led to doubtful perceptions towards the communities that were openly Zoroastrian which lived under the Muslim rule, and resulted in the rise of enmity towards Zoroastrianism on the public and administrative levels.

The inviolability of religion (‘*ismat al-dīn*’), that was guaranteed for the Zoroastrian communities, was evidenced by the survival and maintenance of numerous Zoroastrian temples and sacred-fire houses in different cities and provinces in Iraq and Persia (Arnold, 1913: 161). The existence of Zoroastrian temples was even mentioned in classical works of Shahrestānī and Ibn Qayyim al-Jawziyya, who wrote centuries after the first Arab conquests of the Persian plateau. During the Muslim rule in the Iranian lands where Zoroastrianism had previously been the official religious tradition, the Persian peasants were left unharmed, as long as they did not show resistance towards the Muslim rule (János, 2005: 321). This is analogous to the conditions related to the contract of *dhimma*, which allowed the communities to continue practicing their religious practices within the abode of Islam while offering the *jizya* and, sometimes, other taxes, such as the land tax (Stepaniants, 2002: 163). Other Zoroastrian groups joined the ranks of the Muslim army, while the Persian nobles, in a way to preserve their influence, took up positions in the local administrative field, as well as in the Nestorian church. All in all, the Persians ‘who survived the conquest without converting to Islam preserved their customs and festivals and continued to live much as they had in the past, albeit in new and different circumstances.’ (János, 2005: 231). Zoroastrian communities, as well as other communities adhering to other minor religious traditions throughout the Persian plateau, continued to live under the Muslim rule without attempts of forceful conversion or coercion by the Muslims.

The Zoroastrians status within the Islamic rule cannot be considered without giving attention to Zoroastrianism being mentioned in the early Islamic literature. The encounter between the Muslims and the Zoroastrians was marked by characteristics that distinguishes it from the other cases of interaction with other non *ahl al-kitāb* communities. It can be safely stated that this was an encounter that displayed enormous conversion rates among the Zoroastrian people as compared with other cases of the Muslim expansion into other parts of the world. Such *en masse* conversions led to the diminishment of Zoroastrianism as a religious institution in a remarkably rapid manner. The numbers of adherents to this ancient tradition fell dramatically in favor of the Islamic faith, especially under the rule of the Abbasids. Unlike the example in other non-Muslim lands, including the Indian subcontinent, in which the majority of

the people remained affiliated to their non-Islamic religious systems. The case of the Islamic encounter with Zoroastrianism in Iran proved to be a case of pervasive religio-cultural transformation.

At the same time, a decisive feature that distinguished the example of the Muslim view towards Zoroastrianism is the clarity and unanimity of the legal position concerning the status of the Zoroastrians in Iran in practical contexts. Although conversion to Islam was evident on a large scale, still large numbers chose to remain Zoroastrian and continued to be so over the coming decades. In previous chapters of this thesis, it was established that the case of the Zoroastrians was backed by a *ḥadīth* of the Prophet Muhammad, His practice, and a practice of the early caliphs. This has naturally eased the task upon the Muslims in Iran as to the critical decision of whether or not to accept the communities that remained Zoroastrians as beneficiaries of the contract of *dhimma*. As all the literary and exemplary evidence was acknowledged by the Muslims wherein, the Zoroastrian community was accepted in that sense within the fold of the society, with what this acceptance includes in terms of rights to inviolability of life, property, religious practices, and the rest of the axiomatic human rights. Not even the debate that later came to actualize between the developed schools of Islamic law that addressed the issue of the inclusion of Arab as opposed to non-Arab Zoroastrian communities seems to matter in the discourse of the invasion of the Iranian lands, as its inhabitants fell into the agreed-upon category of this debate. After all, the existence of such solid ground for legal operation evidently served to lift any obscurity that the Muslims might have faced when dealing with an immediate community which was of a non *ahl al-kitāb* affiliation.

Islam did not obliterate all the cultural norms that are affiliated to Zoroastrianism, many of those customs and practices continued to be part of the life of the people in the regions where Zoroastrianism was prevalent. Some of these customs are still observed today in Iran and Central Asian countries; celebration of the Nowruz festivities and the astral calendar used today are examples of the survival of some of the Zoroastrian customs and ideas, at least on the social level. When the Mogul armies invaded Iran during the late Abbasid caliphate, many shrines and houses of worship were destroyed, including the ones related to Zoroastrianism. the Zoroastrian

communities who were left emigrated to India and became known as the Parsis (Stepaniants, 2002: 166). These communities live to this day.

The status Islam held the Zoroastrians at accompanied a complex interaction which unfolded in many forms through decades and centuries under the Muslim rule. The close proximity between the Persians and the Arabs, both geographically and, in some areas, culturally played a role in the incorporation of the Zoroastrians into the new social fabric in the Muslim rule, both as converts and as *dhimmī*s. It can be argued that this proximity in cultural measures made it easier for the Persians to assimilate themselves into the Islamic fabric, which was predominantly Arab in the first decades, until many of the scholars of Islamic law, jurisprudence, theology, mysticism, and even the Arabic language were Persian or of Persian descent. It is not the purpose of this thesis to examine whether or not Zoroastrian ideas had an impact on Islamic law, mysticism or the other Islamic sciences, as is argued by some scholars, but the observation that a considerable number of the Muslim scholars in mysticism, jurisprudence and other sciences were of Persian origin whose forefathers had been Zoroastrians suggests the ease by which they were assimilated into the Islamic social fabric and scholarly system.

The case of the Zoroastrians under the Muslim rule of the Persian plateau is that of a particular nature: it does appear influenced by the long history of interaction between the two peoples, as well as the religious elements in Zoroastrianism which caused several notable Muslim scholars to deem its adherents from among *ahl al-kitāb*, but the was clearly governed by a prophetic narration regarding their inclusion in the status of *ahl al-kitāb* communities. This narration has had its effect in the Muslim thought regarding the Zoroastrians to the extent that they became among the few religious communities whose inclusion in *dhimma* and their payment of *jizya* is hardly disputed among the Muslim jurists. The question whether to extend this status to all communities non *ahl al-kitāb* was the actual line of dispute.

Following the immediately adjacent territories to the Arabian Peninsula, Islam expanded to regions to the East and the West of the globe, reaching other regions which were inhabited by animistic, idolater, or other religions not affiliated with *ahl al-kitāb* or the Abrahamic tradition. The Muslims found themselves in rulership over communities when no clear prophetic narration instructed them on the way their status should be, as was the case with Zoroastrians. The following chapters will provide two examples of these cases.

Chapter Five

The Case of the Non *Ahl al-Kitāb* in North Africa

This chapter focuses on the second case study of non *ahl al-kitāb* communities which were ruled by the Muslims: the case of the idolater and animistic communities in North West Africa. These communities represent a case that was different from the case of the Zoroastrians in different ways. For instance, the inhabitants of North and West Africa were non *ahl al-kitāb* communities with no proximity to the Abrahamic tradition in terms of a sacred literary tradition or a relationship to a divine scripture. They were also non-Arabs and, with that, posed a different experience than what the Muslims had with the early Arab *mushrikīn* in Mecca and other parts of the Arabian Peninsula. This problem, however, may have presented an opportunity for some scholars whose thought aligns with the Adamiyyah paradigm, as it allowed for the inclusion of these communities in the *dhimma* contract and the acceptance of *jizya* on their behalf, since only the Arabs from among the idolaters where denied this choice according to some Ḥanafī scholars (Marghinani, 1970: 2: 379; Qaddouri, 1997: 236). Still, the problem exists as these communities shared with the Arab *mushrikīn* their deviance from the Abrahamic religious tradition and their reverence of multiple deities or idols other than the One God, thus posing a direct violation of the core message of Islam. As was shown in the first section of this thesis, many scholars saw allowing such communities to continue in the practice of their deviant polytheist religions as an endorsement of the false creeds that Islam came to rectify.

The geographical and social dynamics in North and West Africa, and, therefore, the nature of the Muslim rule in the land, was shaped by the nature of the arid environment and the tribal social fabric which depended, to a great extent, on raids and trade. The landscape was largely shaped by the trade networks which connected most of the major cities in those lands. These dynamics have influenced the way the Muslim rule unfolded in the area, as it displayed traits which were far from the centralized governance that was shown in other parts to the eastern Muslim-ruled territories. In addition to these dynamics, the complex relationship between the theoretical

framework of *fiqh* and the social systems present in Africa undeniably affected the Muslim ruling atmosphere. Trimingham argues (1968: 98) that the case of the application of the Islamic law in Africa was not a position of dominance of the *sharī'a* with recognition of the indigenous customs which were not conflicting with the Islamic norms. This might have been the case on the theoretical level. Yet, on the practical level, it was the other way around; the local customs were dominant, resulting in a system where the customary law was the foundation of the legal system, modified and approved by Islamic regulations. The Islamic law, nevertheless, remained the 'universalizing' factor among the different peoples of Africa and indeed displayed an undeniable influence.

The chapter will begin by offering a brief overview of the Muslim conquests and presence in the northern and western parts of Africa over different periods of time and different ruling dynasties. Following that, the chapter will present some elements which characterized the Muslim rule of land, particularly in relation to its non *ahl al-kitāb* inhabitants. The chapter will discuss the affirmation and the inviolability of the rights of life and religious practice which were guaranteed to the non *ahl al-kitāb* communities by the Muslim rulers.

5.1 The Muslim Conquests in North Africa and the Encounters with the Non *Ahl al-Kitāb* Communities

The Muslim conquest in Africa began at the time of the early caliphs. Historical treatises show a series of military disputes between the Muslim armies and the Romans, who used to control much of the Mediterranean coast in the region. Alexandria, as an example, was invaded by the Romans after being controlled by the Muslims, which called for a second conquest of the city during the period rule of the third caliph, 'Uthmān ibn 'Affān (d. 577). At the time of 'Uthmān, the Islamic rule expanded over the Nubian lands under the command of 'Abdullah ibn Abī Sarḥ (d. 656), the caliph's commander and milk brother. Under the leadership of Ibn Abī Sarḥ, Islam began expanding into the areas of Africa that lay beyond Egypt. From the communities which inhabited the Nubian lands, it is narrated that the *jizya* was accepted (Istanbuli in Ibn al-Arabi, 1987: 116). In other historical treatises, it is

mentioned that Ibn Abī Sarḥ accepted the *jizya* as well from the local communities in the North African regions that were under the control of the Romans (Ibn Adhari, 1983: 1: 12). These communities were predominantly non *ahl al-kitāb* according to the classification of the Muslim jurists.

The prominent Muslim scholar, judge, sociologist, historiographer and historian ‘Abd al-Raḥmān ibn Khaldūn (d. 1406) mentions in his well-known and much cited history text known as *Al-‘Ibar wa Dīwān al-Mubtada’ wa al-Khabar* (1988: 4: 165-167) a historical narrative on the Muslim conquest of North Africa. He describes multiple encounters between the Muslims and the local Berbers and other communities in the North African regions – the lands collectively referred to as the *Maghreb* – as well as the Iberian Peninsula under the Muslim rule – referred to as the *Andalus*. Ibn Khaldūn refers to some of the local Berber communities in North Africa using the term “*majūs*”, the term generally used by the Muslims to refer to the Zoroastrians, although it is accepted among historians of religion that the tribes of the *Maghreb* were generally affiliated, not to Zoroastrianism, but to what has come to be known as the Traditional Berber religion, which is an ancient polytheistic religious belief with a set of deities and rituals. It is also believed that many of this traditional religion’s beliefs can be traced to other African and world religions and cultures as influencing elements. In addition to that, classical Muslim historians used the term “*majūs*” in reference to different European, Russian, or Armenian communities. The Norwegian translator and orientalist Alexander Seippel published (1928) a collection of excerpts from Arabic texts describing encounters and attacks on the *Andalus* by groups of peoples who were referred to as “*majūs*”. The collection includes texts which explicitly clarify that a certain people – who would previously have been called *majūs* – come from Russia, as argued by Al-Mas’ūdī (d. 956) (1928: 1). In another excerpt, the Muslim geographer Ibn Sa’īd al-Maghribī (d. 1286) describes the Islands of today’s Britain and Ireland, and states (1928: 23) that its people have been called “*majūs*” before they embraced Christianity. Exactly why Ibn Khaldūn and many other scholars opted to use the same term that is used to generally denote the Zoroastrians to refer to other people is a question that needs to be explored. It can be proposed, however, that he used the term in its rather generic connotation as a term that described the non-Abrahamic religions of the non-Arabs who worshipped not the God of Abraham nor idols, but other deities

such as specific celestial bodies or the dead, which the Berbers in the North African region are reported to have worshiped.

Another possibility for the usage of this term in the case of North Africa is that some of those communities were actually affected by the Manichean ideology, whose roots can historically be traced to Zoroastrianism. In the third Volume of *The Story of Civilization* titled *Caesar and Christ*, Will Durant describes (1954, 3: 606) the development of Manicheans in Persia and their roots and historical detachment from Zoroastrianism. In this course Durant mentions that Manicheanism gained support among and embraced by some communities in North Africa as many Manicheans fled to that region after being persecuted in the Iranian lands. The possibility exists that Ibn Khaldūn's choice of using the term "*majūs*" to describe communities in North Africa could be a reference to these Manichean communities, who, despite being different from Zoroastrians in some beliefs, might have still been affiliated to them in the eyes of Muslim historians. Other sources show (Cooley, 1967: 88) that the Muslim community that was formed in the *Maghreb* after the arrival of Idrīs ibn Abdallah (d. 791), a descendant of the Prophet whose legacy and lineage continue to have an important influence on the *Maghreb* till this day, as a refugee from Abbasid persecution, grouped together all the non-Muslims of those areas, be they *ahl al-kitāb* or not, under the term "*majūs*".

The communities which were settled in North Africa were largely tribal in nature and lived a predominantly nomadic life. On his quest on regaining control of North Africa, the Muslim commander 'Uqba ibn Nāfi' (d. 683), who is the Muslim commander credited with the most significant Islamic expansion in the North African domains, encountered many Berber communities near Tangier and elsewhere in the region (Ibn Khaldun, 1988: 4: 237). His campaign reached the Atlantic shores of North Western Africa as early as the year 681. creating what is referred to by some historians as an Arab Empire that extended from the Persian Gulf to the Atlantic Ocean (Baulin, 1962: 22). Yet, in terms of demography and language, the North African parts of this empire were far from Arab. On the public level, the Islam that was brought by the campaign of 'Uqba ibn Nāfi' remained 'superficial' among the tribes of the North African regions. Studies suggest that, especially in the western parts of North Africa, where the distance to the Arabian Peninsula and the surrounding areas is further, the local

communities' embrace of Islam could not be described as certified or substantial in any way. Jacques Baulin refers to the result of that Islamic conquest as the establishment of a 'fragile dominion' (1962: 23). The Berber communities and the tribes which inhabited the vast arid regions had an affiliation that was not ascertained or fortified with a basic level of understanding of Islam and many among them did not abide by the norms and daily requirements of the Islamic faith and law. Thus, the problem of defining what 'conversion to Islam' means for a society and what it entails is not only posed as an issue in this case, but as a historical reality that proved to cause considerable consequences. Many tribes that inhabited that region, which had been 'converted' to Islam at one point, chose to forfeit that affiliation shortly afterwards. The non-Muslim communities that constituted the local communities in those regions might have converted to Islam at the beginning, but they were not assimilated into the Islamic society, much less Arabized. The pagan Berbers of North Africa are seen as the fiercest resistance that faced the Muslim conquest of the region. Yet, the same people, after embracing Islam, proved to be the greatest source of military power that consisted the Muslim armies which conquered other parts of Africa and the *Andalus*. Some scholars of history and anthropology attribute that to the 'passionate character' of the Berber tribes, which accounts for both their militant resistance towards the Muslim invaders and their role in the other Muslim conquests, as well as their later joining – in great numbers – the ranks of the *khawārij*, a schism that went into bloody conflicts against mainstream Islam. All of this led historians like Baulin to brand the Muslim conquest of the *Maghreb* as being 'marked by fire and by bloodshed' (1962: 23), yet superficial in terms of religious conversion at the same time.

5.2 Characteristics of the Muslim Rule Over the Non *Ahl al-Kitāb* Communities in North and West Africa

It is noticeable through surveying the historical accounts of the Islamic expansion in North Africa that the encounters and rule between the Muslims and the non *ahl al-kitāb* communities in the *Maghreb* regions appear to be more militant than the encounters with the Zoroastrians in the eastern parts of the Islamic ruled territories. Resorting to battle and violent measures with the Berbers and other peoples in North Africa appears to be higher and more frequent throughout the early stages of the

Muslim rule in the region compared to the clashes with the Zoroastrians in the parts to the east. Though this might lead to the assumption that the inviolability of life was not as readily assumed in this case as the previous one, this thesis will discuss this observation in a different lens, and demonstrate that the inviolability of the axiomatics was, in fact, maintained with solid Islamic legal grounds which applied to these communities, even though their case might have been more obscure according to the early encounters.

I will offer three possible reasons for this observation; the first reason is that the Zoroastrians in Asia had been clearly given the option of offering the *jizya*, and, therefore, this option could be resorted to instead of military clash with the Muslim rulership on many occasions. Accepting the *jizya* from the Zoroastrians had a clear base of justification within the Prophetic example and the *ḥadīth* that was mentioned in the previous chapter. No literary base form the Prophetic tradition with such clarity was offered for the people of a polytheistic religion like the Berbers per se. This left a room for speculation and legal reasoning on the side of the Muslim jurists. The second reason is that, in the case of the Muslims encountering the Zoroastrians in Iran, they were encountering a state, one which also happened to be weakened on the inside due to many factors. This allowed the Muslims to expand their control over this state in a rapid manner, involving mass conversions of the Zoroastrian population. It could be argued that facing a state gave the Muslim conquerors a form of harmony, as gaining control over new provinces was more facilitated after gaining control over other provinces in the same state. In the case of the North African tribes, on the other hand, the tribes were autonomous and they acted as separate governing entities. The connections of sovereignty between these tribes was far from that of an empire or a state. History accounts clearly indicate that, during the early conquests of the region, each time the Muslims faced a new tribe was a fresh encounter that had little or almost no connection with the preceding one. It could be said that, as opposed to facing one empire, once strong but then weakened, the Muslims faced what could be likened to multiple city-states, each with its fresh and motivated army which fiercely opposed the invading forces.

The third and most important reason was that, according to Ibn Khaldūn's narration (1988), the non-Muslim communities of North Africa displayed a level of resistance that was troubling to the Muslims after the Muslims gained control over the region. This was manifested by a series of initiation and participation in numerous rebellions against the Muslim rulership in the *Maghreb* and in the southern parts of the Iberian Peninsula, thus breaching the *dhimma* covenant demand for the non-Muslims to maintain a peaceful conduct under the Muslim rule. This caused the urgency and need for military responses and resorts to force on behalf of the Muslims. Examples of such rebellions conducted by these communities include the one in the year 841 at the reign of the fourth Umayyad Emir of Córdoba, Abdul Rahman II, in addition to the attack on the city of Seville in the year 859, where it was reported that many Muslims were killed and that numerous mosques were burnt down. Many other attempts were made by these communities in the *Andalus*, most of which seemed to be originating, according to the Andalusians, from outside of the peninsula.

There is a shortage of resources that explore or even mention the way the Muslims managed their governance and the legal status of the non-Abrahamic local communities in West Africa, especially those that inhabited the regions that are located south of the Sahara. While it is agreed that trade routes presented the central role in spreading Islam through those regions, there remains much room for exploration on the social dynamics that these trade routes fostered with the local communities as well as the nature of impact that Islam evidently managed to imprint in those areas. It was trade campaigns, rather than military ones, which played the most significant role in connecting the African lands north and south of the Sahara, thus acting as the channel by which the Muslim culture and social influence would pass from the already Muslim lands of North Africa – which were connected to the Arabian lands to the east – and the sub-Saharan lands (Prima Bari, 2000: 22). The Muslim traders are often described in the local sources as the agents by whom Islam reached those lands. An observation that supports this assertation is that the establishment of these trade routes paved the way for the Muslim *'ulama'* to immigrate to the lands which lay south of the Sahara, where trade has seen an obvious financial prosperity and uncovered a raw field for the practice of *da'wa*. This, consequently, resulted in cities like Timbuktu – which is located in the modern-day state of Mali and was the capital of the Empire of Mali – to become thriving and important centers of Islamic culture in West Africa. Scholars

from as far as the Western coasts of the Arabian Peninsula migrated to Timbuktu, for example, having heard of the immense centrality of Islamic culture in the city (24). The scholars took the role of the traders in the progression of the Islamization of these cities and areas in sub-Saharan West Africa. The narratives place a vast vitality on the role of the scholars in the establishment of the Muslim rule as well as the overall Islamic social order and cultural importance. The *'ulama'* were given utmost respect, extended authority, facilitation and immense support, both on behalf of the rulers and the people, although the emphasis is more placed on the support of the rulership throughout the local narratives. Yet the fact that the scholars followed the traders in their cohabitation with the African communities does not negate the fact that there had been a systematic attempt to introduce Islam to the region in a purely proselytizing motivation, during the reign of 'Umar ibn 'Abd al-'Azīz, tens of African students were trained in the Islamic sciences and sent to the West African communities for the sole purpose of acting as scholar-viceroys among the peoples (2000: 31).

To our limitation, most of the historical accounts of these sources tend to offer narratives of conquests and inter-relations between the Muslims and local communities on the highest level of leadership, without directing much of the attention on how the Muslims treated the communities under their rule or exploring the social aspects of the non-Abrahamic affiliated peoples in relation to the rule of the Muslims. Yet, these same accounts indicate that the trade between the Muslim traders and the non-Muslim subjects of the region was sustained 'on foundations of fairness and virtue' that recognized each of the parties' financial protection (2000: 35-36). This was largely governed, for the Muslims, by a legal obligation to withhold from unfair monetary conduct with others. In the case of the African regions, these principles extended to the non *ahl al-kitāb* communities of those regions, indicating that the inviolability of property as a natural state was affirmed to those communities, whether they were *dhimmī*s under the Muslim rule – like the communities closer to the North African shores, or the non *ahl al-kitāb* communities residing under a non-Muslim rule in the southern sides of the Sahara (outside of the abode of Islam). Historical accounts mention (Ibn Adhari, 1983) numerous non-Muslim Africans whose trade business prospered under the Muslim rule as they enjoyed full inviolability of their property.

Those examples included non *ahl al-kitāb* who were included in the covenant of *dhimma* in addition to others who were visitor non-Muslims who enjoyed a *musta'men* protection within the abode of Islam.

5.3 The Inviolability of Religious Belief and Practice for the Non *Ahl al-Kitāb* Communities in Africa

Many African countries that had been generally pagan had experienced an encounter with Islam in its early phases of expansion. The African animistic communities have been described in classical and modern historical accounts using the term *wathaniyya* – the term that was previously mentioned to denote the worship of idols according to the Muslim jurists, suggesting the connection that Muslims immediately drew between their religious practices and idol worship. The African indigenous religions varied from worshipping actual sculptor-style entities to the veneration of ancestors and spirits, which, in some cases, did not have a physical presence or embodiment. Yet, through all the forms this religious practice took, it was generally described by the Muslims as idol worship. The Muslims view was clear in that an idol could also be any venerated entity other than God, regardless of whether this entity was presented in an abstract or a physical form. In reference to the classification that the Muslim theologians and jurists developed for the non-Muslim religions, such religious affiliation could very clearly be placed outside the circle of *ahl al-kitāb*. Unlike the case of the Zoroastrians, in which some opinions in the scholarship, like the opinions within the Shāfi'ī and Ẓāhirī schools of Islamic law, considered the possibility of their inclusion in the *ahl al-kitāb* or in a group that is pseudo *ahl al-kitāb*, or tracing their belief to origins within the Abrahamic tradition, no relevant theories of religious approximation are found in the case of the African animistic peoples or pagans. The classification of these groups as non *ahl al-kitāb* was a fact that had little room for interpretation.

Islam's rule over North and West Africa was – similar to the rule in the Persian Plateau – accompanied by mass conversions of the local people and tribes joining the new religion. Yet, these conversions were far from radical in their timeframe; they happened over a very long period of Islamic rule and gained momentum throughout

different historical turns during the Muslim dominance of the land. The North African regions came under the control of the Muslims by the early eighth century, with the Islamization of the inhabitants of the coastal areas occurring gradually afterwards. From the African regions that are closer to the Mediterranean coasts, Islam spread southward through the Sahara Desert and into the Western parts of the continent. The conversions of the nomads in the central and western parts of the Sahara Desert occurred in a widespread manner during and after the eleventh century, when tribes and states such as Almoravids invaded those parts of Africa. The Islamization of some parts of Africa, parts that are almost entirely Muslim countries today, such as Mauritania, took centuries to actualize. During this gradual Islamization of the society, traditional religious practices of the Berbers, as well as other pagan-associated religions, rites, and rituals, were not prevented under the rule of the Muslims. Historical research shows (Handloff, 1990: 65) that in the northern parts of Mali, the Muslim rulership maintained and 'amicable' relationship with minority religious faiths that had been present in the local scene, evidencing the affirmation of the inviolability of religious practices for these non-Abrahamic communities.

The Muslim rule over the non *ahl al-kitāb* communities in Mauritania and the Western parts of Africa was marked by an important characteristic: the role of the marabouts in spreading the faith among the pagan communities. The marabouts, whose name originates from the Arabic work *murābiṭ* ('the one who is garrisoned', pl. *murābiṭūn*), were people who dedicated themselves to a scholarly life of Islamic sciences study and generally were spiritual guides. The marabouts' work in *da'wa* proved to be very crucial in spreading the Islamic faith among the pagan nations in today's Mauritania, Mali, Senegal, and other areas in Africa. It is noted that it was thanks to their efforts that Islam made it from North West Africa into the sub-Saharan areas, the Marabouts work gained significance until it became the main vehicle of Islam in West Africa (Baulin, 1962: 26, 27). Again, the principle of *da'wa* proves to be of a factor of high significance in shaping the view towards the non-Muslims and the non *ahl al-kitāb* communities in the case of the Islamic rule in Africa as well as other regions in the world.

Spreading Islam continued both within the areas ruled by Islam and outside them. Regarding the communities within the abode of Islam, there had been an existing acknowledgement of the inviolability of their religious practices under the dominant schools of law, which were the Mālikī and the Ẓāhirī schools. Outside the abode of Islam, the continuation of the Islamic *da'wa* translated into the assimilation of other new societies within the fabric of the Islamic rulership of the regions further to the north or the east. Muslim kingdoms emerged in West Africa and, in the middle of the eleventh century, the ruling family of the Mali Empire became Muslim. The empire expanded over the following centuries, reaching remarkable political and financial powers. Still, the conversion of the ruling family or certain tribes did not affect the general religious scene for others, as the majority of the masses remained non-Muslim (Baulin, 1962: 27).

> [I]t now became the custom for chiefs on the upper Senegal (Tokolor) and Sahil (Soninke) and the trading class to profess Islam. The pattern which was to characterize Sudanese Islam now formed itself. It was a class religion of chiefs and traders, with a professional class of clerics, but it did not become the religion of the people. As al-Bakri observes of the chief of Malel, 'he is sincerely attached to Islam, as are his offspring and entourage, but the people of his kingdom remain polytheists (*mushrikūn*)'. (Trimingham, 1968: 11).

Throughout the periods since Islam reached those areas spanning to the early 18th century, the peaceful nature of the spread of Islam from the Mauritanian areas down to the pagan kingdoms was maintained. Although the ruling families and the scholarly elite were Muslim, no forceful conversion was practiced upon the people, the fundamental of religious freedom was preserved for both those who belonged to the *ahl al-kitāb* and those who didn't. This fact represents a particularly interesting element in the profile of the Muslim rule in pagan Africa: the axiomatic right of religious practice was affirmed for the non-Muslims whose religious affiliation was considered the 'archenemy' of the Islamic faith since its beginning, paganism and idol worship. The idea of *shirk,* as was mentioned before, is not only refused by the Islamic theology, but is also regarded as the practice that God willed to be unforgiven if committed by any human (Qur'an 4:48). Islam's enmity towards idol worship is rooted in the Islamic theology and its early history, yet the vast majority of the people under the Muslim rule in West Africa were idolaters or animists, worshipping idols, ancestors, or living spirits inhabiting elements of nature, and continued to practice their religious affiliations for centuries under the Muslim rule. This is also evidenced by the

numerous historical accounts of the Christian missionary expeditions which came prior or simultaneous to the European colonization of Africa, which recount that the missionaries faced the challenge of the African paganism, as well as various other indigenous religious traditions that survived for centuries under the Muslim rule in areas like Mali, Senegal and Niger (Baulin, 1962: 27).[i] The mere existence of such religious traditions and communities in major numbers represents evidence that the sanctity that Islamic jurisprudence maintains of the fundamental of religious practice, and naturally the fundamental of life prior to it, was respected by the Muslim political authorities which ruled in Africa.

The ruling and the intellectual elite being the predominantly common sector of the people who converted to Islam in those areas led to the development of an aura of grandiose status around Islam, which, according to some historians (Prima Bari, 2000), has arguably assisted in the acceptance of Islam by many commoners in North West Africa, where big numbers joined Islam following the example of their ruler, king, or tribal leader. This status of Islam in many regions in North and West Africa placed Islam in a position of administrative reign over local animistic and religions of idol worship that were native to the land. Surveying works of history of North and West Africa, it could be seen that the Muslim rulers in those regions displayed the theoretical principles of the universalistic paradigm of the Islamic law that was explored before in this thesis, where the non *ahl al-kitāb* communities enjoyed the necessary rights and inviolability under the Muslim rule. A major element whose effect is noticeable throughout the exploration of the venture of Islam in West Africa is the immense role the personal affiliation of the kings and tribal leaders had on the Islamization of the community and, consequently, the relations with the non-Muslims. As Prima Bari shows in great detail (2000: 34 - 42), historical sources mention numerous kings and

[i] Many relatively modern studies have been dedicated to the study of the encounter between Christianity and the indigenous African religions. It is known that missionaries that belonged to the Catholic as well as the other sects of Christianity operated in Africa for centuries. Some scholars advocate the argument that some of these missionaries were in fact facilitators for the coming colonialization of Africa more than conveyors of a new creed to the Africans. The argument goes that some missionary efforts were aimed at paving the way for land acquisition, as an African tribal member was popularly reported to have said that, when the Europeans came, they gave the Africans the Bible and acquired land, but when they were driven out they gave back the lands but left the Bible behind (Ali, 1998). Much less literature has been written on the encounter between Islam and the African religions, idol worship or other religious beliefs.

chiefs, who belonged to the Empires of Ghana, Mali, and Songhai, whose conversion to Islam not only signaled the arrival of Islam at the status of being the politically dominant force in non-Abrahamic affiliated societies, but also shaped the social and cultural dynamics within those societies and the way animism was treated within as well as without in the form of external relations with neighbouring kingdoms. Histories of West Africa reveal kings like Muhammed Zengina who, after converting to Islam, attracted many Muslim scholars from foreign lands in an attempt to reshape the cultural map of the Dugumba kingdom of which he was the reigning king in the eighteenth century.

Abu ‘Ubaid al-Bakrī (d. 1094), an eleventh century Muslim Andalusian historian, mentions that the king of the Gao kingdom at the time, which is now a city located in the northern parts of Mali and had been the capital of the Songhai Empire, one of the most predominant empires which dominated vast areas in western Africa during the 14th and the 16th centuries, was a Muslim. Al-Bakrī also mentioned that the vast majority of the inhabitants of the Gao kingdom were idol worshippers, despite the fact that the public system there has always produced Muslims to assemble ruling positions (Prima Bari, 2000: 17-18). This social setting is an example of a ruling Muslim minority in a non *ahl al-kitāb* majority community, unlike the Ghana Empire at that period of time, who witnessed the emergence of Muslim communities and even cities (18). The idol worshipping majority that was ruled by a Muslim monarchy in Gao and other parts of the preeminent Mali Empire demonstrated an example of a fairly stable daily life with no reported rejection or even dissatisfaction with the Muslim rule as the same source states, giving the assumption that the inviolability of the local majority was preserved by the Muslims in spite of their adherence to idol-worship.

Although, these ruling authorities maintained a level of independent sovereignty from the Muslim lands of the Middle East, Egypt, and West Asia, the legal scene was largely connected to the scholarship of the schools of Islamic law – particularly the Mālikī school. The jurists within the close circle of the ruling authorities followed the legal opinions which allowed their non *ahl al-kitāb* subjects to practice their religious practices under the rule of a Muslim kingship. In some areas, *jizya* was taken and the communities were allowed the status of *dhimma*. In other areas, however, particularly rural villages which lacked logistical connectivity, the communities had just been

allowed their own semi-autonomous livelihoods and practices (23-26). In connection with the previously discussed debate, connections could be drawn between this acceptance and the fact that these non *ahl al-kitāb* communities were non-Arab populations, which – according to the earlier Mālikī jurists – were the only *mushrikīn* from whom the *jizya* payment can be accepted.

One might leave room for the assumption that converting the masses was simply not among the priorities of the ruling authorities, although the people being followers of pagan religions surely would have risen a flag of caution in the eyes of the Muslim rulership. This was the position of scholars like J. Spencer Trimingham (1968: 11), who attributes this 'compromise' on behalf of the Muslim rulers to conceptions of society in the black parts of Africa, which influenced the relationship between the authority and the people in a way that does not require the establishment of a universalist religion in the governed domain. In any case, the Muslim rulers who ruled the majority pagan societies were often reported to be pious, practicing and enthusiastic Muslims, and it was mostly the legal culture of Islam that constituted the strongest impact of the Muslims in Africa, not the philosophical or the theological (Trimingham, 1968: 3). Therefore, the *fiqh* domain assumedly had a considerable authoritative say in the matter of religious groups within the society that was ruled by Islam. The religious authorities and the *'ulama* in those areas generally did not show discontent of the religious freedom granted to the pagans, which is an indication that the religious authorities – being aware of the pagan majority – did not authorize a breach of one of the five fundamentals of the human inviolability, and that it included all the human beings, regardless of their religious affiliations.

Attracting foreign scholars of Islam is another common trend that is easily noticeable in the case of Western Africa, particularly the areas that are located south of the Sahara. Many among the *'ulama'* willingly migrated southwards either for spreading the knowledge in a raw geographical setting for Islam or in hope for securing a better financial livelihood due to the flourishing economies – usually accompanying traders. Yet, also, many of the scholars were brought – as was mentioned before – by the request of local Muslim rulers and monarchs of the kingdoms which were pagan as a majority. These invitations represent a factor of the treatment of the non-Muslims that could be suggested to be the most identifying factor in the model that was developed

by the Muslims in these regions: the reliance of scholarly presence and influence aided by the rulership. Surely, military action against non-Muslim subjects did occur in some cases, yet it was the factor of scholarship which constituted the majorly identifying characteristic of the Muslim rulership in these lands whose indigenous inhabitants were of non-Abrahamic religious affiliations, as this thesis argues. The argument further goes that the dependence on scholarship, at times where dependence on the rulership alone was possible and arguably more effective, reflects the intention of the Muslim rulers to solidify the rule of Islam in those regions through three possible methods: strengthening the process of *da'wa* among the animistic communities by presenting them with foreign models of conduct that represent a well-learnt scholarly tradition, combating the usually hereditary and possibly mythology-based rituals and beliefs with the aid of scholars who are well-trained in the Abrahamic theological sciences and proofs, that is, putting scholarship in the position to challenge the ritual, and, thirdly, enhancing the knowledge and culture of the already present Muslim part of the community, solidifying their beliefs and practices and providing the connection with the other parts of the Muslim world that is necessary to provide the sense of social belonging to the big body of the Muslim *umma*.

An example of a legal issue that arose in the Muslim-ruled West African regions south of the Sahara was that of slave trade. Those areas were among the locations were human slave trade consisted a main component of the economic life of the inhabitants. These human slaves were captured through different ways, raids being one of the common ways for sourcing slaves in order to be sold in other parts in Africa and the Middle East. The issue of slavery is one that touches upon the right of freedom, property, freedom of expression and other rights for the human beings. Interestingly, these human slaves included Muslims, pagans and animistic persons who came from both Muslim-dominated or non-Muslim countries. To highlight a discussion around this issue in the case of Africa, the example of Aḥmad Baba will be used. Aḥmad ibn Aḥmad Aqqīt, commonly known as Aḥmad Baba, was a Muslim historian, theologist, and Mālikī jurist who was born near the city of Timbuktu in the year 1556 to a family of jurists and Muslim scholars. He was trained in Islamic law and other sciences in Timbuktu and produced notable works in Islamic law and theology. He died in 1627. In one of his much-cited legal verdicts, Aḥmad Baba was asked about the issue of the Muslim and the non-Muslim slaves who were brought to be sold in the abode of Islam

(Baba, 2000). He was particularly asked about the permissibility of buying and owning slaves knowing that some of them come from areas whose inhabitants are predominantly Muslim. Aḥmad Baba upheld the position of the early Mālikī jurists, such as Imam Mālik himself and Saḥnūn, which adopts the position that a person who is known to be a Muslim, a non-Muslim *dhimmī*, or any non-Muslim in a status of peace treaty with the Muslims cannot be made into a slave (2000: 53). This position, in addition to representing a step in the process of limiting the proliferation of slavery by the jurists, acknowledges the inviolability of life and freedom for the persons who are protected under the Muslim rule. It also extends this inviolability to other *muhaden* non-Muslims who are – in this case – pagans, animists, or other non-Abrahamic believers. The fact that the non-Muslim slaves were of non-Abrahamic religious affiliation did not pose, for Baba, any restriction to include them in the social fabric of the Muslim community in Africa or other locations. The debate on this issue among the jurists of that particular time and place seemed not to be concerned primarily with the religious affiliation of the non-Muslim slaves, but rather with the permissibility of bringing slaves from countries that were, however outwardly, predominantly Muslim. Baba clearly situates himself with the tradition that sees freedom as the natural state of all human beings, regardless of their race or religious affiliation. Slavery is seen, according to Baba and the school he represents, as an unnatural state and a tribulation for the human. He, therefore, confirmed the established requirement for upholding just and fair treatment towards these persons, regardless of their religious affiliation. This and other similar cases point to the central point of the social and political inclusion which was evident in the mind of the jurists. Aḥmad Baba, like the numerous examples from the intellectual line he belongs to, saw *dhimma* in this case as a tool of inclusion for the pagan and animistic people, who were the other large group at the time, into the fabric of the Muslim ruled geographies. The legal positions assumed not only were loyal to that intellectual tradition, but were also catering for social and political necessities.

Both the Islamization of the region and the rule of the Muslims over the non *ahl al-kitāb* communities in different parts of North and West Africa were actualized in radically different ways. From trade-based proliferation of Islam and consequently Islamic rule, to social assimilation of the communities, to dealing with the customs and rituals of the local peoples. From north to south, east or west, each region had its significant process in which Islam became the religion of the rulership or the religion of the people.

This chapter presented some characteristics of the Muslim rule in North West Africa and the status that was affirmed to its non *ahl al-kitāb* inhabitants. With the local animistic and idolatrous traditions being foreign to the Arab Muslims, and without a textual guideline to settle the problem of including these religious communities in the circle of *dhimma* and accepting the payment of *jizya* from them, the evident historical practice of the Muslims over an extended period of time was that of acceptance and inclusion. The chapter discussed the affirmation and the inviolability of the rights of life and religious practice which were guaranteed to the non *ahl al-kitāb* communities of the region and the underlying grounds and dynamics that appear to have influenced this affirmation.

The remaining case study is that of a major impact on the history of the Muslim rule in predominantly non-Muslim lands. The case of the Indian subcontinent offers a perspective into the status of non *ahl al-kitāb* communities in Islamic law that is different from that of the Zoroastrian or the African idolater case, as it is a land where the population continued to be predominantly non *ahl al-kitāb* throughout the whole period of the Muslim rule.

Chapter Six

The Case of the Hindu Communities in the Indian Subcontinent

For the main purpose of this thesis, which is to explore theoretical and historical debates and practices around the status of non *ahl al-kitāb* communities in the Islamic law and rule, it could be said that the most relevant case study for exploring the status of these communities under the Muslim rule was the Muslim presence in the Indian subcontinent. I will offer two reasons for this claim. The first is that this case was one of the cases of a Muslim rule in a place which had been, and continued to be, predominantly non-Muslim and non-Abrahamic all through the periods of the Muslim rule and to this day. Drawing from this point, it can be safe to assume that the Muslim expansion to this land could not have practically eliminated the non-Muslim culture and religious affiliations (Surely, this was not an objective for the Muslim newcomers in the first place), not even gradually. This factor represented, among other things, a reason for the Muslim rulers, as well as the jurists who resided in those lands, to take into serious consideration the religious beliefs, rituals, customs, and the legal status of the vast majority, non *ahl al-kitāb* subjects, over whom they have ruled.

The other reason is that this case represents a Muslim encounter with non *ahl al-kitāb* communities in a period of time when the tradition of the Islamic jurisprudence as a field was more mature, codified and well-defined than with the previously explored cases. The growing complexity that is brought by the passage of time into the timeline of the Islamic history called for a higher level of complexity within the study of *fiqh* on the jurisprudential and the applicatory levels. The early legal verdicts, which coincided with the times of the first caliphates when areas like the Persian plateau and North Africa were incorporated in the Muslim rule, were more appertaining to certain cases. Later, as the standards of development of the human social and political life became more complex, both Islamic *fiqh* scholarship and the governing Muslim authorities had to develop more detailed – and sometimes innovative – perspectives

by which they could treat and establish the legal status of people the likes of whom were never familiar to the early jurists or conquerors.

Islam in the Indian subcontinent is complex, and the study of the Muslim presence in the area is a challenging task. This is partly because the religion had developed in the subcontinent in relation with the indigenous religious traditions of the land and dynamically continued for almost thirteen centuries. Hindus alone constituted seven-eighths of the entire population of the provinces under the Islamic rule (Malleson, 1903: 74). Members of other religious communities, such as Buddhists and Jains, constituted large portions of the society as well. The interaction between Islam and those indigenous faiths took many forms, and ranged from adaptation of some of the customs and traditions from other faiths to complete rejection at times. There appears to be more abundancy in historical records that focus on the relations between the Muslims and the Hindus in comparison with narratives relating to any other religious population in India. This obviously reflects the demographics of the land, since Hinduism is the religious tradition which is vastly predominant. Therefore, because of this predominance, this chapter will focus on the Islamic presence in the Indian subcontinent in the ways it dealt with the Hindu population. The status of the adherents of Sikhism, which constitutes a considerable population today, an estimate of 25 million adherents as of 2015 (Pew Research Center, 2017a), will not be discussed since the foundations of the religion were fairly recent in comparison to the history of the Islamic-Hindu interaction in the area. Yet it should not be denied that the insights offered by this long and complex history of interaction do not exclusively apply to the Hindu populations without exceeding them to other religions and belief systems, especially those that are considered non *ahl al-kitāb*.

The chapter will begin by offering a brief account of the Muslim conquests and rule in the Indian subcontinent, followed by engaging with the question of the status of the Hindu populations according to the Muslims. The chapter will approach the question of the inviolability of life, property, and religious practice of the Hindus by examining the desecration and otherwise preservation of Hindu temples, the approach of the Muslim rulers towards some Hindu practices, and other examples which offer a window of looking at how the Muslims affirmed the status of inviolability for the non *ahl al-kitāb* Hindus under their rule. Three methods of justification the Muslims took

towards affirming the inviolability of the Hindus will be presented. The first of which is what can be called theological approximation of the Hindu creed to that of the Muslims', which, for some, facilitated the inclusion of the Hindus in a closer circle to Islam or even deeming them a people of a divinely revealed scripture. The second approach appears in religious syncretism, where notable figures attempted to fuse both religions as a way to facilitate inclusion, one of the major examples of this approach was the *Dīn-ī Ilāhī*, a project of syncretism by the Mughal emperor Akbar. The chapter will analyze this religious project and the competing theories on its underlying incentives. The third approach, and the one this thesis argues is the most appropriate for addressing the status of the Hindus, is the traditional scholarship of *fiqh*, which offers a comprehensive framework to guide the way the rights of the non-Muslim populations should be protected under the Muslim rule. The prime example of this approach in the context of the Muslim presence in the Indian subcontinent is the collection of *fiqh* entries known as the *Fatawa-i Alamgiri* or the *Fatawa-i Hindiyya*. As this case represents a continuation of the prevalence of non *ahl al-kitāb* populations, the chapter will conclude by exploring some contemporary approaches to the question of the status of the Hindu populations in Islam. The discussion will demonstrate the important influence of *da'wa* on how the Muslims view those populations.

6.1 A Summarized Account of the History of the Muslim Presence in the Indian Subcontinent

The history of Islam in the Indian subcontinent is a field that is not given enough attention by Muslim scholars who do not belong to that geographical location. For that, Mahmoud Ghazi proposes (2009: 6) an explanation which places the language barrier at the center of the problem; the first Muslim conquerors who established a government in the land came from the eastern Persian lands (modern Afghanistan), thus Farsi was developed as the official language of learning and sciences. Later, during the British invasion, most of the Farsi culture was lost and English came to be used more commonly, alongside Urdu, which was mainly used as a means of communication between the Muslim community. Ghazi states that the British colonization of India effectively severed the connection with this Farsi heritage with the exception of a few translated works. Examples of which will be mentioned

throughout this chapter. The vast majority of the tradition, however, remains unstudied, preserved in its original language in the libraries situated all around the Indian subcontinent.

India had been a place that intrigued the early Muslims. Establishing trade relations with India was a common practice among the Arabs even before Islam, yet the sentiment one gets from reading early accounts is that the nature of the land, which was strange to the early Arab Muslims, caused curiosity and caution. Aḥmad ibn Yaḥyā al-Balādhurī (d. 892), a prominent 9th-century Muslim historian, produced an account of the early stages of the Muslim military interaction with the Indian subcontinent. His celebrated work *Futūḥ al-Buldān* ('The Conquests of Lands') is a treatise on the geographical conquests of the Muslims at the time of the Prophet and the early caliphs. In the section where he explores the conquest of the Sindh, the lower Indus valley, he narrates (1988: 416 [own translation]) on the authority of 'Ali ibn Abī Saif that the second Muslim caliph, 'Umar ibn al-Khaṭṭāb, commissioned 'Uthmān ibn Abī al-'Āṣ al-Thaqafī (d. 675) to govern Bahrain and Oman in the year 636. The latter sent a military expedition to Thane, a village near today's Mumbai in the Indian province of Maharashtra. He was victorious in his minor expedition and when the army returned he sent the news back to the caliph, who was not pleased with this expedition and wrote back telling him that he has placed "worms over a stick" ('*dūd 'alā 'ūd*'), an Arabic expression for placing people in unnecessary danger, and that the caliph would have punished him if this skirmish caused any casualties among the Muslim soldiers. Another narration states that the third caliph 'Uthmān ibn 'Affān ordered his commissioner in the *'Irāq* to delegate a trustworthy envoy to visit India and report on its situation. The envoy toured the southwest parts of the Subcontinent (modern day's Baluchistan and Sindh) and reported to the caliph the vastness of the land's geography, demography, and resources. His statement reflects that both the cultural norms of the land and the nature of its resources were alien to the Muslims to the extent that the participants in a prospective military campaign would suffer malnutrition had their numbers been great, or otherwise would get consumed in the vastness of the land had their numbers been small (1988: 417 [own translation]). 'Uthmān consequently decided not to conquer the subcontinent due to this geographical vastness and dissimilar cultural and social fabric. Both narrations suggest a sense of reluctance that the early Arab Muslims had towards engaging in campaigns in the Indian subcontinent.

This land had been far more distant, peculiar and different to the early Arab Muslims in comparison to Persia, Anatolia, North Africa or even the lands in Central Asia.

During the decades that followed, the succeeding caliphs authorized numerous minor skirmishes and expeditions with varying levels of success in different areas in the Indian subcontinent. The first conquest that can be described as a real arrival of Islam to the subcontinent was led by Muḥammad ibn al-Qāsim al-Thaqafī (d. 715) in the year 711, during the Umayyad caliphate, under which Ibn al-Qāsim served as a trusted commander. Ibn al-Qāsim invaded the Sindh and incorporated the conquered lands into the Arabic Muslim empire. Another conquest which has been described by historians as the major Muslim conquest of India happened around the year 1000 and was led by Maḥmūd ibn Sebüktegīn, more commonly known as Mahmud of Ghazni or Mahmud Ghaznavi (d. 1030), who conquered the northwestern parts of the Indian subcontinent. This conquest took place during the Abbasid caliphate, towards which Ghaznavi kept his allegiance, at least on the broadest levels. This, in turn, was followed by a chain of Muslim kings, sultans, and emperors who would launch campaigns to further expand the Muslim rule of the land where previous Muslim campaigns have successfully set foot.

The school of law that Mahmud Ghaznavi himself was affiliated to was originally the Ḥanafī school. But sources confirm (Ibn Kathir, 1988: 12: 38) that he changed his *madhhab* and joined the Shāfi'ī school under the influence of the prominent Khorasani Shāfi'ī jurist and scholar Abū Bakr al-Qaffāl (also referred to as al-Qaffāl al-Saghīr) (d. 1026). Whether this change of the school of law on behalf of one of the main influential personalities in the history of the Islamic presence in the Indian subcontinent has affected the way Muslims viewed the non-Muslim communities in the area is an important question and a plausible argument. But what appears to be the most probable case is that this was a rather personal transformation that did not affect in shaping the way the Hindus were treated by the Muslim rulers who succeeded Ghaznavi. Also, it is not clear through surveying the classical sources that mention this transformation whether it occurred before or after the conquest of many parts of the Indian subcontinent; looking chronologically in an attempt to arrive at an approximation for when this transformation occurred, we find that it is either likely to have happened before or after the campaign that Mahmud Ghaznavi led on India, as

the time whence al-Qaffāl was active as a jurist was approximately from the age of thirty to his death, which was from around the years 970-1026, a period that surrounds the time in which Mahmud's campaigns on the Indian subcontinent took place. In any case, the assumption that appears to be the most likely is that this conversion of the legal *madhhab* was generally personal in nature, although Ghaznavi was reported to have been engaged in theological debates and was extremely interested in learning the *ḥadīth* tradition (Amin, 2013: 230), there is not enough evidence to suggest that his *fiqh* orientation and shift had a tangible effect on the status that the Hindus lived within during the centuries of the Muslim rule in the subcontinent.

6.2 A General Overview of the Inviolability of Religious Practices and Buildings of the Hindus Under the Muslim Rule

It appears that the way the Hindus and other religious communities were treated depended to a considerable degree on the personality of the Muslim ruler. Some rulers showed much higher levels of toleration of other faiths and incorporation of their adherents in the public and political sphere than others.

Muḥammad ibn Al-Qāsim's invasion of the Sind was fueled by the constant frictions on the frontier separating the Muslim dominated Balkh (modern day northern Afghanistan), *Mā warā' al-nahr* (('the land which lies beyond the river') i.e the Oxus river), and Turkistan, from the Sindh. The conquest of these lands brought – according to historical sources – a crushing end to the Indian cults present there, and this has been a cause which contributed to increasing the Indians dislike of the foreign invaders (Ahmad, 1949: 26). Yet other sources including the Chach Nama, which is one of the main sources for the history of Sindh in the seventh and eighth centuries, assert that the young Muslim general left the people of Sindh to their ancient faiths, and that he was to a very high degree tolerant in religious matters (1949: 27). Here appears a recurring aspect of the Muslim encounter with the non *ahl al-kitāb* inhabitants of India; that policies with alternating toleration towards the indigenous religions were demonstrated by different rulers. As will be discussed with some more detail further into this chapter, rulers like the Mughal emperor Akbar (d. 1605) were famous for a remarkable level of toleration and respect towards the religious practices of the non-

Muslims and even their incorporation in the highest levels of government. A level which gained him a good standing according to some and an enmity according to others. The personality of Akbar as an inquirer – as some historical accounts describe him – and the openness he was reported to possess played a significant role in determining the situation of the other religious communities. He and other emperors have significantly changed the system of treatment of the inhabitants of the Indian subcontinent because of temporal changings in their personal views towards Hinduism in particular or religion in general. Moreover, many of these mentioned changes occurred because of some sort of influence by an individual or an idea upon the ruler. Rulers like Mahmud of Ghazni are claimed by historians like Bīrūnī to have displayed a more exploitative fashion in his military campaigns expanding his rule, being not lenient towards the Hindus, and even to having ruined much of the prosperity of India (1949: 27). Another example is that throughout the conquests of the sultan of Delhi Quṭb al-Dīn Aibak (d. 1210), one of the prominent Muslim conquerors of the early Turkish empire in the subcontinent, spoils of war were taken and some idol temples were demolished and converted into mosques (142).

The demolishment of some temples pertaining to non *ahl al-kitāb* communities, though as anti-inclusive as it may seem, does not suffice as an evidence to rule out the consideration that the Muslims in India maintained the fundamental freedom of religion and the inviolability of religion that were previously discussed in the first section of this thesis. In fact, considerable scholarship provides evidence that supports the claim that the instances of desecration do not constitute an evidence for intolerance of religious practice on behalf of the Muslims. One of which is a recent study by Sriya Iyer, Anand Shrivastava and Rohit Ticku (2017) which proposes a method that identifies the motive for temple desecrations by Muslim rulers and armies using a uniquely constructed geocoded dataset on temples, ruling dynasties and battles in medieval India. This study concludes that the temples were desecrated only in the course of battle, and not merely because they existed as non-Islamic houses of worship. Thus, it tilts the balance in favor of the narrative that the desecrations that occurred throughout the Muslim-Hindu encounters were driven by political considerations and triggered by military disputes over the narrative of iconoclasm; that the temples were destructed simply because they were un-Islamic in the theological sense, their idolatry or religious imagery, etc. The study shows that the likelihood of the desecration of a

Hindu temple increases when an outcome of a battle is in the favor of the Muslims. At the same time, the likelihood of desecration is evidently not affected by whether or not the temples were located within the Muslim-controlled territories. This strongly suggests that the desecration, destruction or conversion of Hindu temples was aimed at undermining the morale and authority of the opposing Hindu armies, and was fueled by political and military rather than theological motivations.

It is natural to assume that the sentiments of the Indian peoples would vary depending on the degree of toleration from the Muslim rulers towards their religious practices at any certain time, but it is noted by many historians that the general impression of the non-Muslim populations under the Muslim rule in the subcontinent was that of contentment. Colonel G. B. Malleson, an English officer and commander, reporting his historic findings at the time of the British rule in India, particularly on the legal aspect and the administration of justice, states (1903: 75):

> Theoretically, the administration of justice was perfect, for that was dispensed according to the Muhammadan principle that the state was dependent on the law. […] The general contentment of the people would seem, however, to authorise the conclusion that, on the whole, the administration of justice was performed in a satisfactory manner. Time had welded Together the interests of the families of the earlier Muhammadan immigrant and those of the Hindu inhabitant, and they both looked alike to the law to afford them such protection as was possible. In spite of the many wars, the general condition of the country was undoubtedly, if the native records may be trusted, very flourishing.

6.3 Sufism, Theology and *Fiqh* as Influencers of the Muslim View of the Status of the Hindu Populations

It is worthwhile to keep in mind another aspect that had an enormous effect on formulating and reshaping the status of the non *ahl al-kitāb* populations under the Muslim rule in the Indian subcontinent, which is the predominantly spiritual nature of the public adherence to Islam among the Muslim population in India. People had their affiliation largely placed within the mystical and spiritual domain of Islam. As is affirmed by scholars of religion and history, it was the Sufis and the spiritual masters who had the most instrumental role in spreading the Islamic culture through the

subcontinent (Schimmel, 1982: 1). It is also noted that Sufis, rather than the *'ulama* (of the legal and theological domains), assumed the role of the inspirers of the Muslim community, both on the levels of the masses and the intelligentsia (Ahmad, 1969: 3). The seats of the notable Sufis – alive or dead – were central places around which the Muslim community gathered to practice communal worship, praise God and His Prophet, and seek the blessings of the Sufi, serving, at the same time, as a social and political center for the Muslims. One could say that this feature continues to this day in India and Pakistan, as the spiritual affiliation to Islam and membership in the various Sufi orders ('*ṭarīqa*s') is very widespread among the Muslim communities there. This has also had its influence on the way Islam viewed the adherents of the indigenous religions of the land. In most cases, one can safely claim that societies with a more spiritual adherence to religion are generally more prone to acceptance of the other, be it a faith or a culture, since a main focus in this case is the inward adherence rather than the mere outward practice of the faith and the laws of religion, in addition to other factors. This leads to an understanding that other religions, which might have a completely different set of rites, laws or practices, can actually appear closer to Islam if viewed through the lens of inner fulfillment, quests to the truth and purification of the self, a dimension that is common between Islam and many Eastern and Western religions and cultures.

This point is not only evident but also remarkably abundant in the case of Muslim-Hindu interaction in the subcontinent, as Mahmoud Ghazi (2009) points out that a considerable number of Muslim scholars sought to approach Hindu traditions through mystical dimensions of Islam, finding many similarities in self-perfection and spiritual elevation between the two. Notable Muslim scholars and spiritual masters are reported to have even been regular students of gurus, yogis and Hindu masters seeking to be trained in meditative and reflective sciences. One of the notable texts in Hinduism and a very popular exemplary text in the study of the Hindu culture is the Bhagavad Gita, a spiritual and deeply philosophical poem that offers teachings in the form of a dialogue between the warrior Arjuna and the Hindu god Krishna, his charioteer. Any reader of the Bhagavad Gita with only a basic background in Sufism cannot fail to notice points that display similarities or common grounds between Hinduism as shown in the Gita and Islamic mysticism. This is not to say that the Bhagavad Gita is a Sufi text, but to affirm that people within the spiritual tradition of Islam can, without much

effort, relate to many teachings in the much-celebrated text. This, in fact, has occurred frequently as many Sufis noted and wrote of these similarities. Other examples of text other than the Gita exist in this regard, where Muslims related to the Hindu scripture in a way that created a line of shared aspects of spirituality that became relatable between the spiritually-inclined adherents of the two religious traditions, affecting the status these Muslims saw for the Hindus who adhere to these scriptures.

Therefore, this thesis argues that the spiritual nature of the Muslim community of the Indian subcontinent has had its influence towards a higher level of inclusion and inviolability of the non-Muslim communities in general, the Hindu community being the most dominant in those areas. Identifying the affiliation to Islam as one with a spiritual nature offers a common ground with other faiths, especially the faiths with an evident spiritual culture. Members of each of these faiths can relate to universal teachings of spiritual atonement, immortality and awareness of the soul, purification of the heart, and many other notions that they share, paving the way to a more encompassing understanding of the other's beliefs and cultures. Hinduism is evidently rich with spirituality; the use of spiritual annotations and the references to spiritual journeys in its texts, among many other features, offer compelling evidence to the dominant spiritual dimensions. All this established a ground by which Muslims related to the Hindus in a rather inclusive way, as is evident in many examples that will follow in the next sections of this chapter.

Another aspect of the Islamic view of the status of the Hindus under the Muslim rule was shaped by what can be labelled as a constructive theological approximation between the two faiths. In this domain, Muslim scholars and theologians studied the Hindu belief system and attempted to draw points of congruence that would enable a closer proximity between the two theologies through those theological points. As we explored the effects that the spiritual dimension of Islam had in this regard, intellectual attempts in the domain of theology have also been displayed in classical times to assist this proximity, consequently establishing the rationale for the status of inviolability, or eligibility for *dhimma*, for the Hindus and other non *ahl al-kitāb* communities in the subcontinent.

Hinduism, unlike Islam, is not a defined creed, but rather a collective culture, a civilization-process (Ghazi, 2009: 13 [own translation]; Ahmad, 1949: 24). Be that as it may, the desire of the Muslims to study the Hinduism has been expressed through various works about, and trips to, the land. Before and after the Islamic conquest of the subcontinent, we find mentions of Hinduism and the Hindu culture in various occasions and a scale of different tones. Yet, perhaps the most comprehensive work of its time about India's civilization and the Hindu culture that was done by a Muslim scholar was Bīrūnī's magnum opus *India*. Abū Rayḥān Muḥammad ibn Aḥmad al-Bīrūnī (d. 1048) was a Muslim scholar and historian who is described as having possessed many qualities in style and being attentive to detail, which is evident from his account of the Indian landscape and topography, for example. He was well-versed in Sanskrit and is regarded by many as the founder of Indology. Bīrūnī accompanied Mahmoud of Ghazni during many of the latter's military campaigns and skirmishes in the Northern parts of the Indian subcontinent, and produced his encyclopedic account *Kitāb Taḥqīq Mā lil-Hind Min Maqūla Maqbūla Fi al-'Aql Aw Mardhūla*, which can be translated to 'The book confirming what pertains to India, whether rational or despicable' (Lawrence, 1996: 285), generally known in the West as *India*. Bīrūnī dedicated the second chapter of this book to offer a portrayal of the Hindu beliefs about God, which he clearly refers to (Biruni, 1958: 20) as "their belief about God Almighty" in the terms that are usually used by the Muslims; "*i'tiqāduhum fi-Allāh subḥānah*". He moves on to demonstrate that their beliefs about God – particularly those held by the intellectual elite and religious leaders – are not entirely alien to those of the Muslims;

> [T]he Hindus believe with regard to God that he is one, eternal, without beginning and end, acting by freewill, almighty, all-wise, living, giving life, ruling, preserving, one who in his sovereignty is unique, beyond all likeness and unlikeness, and that he does not resemble anything nor does anything resemble him. If we now pass from the ideas of the educated people among the Hindus to those of the common people, we must first state that they present a great variety. Some of them are simply abominable, but similar errors also occur in other religions (Ahmad, 1949: 16).

This excerpt demonstrates remarkable similarities that could be seen in both belief systems. The attributes of God in the Islamic creed, mentioned in countless traditional text belonging to the main Islamic schools of creed, the Ash'arī and the Māturīdī schools, are remarkably corresponding to the Hindu beliefs as stated by Bīrūnī. These

include but are not limited to *al-waḥda* (‘oneness’), *al-qidam wa al-baqā’* (‘eternal, without beginning and end’), *al-irāda* (‘acting by freewill’), *al-qudra* (‘almighty’), *al-‘ilm* (‘all-wise’), *al-ḥayāh* (‘living’), and *khulf al-ghayr* (‘that He does not resemble anything nor does anything resemble Him’). It can be argued that this selection of attributes was a part of Bīrūnī’s attempts to draw the attention to the closeness between Hinduism and the Islamic creed, at least on the level of its learned community, which, he affirms (1958: 23, 24), is the truer version rather than the distorted beliefs of the ‘misled’ masses.

This congruence has many implications. The first of which is creating a theological common ground in that the God the Muslims worship is the same deity in Hinduism. This is shown through Bīrūnī’s referrals to God in the way Muslims do to confirm this point. Acknowledging that the deity in the Hindu culture is no different than in the Islamic faith is the first step for the Muslim scholars and community members to place Hinduism in a closer circle, a circle that does not exclude them as people who disbelieve in God, which consequently puts them in a position similar to that of the Abrahamic communities. Secondly, it affirms that the two traditions are congruent in the context of the attributes of God – the same God both traditions affiliate to. The set of shared attributes of the divine that were mentioned by Bīrūnī – which caused some divisions even within the Islamic body between the traditional Muslims and other sects throughout history – brings Hinduism even closer to the traditional Islamic creed, one might suggest it was intentionally mentioned the way it is in the book that had been the main guideline for the Muslims about the beliefs of the Indians for many years. Thirdly, it rules out the stigmatizing affiliation of Hinduism as a belief system with *shirk*, a term which may include both polytheism and idolatry. Although *shirk* in the Islamic sense is practiced among the Hindu community, Bīrūnī insists (1949: 20) that neither polytheism nor idolatry is part of the real Hindu belief or the practice of the learned Hindus, but that the veneration of idols, which are representations of the one God, is only the misguided act of the common people – deliberately misguided by the learned Hindus, according to Bīrūnī. Hinduism on the theological level, Bīrūnī affirms, is free from worshipping anything but God alone, including any representations of Him or any other supernatural being in the form of idols, pictures, or any form of depiction. Therefore, it could be said that he described the belief of the Hindu higher classes as monotheist, and only that of the common public to be polytheist. However, an integral

pillar of the Hindu belief system that stands away from the belief of Islam and other Abrahamic religions is metempsychosis. It is, nevertheless, a pillar so crucial that Bīrūnī, famously stating '*al tanāsokh 'ilm al niḥla al hindiyya*' (Biruni, 1958: 38), describes it as the password (Lawrence, 1996: 286) or the shibboleth (Ahmad, 1949: 17) of Hindu belief, comparable to religious brands as fundamental as the trinity for Christianity, the institute of the sabbath for Judaism, and the confession there is no god but God, and that Muhammad is His prophet (the *shahāda*) for Islam.

The third domain that offers a ground for the study of the status of the Hindus within the Islamic rule in the Indian subcontinent is the domain of Islamic law, *fiqh*. This is not only the most vital domain for this thesis as it constitutes the ground upon which the study of the status of the non *ahl al-kitāb* peoples focuses its inquiry, but it is, as well, the most integral domain of the entire question of the status of non-Muslim communities and the inviolability of humans as a whole subject in Islam. It is within the realm of Islamic law that the violability or inviolability of the lives, wealth, religious freedom, and all other rights and duties of the Hindu population is studied. The previous peripheral discussions related to how the domains of Islamic theology and spirituality offer grounds for the incorporation of the Hindu communities into a closer circle of acceptance. While these domains undeniably constitute a positive effect on the collective sentiment of the Muslim community towards the non-Muslims, the domain of Islamic law remains the domain which holds the true power to incorporate or otherwise alienate the Hindu or any other community in this matter. It is the Islamic law that provides bases and guidelines for the political systems on the way all the communities, be it Islamic or non-Islamic, should be treated. The rights and duties of these communities, and their social standing, are also determined by the law. Furthermore, the rulers throughout Islamic history were always expected to comply with Islamic law, at least on the outer level; it is the ideal against which their policies are compared and the code which holds them accountable in the eyes of the community of believers.

However, it is equally important to keep in mind that the Muslim rulers have not always been entirely observant of what the *fuqahā'* decreed in the name of Islamic law. They have shown varying levels of adherence to it, ranging from total submission to ignoring, overlooking and even rejection at times. But Islamic law as illustrated by

the scholars of the *umma* has always been viewed as a standard by which all policies and practices ought to be conducted, so that conducts could be maintained as God wants them to be.

6.4 *Fiqh* and the Governance of the Non *Ahl al-Kitāb* Communities in India

This chapter will take a historical approach in order to examine what the *fiqh* domain offers regarding the question of the status of the adherents of Hinduism under the Islamic rule. From historical narratives, the chapter will attempt to shed light on sides of the legal aspect which set the standard for the rights and duties of the non-Muslim community in the subcontinent. Naturally, the assertion that the rulers and other people of political or administrative authority did not always observe the standard set by the law leads to the conclusion that not all practices of rulers, military commanders, patrons, or community leaders are in themselves representations of the Islamic law. Yet, it remains useful to keep in mind that the jurists and the judges typically occupied substantial and influential positions with an ability to bestow a positive or negative implication upon a ruler's rule, and, at times, even mobilize the public against the ruling authority. The role of the jurist has proved effective through many instances in the Islamic history, and the responsibility and obligation of the Muslim ruler to adhere to the Islamic law is an established theoretical principle in Islam.

It is argued that the Muslim rulers in the Indian subcontinent, particularly those belonging to the Turkic dynasties who ruled the Sultanate of Delhi (otherwise called the Turkish Empire of Delhi) from the early 13th to the mid-15th century, established their rule in a medieval kingship fashion as a secular institution rather than theocratic. In comparison to the early Muslim caliphate, in which the head of state was elected by the community of the faithful – which was the case at least in the first decades of the caliphate – and thus derived legitimacy from the people and took up their duty in front of God, and to the Sassanian emperors of Persia who claimed divinity and made it the basis on which they legitimized their rule, the Muslim kings of Delhi adopted a symbolic role of 'God's shadow on Earth', *zillullah*. Yet their application of power, from Mahmud of Ghazna to Shams-ud Din Iltutmish, was based on Persian tradition and not Islamic law (Ahmad, 1949: 7). In spite of the fact that this argument appears

to be supported by historical evidence, it is also unlikely that jurists had no influence in the public sphere or the government level, especially that other scholars during the Muslim presence in the Indian subcontinent assert (Ghazi, 2009) that sultans such as Shams-ud Din Iltutmish were known to be pious Muslims with immense regard for Islamic law and for the scholars, jurists, and judges who represented it. Muhammad Aziz Ahmad points out (1949: 330) that, even though there were numerous "non-Islamic" features in the Turkish Empire of Delhi, such as the attention given to building extravagant palaces, the rulers still showed respect towards theologians, jurists, and judges, many of which maintained severely critical positions in the face of the government and the administrative establishment. Interestingly, while Ahmad states that, most of the time, these Muslim scholars were kept under control by the state, the mystics and Sufi masters were not. Those were apparently free from the commanding watch of the authority, and thus constituted a bigger threat towards it at times. The judges were, nevertheless, autonomous to a certain extent. They practiced their full authority to decide upon matters of personal law, which directly affected the daily lives of the members of the community. However, they sometimes came into conflict with the political authorities regarding certain state-inflicted laws and decrees (361).

Therefore, it is clear that the Muslim state in medieval India cannot be described as a theocracy, in spite of the fact that it has been popularly described as such (323). The evidence suggests that this connotation is truly misleading and inaccurate. The assumption follows that the policies of the Muslim government did not necessarily reflect what the jurists wanted, even less the conduct required by Islamic law. The accountability of the authorities towards the Lawgiver, God and His Prophet, however, was, and had always been, a significant consideration; everybody is accountable in front of the divine law, and, if no form of actual rectification could be applied by the Islamic legal institution or the public to amend the deviation, then whoever breaks the law was perceived not to be immune from Godly wrath and punishment in the hereafter. Such is the complex relationship between the ruling authority and the *fiqh* institution – represented by judges and jurists. These dynamics were not exclusive to the Muslim presence in medieval India, but also in many other geographical contexts in the history of Islam.

6.4.1 An overview of the inviolability of religious and legal practice of the Hindus

The generally accepted view is that, under the Muslim rule of the Indian subcontinent, the status of *dhimma* was extended to the non *ahl al-kitāb* subjects. The extension of this status was conducted 'readily', and, in this acceptance, it followed the conduct set by the earlier Muslim governments in the Indus basin, as Marshall Hodgson states (1974: 2: 278). According to historians, the Muslim conquest of the land in its earliest stages involved the looting and demolishment of Hindu temples, which led to the number of early temples being significantly few in those areas where the first wave of conquests took place, in terms of the number of non-Muslim subjects, however, the same does not apply (2: 278). This appears to stand in violation of the protection of the religious rights of humans in the Islamic tradition that was explored earlier, as the looting and destruction of temples could be viewed as a clear offence against the right to freely practice religion that this thesis demonstrates Islam affirms for all human beings.

Yet, two possible reasons for the destruction of temples being more prevalent in the first stages, and becoming less the case during the continuation of the Muslim conquest of India, will be proposed and assessed: the first is that the Muslims, facing hugely increasing numbers of non *ahl al-kitāb* communities as they ventured deeper into India, saw that it was more practical to start accepting the existence of their religious practices, which were represented by the temples they had erected. It is possible that this would have consequently led to the Muslims to being more accepting of both the religious practices of these communities and their houses of worship. This possibility has its theoretical grounding in the statement of Ibn Qayyim al-Jawziyya that was previously mentioned, for example; the hypothesis that facing an overwhelmingly increasing number of non *ahl al-kitāb* communities is by itself a legal – and somewhat rational – justification for accepting their incorporation in the Muslim-ruled fabric without their religious inviolability being revoked or their livelihoods challenged. The second possible reason is that, as was the case historically shown in the Muslim conquest of the Iranian plateau, the impact and magnitude of Hindu resistance faced by the Muslims at the first waves had been more intense than later throughout the conquests as the Muslims gained momentum and strength (Ghazi, 2009). This offers a

viable explanation of the higher level of hostility towards the non-Abrahamic religion of the inhabitants of the lands under conquest and, hence, the increasing number of temple destruction occasions during the first wave of the Muslim conquest of the Indian subcontinent.

In different contexts, the non-Muslim religious communities that resided under the Muslim rule have had systems of law and governance in daily matters that could be very different from the Islamic laws and systems. For many reasons, local systems have developed in order to accommodate these jurisprudential differences of other religious communities within the Muslim state. An acknowledged and well-known example of such a system is the Ottoman *Millet sistemi*, a system of legal governance in which the members of different politico-religious communities (*millet*) who lived in the Ottoman empire were given the authority to maintain their systems of jurisdiction to administer their various issues. Each of these *millet*s were headed by a religious community leader or a cleric, a *millet başı*, who was in turn appointed by the sultan, usually chosen from a list of candidates that the leaders of each community provided. Under official patronage from the sultan, and as long as the leaders maintain order in loyalty to the empire and the sultan, they were free to practice administration over the community through this officially sanctioned bureaucracy.[i] It is widely argued among scholars and historians, and presumably in the minds of the Ottoman officials who designed and implemented this system, that the *millet* arrangement helped keeping things in order for the Ottoman government to rule over different religious communities without causing much resistance that might be triggered by the application of the Islamic law in these communities' affairs. This appears to be a plausible precaution since the forceful application of a foreign religious law upon another religious community in all its issues and affairs is likely to cause discontent and possibly more. Yet it was noted by some historians (Masters, 2009: 384) that this system of 'local governance among the various religious communities as contributing

[i] Non-Muslims in the Ottoman empire were – at one time – organised into three officially sanctioned *millet*s: Greek Orthodox, headed by the ecumenical patriarch, Armenians, headed by the Armenian patriarch of Istanbul, and Jews, who after 1835 were headed by the *hahambaşı* in Istanbul (Masters, 2009: 383). Studies also show that there were other religious communities that further enjoyed a considerable degree of autonomy in legal, religious, financial and educational affairs. At later times, more and more religious groups became officially recognized as *millet*s, such as the Syriac Christians and the Armenian Catholics, for example. By the end of the Ottoman empire, twelve separate Christian communities were officially recognized as *millet*s (2009: 384).

to the rise of nationalist sentiments among the various Christian communities where religion and nationality could be conflated'. It is largely true that this system helped preserve the order within the Ottoman rule over these communities to a big extent, but the education and legislature of the members of these communities in their own religious systems and cultures may have had inspirited the members of a certain religious community to perceive themselves as a separate nation.

A similar status appears to have been given to the Hindus in India, except that – in India's case – these religious communities were outside the *ahl al-kitāb* sphere in its classical definition. Historical evidence shows that when it came to judicial issues, like settling disputes, civil law, religious legal affairs, and other judicial matters, the Hindus had their own judicial system which they were able to apply without any significant hindrance (Ghazi, 2009: 24; Ahmad, 1949: 361; Malleson, 1903: 75). Villages with Hindu populations retained their jurisdiction and administered their legal affairs with purely Hindu law. In some provinces, as Colonel G. B. Malleson recounts in his colonial treatise of India, the higher classes of Hindu communities maintained hereditary positions of jurisdiction which were subordinate to the governor (1903: 75). The general subordination to the Muslim authority on the higher level was a shared feature in both this arrangement and the Ottoman *millet* system. And although more research could be done on the points of similarity and contrast between them, it is safe to assume that the existence of such systems is, in itself, a powerful indicator that both the Islamic legal and administrative systems acknowledge the subsistence and autonomy of other jurisdictions belonging to other faiths and cultures, and that these jurisdictions are able to govern the affairs related to their own adherents. That these systems might or have been used to secure political stability and facilitate the rule of the Muslims could very much be a plausible assertion, but it still does not negate the fact that the operation of non-Islamic legislature systems side-by-side with the official Islamic system is a major step representing multi-religious incorporation under the Muslim rule. Not only were these systems operational, they were also encouraged by the authority and by the legal institution, who was almost always present on the side of the government and had its influence on the administrative and common level. The mere allowance of free exercise of the religion was surpassed to facilitating the application of Hindu law upon the Hindus. In fact, historical narratives suggest that in

the case of the Muslim rule in the Indian subcontinent, the Hindu element was 'very strong' in all the departments of the government, including judiciary practices (1903: 75).

6.4.2 The Hindus and the *jizya* payment

Under the Muslim rule of the subcontinent, The Hindu populations paid the *jizya*. It was institutionalized from the earliest periods of the Muslim rule by Muḥammad Ibn al-Qāsim himself, who, having confirmed the Hindu, Buddhist, and all other religious communities their freedom of worship, instated the *jizya* upon them. Among other things, this primarily signaled out that these communities be treated in the same way as *ahl al-kitāb* communities in regards to civic and religious inviolabilities (Ghazi, 2009: 18). This was the general case during the rule of the Turkish sultans of Delhi and also the Mughal rulers, with the exception of the few rulers who entirely abolished the *jizya* at times. It can evidently be seen that this payment was not considered a fee against military protection, as the higher classes of the Hindus who were leading their local communities still supplied a certain quota of troops for service in times of war to aid the Muslim rulers in their campaigns (Malleson, 1903: 75). Drawing from the theoretical discussion in the first section of the thesis, this can be seen as an example that the purpose of *jizya* was not a fee of some sort, as it was not linked to military or life protection. The presence of more substantial tax channels suggests that it was not viewed as a source of revenue as well. In this and other case of Muslim rule, as this thesis argues, *jizya* was seen as a symbol of the Muslim dominance over the Hindu and other non *ahl al-kitāb* communities. The system of governance in the subcontinent was, as shown before, that of a somewhat structured localities under a bigger domination, and, as can be seen from the demographics of the land, most of these localities where non-Muslim. In such a structure, the *jizya* serves as a shared tribute that easily marks out this domination.

For this reason, the instatement or abolishment of the *jizya* had been alternated depending on the views of different Muslim rulers of the different dynasties. With some rulers known to have had a stricter position towards non-Muslims than others. In a way, observing the *jizya* principle as a law practiced was encouraged by the authority that cared for signaling the upper hand of the Muslim government over the

non-Muslims, while rulers who abolished it did not want to signal this dominance in that way. Historical narratives indicate that it was the third Mughal emperor, Akbar, who famously abolished the *jizya* in the ninth year of his reign on the grounds that he found the tax itself to be a vicious obligation and that it allows the tax collector to be vile, hence it can be very degrading to the Hindus (Malleson, 1903: 174, 175). This has resulted in a positive sentiment towards emperor Akbar by the Hindus and members of other religious communities, and, being so, aided the emperor to win the trust and loyalty of his subjects from the native populations. However, it fueled waves of discontent by the Muslim jurists and the populations who supported their legal system, and saw this as a major violation of the *sharī'a*. Historical and academic sources vary on their portrayal of Akbar's abolishment of the *jizya*, the general sentiment of the clergy, however, was a negative one.

The *jizya* payment was one of the main elements of the Muslim rule that the Muslim jurists seemed to stress on, particularly after its major abolishment by Akbar. One of the most prominent and notable scholars who played a significant role in this issue was Aḥmad al-Fārūqī al-Sirhindī (d. 1624). He was a sixteenth-century Indian Islamic scholar, a notable theologian, a prominent *faqīh* of the Ḥanafī school, and a prominent member of the Naqshbandī Sufi order. He has been given the title *Mujaddid alf sānī* ('the reviver of the second millennium'), as he was largely responsible for the revival of traditional Sunni Islam in opposition to the straying and un-Islamic religious tendencies which gained momentum during the reign of the Mughal emperor Akbar (Encyclopædia Britannica, 2007). As arguably the most prominent representative of the Islamic jurisprudence of his time in the Indian subcontinent, Sirhindī was a major advocate of reinstating the *jizya* upon all non-Muslims under the Muslim rule, seeing it as an integral part of *sharī'a* the abolishment of which constitutes a challenge to the Islamic rule. In his strives to reinstate it, he made contact with the highest authorities and wrote to the emperor Jahangir – who succeeded Akbar – demanding that the latter reinforces the *jizya* upon the non-Muslim communities in India (Ghazi, 2009: 131).

As was theoretically shown in chapter three, the importance of the *jizya* in the eyes of the Muslim jurists does not seem to be coming from a financial point of consideration. This practically applied in the case of the Muslim rule of India. The empire's finances were apparently flourishing at the reign of Akbar and his successors, as suggested by

historical sources, and it was described as an era of commercial expansion (Columbia.edu, 2017). The superfluous revenues from the thriving trade, agriculture, and industry – particularly cloth manufacturing and exports – would clearly lessen the dependency on collected tributes from the non-Muslim communities for the financial wellbeing of the empire. Certainly, clerics like Sirhindī would care about other than flooding the imperial court with extra funds collected from a high number of subjects, especially that the Mughal monarch was perceived as living a life that was not entirely abiding by the Islamic law, the institution they represent. That, in addition to the previously mentioned fact that the prominent Hindus still provided a quota of troops for the military, and, therefore, the tax was not needed for military compensation, leads us to the assumption that the reason behind the insistence on maintaining the *jizya* by the jurists was entirely symbolic in nature. The *jizya* was a most powerful statement of the authority of the Islamic law in the land, a declaration of the superiority of the hand of Islam over other prevalent faiths and cultures in the subcontinent. For them, the existence of this payment was a sign of assurance that their religion's jurisdiction was predominating over all the other systems, whose adherents were in number many times bigger than the Muslim population. This is confirmed by Abul Fazl, one of the most trusted advisors of Akbar and a figure that was – despite being anointed in a scholarly position – generally disliked by orthodox Muslim scholars, when he makes it clear that the calls of the *ulama'* to reimpose the *jizya* was not only based on a desire for profit, but as a wish to prevail over their opponents, i.e. the Hindus (Chandra, 1997: 168). Years passed before the strives of Sirhindī and his colleagues in the clergy seemed to pay off, as the *jizya* was reinstated by the emperor Aurangzeb (Also known by his regal name Alamgir, 'conqueror of the world'), who has received a notorious reputation and harsh criticism from non-Muslims and from Hindu scholarship partly because of this restoration.

The other main elements of the Islamic rule that the scholars of *fiqh* insisted on maintaining were the issue of building new Hindu temples and the issue of slaughtering cows, both are essential to the Hindu faith and could be seen as key indicators of their religious practice. As the cow represented a sacred religious symbol for the Hindus, slaughtering it was unacceptable and a source of major discontent. To avoid the discontent of their Hindu subjects, slaughtering cows for food was forbidden by law of some Mughal kings for a period of time. The Muslim scholars, however,

particularly the legal jurists, viewed that as undermining the authority of Islam. They considered the butchering of the cow in occasions like the Eid part of the *sha'īra*, a legally established ritual of Islam, and a permissible source of sustenance that should not be forbidden to the Muslims for the purpose of gaining the favor of the Hindus. Therefore, they saw forbidding it unacceptable, as it announces an opposition to what God has made permissible, more so if it is intended to secure the contentment of the Hindu classes on behalf of the Islamic law. As a major example, Sirhindī has called for allowing the butchering of cows even at times when *jizya* was not being taken from the Hindus. He wrote to the emperor Jahangir – Akbar's successor – demanding that he re-allows the Muslims to perform sacrificial and normal slaughter of cows during Eid observations and for meat consumption, describing that as the least to be done until *jizya* is reinstated (Ghazi, 2009: 131).

The other issue was the building of new temples for the Hindus. As was discussed with more detail in a previous chapter, building new temples for the non-Muslim communities under the Islamic rule in the major cities or capitals – other than the ones that had existed before the Muslim presence – was classically decreed to be impermissible by the Muslim jurists as a general case. The decree was narrated by many scholars including Ibn Qayyim al-Jawziyya (1995: 2: 130). It is clear that the Ḥanafī jurists in the Indian subcontinent, like Sirhindī and others, adopted this position in the case of the Hindus, without this position having a real influence on the rulers at times, many of whom commissioned the establishment of temples dedicated to Hindu deities in cities revered as holy among the Hindus such as Varanasi on the side of the Ganges river. The jurists generally opposed the ongoing practice of constructing new temples and houses of worship for the Hindus in cities and towns under Islamic rule because they believed this to be an encouragement of proliferation of a belief system that was deemed opposing to the Islamic belief system, consequently bringing the accomplishments of the Muslims conquering the land, and their struggles and strive to spread the ideals of the Islamic faith, to a state of futility. In the end, the demands of the jurists bore fruit when the emperor Shah Jahan suspended the permission to build new Hindu temples and houses of worship. This is different, however, than the destruction of temples already in existence, which is seen by the scholars of law as the practice that negates the inviolability of religion.

6.5 Syncretism as an Approach to Ruling the Hindus: Assessing Akbar's *Dīn-i Ilāhī*

Theological approximation and adherence to the scholarship of *fiqh* were two major methodologies that the Muslims undertook to help construct the status of their Hindu and other non *ahl al-kitāb* subjects. Another methodology that can interestingly be found in the case of the Indian subcontinent is syncretism; generally defined as a philosophical and religious combination of two or more religions into one that is viewed to contain elements of both. While this methodology seems to have occurred more than once in the history of the Muslim rule in the Indian subcontinent, one attempt stands as the most historically known and debated; the attempt of the Mughal emperor Akbar to construct the status of his subjects as equals by introducing his project-religion *dīn-i Ilāhī*.

As mentioned before, the history of the Muslim rule in the Indian subcontinent presents proof of the sizable impact of the ruler's individuality in terms of determining the official stand towards, and the status of, the Hindus and other non-Muslim communities. The personal views of Akbar, the third Mughal emperor, for instance, had an immense shift in the history of the status of the Hindus, as well as a religious innovation that has been a source of resentment and opposition from jurists and Sufis and – understandably – a source of content for many non-Muslims. This impact of individuality is manifested in the shift that Akbar apparently experienced in his personal beliefs towards Islam and religion in general. Historical sources report that Akbar's conduct in his early years as a young prince and ruler was that of a faithful Sunni Islamic conduct. His veneration of saints and scholars was noted, and he is often described as having been a devoted Muslim in all regards. The views of Akbar, however, began to shift away from this devotion, as he started showing a desire to further incorporate non-Muslims in the religious, political, and social spheres. Hindus had been very much involved in administration before, as we also examined earlier. Their high classes were engaged with the Muslim authorities in organizing the community issues and they held critical governmental positions. Yet, it appears that

Akbar wanted to further deepen this integration, fixating the status of his non *ahl al-kitāb* subjects, and aimed for an assimilation of his subjects into one unified community.

In the year 1575, Akbar's interests in religious, spiritual, and philosophical matters led to the construction of the *Ibadat Khana* ('The House of Worship'), a hall in which he held discussions of religious matters and sessions of debate among the learned and the notable scholars in theology, philosophy and mysticism. The discussions, at first, were restricted to Muslim scholars, who belonged to various schools and *madhhab*s. The scholars' much heated discussions, to the displeasure of the emperor, often turned into shouting and vile accusations. This is reported to have caused the emperor to invite representatives of other religions to participate in those discussions, and to evidently develop a negative sentiment towards the existing religious dogmas, as well as a negative shift in his thought towards the Islamic orthodoxy and those who represented it. The fact that the *Ibadat Khana* was a place dedicated to Islamic discussion at first seems, and had been used, to suggest that Akbar was looking for answers for his inquiries and interests in religion from within the Islamic tradition, before turning away from purely Islamic contexts and giving part to other religious narratives to enter the discussion. Theologians, mystics, maters, clerics, philosophers, and learned representatives of Hinduism, Christianity (there were some recorded appearance of European missionaries in the hall), Buddhism, other religions and even atheists were invited to present their ideas in the discussion hall. This, as well, reportedly evolved into hostile arguments between them, as no topic was immune from discussion and they thus touched upon matters which were deemed sensitive to some religious traditions, such as the nature of God and the validity of some of the main revered texts and personalities for some religions.

Akbar came to a personal conclusion that no religion could possibly claim total monopoly of the truth, and that each of the known religions possess an equal opportunity and probability of having attained a side of the truth. That conclusion was convincing enough for him to lead him to establish a syncretic religion which incorporated the elements he deemed most universal and favorable, mainly from Islam and Hinduism, but also including other religious traditions such as Sikhism, Zoroastrianism, Jainism and Christianity. This became known as the *Dīn-i Ilāhī*, which

is often translated as 'The Religion of God' but is better translated by Malleson (1903) simply as 'The Divine Faith'. The Arabic term *ilāh* is usually used to refer to God, but it could also refer to any deity or divine entity other than the God of the Abrahamic religions. Yet it is clear this was intended to replace traditional religions and is therefore best translated as 'The Divine Religion'. Modern studies show that this name was given later in time and that the name that was used at the time of Akbar was *Tauhīd-i Ilāhī* (Chandra, 1997: 177), which can be translated at divine monotheism or simply monotheism. It contained elements of these religions with an emphasis on spirituality and ethics, deeming honesty, piety, prudence, kindness and such values as central values that should be maintained and regarding dishonesty, pride, and other unethical values as sins, therefore not placing great significance on the ritual worship practices of the mainstream religions such as the daily five prayers or the punishable prohibited actions such as the consumption of alcoholic beverages.

This religious movement was not very successful if measured by the number of adherents, which are reported to be less than thirty in most accounts, yet it still ignited a big wave of reaction in the empire, probably because it was initiated and patronized by the emperor himself, a fact that understandably resulted in an evident concern among the Muslim scholars about the possible proliferation of these ideas among the masses. While the actual adherents of this syncretic movement remained very few in numbers, it is suggested that some culturally established religious traditions which the *Dīn-i Ilāhī* adopted might have crept into the beliefs and practices of the Muslims in India, whose traditions were naturally influenced by the much bigger Hindu population. For this reason, some religious deviations occurred in the creed of the Muslims, as Sirhindī repeatedly declared. Obviously, Sirhindī and other scholars of theology, law, and Islamic mysticism fiercely opposed Akbar's *Dīn-i Ilāhī*, declaring it a blasphemy against Islam and a form of apostasy.

Academic resources and historical treatises offer different narratives describing Akbar's *Dīn-i Ilāhī*, and, likewise, reach various judgements on its motivations, nature, and implications. Surveying these treatises, there appears to be three different hypotheses on the motivations behind Akbar's establishment of this new religious system. Although these hypotheses are not distinctive, there are intersecting elements between them, making an argument valid for more than one hypothesis of motivation.

At the same time, they can still be divided into more than one hypothesis because, although they share some elements, they still are different in the way they offer different standpoints from which we can view Akbar's religious innovation. For this reason, they are divided into three hypotheses in this thesis.

The first hypothesis takes quite literally the motivations stated by Akbar in historical narrations or the *Akbarnama*; that this innovation was a genuine search for the truth. This truth, in Akbar's thinking, could not be possibly restricted to, or exclusively achieved through, just one of the mainstream religions. The sources that support this hypothesis, mainly coming from non-Islamic ideological standpoints, such as (Malleson, 1903), expressed a positive sentiment about this religious innovation, appraised Akbar for being endowed with an inquisitive mind which sought the truth without being lazily content with the religion that he was born into (148-150). The vast majority of Akbar's subjects were not Muslims and it only felt reasonable not to restrict the truth or the knowledge of the divine to the few who adhered to Islam, as this narrative argues. While this conclusion might have made sense to Akbar and the influential class which assisted him, it is clear enough that there is no necessary correlation between the number of adherents to a certain faith system in a certain geographical location and the actual creed and belief this system presents or represents. This conclusion, one can argue, was mostly brought out by the blunt and ill-mannered conduct of the Islamic scholars in the course of discussion in the *Ibadat Khana*, as resources show, in the fashion of their shouting and often resorting to accusations to each other instead of the cultured philosophical discussions that Akbar had in mind. This, presumably, led Akbar to formulate a conviction that the religion he was born into, Islam, faces many questions on the validity to its claim of truth since it is sectarian, and that the leaders of each of these sects claim monopoly to the truth and that this, rationally, cannot be collectively true. He, accordingly, developed what he deemed an objective stand towards mainstream religious elements. The debates between representatives of different religions, each of whom trying to establish the superiority of their own faith, led Akbar to a conviction that these debates were almost entirely futile.

The second hypothesis is one that accuses Akbar of simply intending to diminish Islam as a faith and as a social and political authority in the subcontinent. This hypothesis is backed by some Islamic scholars and jurists, who see Akbar's innovation not only as a departure from traditional Islam, but as a deliberate movement against it. This hypothesis shares with the prior the assertion that the uncultured nature of the debates that brought together representatives of the Islamic sciences influenced Akbar's determination to refute the entire faith and establish a new one. On the other hand, it argues that this has influenced a hatred of Islam in Akbar rather than an "awakening" experience on the nature of truth. As Ghazi (58-63) takes an offensive stand against the religious innovation of Akbar, he begins by elaborating how the emperor was very devout and observant of the Islamic law in his early years. When Akbar ascended the throne, he was faced by vile movements from Hindus with the intention of overcoming the Muslim culture and bringing a unified Hindu empire in India. Hence, it was a political necessity for him to bring closer the representative of non-Muslim traditions and to appoint them in critical positions in the state, which in turn, the writer claims, had an effect on his way of thinking towards these religions and towards Islam. Ghazi demonstrates (78) through incidents of assassination and prosecution against particularly the Muslim scholars that the *Dīn-i Ilāhī* was not an attempt to unify Islam with Hinduism and desirable elements from other religions but rather an institution to facilitate the abolishment of Islam. This is evident from the way Islam was being ridiculed in the meetings, official writings and salutations of the adherents of the movement, which were appallingly skewed versions of the Islamic style.

The third hypothesis sees the *Dīn-i Ilāhī* as a cultural outcome stemming from a political necessity. It states that Akbar saw in this innovation a political opportunity to unify the social fabric of the people he ruled and used it as such, and that Akbar's movement did not share mainstream religions elements which established religions have. For example, it did not present, like proselytizing religions, a reward for joining or a punishment for disbelieving in what the creed offers. These reasons led to viewing Akbar's project as merely a political strategy. The allegation that this "religion" was more likely a set of personally held beliefs rather than a religion of a confessional style seems to be true. Akbar used to practice the mixed elements of his belief, such as repeating one thousand and one names of the sun in Sanskrit, paying respect to fire, and banning the slaughter of animals on a certain day, in a fashion that apparently had

no compulsion to acceptance by the people, nor was conversion to his belief system propagated by missionaries. This is also proven by the fact that so few people officially adopted this belief system, despite the fact that it was the emperor's own. Still, many elements remain in this system that qualifies it to be given the description of religion and not merely a political or social strategy.

The *Dīn-i Ilāhī* is not a sect that emerged from Islam but still claims ties to it at the same time. It is a religion that severed its ties with Islam in the sense of origin but only maintained some of them in the sense of belief (integrated with forms of belief and devotion from other religions) and ethical practices. Therefore, we cannot utilize a framework with which the non *ahl al-kitāb* populations were treated in terms of this religion and reflect that as an Islamic framework. The insights that might be drawn from the development of the *Dīn-i Ilāhī* are not to be taken as Islam as a religion or Islamic *fiqh* as a legal system. On the conceptual level, what *Dīn-i Ilāhī* demonstrated in the incorporation of other religions, the adoption of some of their ideas, the affirmation of their sound methodologies in search for the truth, and the abolishment of any social differences between their adherents does not reflect the Islamic paradigms, neither on the theological nor the legal levels. On the wide scene, however, the rule still remained Muslim and appeared Islamic. There are no historical accounts that exclude the last years of Akbar's reign as a period of a rule of the Indian subcontinent that was other than Islamic, at least formally. It is still part of the whole *Muslim* rule of India and Akbar still among the notable rulers of the Mughal empire, which was a *Muslim* empire. It is only natural that Islam still formally held the ruling power of the subcontinent despite this religious reformation in the court of the emperor. Yet this attempt represents the most historically notable among other attempts to syncretize Islam with the local religious traditions in the hopes of achieving an acceptable level of protection and equality among their adherents in the eyes of the intelligentsia or the ruling classes. A method, this thesis argues, that had no real need as the domain of *fiqh* in itself allowed such a status of inviolability which had been established for centuries.

Akbar's focus on ethical and spiritual deeds and his apparent dislike for worship rituals with connotations to a certain religion was obvious in his thought and conduct. Although we find him reportedly adopting and practicing some rituals, like reciting

names for the sun in Sanskrit, there appears to be a tendency in Akbar's thought to avoid rituals that could be considered harmful or violent, such as the butchering of cows – or any other animal, as his preference was. One of the religiously connotated rituals that Akbar and other rulers belonging to the Muslim dynasties found difficulty in supporting was the *sati* practice. *Sati* was an indigenous practice where a newly widowed woman would be immolated alive with her dead husband's body. Practicing *sati* varied widely between provinces and its religious veneration was not uniform, nor was it an unanimously agreed-upon religious obligation. Yet historical sources and incidents suggest that the practice was more common in noble Hindu families and widows belonging to the higher castes. Many sources recorded incidents of widows of notable leaders or local princes who declared their wish to be immolated next to their dead husbands in many provinces, some of whom were venerated and had shrines erected for them after their death by the fire (Shamsuddin, 2020). It is also noticed that some incidents reported the existence of familial or social pressure upon a widow to commit to *sati* by her relatives, or even her sons, as a form of a familial honor and veneration for the dead husband. The Mughal emperors, particularly Akbar, naturally showed their dislike for such a ritual. They regarded it an act of homicide against an innocent human and an act of suicide for the widows themselves. The Muslim scholars and jurists clearly opposed it, and decreed it as being an unnecessary ending of a human life without a legitimate reason, thus violating the axiomatic of life. The famous Muslim scholar, explorer and geographer Ibn Battuta (d. 1369) narrates (1929: 191-193) a *sati* ceremony which he witnessed, to his utmost disapproval, describing it as 'infidel' and seeking refuge in God from a scene that he likened to 'a spot of hell'.

This disapproval was translated into policies in different ways and to different degrees by the Muslim rulers. The contested observation was that, in Muslim areas, it was prohibited to force a woman into committing to the practice of *sati* (Chaudhuri, 1976). Yet, even under this rule, narrations support the claim that the practice was still forced upon some Hindu women (Shamsuddin, 2020: 55-58). Although the general tendency of both the Sultanate of Delhi and the Mughal Empire was to not forcefully interfere with this indigenous Hindu practice associated with the higher castes, some Muslim rulers openly discouraged it and some issued bans against it. Among the Sultans, Mohammad ibn Tughluk issued a policy requiring an official license to administer the practice as an attempt to discourage the act. From the Mughal emperors, it was

Humayun who issued a short-lived prohibition of this practice, even if it was proved consensual from the side of the widow (56).

Akbar, however, could not issue a ban on the act of *sati* or decree its complete abolishment. The rite was venerated and held with high honor among many of the Hindu high classes and the families of Rajputana, the sons of princes, with whom Akbar had strong ties and relations. Akbar, again, prohibited forcing widows on committing themselves to this rite, whether before or during the rite itself. Widows on some incidents tried to escape the fire during the rite and were sometimes forced to commit to death by the surrounding people. It is plausible that, because of this, Akbar decreed that if any woman shows even the slightest sign of clinging to life during the rite, *sati* is not permitted (Malleson, 1903: 164-165). After Akbar, the emperor Jahangir (reigned 1605 - 1627) officially prohibited the *sati* practice entirely (Shamsuddin, 2020: 56), placing aside the previous consideration of the Hindu higher castes' favor. The ban appears to have continued – at least as an official policy – throughout the reigns of the emperors Shah Jahan (reigned 1627 - 1658) and Alamgir (reigned 1658 - 1707), the latter being renowned for his affiliation to Islamic law. The rite of *sati* diminished over time but there were recorded incidents of noble families committing to it even during the British rule of India, where the East India Company clearly made it clear that this was distasteful and issued similar laws to the ones Akbar issued, ending in a formal act to ban the practice of *sati* in 1829. Nevertheless, local reports suggest that a few practices of *sati* have occurred in recent years in some rural areas of India.

6.6 *Fiqh* as a Framework for the Status of the Hindus Under the Muslim Rule: the *Fatawa-i Alamgiri*

The sixth Mughal emperor Aurangzeb (d. 1707), who was also called Alamgir, commissioned the compilation of an encyclopedic work of law at the end of the 17th century: the *Fatawa-i Alamgiri*. It is also known as *al-Fatawa al-Hindiyya*, particularly in Arabic sources, to note its connection with India ('*al-Hind*'). Around five hundred jurists from different geographical areas (The Hijaz, Baghdad, and South Asia) took part in this compilation under the leadership of the scholar and Ḥanafī jurist

Nizam Burhanpuri, also known as Nizām al-Dīn al-Balkhī. As Siddiqui rightfully notes (2012: 12-16), *Fatawa-i Alamgiri* is not a collection of legal verdicts pertaining to jurists (sing. '*fatwā*' or pl. '*fatāwā*'), as the title might imply, but is in fact a legal text written in the *mabsūt* style; which is a text that lists many statements of applied Islamic law ('*furū' al-fiqh*') and refers back to earlier sharia texts as justification. In fact, much of the *Fatawa-i Alamgiri* consist of referrals by quoting major and respected textual sources of the Ḥanafī school in each topic; that is, putting down a compilation of legal opinions and verdicts stated in these sources on a certain issue or inquiry. These sources include *al-Hidāya, Badā'i' ul-Sanā'i', al-Muḥīṭ, al-Mabsūṭ, al-Sirāj al-Wahhāj, Fatāwā Qāḍī Khān*, and other sources that are known to the student of the Ḥanafī school of Islamic law. In large parts of the *Fatawa,* one can barely find any legal opinion that is generated by the compilers themselves, the vast majority of the verdicts and opinions are attributed to those sources and are stated on the authority of previous Ḥanafī jurists who authored those sources, such as al-Kāsānī, al-Marghīnānī and al-Sarakhsī. Therefore, to suggest that the *Fatawa-i Alamgiri* provides an exemplary collection representing the Ḥanafī school in the legal areas it covers does not seem to be farfetched. It can possibly be regarded as a Ḥanafī legal code text which could be of immense value not only for India, but also anywhere in the world, and yet, considerable value is added by the fact that it was compiled in and for the purposes of serving the legal system in India, a place where the non-Muslims sharing the land are vastly non *ahl al-kitāb* peoples. The *Fatawa-i Alamgiri* was compiled to serve as a legal code on the daily and general matters of personal, familial, financial and political laws in an order that bears remarkable resemblance to the other texts of *furū' al-fiqh*, all according to the Ḥanafī school, the dominant and official *madhhab* of both the political establishment and the Muslim community in India at the time.

Classical and recent studies have made attempts to look into the motivations behind the commission of the *Fatawa-i Alamgiri*, with suggestions that this text represented a means for the Islamic scholarly elite to regain their prominence as active elements in the Indian society after their role was diminished during the reign of Akbar, who expressed – as was mentioned before – particular discontent with the Muslim scholars and clerics. Others suggest that the *Fatawa* 'stiffened the social hierarchy' of the Indian society by assigning some legal immunities and privileges to certain social groups, on top of which was the emperor, who enjoyed the highest form of privileges

states in this legal compilation (Malik, 2008: 195). However, as much as these suggestions may help to offer a clearer view on the motives behind the commission of the *Fatawa-i Alamgiri* compilation, or the features which characterize this work in terms of organizing or affirming the existing organization of the society, it will not be of much value to explore them further for the purposes of this thesis. In reality, it appears that what the studies agree upon is that the *Fatawa* – at least – had a significant impact on the legal, social, religious and political spheres in the Indian subcontinent. It was compiled to serve as a reference legal code and it appears to have served this purpose. It was even used by non-Muslim administrations in India and during the British colonial presence until the 20th century. Therefore, it would be beneficial to analyze parts of this text that address the issue of the non *ahl al-kitāb* communities in India, the issue of the *jizya* payment, the key to the issue of their *'iṣmah*.

The *Fatawa-i Alamgiri* represents a proof that the Ḥanafī legal theory, in its known and original form, has been used to address the legal issues and regulate the legal life of a non *ahl al-kitāb* majority inhabited land under the Muslim rule. The Ḥanafī sources that were referred to throughout the *Fatawa* were written in different geographical locations with various racial and religious demographic atmospheres, nevertheless, as mentioned before, no major alterations were made to the statements of the texts that were written in Iraq or Syria, for example, in attempt to accommodate them to the Indian society. This means that these legal opinions were seen valid for application on any society as they are, including the Indian society. Particularly of interest to this thesis is the religious affiliation of the people whom the law addresses, and it is worth marking how the same set of laws were seen valid for application in Muslim-ruled societies with non-Muslim communities belonging to the Christian and Jewish faiths as well as in India where the majority of non-Muslims were Hindus. Surely, the jurists who compiled the *Fatawa* had in mind that the situation in India was different than that of Iraq or the Hijaz, and that whenever there was a mention of non-Muslims in the sources, it would mean a different religious group in the context of India. Yet, within the *Fatawa-i Hindiyya*, only minor things were noted to distinguish the Indian societal or cultural differences, such as pointing out that the Indians prefer wearing a healed shoe rather than the traditional *na'l* used in the Arabian lands, and thus the legal verdict was reflected by analogy to point to a common Indian *mak'ab* rather than a *na'l* for this case (1893: 2: 250).

Following this methodology, the rulings related to the payment of *jizya* in the *Fatawa-i Alamgiri* are also reflected upon the Indian society based on the previous Ḥanafī sources. The parts explaining the legal opinions related to the *jizya* were conveyed to this text which was meant to be a legal code for the Indian subcontinent. Adhering to the Ḥanafī school, and loyal to the texts that the *Fatawa* repeatedly cited, the legal opinion that the non *ahl al-kitāb* communities are eligible to provide the *jizya* payment is maintained. In the second volume of the *Fatawa*, the opinion of the school is affirmed;

> If the Muslims enter a *dar al-ḥarb* territory, and lay siege to a city or a fortification, [the proper conduct is] that they propose the message of Islam to the non-Muslims they encounter. If the people answer to this call the Muslims will not resort to battle. Otherwise, they require them to pay the *jizya* as is narrated in *al-Hidāya*. If the people accept, they will qualify for a status equal to ours in rights and responsibilities, as is narrated in *al-Kanz*. This is applicable if *jizya* can be accepted from them, if they are not eligible for it, they will not be given this proposal, as is narrated in *al-Tabyīn*. The disbelievers constitute different categories: The first is the category from which the payment of *jizya* and inclusion in the *dhimma* is not permissible, these are the Arab *mushrikīn* who do not have *kitāb* ('divine book'). […]. The second category is one from which *jizya* can be taken by consensus of the Muslim scholars, these are the *ahl al-kitāb*, the Jews and the Christians, be they Arab or non-Arab. It is also permissible to take *jizya* from the Zoroastrians by consensus, whether or not they are Arab. For the third category, the permissibility of accepting *jizya* from them is disputed, these are the *mushrikīn* other than Arabs, and other than *ahl al-kitāb* or the Zoroastrians. In our position, it is permissible to take *jizya* from them, as is narrated in *al-Muḥīṭ* (1893: 2: 192, 193 [own translation]).

The congruence between the view of the *Fatawa* and the major Ḥanafī sources is evident throughout the text. Keeping in mind the geographical context of the *Fatawa*, it becomes evident that the acceptance of the *jizya*, and, therefore, the status of *dhimma*, in the case of the Hindus, is permissible in Islamic law. The conviction is present, as the referral to previous classical texts indicate, well before any political consideration was made for the Hindus case in the subcontinent. Reference to the *ahl al-kitāb* connotation throughout the *Fatawa*, whether in the course of the laws of marriage (1: 281; 338; 568), the course of the conquests and rulership (2: 192; 245), or the course of the laws of food and slaughtered meat (3: 115; 5: 285), is no different than that of the greater Ḥanafī school. The classification of the Hindus as non *ahl al-*

kitāb is maintained throughout the text. Therefore, it can be concluded that this work, which signifies the traditional position of the *fiqh* in relation to the status of the Hindus under the Muslim rule, affirmed their eligibility for *dhimma* and their inviolability, while maintaining their classification as non *ahl al-kitāb*. That is, without resorting to seek theological proximity with the Hindu philosophy, much less attempting to combine elements of it and the Islamic religion. While both syncretism and theological approximation suggest the internal assumption that the inviolability of the Hindus in the eyes of the Muslims relied on their theological beliefs being not too far from those of Islam, and therefore attempted to bring them closer together in one way or another, Islamic law did not have this assumption, according to the school the *Fatawa* represented. Affirming the *dhimma* and inviolability of the non *ahl al-kitāb* populations in the subcontinent was readily accepted regardless of the details of their philosophies and their religious rites, practices or beliefs.

In the year 1564, well before the issuance of the *Fatawa*, Akbar entirely abolished the *jizya* in a decree that had not been preceded before him in the centuries of the Muslim rule in the subcontinent. The *Fatawa-i Alamgiri*, however, came to confirm that element and signaled the reconnection with Islamic law and its major schools. It is a work that lives to this day, and is considered one of the major resources for the Ḥanafī *furū' al-fiqh*, not only in the context of the Indian subcontinent, but also the scholarship in general, no matter the geographical context.

6.7 The Indian Post-Classical and Contemporary Scene on the Status of the Hindus in Islam

Of the three cases that were discussed in this section, only the case of the Indian subcontinent stands as one where the non *ahl al-kitāb* communities' presence alongside the Muslims is significant to this day. In modern-day Iran and in North Western African countries like Mauritania, Islam has become proliferate over the years, and those states remained largely Muslim by rule and population. Whereas, in India, the population remained predominantly non *ahl al-kitāb*, even after the end of the Muslim rule in the land, which lost its classification as an 'abode of Islam' in the classical sense. This has resulted in the inquiry among the Muslim jurists on the status

of their co-habitants to remain of vital importance in daily life matters, and not only to establish a theoretical case of the status of those communities. The case of the Indian subcontinent is crucial for the purposes of this thesis as it continues to offer insight on how the Muslims viewed the status of the Hindus both under the Muslim rule and as co-habitants in a land that is not governed by Islam. While areas of similarity can be found among both cases, exploring how the tradition evolved can enhance our understanding of how the principles of the status of the non-Muslims can be significantly effective in cases of non *ahl al-kitāb* communities in different ruling circumstances and time periods. In this section, three post-classical and contemporary movements that were led by Muslim influential figures in the Indian subcontinent will be analyzed in relation to the view of the Hindus and the affirmation of their inviolability. It will be shown that these movements represent, to some degree, a continuation – or weariness – of the classical traditions and methods that appeared in Muslim-ruled India in this regard.

The question of the legal status of the Hindus according to the Muslims entered a new era after the end of the Muslim rule in the subcontinent in the 18th century. The position of the Muslims shifted from a ruling to a ruled minority, and the Muslim narrative had to change from one that addressed the issue in a status of political dominance to a status of being a religion of a minority community under non-Muslim rule. This led many Muslim scholars and thinkers to attempt to develop new frameworks in which the view of the status of the Hindus can be addressed in this unprecedented situation. This thesis argues that all these frameworks that addressed the status and inviolability of the Hindus, being the majority religious group, are those of inclusion, as was the case in the period of Muslim rule. Of course, there has been numerous incidents of Muslim-Hindu conflict throughout the old and modern history of India, an example of which is the rising conflict around the time of the partition that resulted in creating the separate independent dominions of India and Pakistan. Yet, one cannot fail to notice the political and colonial incentives behind this violence, as it is established that on the scholarly religious level such exclusion was not an element of the religious law. Even the most intolerant Muslim scholars, whether before or after the Muslim rule of the Indian subcontinent, did not advocate the annihilation of Hinduism from India. After the end of the Muslim rule, Muslim scholars varied in their levels of inclusion of the Hindus; some advocated a closer rapprochement towards the Hindu faith and scripture,

others called for a pragmatic dialogue with the Hindu peoples for the maintenance of peace and prosperity in the social and public life, while others opposed that openness and longed for restoring the lost domination of Islam, all the while faithful to the tradition of inclusion in the past.

I will divide these attempts into two main frameworks: what I call the cooperative inclusive framework and the theologically linked inclusive framework using a case for each to discuss briefly and link these developments with models from classical Islamic jurisprudence. The less inclusive frameworks reflecting the ideas of some scholars cannot be described as 'exclusive' on the social level as, although they excluded the Hindu faith from closer incorporation with Islam, they did not exclude the Hindus from their right of abiding and thriving in their home. In other words, the status of the Hindus was confirmed to be one of inviolability.

A noticeable shared element among all the frameworks that will be discussed is the element of *da'wa*, the Islamic duty of inviting others to convert to Islam. As repeatedly shown throughout the thesis, *da'wa* is a duty that Muslims all around the world see as an important element in their religion, both evident in classical as well as modern time, in theory and in practice. By briefly exploring the movements led by Muslim scholars in India, one cannot fail to notice that *da'wa* plays a significant role in shaping the philosophy and thought of each of these movements. The scholars, theorizers and activists of those movements always had their duty of *da'wa* towards the Indian peoples at the forefront of their agendas, and it constituted a driving force that had a considerable effect on the view of the status of the Hindus and other non *ahl al-kitāb* communities in the subcontinent.

Another element that can be drawn from exploring these frameworks is a caution of syncretism. As was mentioned before in this chapter, identifying areas of theological proximity between Hinduism and Islam was a common theme among many scholars, who also pointed to many points of similarity between the Hindu scripture and elements of Sufism. While this theme seems to have carried on to post-Muslim-ruled India, a sense of awareness and caution by the modern movements is evident about their association with the Hindu tradition; there appears to be a general sentiment that these thinkers insisted that their movements stay firmly and actively situated within

the Islamic religion. Forms of religious 'fusion' were avoided and the scholars who advocated the inclusion and inviolability of the Hindus did so while insisting on their belief that, though Hindu teachings are not void of truth, Islam is the only religion with the ultimate, undistorted and complete truth; that, while religious law differs from tradition to tradition, the Islamic *sharī'a* is the final and most perfect legal system. A strong determination against creating anything like Akbar's syncretic religion is apparent in all these movements. It is not likely, however, that the existence of Akbar's attempt in the Indian history is the reason for this caution as it seems to be not commonly mentioned in the modern movements founding publications and sermons, though the possibility remains to be explored.

The first framework is what this thesis calls the cooperative inclusive framework, which was advocated by Sayyed Abu al-Ḥasan 'Ali Nadwi (d. 1999), one of the most recognized Muslim scholars in modern-day India. Born into a family of Islamic scholarship which has produced many notable scholars and Sufis, he grew up detesting the injustice he deemed was caused by colonialism in India. India was under the British rule and the Muslims worldwide were suffering the effects of Western oppression, and this led Nadwi to be fueled by a 'hatred of the West', as one of his biographers notes (Sikand, 2004: 31), though this hatred was directed towards the oppression caused by the West and its colonialist power. This has had an obvious imprint on Nadwi's strivings for Islamic revivalism and his views on non *ahl al-kitāb* communities inhabiting the land. Rather impressively, Nadwi's hatred to the West and its oppression towards Muslims did not make his strivings typically militant or violent. Instead, probably influenced by the moderation of the scholarly upbringing he received from his family, his attempts focused on positive inclusion and, even when faced by militant Hindu attacks on some mosques or Muslim communities, he maintained steadfast in promoting peaceful cooperation and political and social involvement with non-Muslims instead of retaliation and militancy.

In 1951 Nadwi founded the *Payam-i Insaniyat* (Message of Humanity) movement which aspires to propagate the shared values of humanity, and inclusion of the people of India from all religious affiliations. This movement, whose name demonstrates a clear connotation with the Islamic universalist tradition that the thesis explored in the

first section, consisted mainly of rallies and gatherings in which Nadwi and other scholars and speakers delivered speeches to the people and addressed religious and social matters that the people of India could relate to. His speeches in the rallies organized by this movement used Islamic legal literature and classical sources to stress the importance of recognizing the rights and inviolability of people of all faiths. The thought of Abu al-Ḥasan Nadwi, manifested in his speeches and preaching, displays a typical representation of the universalist classical Islamic legal tradition. His affiliation to that school was clear in many of his speeches, where he frequently insisted that all human beings, irrespective of their religion, race, color, caste and class were creatures of God and therefore shared a fraternity in that sense. They are, as he describes, 'the most precious' of God's creation and an 'expression of Divine mercy' (2004: 48). These elements show remarkable similarity to the justification approaches that the universalist school utilized for its position, particularly drawing upon the concept of the divinely-bestowed human dignity ('*karāma*') which is shared by people of all religious beliefs. Loyal to the universalist position, focusing on *da'wa* was another feature of this inclusive framework, in addition to being an element that the Islamic movements in the subcontinent can relate to almost unanimously. For Nadwi, *da'wa* was well accounted for in the vision he had for *Payam-i Insaniyat*. He saw this movement as a means for Muslims to connect with the non *ahl al-kitāb* peoples and pave the way for people of other faiths to have a clearer understanding of Islam and realize that it has the potential to provide solutions for their struggles. He viewed the movement as a way by which Muslims can fulfill their duties of *da'wa* towards the non-Muslim communities while staying faithful to their Islamic fundaments and religious duties. Alienating the Hindus was the mistake the Muslims did during their centuries of ruling and being in India, Nadwi argued.

Yet, unlike other inclusive frameworks, this framework did not attempt to fuse elements of Islamic and Hindu beliefs into one context to facilitate the inclusion or the inviolability of the non *ahl al-kitāb* communities. Nadwi did not call for a form of theological rapprochement that would entail any compromise of any belief or ritual on behalf of the Muslims towards any non-Islamic tradition in the subcontinent. While he focused his work towards increasing cooperation between people of different faiths, Nadwi frequently cautioned the Muslims from the attempts and moves towards a 'unity of religions' (*wahdat-i adyan*) and considered it a great *fitna* ('strive' or 'temptation'),

one which Muslims needed to be aware of and avoid in order to preserve Islam's uniqueness and superiority (2004: 46). It can be argued that by emphasizing the universalist nature of the Islamic tradition, and by advocating striving against injustice and the inclusion of people from other faiths as a fundamental Islamic principle, Nadwi aimed to root the Muslims more firmly into their tradition, rather than feeling drifted away from their faith towards any syncretic approach. He thus managed to highlight a ground for Muslims to better understand the status of the non-Muslims without resorting to theological approximation or religious compromise, much less an approach of any degree to a syncretic religion. The universalistic nature of Nadwi's movement manifests in a picture which he drew of humanity; declaring through one of his speeches at Moradabad in 1978 that 'The prophets always strove to make sure that the beads of humanity always remained strung in one necklace', while 'Satan always tries to break the necklace and cause the beads to collide against each other'. (2004: 46).

Another notable scholar who advocated this framework was Wahiduddin Ali Khan (born 1925), who is considered to be one of the *'ulama* who have notable efforts towards advocating peace and inclusion which are, in many ways, similar to Nadwi's; he affirms that establishing bridges with the other religious communities opens up new avenues for Muslims to spread the values of their religion and practice their duty of *da'wa*. He also insists that the acknowledgement of the differences between religious traditions should not resort to syncretism of any kind which might be proposed to override those differences.

A point of interest in Wahiduddin Khan's thought is his view on the jurisprudential side of dealing with the non *ahl al-kitāb* in India. Khan called for a transformation on the way Muslims viewed the others through studying Islamic jurisprudence *fiqh* with a new lens. He rightly notes that classical Islamic jurisprudence developed in a context of Muslim political dominance. He argues that this context resulted in a 'politically ruling mentality' that the Muslims developed (Sikand, 2004: 57)[i]. This is verifiable –

[i] Wahiduddin Khan objected to the division of the world which is found in traditional Islamic legal scholarship into two compartments, *dār al-Islām* and *dār al-ḥarb*. He viewed that division as an 'un-Islamic' way of looking at the world, describing it as a view that is expansionist and violent (Sikand, 2004: 57). It can be said that Khan did not find this twofold separation of the world as Islamic as it should be because it does not allow for missionary work, which is crucial to Islamic operation as he

as was discussed in earlier chapters – through some major works of *fiqh*, in which this ruling mentality and political dominance can be noticed. For example, the sections of *Aḥkām Ahl al-Dhimma* that are dedicated to the social norms of the *dhimmīs* (Ibn Qayyim al-Jawziyyah, 1995: 1: 205-235), their respect and expected behavior towards the Muslims (1995: 2: 191), and their style of clothing and riding mediums (2: 165-183) display this ruling mentality that Wahiduddin Khan talks about, the way the non-Muslims were expected to participate in the society was clearly based on the presence of Islam as the uppermost ruling authority. Yet, as shown previously in this thesis, it can be suggested that the classical Islamic sources of the universalist tradition manifested a different stance in dealing, not only with the non-Muslim subjects of the then dominant Islamic governing system, but with all the non-Muslims wherever they are: a stance of acknowledging their humanity and safeguarding their rights and inviolability as humans. This might have been based on a status of political dominance for the Muslims, but for the universalist scholars it was clear that the Muslims did not rule every other human on earth. Which leads us to suggest that it is probably more suitable to describe these sources as stemming from a political dominance that had resulted in a 'politically responsible mentality' towards the non-Muslims – be they subjects of the Muslim government or subjects of their own different governing systems – rather than a 'politically ruling' one, as Khan describes it.

The second framework which addressed the question of the status of the non *ahl al-kitāb* populations is what can be called the theologically linked inclusive framework. The main proponent of which is Shams Naved 'Usmani, an Indian Muslim scholar

understands it. Viewing all territory ruled by non-Muslims as a place of potential war rules out, he argues, the important process of *da'wa*, calling the people to Islam and preaching Islamic values, in these territories. He blamed the classical sources for ignoring a third compartment which he calls *dār al-da'wa*, ('the abode of invitation'). This is the compartment of the world which is ruled by non-Muslims and in which non-Muslim inhabitants can potentially be invited to Islam. Furthermore, he argued that only those non-Muslim controlled territories in which Muslim inhabitants face prosecution should have been labelled as *dār al-ḥarb*. Only in that case should Muslims resort to violence in self-defense and to protect human rights. The traditional *'ulama*, in his opinion, where victims of the 'politically ruling mentality' (2004: 58) in that they were unable to envision the possibility of this third group; a group of non-Muslims who were neither subjects or potential subjects of an Islamic rule. This opinion could be described as valid assuming that the term *dār al-ḥarb* literally referred to territories ruled by non-Muslims as 'abodes of war' in the sense that these territories represent an opportunity of war rather than a description denoting that these territories alone hold a possibility of war, one that is not present in the *dār al-Islām*. It can also be noted that, while the classical *'ulama* chose to assign the description 'the abode of war', which might have a violent appearance, did not rule out the potentiality of peaceful *da'wa* even in these abodes.

born in Deoband, northern India in 1931. Like Nadwi and Khan, 'Usmani was born into a scholarly family and received traditional Islamic education as a child. Similar to the previously explored movements, 'Usmani held *da'wa* in high regard as a crucially important duty of Muslims, considering it as the most important purpose for their existence (2004: 134). He saw himself as an inviter, first and foremost, and called the Muslim community to retake their *da'wa* duties and to represent their values and peacefully spread its teachings.

To serve its proselytizing agenda, this framework, however, took a theological approximation and integration method which the previous framework had not. For 'Usmani, this approximation represented the most efficient and appropriate way of taking up the *da'wa* duty towards the Hindu population. His method could be put into two points; firstly, a step that Muslim missionaries should take is to study the Hindu texts and familiarize themselves with their tradition, and, secondly, to speak to the Hindus in their own religious context and reach out to them in terms they would find understandable and intelligible. To actualize these points, he encouraged studies and research in the field of comparative religions and lead an approaching move towards the Hindus. He took an interest in Hinduism and, after learning Sanskrit, he spent years studying the Vedas, the Upanishads and the Gita. It can be said that the peak of his rapprochement was when, in his most known work *Agar Ab Bhi Na Jage To* (written by his disciple Syed Abdullah Tariq and popularly referred to as 'Now or Never'), he called upon the Muslims to 'wake up' to the 'fact' that the Hindus were the community of the Prophet Noah, who is a Prophet and Messenger that is mentioned in the Qur'an and who Muslims regard as one of the early Prophets sent by God (2004: 135).[i]

[i] In the *Agar Ab Bhi Na Jage To*, 'Usmani declares that the personality named 'Manu' in the Hindu scripture is in fact Noah, and is the Prophet of the Hindu community. He begins his argument by quoting the Prophetic tradition to prove that the people of Noah had lost their connection with their prophet by quoting a *ḥadīth* that he nation of Noah will not recognize him as their prophet and linking it with the fact that the Hindu people lost the connection with the human who received the Vedas, which the Hindus believe is the word of the divine. He also touched upon the Islamic belief that Noah was not only a Prophet, but also the first Messenger with a message and a *sharī'a* from God. This, he claims, is none other than the Hindu scripture (Tariq, 1999: 13-14). 'Usmani then moves on to present evidence of his argument from the Hindu scriptures and tradition. Examples of these evidence are; arguing the name Mahanuvu ('the Great Nuvu'), who is another name given to a revered person in the Hindu tradition is also none other than 'Noah', pointing to the remarkable resemblance between the names (1999: 14); that, as religions dating systems are linked to their prophets (Birth of Prophet Jesus, *Hijra* of Prophet Muhammad, …), the dating system used by the Hindus is specified by the *Jala-pralayam*, or the 'Flood of waters' (15); and numerous other insights that confirm his theory.

‘Usmani’s first step was to bring the Hindu faith closer to the Islamic worldview by rooting it in the Islamic tradition and the prophetic narrative that is integral to the Islamic theology. Of particular interest is his argument that the Hindu peoples are those who were referred to in the Qur’an as the ‘Sabians’ (17-18). The Qur’an mentions (2004: 2: 62) the Sabians in connection with the Jews and the Christians, leading ‘Usmani to infer that they must be the people of a great religion which is as widespread as Christianity and Judaism. He then explores the description of the Sabian people as laid down by scholars and theologians and arrives to the conclusion that only the Hindus possess these descriptions. Thus, he establishes a connection between the Hindus and the Jews and Christians, who were the two religious groups classically referred to as *ahl al-kitāb* and brings the Hindu religion to a much more familiar stand in the eyes of the Muslims, that of the People of the Book.

‘Usmani attempted to link the Islamic tradition to the Hindu by pointing racial, religious, and geographical commonalities between them. Following in the footsteps of classical scholars who advocated this kind of theological approximation, he embarked on a comparative study of the Qur’an and the Vedas and compiled a list of direct and indirect similarities between them (Tariq, 1999: 30-32). He removed the obstacles that stand in the process of rapprochement in his attempt to restore Hinduism to its ‘rightful’ proximity, or ‘kinship’ to Islam and the family of Abrahamic religions. Regarding metempsychosis, which is regarded a pillar of the Hindu faith as scholars like Bīrūnī stated, he adheres to the belief that it has been mispresented and distorted, as ‘[i]n Vedas there is clearly the mention of only one lasting life after the present one (57). Metempsychosis is, for ‘Usmani, therefore, allegorical; a symbolic representation of the human fluctuations and physical and psychological changes. He also points out to the mentioning of Prophet Muhammad in the Hindu scripture, something that scholars before him have pointed out.

‘Usmani laid the foundations of his theory that places the Hindus in a closer proximity to the Islamic tradition and includes them in the universal Islam – which is the religion of all the prophets according to the Muslims. After bringing the Muslims’ attention to the divine origins of the Vedas, Usmani hoped the next step would be for the Muslims to extend a hand to the Hindus and reconnect them with their Prophet, which will, after revealing the predictions of Noah about arrival of Prophet Muhammad as the last

messenger, lead the Hindus to accepting his prophecy. After rediscovering the true meaning of the Vedas, and seeing Muhammad's message as a fulfillment of their scriptures rather than a negation, the outcome that 'Usmani hoped for was that the Hindus would accept Islam *en masse* (Sikand, 2004: 135). Based on his innovative and radically reformative reading of the Hindu and Islamic scriptures, much of it resulting in personal hypotheses and theories, 'Usmani's framework entailed an intimate religious incorporation between the Hindus and the Muslims.

After discussing the theological points of commonality between the Hindus and the Muslims, 'Usmani addressed the legal status of the Hindus according to the Islamic *fiqh*. As mentioned before, Muslims believe that God's religion is one and shared by all the Prophets, which is Islam in the broad theological sense (submission to God and worshipping Him with absolute monotheism). These principles cannot be abrogated or replaced as Prophets are sent to their different peoples. However, Muslims also believe that the matters related to the law are not necessarily shared by all religious traditions. The other messengers had their variant *sharā'i'* (sing. *sharī'a*), and the *sharī'a* of the Prophet Muhammad was the last system of law to replace the previous systems. The issue of the Hindus classification according to the Islamic law is, therefore, of vital importance and remains a question demanding an answer. 'Usmani presented an atypical attempt to resolve this challenge. He began by stating that the Hindus have historically been treated in the 'like of the People of the Book' status, and not in the category of the *mushrikīn*, since the invasion of Muḥammad Ibn al-Qāsim, who, in response to the people of *Brahminabad* (Indus), allowed them the status the Christians, Jews and Persians had in Iraq and Syria (Tariq, 1999: 71). Based on the fact that the Hindus, despite being involved in some practices of *shirk*, believe in God and prophethood, however ambiguous or distorted, and that they believe in a form of reward and punishment after death, 'Usmani insists that they should not be categorized as infidels or *mushrikīn*. And based on the fact that the Hindus lost their connection to their Prophets to mythologies and, therefore, failed to maintain the affiliation with the book of God through a recognized prophet, he also states that they cannot be categorized as 'People of the Book'. The Qur'an specified the 'People of the Book' category to include only the Jews and the Christians, and 'Usmani sees that as a proof that, to be recognized as *ahl al-kitāb*, the community must maintain the affiliation, though 'mutilated' with their divine scripture through a well-recognized prophet which

they know and believe in. He proposes a different category to classify the Hindus: the group of *'ummiyyīn*. This term is mentioned in the Qur'an (translated as 'illiterates'):

﴿ وَمِنْهُمْ أُمِّيُّونَ لَا يَعْلَمُونَ الْكِتَابَ إِلَّا أَمَانِيَّ وَإِنْ هُمْ إِلَّا يَظُنُّونَ ﴾

> And there are among them illiterates [*'ummiyyūn*], who know not the Book, but (see therein their own) desires, and they do nothing but conjecture. (2:78). (Abdullah Yusuf Ali, 1946: 38).

Another Qur'anic verse indicates that the group of *'ummiyyīn* (translated herein as 'unlearned') is different than that of *ahl al-kitāb*:

﴿ وَقُل لِّلَّذِينَ أُوتُوا الْكِتَابَ وَالْأُمِّيِّينَ أَأَسْلَمْتُمْ ۚ ﴾

> And say to the People of the Book and to those who are unlearned [*'ummiyyīn*]: "Do ye (also) submit yourselves?" (3:20). (Abdullah Yusuf Ali, 1946: 127).

Therefore, as in the sense that they do not recognize the Book except for suppositions and speculations, 'Usmani claims that today the only people who can be classified under this category are the Hindus (72); they are the people who lost their correct knowledge of their scripture and their living relation with their prophet, Manu, or Noah. The duty of the Muslims is to draw the Hindus from their *'ummiyyīn* category by revealing to them the truth about their scripture and reconnect them with their prophet, which will consequently result in their joining the ranks of Islam as their scriptures would lead them as mentioned before.

At a time of rising anti-Muslim militancy among some Hindu groups, 'Usmani managed to pave a new course for the Muslims in India to relate to the status of the Hindus. While maintaining the importance of the Muslims' duty to commit to *da'wa* towards the non *ahl al-kitāb* inhabitants of the land, he also addressed the legal status of the Hindus in an innovative way. This, though, did not cover the legal aspect in its entirety, as 'Usmani does not seem to clarify the legal consequences of placing the Hindus in the *'ummiyyīn* category other than them belonging neither with *ahl al-kitāb* nor with *mushrikīn*. Rightly, he asserts their right to receive *da'wa* and situates that

with their assigned status as people who have lost the organic connection with their book and prophet. In fact, what is particularly significant about ‘Usmani’s work for this thesis is his articulation of this new category of *‘ummiyyīn* within a framework of Qur’anic, prophetic, and historic indications, and placing it within a wide context of the acceptance of the Hindu scripture as divinely inspired, creating a theory that has implications for both Hindus and Muslims, all of that while rooted in his Islamic belief and his assertion that the last and replacing *sharī’a* is that of Prophet Muhammad. Expectedly, ‘Usmani’s ideas received criticism from both Hindu and Muslim circles, accusing him of incorporating Hindu false beliefs into the Muslim tradition and – conversely – trying to create a drive among the Hindus to convert to Islam in mass. Some critics have even accused him of having Brahmanical agenda for his ideas and theories.

The case of the Hindus in the Indian subcontinent offers insight on the discussion of the status and the inviolability of the non *ahl al-kitāb* communities under the Muslim rule. The relevance of this case to our thesis question comes from many facets, including the fact that it represents a mature *madhab* tradition’s response to a majority population that are visibly deemed as non-Abrahamic in their affiliation. In this chapter, three approaches to the status of the Hindu populations in the Indian subcontinent under the Muslim rule were presented and discussed. The first of these approaches, theological approximation, is demonstrated by the works of many Muslim scholars, particularly theologians, who attempted to find a common theological ground between Islam and Hinduism. Viewing the Hindu creed in a closer place to the Islamic provides a justification for placing the Hindus in a closer circle in terms of their status according to the Muslims. Examples of this approach include the thought of Abū Rayḥān al-Bīrūnī. The second approach was syncretism, manifested in the attempts done by Muslim figures – most notably Akbar – to create a merger between the religious traditions of the land. This approach was evidently less favorable to the Muslim scholars and to the general public at the time. The third approach took form in the scholarship of the Ḥanafī *fiqh*, a prime example of which was the *Fatawa-i Hindiyyah* commissioned by Alamgir, which depended on the tradition of the Ḥanafī school in establishing the inviolability of the Hindus and their eligibility to be admitted to *dhimma* under the Muslim rule.

Though all three approaches share the same conclusion: the inclusion of the Hindus in the circle of inviolability and the protection of their axiomatic rights, the chapter argues that the *fiqh* tradition of the Muslims includes the firm ground to guarantee this inclusion without resorting to theological interpretations or the act of forging a new doctrine out of existing ones. *Fiqh* has a lot to offer in the area of guaranteeing the inviolability of the Hindus and supporting it with evidence rooted within the Adamiyyah tradition.

Section Three

Contemporary Perspectives around the Status of Non-Muslims and Non *Ahl al-Kitāb* Communities

Chapter Seven

Contemporary Positions on the Status of Non *Ahl al-Kitāb*

The Islamic legal tradition continued to be the science looked towards for discussing issues related to the status of the non *ahl al-kitāb* communities in the Islamic law in contemporary times. The interrelations between different religious groups have become increasingly imperative to study, given that most of the Muslim-majority countries nowadays host non *ahl al-kitāb* residents. Therefore, the question of the status of these communities according to Islamic law, with all what it entails, continue to be essential to explore and understand in the dynamics of this day and age of high mobility and connectivity. Today, different streams of thought in the Islamic scholarship represent the opinions of the scholars and legal thinkers on the status and inviolability of non-Muslims, in general, while some extend to the non *ahl al-kitāb* in particular. These streams vary in their fidelity to those brought by the scholarship in the formative and classical periods, which have been explored in the previous chapters of this thesis. Still, many of the contemporary scholars to be discussed in this chapter have maintained fidelity to the major streams in the scholarship of *fiqh*, while others have innovated pathways which they deemed suitable to this age or read the positions discussed earlier through a lens of the modern times.

The divergence *ahl al-kitāb* / non *ahl al-kitāb* does not appear in much of the contemporary discourse regarding the status of non-Muslims. As will be shown with more detail in the chapter, many of the scholars who embarked on this topic did so in the more generic Muslim / non-Muslim framework. One can also notice the localized nature of this reference, with many scholars using examples of non-Muslim communities from their local territories when referring to the status of the non-Muslims in Islamic law. For this among other reasons, much of the writings of Arabic speaking jurists focus on the Christians and the Jews when they refer to non-Muslims, given that these are the religious communities that are mostly relevant to the geographical situation, while scholars from India and Pakistan, for example, largely

refer to non *ahl al-kitāb* communities that share their geographical residence. Still, the discourse used by the scholars who were selected for this chapter's discussion can be extended to non-Muslims in general, with specifications given to either *ahl al-kitāb* or non *ahl al-kitāb* communities.

The main purpose of this chapter is to highlight the continuity of the main positions shown in the previous chapters in contemporary Muslim legal thought, to classify contemporary approaches related to the status of the non-Muslims and non *ahl al-kitāb* communities in Islamic law, and to present the Adamiyyah paradigm as a paradigm suitable for contemporary consideration of the question as it has been throughout the thesis, in the conceptual and the historical senses. The adherence to this paradigm will be shown to be continuing throughout the Muslim legal thought, but also the continuation of the Ibrahimiyyah paradigm will be highlighted in one example. The four scholars discussed in the following pages have been selected to represent different streams in relation to the discussed positions, all of whom display a high level of influence on the contemporary arena of Islamic law and scholarship. To maintain the harmony with the previous method, which depended on the opinions of Muslim jurists who belonged the major schools of Islamic law, three scholars mentioned in this chapter have been selected to be traditionally trained in the *uṣūl* and *furū'* of *fiqh*, in addition to their academic training or expertise, and all pertain to already established major schools of Islamic law.

The chapter will attempt to discuss the thought and legal approaches of these scholars to highlight examples of contemporary Muslim legal approaches to the question of the status of non-Muslims and particularly non *ahl al-kitāb* communities. At the same time, exploring these examples consists an attempt to study the elements of the paradigms discussed which could be extended to contemporary times in the context of religious diversity management and affirming the inviolability of the non *ahl al-kitāb* communities in Muslim-majority countries. The position of each of the scholars will be explored in terms of their methodologies, their view of the status of non-Muslims in general, their view on the *jizya* payment as a key to understanding the inclusion in the inviolability, their position on inviolability and what nullifies it, and their view of the binary division of the abodes of Islam and war.

7.1 Wahba al-Zuhaili: An Example of Contemporary Universalism

Wahba al-Zuhaili was a Muslim Shāfi'ī jurist and scholar who is considered among the most prominent jurists in contemporary times. He was born near Damascus in Syria in the year 1932. He received his primary and secondary education in Syria before travelling to Egypt to complete his undergraduate and postgraduate studies at Al-Azhar University, Ain Shams University and Cairo University. Following that, he spent his life teaching Islamic law and jurisprudence in many universities and institutions in Syria, Libya, Sudan, Saudi Arabia, Qatar and the United Arab Emirates, as well as giving lectures and talks in many other countries. He served as a member of different international *fiqh* committees until his passing in 2015. Zuhaili was a scholar of law who belonged to the Shāfi'ī *madhhab*, a fact that makes studying his thought on inviolability and inclusion of non *ahl al-kitāb* communities one of a considerable importance. He is considered an authority on Islamic law and jurisprudence, with numerous works and publications focusing on Islamic law, economic and financial issues in Islam, and the Islamic view on different international affairs. Among his works are written manuals of *furū' al-fiqh* according to each of the four Sunni schools, simplified to the unspecialized reader, as well as books on *uṣūl al-fiqh*, Islam and International Relations, Islam and war, and other respected sources and publications. In the context of this thesis, Zuhaili's thought provides a notable example of a contemporary Muslim scholar whose ideas are influential and respected in his areas of expertise. At the same time, he is one of the contemporary jurists who addressed the question of the status of non-Muslims in the Islamic law in many of his works while situating his thought with that of the legal scholarship which was discussed with detail in the first section of the thesis. As will be shown in the following pages, Zuhaili could be seen as a jurist who is intellectually descending from the earlier jurists in the sense that he maintained and conveyed the position of the known schools on the inviolability of the human beings, as well as the grounds on which the rationale for this inviolability rested.

Throughout the works of Zuhaili, one cannot fail to notice the emphases on the element of human dignity in his view towards the other. Zuhaili clearly situates his thought with that of the Muslim legal scholarship in believing that the viceregency ('*khilāfa*')

of humans on earth is a key concept that leads to the dignity of human beings ('*karāma*'). In his conviction, this dignity, which is upheld by God and by the human beings He created, extends to all human beings and is not exclusive to the Muslims (2000: 9, 10). On the basis of this dignity, in addition to cultivating the earth and advancing civilization as a purpose of creation, all human beings are seen eligible for peaceful existence. For Zuhaili, this has several indications, including the opportunity to extend proposals of peace, upholding peaceful diplomatic relationships, and guaranteeing the safety and protection of the non-Muslims in all the territories where the rule of Islamic law is established. It is evident in his thought that the natural state for humans is that of inviolability. In this, Zuhaili, clearly adheres to the universalist stream of thought, not only in the conclusion regarding the inviolability question, but also on the basis on which that conclusion stands; that the human dignity and viceregency, which are shared qualities for all human beings, call for inviolability and affirmation of rights and the protection of these humans. In his account on the protection of human dignity, Zuhaili points to a legal principle as one that affirms the inviolability of all dignified humans;

> Dignity is a natural right for every human. It is upheld by Islam and is considered the foundation of rulership and the premise of interrelations. It is, therefore, not permissible to disregard anyone's dignity, or to revoke the inviolability of their blood [life] or honor, equally so be they virtuous or sinful, Muslim or non-Muslim. This is because punishment serves a medium for correction of wrong and for reprehension, not that of torture or humiliation. (1989: 8: 6208 [own translation]).

In the course of discussing issues related to the status of non-Muslims in Islamic law, at least in his known published works, Zuhaili usually refers to non-Muslim as a group without further specifications of their categorization in relation to a divinely-revealed scripture. Although he does not mention non *ahl al-kitāb* communities in a specific way, he mentions (1989: 8: 6418) that the Muslim state can establish and maintain cooperation with non-Muslims from *ahl al-kitāb* and non *ahl al-kitāb* affiliations for the sake of many aspired goals including spreading peace and justice and avoiding bloodsheds. He refers to the verses in the Qur'an which guide the Muslims to accept calls for peace if the non-Muslims initiate them;

﴿ وَإِن جَنَحُوا لِلسَّلْمِ فَاجْنَحْ لَهَا وَتَوَكَّلْ عَلَى اللَّهِ ۚ إِنَّهُ هُوَ السَّمِيعُ الْعَلِيمُ ﴾

But if the enemy incline towards peace do thou (also) incline towards peace, and trust in God: for He is the One That heareth and knoweth (all things). (8: 61). (Abdullah Yusuf Ali, 1946: 430).

In addition to the verse which requires the Muslims to provide protection for the idolaters while they reside in the Muslim-ruled territory, and ensure they are conveyed to a state of *amān*;

﴿ وَإِنْ أَحَدٌ مِّنَ الْمُشْرِكِينَ اسْتَجَارَكَ فَأَجِرْهُ حَتَّىٰ يَسْمَعَ كَلَامَ اللَّهِ ثُمَّ أَبْلِغْهُ مَأْمَنَهُ ۚ ذَٰلِكَ بِأَنَّهُمْ قَوْمٌ لَّا يَعْلَمُونَ ﴾

If one amongst the pagans ask thee for asylum, grant it to him, so that he may hear the Word of God; and then escort him to where he can be secure. That is because they are men without knowledge. (9: 6). (Abdullah Yusuf Ali, 1946: 440).

These verses, for Zuhaili, provide a ground for affirming the position that cooperation with the non-Muslims, including non *ahl al-kitāb* communities, as well as treating them with justice and affirming their rights of life and religious affiliation, are well-established principles in Islam. Furthermore, Zuhaili acknowledges that the Islamic law has regulated the view towards non *ahl al-kitāb* religious traditions by accepting the virtuous and righteous elements that may be present in them and excluding what is not virtuous or not accepted in Islam (1989: 8: 6420). He uses the Zoroastrians and the Arab pagans as prime examples when referring to non *ahl al-kitāb* communities, often citing the verses or the Prophetic examples on instances which include the mention of these communities and their status according to Islamic law. It is obvious to the reader that Zuhaili takes the example of the Zoroastrians and the Arab pagans to be one that is representative of all other non *ahl al-kitāb* religious communities, and that it is one of affirmation of rights and inviolability.

Adhering with the position of the scholars mentioned in the first section of this thesis, particularly those belonging to the Ḥanafī school, Zuhaili sees animosity ('*ḥirāba*') as the reason for nullifying the inviolability of the disbeliever, and not their being in a state of disbelief. Even in a state of war with the non-Muslims, the reason for fighting the disbeliever is not their disbelief or apostasy ('*kufr*'), as some scholars have argued, but rather their active and practical animosity towards the Muslims, conspiracy against them, or aiding in fighting them by any means (Taja, 2015). In his thought, the fact that God is the Creator of all humans, and that He willed their creation to be marked by the variety of belief and disbelief, does not nullify the status of inviolability that every human – including the idol worshippers - must be eligible to in the natural state.

When discussing issues like the principles of the relationship with non-Muslims according to Islam, or the status of the non-Muslims in Islamic law, one notices a general recurring tendency among the contemporary scholars and authors to refer to the covenant of Madina, also referred to as the Charter of Madina[i]. This charter is often taken as a primary example on the Prophetic way the relationship with affiliates of other religions, as well as the governance of different religious groups in the Muslim state, were regulated. The charter is popularly regarded as a standpoint of studying the principles of international relations, diversity management, and inter-religious relations in Islam. Wahba al-Zuhaili, like other scholars, refers to the covenant of Madina (1989; 2000), yet, at other instances, focuses on another aspect of the Prophetic example that he considers vital to understanding the Islamic legal way of viewing, approaching, and building and maintaining relations with non-Muslim states and communities. This aspect is the correspondences which the Prophet initiated with the emperors and kings of Persia, Byzantine Empire, Egypt and other states, calling them to the message of Islam. For Zuhaili, the historical value of these examples of correspondence exceeds their being a display of the vitality of conveying the message of Islam to non-Muslims, *da'wa*, for the Muslims, but also can be considered testimonies to the validity of extending the hand, establishing cooperation, and – relative to the discussion of this

[i] Also known as the Constitution of Medina, or the Covenant of Medina. The charter is a legal document that was drawn after the arrival of Prophet Muhammad in Medina in the year 622. It served towards affirming the rights, responsibilities, and social relations within the city between its inhabitants, who, at the time, were majorly non-Muslim.

thesis – viewing the non-Muslim as a dignified human who enjoys rights and autonomy (2000: 11-13). Citing these correspondences is a theme of Zuhaili's works which discuss the status of the non-Muslims in Islamic law, as well as in Islamic history. As a scholar who wrote on different aspects of the history of the Muslim civilization, Zuhaili considers the correspondences between the Prophet of Islam and the rulers of neighboring states at His time to be a key to understanding the similar acts of diplomacy that the Muslim rulers displayed with other non-Muslim states and groups in the Umayyad, Abbasid, Andalusian, and other instances in history, as well as the validity of the positions many of those rulers and caliphs took towards those states and communities.

In the previous chapters of this thesis, the issue of dividing the world into two domains, *dār al-Islām* ('the abode of Islam') and *dār al-ḥarb* ('the abode of war') was mentioned. The tendency of the formative and classical periods scholars of *fiqh* to refer to the world through the lens of this dichotomy is both apparent and a source of controversy. Many contemporary scholars and academics challenged this dichotomy, including the previously mentioned Indian scholar Wahiduddin Khan, who advocated what the thesis called the cooperative inclusive framework in the context of the Muslim view of the non *ahl al-kitāb* communities. Other scholars, on the other hand, attempted to remain loyal to this division. Such scholars articulated responses to the conception that can be drawn from the superficial level of the labels of the abodes; that this classification suggests a status of enmity that is associated with all non-Muslims who reside outside the abode of Islam.

Among the scholars that maintained fidelity – in principle – to this division, while attempting to highlight its flexibility in our contemporary times, was Wahba al-Zuhaili. Although he maintained that this classification of territory was formulated by the legal scholars no earlier than the beginning of the 9th century, Zuhaili maintained a scholastic fidelity to this classification as understood in its proper framework, and has attempted through his work to explain this framework, which he saw to be essentially bound by time and social space. In his defense of this classification by the jurists, Zuhaili articulated (1998: 192-194) two major motives that he believed led to their formulation of this dichotomy. Both of these motives are time-bound and circumstantial. The first of which was the need for the unity and solidarity of the

Muslims at their earlier stages against a common enemy outside their abode, which was then centralized around the Arabian Peninsula and the Near East. This need to unify the efforts and might of the Muslims led, according to Zuhaili, to the perception of other abodes like India and Central Asia as abodes of war. The second motive is embodied in an Islamic legal conceptualization of the social and political circumstances that were dominant during the formative and classical periods, which were, generally, governed by warring relationships unless clarified otherwise in the form of a covenant or a treaty. Interestingly, Zuhaili states that, in this, the Muslim jurists had not depended on the textual sources of Islamic law but on the social and political circumstances of the time. As we see this theme of division of the territories among other civilizations, like the Roman law which equated the category of foreigner with that of enemy, Zuhaili saw in this and similar examples proof that the social and political situations inspired such divisions among the jurists and legal scholars. This included the Muslims, who did not detach themselves from the national and political picture of the world that surrounded them, which, in some cases, did not see residents of foreign domains as subject of a legal personhood, much less a subject of inviolability or legal protection.

Zuhaili's position on the grounds for the inviolability of human beings is also one that is conforming to that of the scholars of the Adamiyyah paradigm. Relaying the quotes of the *fuqahā'*, as he comments on the Islamic principles in the state of war, he states that

> The human being is inviolable ('*al-ādamiy ma'ṣūm*') so that they can uphold the burdens and duties of God's commissioning ('*taklīf*'). The permissibility of violating life is but a transient verdict that is permitted to prevent the harm from their side. Disbelief in itself is not a rationale for fighting the disbelievers. (2000: 28 [own translation]).

Zuhaili uses the terms *ādamiy* and *ma'ṣūm* in an apparent loyalty to the terminology of the jurists in the formative and classical periods of Islamic law. He, also, concurs with the thought of the Ḥanafī scholars and with other prominent scholars who accounted on personhood and demonstrated that the human being, being an intended recipient of God's discourse ('*khiṭāb*') and His commissioning ('*taklīf*') – as Abū Ḥāmid al-Ghazālī elaborated, calls for the inviolability of the life of the said human in

order to be able to receive and uphold this commissioning. To be able to receive and uphold the divine *taklīf*, and the principle of human dignity – which was mentioned earlier in this chapter, appear to be the two most principal rationales that support the inviolability of all human beings in the thought of Wahba al-Zuhaili.

Being a jurist belonging to the Shāfi'ī school himself, Zuhaili prefers to interpret the opinion of the school he belongs to, all the while taking the historical context into consideration. A major example of this approach is the question of the inviolability of the non-Muslim in the natural state, or the *de facto* status of the residents outside the abode of Islam. In the first section, the thesis discussed the principle that, according to the communalist school, inviolability is attained by either faith or a covenant of peace with the Muslims. Speaking of this position, Zuhaili highlights that the positions some of the *fuqahā'* took – including the Shāfi'īs, in regards to the violability of the non-Muslims residing in the abode of war ('*ḥarbī*'), were based on the mentality of the surrounding historical and social environment. He states (1998: 685) that when the formative and classical Muslim jurists' verdict the permission to take the life and wealth of a *ḥarbī*, it was based on their impression that every *ḥarbī* is a warring individual against Islam. In other words, this perception of the residents of the abode of war was effectively the basis of the communalist position. Based on this, Zuhaili sees that, as the warring situation is drastically different on the international arena than how it was at the formative and classical times, this impression cannot be considered a basis for nullifying the inviolability of the non-Muslims anymore. As the participation of war became a craft of the armed forces, the assumption of animosity is restricted to that, and cannot be extended to the civilian. As the rationale behind nullifying the inviolability is animosity, lifting the assumption of animosity confirms the inviolability of the non-Muslims, regardless of their residing places.

Contemporary scholars have discussed the issue of the *jizya* payment on many occasions and in different contexts. Some have sought to codify the reasons why this payment ceased to be implemented in modern Muslim-majority states. In this debate, Zuhaili advocates the legal opinion that this payment is inappropriate for today's world on the basis of the participation of *ahl al-dhimma* in the military protection of the Muslim-majority countries in which they reside. Zuhaili understood *jizya* as primarily a payment given in return of the protection that the Muslims provide for the abode of

Islam which the non-Muslims share (1989: 8: 5879). This is the foremost function of the *jizya* in his view, which supposes the refrainment of the paying non-Muslim residents from militarily defending the abode of Islam. Per this view, he sees the enrollment of the non-Muslim citizens in the military service, conscription, or their participation in defense against invasions, as bases for nullifying the requirement of *jizya* payment. As the participation of all citizens in the defense of the Muslim-majority countries or military service has become the norm, it follows that the payment of *jizya* is no longer necessary in the opinion on Zuhaili, as the purpose it serves is no longer in place. In the thought of Zuhaili, the primary purpose of the *dhimma* is to enable the peaceful existence of the non-Muslims together with the Muslims, consequently allowing them to be introduced to the Islamic religion through this coexistence (1989: 8: 5879).

Yet, following protection as the major element in the meaning and functionality of the *jizya*, Zuhaili also acknowledges the function of *jizya* as a symbolic display of the superiority of Islam over its non-Muslim subjects. He describes the payment of *jizya* as a 'tangible proof of loyalty to the Islamic state' (1989: 8: 5879 [own translation]) and an 'outward display of obedience' (1998: 692). This is harmonious with numerous traditional scholars of Islamic law and with the conclusion discussed in the body of this thesis. At the same time, Zuhaili's approach citing historical examples from different periods of the history of Islamic rule led to his assertion that another purpose of *jizya* was the provision of peace that the Muslim rule provided for the non-Muslims under the contract of *dhimma*. Throughout his works, the reader cannot fail to notice that citing historical instances in which the Prophet, the companions, the Muslim rulers or other notable Muslim figures displayed stands towards the *jizya* payment which indicated this meaning that it may entail. Zuhaili cites (1998: 698, 699) examples where the companions associated the *jizya* that the non-Muslims in Armenia, Antioch, and other places where required to pay with the military protection that the Muslims provided. In these cases, the Muslims agreed on lifting the *jizya* as the non-Muslims participated in the defense of the territory. For Zuhaili, following his methodology mentioned earlier, this indicates that *jizya* can be lifted if the non-Muslims are willing to participate in the defense of the land and, by applying the principle of analogy, sees that the non-Muslim citizens who reside in the Muslim countries today are not required

to pay *jizya*, as they participate in the national military service and are susceptible to be affected by a military conflict in case of an outside aggression.

In the course of laying out the position of the Adamiyyah paradigm scholars, which is that *jizya* can be requested from all non-Muslims had they not been from the Arab pagans, Zuhaili mentions a narration in which the Prophet urges all the army leaders that He appointed that, when they meet the enemies from amongst the *mushrikīn*, they should call them to one of three offers: embracing Islam, giving *jizya*, or military action (Abu Dawud, no date: 3: 37 [own translation]). Zuhaili mentions that, for many classical scholars of Islamic law, the mention of the word '*mushrikīn*' in the narration without specifications lead them to adhere to the position which accepts *jizya* from all non-Muslims, be they *ahl al-kitāb* or not, and irrespective of any racial belonging (Zuhaili, 1989: 8: 5881), as opposed to the other paradigm that limits the eligibility of *jizya*, and consequently to *'iṣmah*, to *ahl al-kitāb* among the non-Muslims. Zuhaili sees that this position reflects a view towards non *ahl al-kitāb* communities which is characterized by inclusivity and acceptance.

7.2 Abdul Aziz ibn Baz: Disapproving the Adamiyyah Paradigm

Abdul Aziz ibn Abdullah ibn Baz was a Saudi Arabian jurist, judge, and a scholar who continues to be one of the most cited jurists among the Eastern Arab Muslims to this day. He was born in the year 1912 in the city of Riyadh, Saudi Arabia, and received his training in Islamic sciences, particularly *fiqh*, at the hands of local Islamic scholars who were mainly associated with the Wahhābī stream of religious thought. This stream was established by Muḥammad ibn 'Abdul Wahhab (d. 1792), a figure who had a big influence on the shaping of the Saudi Arabian religious scene, and is known to adopt hardline opinions towards many beliefs and practices of the Muslims at the time, deeming them to be unlawful distortions ('*bida'*') in which the Muslims have fallen. This led many to denote this stream as an intolerant version of thought among the streams developed in modern Muslim-majority countries. Ibn Baz was one of the most influential scholars who belonged to this stream, and is considered a legal authority in law, particularly in Saudi Arabia and other Arab countries. Ibn Baz assumed many high positions in the Saudi state, including the presidentship of the Saudi General

Presidency of Scientific Research and Exile, membership of the establishing committee of the Muslim World League, appointment as the grand Mufti of Saudi Arabia, and other academic positions. His influence is considerable among the followers of the Salafī and the Wahhābī streams as well as among common Muslims around the world. Ibn Baz and the stream he represented situate their legal adherence to the Ḥanbalī school of Islamic law. He died in 1999.

Ibn Baz, and the figures of the Wahhābī stream in general, depend on textual evidence as their methodology of arriving at legal opinions. As shown earlier, scholars like Zuhaili display a diversity in their reasoning between citing texts, reasoning, and using historical examples. Ibn Baz's school of thought, however, depends heavily on Qur'anic verses and Prophetic narrations as a source of legitimizing their legal stand, at times to an extent where they adhere to the literal version of the text. This will be shown in the course of discussing the evidence on which Ibn Baz based his approach, as many of the stands he chooses to adhere to, including the question of the status of the non *ahl al-kitāb* communities under the rule of Muslim-majority states, follow this style. In these and other questions, this section argues that many of the positions that Ibn Baz took were not only based on the literal interpretation of Islamic sacred texts, but that these literal interpretations were also used to disregard other positions which depended on the conduct of the earlier Muslims, and, at times, disregarding the practices themselves as distortions of the textual commandments of the Qur'an and the Sunnah.

The stance taken by the school of thought which is associated with Ibn Baz is perceived to be one of exclusion and rigidness in relation to the other. This perception is common both among the general scholarly body and the general public, who associate this school of thought with many of the "hard-liner" stands that is taken towards many issues, including the status of the non-Muslims, in the countries where this school thrives. It becomes imperative, thus, to attempt to extract the general view this school has towards non-Muslims and non *ahl al-kitāb* communities in particular. Ibn Baz, in his main collection of *fatāwā*, repeatedly mentions non-Muslims, both from *ahl al-kitāb* or non *ahl al-kitāb* traditions, in the course of speaking about different entries and legal matters. A general characteristic that can be inferred from these mentions is that Ibn Baz sees the distortion and the unlawful alteration of the original Jewish and

Christian messages as a major sin that *ahl al-kitāb* have fallen into (2004: 1: 164; 2007: 2: 99). He repeatedly uses the terms *ibtidā'* and *ghuluw* to denote these unlawful distortions and additions to the religious tradition, which he sees as the key reason for their straying from the original religious traditions. Even so, similar to other scholarly opinions that were mentioned earlier in the thesis, Ibn Baz adheres to the assertion that *ahl al-kitāb* enjoy a status that is somewhat preferable to Islam than that of non *ahl al-kitāb* communities. He states (2004: 1: 164) that *ahl al-kitāb* communities have a relation ('*nisba*') with reveled religions and associate themselves with prophets of God, whereas the non *ahl al-kitāb* do not have such a connection or a legitimate source as such. This connection is the underlying reason for allowing the Muslims to eat from their slaughtered meat or marry from the *kitābī* women. He, however, states that this connection and association are both untruthful from the side of the *ahl al-kitāb* group, and are abrogated by the religion of Islam, putting both groups in a category of *kufr* ('apostasy') in relation to the Muslims (2004: 1: 301).

Ibn Baz aligns himself with the position that sees apostasy ('*kufr*') as a sufficient reason to nullify the inviolability of the non-Muslims. Throughout his legal issues, he arrived at this position based on considering a number of Qur'anic verses, including:

﴿ وَقَاتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ لِلَّهِ ۖ فَإِنِ انْتَهَوْا فَلَا عُدْوَانَ إِلَّا عَلَى الظَّالِمِينَ ﴾

> And fight them on until there is no more tumult or oppression, and there prevail justice and faith in God; but if they cease, let there be no hostility except to those who practice oppression. (2: 193). (Abdullah Yusuf Ali, 1946: 76),

as well as Prophetic narrations, including the often quoted *ḥadīth* that was mentioned in the first section; "I have been ordered to fight the people until they bear witness that there is no god except Allah, and that Muhammad is the Messenger of Allah. If they do that, their lives and wealth are protected from me save by the rights of Islam. Their reckoning will be with Allah". For Ibn Baz, these textual pieces of evidence consist a strong case for considering disbelief, rather that animosity ('*hirāba*'), the ground upon which military fighting can stand. Therefore, one can concur that the 'tumult or oppression' ('*fitna*') mentioned in the Qur'anic verse is simply congruent with

disbelief and apostasy, which, according to this position, consists the rationale for permitting military action against the non-Muslims. The conclusion drawn, for Ibn Baz, is that fighting the apostates is clearly a mandate upon the Muslims in the case that they refuse to adhere to the message of Islam after it had reached them, and that 'there is no inviolability of their lives and wealth unless they do [accept that call]' (2004: 2: 437). The only exception in that case are those who are committed to paying the *jizya* from those who are eligible to it. According to Ibn Baz, this principle applies in both types of fighting that scholars of Islamic law articulated; defensive ('*jihād al-difā'*') or offensive/seeking ('*jihād al-ṭalab*').

Based on that, it can naturally be concluded that, according to Ibn Baz, the virtue of humanity cannot qualify as grounds for the inviolability of persons on its own. He situates himself with the position which holds that *'iṣmah* can only be attained through the virtue of adherence to the Islamic faith, or by a covenant of peace with the Muslims, an example of which is the *dhimma* contract. Had the virtue of humanity been a reason for inviolability in his thought, apostasy would not have been a downright reason for permitting fighting with the non-Muslims. As this is the case for Ibn Baz as shown earlier, then it is faith or a covenant of peace that are the sole grounds for inviolability. The underlying assumption that allowing the inclusion of non-Abrahamic communities into the circle of inviolability constitutes a threat to the religious purity of the Muslim nation is clear in Ibn Baz's thought. Ibn Baz, and the stream of thought he belongs to, see the distortion of the Islamic creed as he understands it as something that can be caused not only by other religious traditions, but also by other streams of thought and theological schools in Islam. For him, this unlawful distortion, including innovations, should be kept outside the Muslim community, in order to maintain the purity of Islam as practiced by the rightful earlier Muslims *the salaf*. Of course, this is not saying that this position is the modern-day descendant or equivalent of the communalistic school led by the Shāfi'īs in formative, classical, and post-classical periods. Nor does this position claim this sort of connection, as it is commonly perceived to be of a nature that is different than that of the *madhāhib*. Ibn Baz, however, places his legal opinions of grounds of the sayings and opinions of the past jurists, without the kind of connection and commitment that a modern-day Shāfi'ī jurist would display to the *madhab* that they represent.

Still, it is also the position of Ibn Baz, and the stream he is aligned with, that the permissibility – or mandate, as was shown above – to engage in military conflict with the non-Muslims is not unconditional. The *da'wa* to Islam must first reach the non-Muslims. Only if that call was refused then the permissibility becomes effective. This is similar to the assertion that the communalistic school has, which grants a type of temporal and conditional inviolability to the non-Muslim communities. This deems them inviolable to an extent until the message of Islam is revealed to them. In the first section of the thesis, it was shown how this feature is present in the Shāfi'ī school of Islamic law.

In the thought of Ibn Baz, one of the main features of the *jizya* payment is that it is bound in the time period of its applicability to the *sharī'a* of the Prophet Muhammad up until the second coming of Prophet 'Isa ('Jesus'). Who, in his second coming, will assume command of the Muslim nations (2004: 1: 429; 3: 190; 2007: 4: 279). Ibn Baz takes the *ḥadīth* narrated in Ṣaḥīḥ Muslim where the Prophet informs about the nature of the second coming as a basis for this conviction, as it includes that Jesus, at that time, will abolish the *jizya*. Ibn Baz, following the common scholarly understanding of the *ḥadīth*, affirms that *jizya*, as an option for the non-Muslims to live under the Muslim rule, will end at that time and only adherence to Islam would be accepted. *Jizya* is, therefore, a temporary allowance for the eligible non-Muslims to continue in their religious practice until the second coming of the Prophet they claim adherence to is witnessed, at which time this allowance will be abrogated. What this conviction also means, for Ibn Baz, is that it is the responsibility of the rightful Muslim ruler to uphold this system as long as the second coming of Jesus is yet to actualize, as it signifies the temporality of the *jizya* payment.

Addressing the question of the status of the non *ahl al-kitāb* communities, Ibn Baz takes a closer proximity to the Ibrahimiyyah position of the debate. After acknowledging the difference of opinion that the jurists have on including non *ahl al-kitāb* communities into the payment of the *jizya*, and, therefore, the circle of *dhimma*, Ibn Baz lays out the details of each of the positions' evidence before stating that the stand represented by what this thesis called the Ibrahimiyyah paradigm is the more correct of the two (2004: 2: 438). The position Ibn Baz sees as the most sound is that the eligibility of *jizya* is restricted to the Jews, the Christians, and the Zoroastrians, as

they were the only groups that were affirmed in the textual evidence. In this area, Ibn Baz reiterates the pieces of evidence discussed previously by the jurists pertaining to both positions, but affirms that the textual evidence restricts the eligibility for *jizya* to the three said groups. All the other religious groups are to be mandatorily fought against by the Muslims until the accept Islam as a religion (2004: 3: 190). As the methodology of Ibn Baz is primarily focused on the study of religious texts, he regards historical examples as of secondary importance. This is shown by his assertion that no textual narration can be found where the Prophet accepted the *jizya* from outside those mentioned groups (2004: 2: 438, 439). The puritan movement to which Ibn Baz belongs, Wahhabism, is one that is known for repeatedly assaulting the practices of many of the early Muslim states, deeming them of showing derailed distortions from the original way of the earlier Muslims, commonly referred to as the *salaf*. It can be argued that this particular characteristic plays an important role in disregarding the positions that these states historically displayed towards the non *ahl al-kitāb* communities that were under their rule. Historical incidents and patterns may have seemed examples of this distortion of the "pure" system of early Islam to Ibn Baz and others belonging to the Wahhābī stream. It is possible that these historical examples represented a negative connotation rather than an evidence for a legal opinion to be based on.

When asked by a Pakistani journal about non-Muslims from non *ahl al-kitāb* affiliations who reside with the Muslims under the Muslim rule, Ibn Baz's legal opinion displayed a multi-staged approach towards these communities (2004: 2: 449, 450). This approach begins with the obligation upon the Muslims to call them to the religion of Islam in a process of enlightening *da'wa*. This is to fulfill the condition that was elaborated earlier, which is a keystone in understanding the inviolability question in this position. The second stage that Ibn Baz offers, in case of their rejection of this call, is for the non-Muslims to be transferred to non-Muslim countries had they not been citizens of the Muslim-majority country under question. This is followed by a third stage, in which the communities are citizens of the country; to be offered a window of repentance. Refusing the repentance offer means that death should be inflicted upon them. The option of paying *jizya* is not offered unless these communities are from *ahl al-kitāb* or from the Zoroastrians. Ibn Baz introduces three considerations to be taken by the Muslims in this regard; firstly, it is imperative that they make sure

the *da'wa* reaches the non *ahl al-kitāb* fully explained and with all its aspects revealed. This could be a way for them to understand Islam and to accept the message. Secondly, this multi-level response to the non *ahl al-kitāb* communities under the Muslim rule applies only in the case of the Muslims being politically capable and powerful, otherwise the Muslims are only required to be vigilant in their own conduct and to avoid residing with the non-Muslims as much as possible. Thirdly, this response is all possible on geographical territories except for the Arabian Peninsula, where the position that Ibn Baz adheres to is that no religion other than Islam is permitted to reside there. Therefore, a response similar to the previously mentioned should not be possible in the case of the Arabian Peninsula.

The duality *dar al-Islām* and *dar al-ḥarb* is replaced in the discourse of Ibn Baz with *bilād al-Islām* and *bilād al-kufr* ('the countries of Islam and the countries of disbelief'). Following the context of the modern-day states, one can assume that the former is meant to denote the Muslim-majority countries and the latter as all the other countries. In terms of the status of the non-Muslims residing in either, the duality used by Ibn Baz is congruent to the one used by the early jurists. As explained before, Ibn Baz sees that fulfilling the obligation on the Muslims to call the non-Muslims to Islam might not be possible if they reside outside the countries of Islam. This case, therefore, falls under the Muslims not being able to implement the *da'wa* or military action if the Muslims were not strong enough. For the non *ahl al-kitāb* communities that reside within the Muslim majority countries, it is the view of Ibn Baz that the obligation on the Muslims to convert them to Islam is still valid due to their residency in *bilād al-Islām*.

7.3 Abdul Karim Zaydan: Inclusion through Citizenship

Abdul Karim Zaydan was a prominent contemporary Muslim scholar who has established a legacy of considerable magnitude and reverence in Iraq and the Middle East region. His full name is 'Abd al-Karīm Zaydān Bahīj al-'Ānī. He was born in Baghdad in the year 1917, and first received his education in Iraq, where he studied with some of Iraq's prominent jurists and scholars, such as Amjad al- Zahawi and Najm al-Din al-Wa'idh. He earned degrees of law and Islamic studies, and a doctorate

in *fiqh* from Cairo University in Egypt. Zaydan was a Ḥanbalī scholar, and has repeatedly described his belonging to the Ḥanbalī *madhab* to be influenced by his interest in the thought of the Muslim theologian and jurist Ibn Taymiyyah (d. 1328), who was a Ḥanbalī himself (Aljazeera.net, 2014). He taught in Iraq, Yemen, and other countries, both in mosques and in universities as an academic. He authored many books in Islamic law and focused on the contemporary questions and the challenges facing the Muslims today, ranging between political, financial and social issues. These issues included questions around Islam and international law, Islamic banking practices, Islam and modern politics, and other issues. This earned him a reputation of being an Islamic scholar who strives to keep his approach oriented towards the modern world. Zaydan also served on the boards of many scholarly bodies, including the *fiqh* council of the Muslim World League. His political ideology, not favored by the then ruling nationalist Ba'th party in Iraq, drove him to leave the country and take residence in Yemen. He remained there until his death in 2014.

For the purposes of this thesis, Zaydan offers an example of a particular perspective on the issue of the status of non-Muslims and non *ahl al-kitāb* communities in Islamic law. For instance, his upbringing in Iraq appears to have influenced his ideas on communities like Sabians, who continue to exist in very few numbers in Iraq today, and, possibly, the Zoroastrians, with their association to Iran. Presenting his example in this thesis also provides a case of a scholar who is trained in *fiqh* as well as other Islamic sciences, who opposes the position of Adamiyyah in its rationale for inviolability but accedes the inclusion of all non-Muslims, including non *ahl al-kitāb* communities, in the inviolability through the covenant of *amān*. Two positions which, as was shown in this thesis, usually go in concurrence with each other according to the jurists. Zaydan, though, sees them as separate considerations, and sees the inclusion of non-Muslims in inviolability through *amān* a function of the modern-day citizenship system ('*jinsiyya*').

Zaydan sees the categorization of the human beings on the basis of their religious affiliations to be of considerable sociological and political ramifications, and not just a theoretical branding. Moreover, he affirms that the categorization of the non-Muslims on where their theological traditions stand in relation to Islam carries serious meanings and consequences in this world and in the afterlife (1982: 11). He categorizes

non-Muslims into seven groups: *ahl al-kitāb*, Sabians (‘*al-ṣābi’a*’), Zoroastrians (‘*al-majūs*’), atheists (‘*al-dahriyya*’), polytheists (‘*al-mushrikūn*’), deists who deny prophethood, and apostates form the Islamic religion (‘*al-murtaddūn*’). In other words, the big category that can be referred to as non *ahl al-kitāb* encompasses, in Zaydan’s categorization, all the other groups he mentions. With reference to *ahl al-kitāb* Zaydan aligns himself with the position of the majority of the jurists in the formative and post-formative scholarship of Islamic law: that this group encompasses solely the Jews and the Christians (12). He acknowledges, however, the different opinions the jurists had in relation to the Sabians. As mentioned in chapter two of this thesis, many scholars placed them among *ahl al-kitāb*, in close proximity to the Christians, but others described worship of celestial bodies to be part of the Sabian creed and, consequently, disqualified them from that group. Zaydan attributes this difference of opinion to the obscurity of the Sabian theology in the eyes of the Muslims and the lack of understanding he argues exists among the jurists with respect to Sabianism. Their existence as a religious minority in modern-day Iraq, however, appears to have given Zaydan the ability to describe their faith as one which is rooted in belief in God and fundamentally connected to prophethood through prophets Adam until Yahya (John) (14-15). It is because of this that he sees them to be included in the *ahl al-kitāb* category, even if they perform their prayer in the direction of the North Star or other celestial bodies (15). As for the Zoroastrians, he opposes the opinion that they belong to *ahl al-kitāb* or the quasi-*ahl al-kitāb* groups (16). He also adheres to the opinion that they permit incest, which reflects on the way they are viewed in terms of permissibility of inter-marriage with the Muslims.

When it comes to inviolability, Zaydan does not entirely agree with the position of Adamiyyah. To be more specific, he appears to agree with the Adamiyyah position when it comes to inclusiveness, seeing that all humans are eligible to be included the *dhimma* of the Muslims and, consequently, inviolability, but not in when it comes to the justification of this inclusion. As was discussed previously in this thesis, the Adamiyyah paradigm views the virtue of humanity as the underlying basis for the inclusion of all non-Muslims in inviolability, the position Zaydan assumes, on the other hand, while acknowledging that all non-Muslims, be they *ahl al-kitāb* or non *ahl al-kitāb*, are illegible to be included in inviolability, sees that the virtue upon which that inclusion resides is citizenship (he refers to citizenship using the term ‘*jinsiyya*’,

other sources use '*muwāṭana*'). In conformity with the communalistic position mentioned in the first section of the thesis, Zaydan states (1982: 20) that inviolability is attainable through one of two virtues: *'īmān* or *amān*. Individuals who can be described as *ḥarbī* (non-Muslim resident of the abode of war), lacks those two virtues and, therefore, cannot be given inviolability. For him, the natural setting of inviolability lies within the abode of Islam, where Muslims enjoy the inviolability ('*'iṣmah*') of their lives and property by virtue of their Islam, and the *dhimmi*s by virtue of their *dhimma* (1982: 19). In a contemporary sense, this translates as being legal citizens of a country that is ruled by Muslims.

Abdul Karim Zaydan was among the Muslim scholars of *fiqh* who discussed the issue and the question citizenship, itself a notion of Western origins, its applicability and surrounding considerations in Islam and the Muslim societies. Within Islamic circles, a big part of this discussion usually involves the question of the non-Muslims under the rule of Islam. Furthermore, the reforms leading to the introduction of the system of citizenship in modern Muslim-majority countries, and other associated issues such as the military service, highlighted the need to revisit established systems in Islamic law, the *dhimma* contract and the *jizya* payment being at the forefront of those systems. Zaydan, as a scholar who acknowledged reform, was aware of these tensions, and reflected on them in many of his works.

In Zaydan's *Aḥkām al-Dhimmiyyīn wa al-Musta'manīn fī dār al-Islām* ('The legal rulings of *dhimmi*s and those under *amān* contract in the abode of Islam'), he includes among his first affirmations that the contract of *dhimma* includes the Jews, the Christians, and other non-Muslims who reside in the abode of Islam (22). In this, Zaydan's position conforms with the Adamiyyah paradigm as per inclusion of non *ahl al-kitāb* communities. He however sees citizenship granting as the way for this inclusion (24). He recognizes two methods by which the citizenship of a Muslim country can be granted to a non-Muslim: citizenship by birth and by naturalization. In his argument, granting *dhimma* to a non-Muslim resembles granting them citizenship by naturalization in the modern sense. This naturalization, as is the current international protocol, is the decision of solely the granting country. Another issue is addressed by Zaydan in this area, which is the question of the residents of a Muslim country who do not hold its citizenship. For him, this is not a case of *dhimma* but one

of *amān*. He sees the non-Muslim legal resident as a temporary *musta'men* in a Muslim country (Zaydan, 1983). In this regard, he draws a remarkable resemblance between the transition from a resident to a citizen and the transition from a *musta'men* to a *dhimmī* (1982: 34). In the writings of the formative and classical jurists, the indication of the acceptance of inclusion in the contract of *dhimma* sufficed to include a non-Muslim resident of the abode of Islam in that contract (Kasani, 1983: 7: 110). This is comparable, as Zaydan argues, to the application a non-Muslim resident submits to the government of a Muslim country indicating their want to be naturalized. In this, he does not only highlight the similarity between this modern practice and the rulings established by the jurists, he roots the permissibility of this practice in classical Islamic law.

When it comes to the *jizya* payment, which is an archetypal attribute to *dhimma*, Zaydan refuses the suggestion that the purpose of this payment is financial, and sees it impermissible to establish the *dhimma* with a non-Muslim with this purpose in mind. He leans towards seeing *jizya* as a payment against refraining from military service (Ghannushi, 2010), which indicates that the participation in this service constitutes a reason to abolish that payment (Zaydan, 1983). It also guarantees the inviolability of religious practice for those communities (Zaydan, 1988). As for the eligibility question, Zaydan situates his thought within the known positions of the formative jurists (1982: 35). His position conforms with that of Imam Mālik; accepting the *jizya* – and looking at the issue through a modern lens, citizenship – from all non-Muslims, be they of Abrahamic, non-Abrahamic, or no religious affiliation. The only exception he points to is apostates who leave Islam ('*murtaddūn*'), which also conforms with the opinions of the formative and post-formative scholars. Zaydan refuses the position which excludes the Arab idolaters from eligibility to pay *jizya* (mainly adopted by the Ḥanafī scholars). He argues that the reason for that is because the verse that instated the *jizya* was revealed after all the Arab idol worshippers had entered Islam. He also believes that the fact that the Prophet took the *jizya* from the Zoroastrians to be an evidence of the eligibility that extends to all other non *ahl al-kitāb* communities. His opinions on this are influenced by his view that the disbelief of the Zoroastrians is more severe than that of the idol worshippers of Makkah, as the formers did not acknowledge the oneness of God as a Creator and Sustainer while the idol worshippers did, and only associated other idols with Him in worship and supplication.

Furthermore, he sees the Arab idol worshippers as a people who maintained remnants of the Abrahamic tradition, possibly referring to the practices of reverence to Ka'bah, sacrifice, and other practices. The Zoroastrian, he claims, have no such relation, as they differ from the Abrahamic tradition and do not hold any practices or morals that indicate such a relationship, an example he presents is the practice of father-daughter and mother-son incest.

Finally, the question of the duality of the abode of Islam and the abode of war has been discussed by Zaydan in a manner that displayed fidelity to the general positions established by the scholarship of *fiqh* in the earlier periods. The binary divergence of the abode of Islam and the abode of war was held by many scholars, who had different opinions on what factors determine the characterization of a territory as one or the other. Some of the jurists have considered the prevalence of the rule of Islam in the territory to be the factor vis-à-vis other ruling systems, while others, such as Kāsānī, considered the prevalence of peace to be the deciding factor in the abode of Islam. Zaydan regards the main condition for branding a territory as *dār al-Islām* is for it to be governed and ruled by a Muslim authority, which, in turn, results in the rule of Islam being apparent in that said territory. In this, he conforms with the opinion of Sarakhsi, who defines the abode of Islam as one that is 'under the hand of the Muslims, and is identified by the feeling of safety that the Muslims have in it' (1971: 3: 81). According to Zaydan, however, the presence or absence of Muslims as residents in an abode does not have an impact on considering the abode as that of Islam or that of war. The deciding factor is, rather, the nature of the authority ruling that abode. In this, he conforms with the prominent Shāfi'ī jurist Abu al-Qāsim al-Rāfi'ī (d. 1226), who regarded the rulership of a Muslim ruler to be sufficient for an abode to be called that of Islam (1997: 8: 14). In the modern-day nation-state divided world, Zaydan sees that the description of the abode of Islam is one that encompasses all the countries that can be identified as Muslim (1982: 19). One can notice the reflection of the attribution of the abode of Islam, used in *fiqh* texts, to the modern-day Muslim countries in the thought of Zaydan. As for the abode of war, the position Zaydan takes is that, generally, it is the collection of territories which are not ruled by Muslims, neither by the rule of Islamic law, and that its non-Muslim inhabitants are characterized are *ḥarbī*. While some scholars acknowledge the existence of a third *dār al-'ahd* or *dār al-muwāda'a,* Zaydan sees it as part of the abode of Islam. This assertion, however, is

reflected from his understanding that this name is given to the abodes that have been subjugated to the rule of Islam by peaceful means, rather than militancy.

7.4 Hüseyin Kâzım Kadri: Adamiyyah and the Contemporary Human Rights Discourse

The period spanning from the late eighteenth century towards the dissolution of the Ottoman empire, known in the history literature as the Modernization era, carried a considerable weight of implications in relation to the status of non-Muslims according to the Islamic thought. Factors which accompanied this era included the wave of nationalism which – induced by the West – affected the Muslim countries and the Ottoman state, creating a shift from religious-based classification of the population into one that is more centered around ethnic considerations. Recep Şentürk describes (2005: 86) this shift as one that is both influenced by the spirit of nationalism and the prevalence of a secular approach to identity. At the same time, the gradual severance from the classical *dhimmī* status of the non-Muslims at the time of these reformations, known as the *Tanzimat,* culminated in the year 1855 when the Ottoman Sultan Abdulmejid (who ruled through the years 1839 - 1861) approved a reform document of minority rights that was issued by the Royal Advisory Council of the Ottoman Sultan. The reformations included in this document included – to the interest of the area of this thesis' inquiry – abolishing the *jizya* payment, in addition to other reforms regarding the non-Muslims' right to restore their churches, accepting their testimony as equal to that of Muslims, and their participation in the military service, official state jobs and administrative positions (2005: 87). The approval of the document by the Sultan, the holder of the title 'Caliph of the Muslims' at the time, as well as the Sheikhulislam, the highest official of the religious scholars, bestowed an undeniable religious authority over these reforms (Şentürk, 2013: 307). The status of *dhimma* was effectively turned into equal citizenship for the non-Muslim subjects.

What is particularly interesting for the scope of this thesis is to present an example of Muslim thinkers' approach to the inviolability of the rights of non-Muslims within the period of modernization, and the period which immediately followed this shift from the classical view towards them. To serve this purpose, the approach of the Muslim

political and religious thinker, statesman and writer Hüseyin Kâzım Kadri (d. 1934) will be included in this chapter. The peculiarity of this example is that it represents a view of a Muslim thinker who witnessed the implications of the reformations of the Ottoman state when many influencing factors challenged the line of division of the Muslim – Non-Muslim duality on which many of the previously mentioned thinkers based their assumptions. Additionally, Kadri, being a man of the state, witnessed the radical transformations which brought forth the 'ethno-secular Turkish national identity' which was unfolded through the movement from a predominantly religious character of nationality to a radical rupture from the religious self-identification during the years of the adoption of Republicanism in Turkey (1924-1929) (Yıldız, 1998: iv-v). These factors are among the reasons why the thought of Kadri holds a different background in comparison to the other scholars mentioned in this chapter.

Hüseyin Kâzım Kadri was born in the year 1870 in Istanbul. He was known to be a determined learner from an early age as he educated himself and became well-read in religion, political science, and linguistics. He graduated from the school of political sciences known as the *Mülkiye Mektebi* and the İzmir English Commercial School, before he continued his studies in agriculture in Germany. He spoke Arabic, Persian, Greek, Latin and French, as he was interested in the French writers and philosophers such as Rousseau, Montesquieu and Voltaire, as well as the political and social history of the French revolution (Saruhan, 1998: 311). In cooperation with his colleagues, he established the newspaper *Tanin* in which he published many of his articles on religion, politics, philosophy, language and economy. In his career as a statesman, he was appointed as a governor of Samsun, Thessalonica and Aleppo. He served as a member of parliament more than once. His religious writings included various topics which ranged from the *tafsīr* of the Qur'an to the rights of humans in Islam. He died in Istanbul in 1934.

Kâzım Kadri's years of political work and religious writing resonated with the development of Human Rights as an international concern and discipline. Among his celebrated works was a short account that relates to human rights in Islam published by the name *İnsan Hakları Beyannamesi'nin İslâm Hukukuna Göre İzahı*, which can be translated as 'The Explanation of the Declaration of Human Rights from an Islamic Legal Perspective'. Interestingly, this account was originally titled *Teşrî-i İnsânî ve*

İslâmî, which can be translated as 'man-made law and Islamic law', marking the duality of divine law and secular law. The account was published by Osman Nuri Ergin in 1949, who opined to refer to the United Nations' Declaration of Human Rights in the title of the published work. In this account, Kadri attempts to demonstrate that many of the rights presented in the modern discourse of Human Rights are established Islamic norms (Albayrak, 1998: 555). He quotes what he believes as the foundations of these rights mentioned in the Qur'an and the Sunna long before any human attempt to codify them. Relying mainly on this particular account, we will attempt to conclude the approach of Kadri to the question of the status of the non-Muslims and the protection of their rights.

The methodology Kadri followed in formulating his view in relation to human rights relied heavily on quoting verses from the Qur'an or Prophetic narrations ('*aḥādīth*'). This marks an approach to root the rights of humans and their protection in the primary sources of Islamic law. Kadri's approach involved commentating on verses from the Qur'an, narrations from the Sunnah, and, in lesser frequency, quotations from the notable companions, such as the sermon that the first caliph Abū Bakr al-Ṣiddīq gave when he was entrusted with the leadership of the Muslims in the year 632, which Kadri used to point out the right of equality of the people in front of the law, as well as to establish the rights of the people when it comes to their ruler (1949: 47). Kadri concludes from his commenting on the texts evidence to support the ideas he presents. Yet, as one can find a Qur'anic exegesis among his works, he does not point out to that in his writings on the rights of human beings, nor quotes from other respected Qur'anic exegeses on the verses he comments on.

Though not actively attributing his conviction to the universalistic tradition of *fiqh* which adheres to the Adamiyyah paradigm, Kadri's arguments situates him within this tradition. His view on the protection of the rights of humans regardless of their religious affiliation stems from the equality of all people as created by God. He quotes the verse from the Qur'an:

﴿ يا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُم مِّن ذَكَرٍ وَأُنثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا ۚ إِنَّ أَكْرَمَكُمْ عِندَ اللَّهِ أَتْقَاكُمْ ۚ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ ﴾

O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of God is (he who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things). (49: 13). (Abdullah Yusuf Ali, 1946: 1407).

Kadri sees that the principle this verse establishes for the Muslims is effectively a principle of equality of all human beings in their rights by birth, which is one that is placed at the forefront of the modern human rights discourse (1949: 45). Kadri points to the entire body of humanity to be addressed by that verse, leading to the conclusion that there is no preference of a group of humans over others except by the virtue of righteousness ('*taqwā*'). He sees the equality principle as a core Islamic principle, which, in turn, is a foundation for protecting the rights and the inviolability of all human beings.

Another principle he believes is a foundational Islamic principle is brotherhood ('*uhuvvet, kardeşlik*') between humanity. For this conviction, he quotes the verse:

﴿ إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ ۚ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ ﴾

The believers are but a single brotherhood: so make peace and reconciliation between your two (contending) brothers; and fear God, that ye may receive Mercy. (49: 10). (Abdullah Yusuf Ali, 1946: 1405).

In Kadri's understanding, the brotherhood that Islam established between believers includes all human beings (1949: 45). He takes the word 'believer' as one which denotes all who believe in God or any of His messengers, not solely the Muslims, which incorporates, according to Kadri, a circle that is much wider than that of the Muslims. He also quotes the Prophetic narration "*Al-khalq kulluhum 'iyāl Allāh*" ('all creation are God's dependents'), pointing to the term *'iyāl Allāh* as one that implies

sanctity (‘*hürmet*’) and the protection of rights (‘*haklarının korunması*’) among all human beings (45). In the same account, Kadri continues to use similar textual evidence to back his position, from narrations that discourage maltreatment of people – even disbelievers, to narrations encouraging merciful conduct towards God’s creation. He uses these narrations as evidence that there exists a religious duty upon the followers of Islam to respect this relationship with all other humans and to uphold their natural rights, the guarantee and protection of which is a well-established notion according to the Adamiyyah paradigm adherents. In addition to this, he does not point out to any difference in this regard on the basis of religious affiliation, and he does not see a qualifier for inclusion in this protection other than humanity.

Religious practice is a right that is protected by Islam for all human beings in the view of Kadri. As is his dominant methodology, he relies primarily on the Qur’anic partial verse:

﴿ لَا إِكْرَاهَ فِي الدِّينِ ﴾

> Let there be no compulsion in religion. (2: 256). (Abdullah Yusuf Ali, 1946: 103).

This verse, for Kadri, provides the clearest evidence that ‘Islam does not forcefully inflict choices of religion and theology’ upon people (1949: 50). Kadri extends this notion to include beliefs and ideologies, he sees that Islam does not aim to nullify any person’s ideology or creed. On the contrary, as Kadri notes, throughout its history, Islam has sought to ‘protect and preserve the religious and sectarian traditions of the religious groups residing in the abode of Islam’ (51 [own translation]). He states examples from the history of Islam to further support this right, including the refusal of the second caliph ‘Umar when he was invited to pray inside the Church of the Holy Sepulchre in Jerusalem fearing that it could be turned into a mosque if he did.

The right to belief extends, for Kadri, to include the right of expression and free speech. This can be placed in comparison to the right of expression which was declared among the basic human rights in modern times. For Kadri, the multiple narrations and historical incidences which place upon the Muslims the duty to point out wrongdoing

(‘*munkar*’), or to stand out – by action and by word - in the face of injustice, demonstrate how Islam instilled the right of expression for people from its earliest periods. Adding to that, it can be said that the right to criticize the rulership’s wrongdoing has never been reserved to Muslims or Abrahamic religions’ adherents according to *fiqh*, which is why this right of expression and sharing opinions can be deemed universal, as all human beings are entitled to it (51, 52).

Kadri’s examination of the rights of humans in Islam comes as an attempt to demonstrate Islam’s inclusion of all humanity and guarantee of the list of human rights that have later come to form the declaration issued by the United Nations. It could be said that, following Kadri’s arguments, his ideas are conforming to the tradition of universalism, although he does not outwardly situate his thought in the tradition of Islamic scholarship or in the schools of *fiqh*. In addition to not citing major texts of *fiqh*, his commentaries on the Qur’anic verses, at least from what is included in his account on human rights, are not supported by evidence from the respected books of *tafsīr*. All in all, Kadri’s thought provides a great window into understanding the view of a Muslim statesman of a critically changing Islamic empire, whose ideas continued to be universalist and conforming to the tradition of Adamiyyah during times of modernization and influence by the Western norms in relation to human rights and their protection.

The previous examples represent major approaches in the contemporary Muslim legal thought in relation to the status of non-Muslims and non *ahl al-kitāb* communities. While it is evident that most contemporary Muslim legal scholars and jurists affirm the preferred degree of the non-Muslims from *ahl al-kitāb* affiliations over those from non *ahl al-kitāb* affiliations (Zuhaili, 1989: 1: 40, 41; Qardawi, 1992; Ibn Baz, 2004: 1: 164), non *ahl al-kitāb* communities are viewed as inviolable according to the majority of streams in the contemporary arena of Islamic law. Without resorting to the consideration of the military power of the Muslims as a consideration, the discussion of the contemporary positions reveals that the formative and classical ones, particularly the universalistic school and the Adamiyyah paradigm discussed previously in the thesis, provide a solid base on which modern approaches can be based. The model that Adamiyyah paradigm presents is already and coherently capable of regulating the

status of the non *ahl al-kitāb* communities in today's world, all the way remaining loyal to the formative and classical legal scholarship.

The historical context comes into effect in these and other contemporary approaches. For example, the legal opinions of the Shāfi'ī scholars nowadays are much more inclined to universalism despite the fact that the origins of their *madhab* were not. As shown in this chapter, for a prominent Shāfi'ī jurist like Zuhaili, the issue of the inclusion of the non-Muslims in *dhimma* and the payment of *jizya* is dependent on their participation in national defense and their being militant themselves, both of said cases are different in today's world due to the existence of specialized national armed forces and military service. Such jurists understood that different circumstances in different time periods call for different measures to be taken in Islamic law, and that the circumstantial consideration are capable of amending verdicts that were once deemed final. For a jurist like Abdul Karim Zaydan, a notion as naturalized as that of citizenship in the world we live, and its nation-state based geopolitical allocation, can and ought to be factored in the way Islamic law views the status of non-Muslims.

Conclusions and Future Prospects

This thesis highlights and analyses the divergent positions that exist within the Islamic legal scholarship on the inviolability of the non-Muslims and the communities of non-Abrahamic religious traditions. While focusing on the legal side of the question of the status of these communities is the most central to the endeavors of this work, political and social levels exist in the framework of understanding this status. Through offering the discussions on the rights of human beings, the universalistic and communalistic debate, and presenting the Adamiyyah paradigm as one that guarantees the inviolability and respectful inclusion of all non-Muslims in Islam, the theoretical legal level was explored. The way the Muslim jurists, especially in the formative and classical periods of Islamic law, viewed the non-Muslim and non-Abrahamic traditions had an apparent role in the positions they took when it came to discussing the status of these communities. While some of the jurists saw the inclusion of these communities as established in the notions of human dignity and viceregency on earth, and saw the acceptance of *jizya* from these communities and inviting them under the *dhimma* status as a way to facilitate this inclusion and to bestow the Muslim sovereignty over these communities, others saw the gap between Islam and the non *ahl al-kitāb* religious theologies as a barrier to this inclusion. For the second position, admitting the non-Abrahamic peoples their religious inviolability was thought of as a contradiction to the core Islamic principle of acknowledging and worshipping God, which, at least in their outward form, only Judaism and Christianity shared with the Islam. The consequences were of judicial, political and social nature, where the mentioned paradigms translated into a position that grants inviolability by virtue of humanity, and a position that grants it by virtue of faith or covenant, restricting the non-Abrahamic communities from this inclusion.

The legal level offers a basis for the political and social levels in the discussion around the status of non-Abrahamic communities under the Muslim rule. The Muslim rule in different parts of the world show that the status of *dhimma*, with the rights and inviolability it entails, was readily extended to the communities of non *ahl al-kitāb*

religious affiliations. This extension was seen as a political necessity for many jurists, particularly those who lived in areas where the predominant population was that of a non-Abrahamic affiliation. This inclusion, nevertheless, had to be grounded on a religious legal base. The thesis provided examples of the observed recurring method of religious approximation, where the Muslim jurists identified theological points of closeness with the other religion to facilitate a political and social acceptance. However, the jurists found in the theoretical frameworks of inclusion a well-structured model of inclusion readily offered by the what the thesis calls the Adamiyyah paradigm. This paradigm, while affirming the axiomatic rights – such as life and property – for the non-Muslims by the virtue of their humanity, transcends this level of inviolability to a higher level of dignity on social and political areas. Examples of this were included in the second sections of this thesis, where the Hindus, for instance, were given high administrative positions and Zoroastrian communities were admitted to the political elite under the Muslim rule of those regions. Other examples show that the Muslims respected the social formations of these communities and affirmed their judiciary and social autonomy. The political nature of the Islamicate, which encompasses diverse social and cultural traditions other than Islamic, seems to have been a present consideration in the thought of the jurists who adhered to this paradigm. While the different perspectives on the inviolability of the non *ahl al-kitāb* were generally pertaining to the differences of the *madhhab*s of Islamic law, this difference was more apparent on the religious theoretical level than on the political and social levels, where facilitating the governance and the protection of the non-Abrahamic communities was the historically prevalent practice in the history of the Islamic civilization.

The Adamiyyah paradigm, in this light, can be viewed and studied as an Islamic legal alternative to what is called universal human rights in the modern world, particularly when it comes to affirming the rights of religious communities. Even though the divergence of positions regarding the inviolability of the non *ahl al-kitāb* communities existed within the Muslim legal circles, their inclusion on all levels was facilitated in the reality of the Muslim rulership and in its historical sociology. At the same time, this was accompanied by a constant adoption of a formidable evidence base rooted within the sources of the *sharī'a*. This facilitation served to affirm the equal inviolability of these communities pertaining to a wide religious diversity by focusing

on the aspect of humanity that is shared among all persons, transcending that to the aspect of the human dignity and viceregency on earth, concepts that are well established in the Islamic theological worldview.

In August 1990, the member states of the Organisation of Islamic Cooperation (OIC) – then known as the Organization of Islamic Conference – convened in Cairo, Egypt, and adopted the Cairo Declaration on Human Rights in Islam. The declaration came to 'contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution' (OIC, 1990). In the fourth article of the declaration, the convention affirms that inviolability is the entitlement of every human being, in regaords to their honor and good name, but also, according to the second article, their life, which, according to the convention, is a God-given right that is guaranteed to every human being. Many years later, in January 2016, marking the 1400th anniversary of the Charter of Medina[i], a conference focused on religious minorities in Muslim lands, held in Marrakesh, produced a concise declaration which was given the title 'Marrakesh Declaration'. The declaration affirmed the gravity of the situation afflicting Muslims and non-Muslims alike throughout the world as a result of distorting the tradition of Islam in relation to viewing the people of other faiths and the rights of religious minorities, especially in the Muslim world. The declaration called upon Muslim scholars to 'develop a jurisprudence of the concept of "citizenship" which is inclusive of diverse groups.', confirming that such jurisprudence be 'rooted in Islamic tradition and principles and mindful of global changes.' (2016). In addition to that, the declaration viewed the Charter of Medina as one that is able to provide a suitable framework for national constitutions of Muslim-majority countries and the United Nations Charter, particularly in the context of affirming religious communities' rights and consideration for public order. In the sense that citizenship includes the right to enjoy the inviolability of all the axiomatics and dignity granted to all members of the political unit, the Adamiyyah paradigm, as mentioned in this thesis, offers a *fiqh*-grounded perspective for this jurisprudential concept of citizenship whereby the

[i] The Marrakesh Declaration itself defines the Charter of Medina as 'a constitutional contract between the Prophet Muhammad, God's peace and blessings be upon him, and the people of Medina, which guaranteed the religious liberty of all, regardless of faith.'.

inviolability, rights, and dignity of all humans, regardless of their religious affiliation, becomes protected anywhere in today's Muslim world.

These calls and declarations represent the critical importance of the issues of human rights and the inviolability of humans in today's world, including the view Islam and the Muslims have towards these issues. They also affirm the need for looking into the traditional worldview of the Muslims as one that is able to provide a coherent and universal legal framework for the world in which people live and share their existence. This thesis presented the debates within formative and classical Islamic *fiqh* on the status and inviolability of the people of non-Muslim, and particularly non *ahl al-kitāb* religious affiliations. As the thesis argues, these debates are capable of producing meaning and insight to problems of intolerance which are caused by either complete detachment from, or distortion of, this legal tradition. Rooted within this scholarship of jurisprudence, principles of affirming inviolability and inclusion can be found. The divergent opinions within the Islamic legal scholarship, as is shown throughout the thesis, still provide areas of enquiry and discussion to be explored.

The cases of Muslim rule examined in the second section of the thesis offer a practical lens to look at the non *ahl al-kitāb* communities parallel and supportive to that of the scholarship of *fiqh* and the divergent schools of thought it entailed on their status. To this day, many of the said communities exist within countries of *ahl al-kitāb* religious contexts while maintaining their own local or traditional religious affiliations. In an interview on Al-Jazeera channel with Abdul Rahim Ali, the president of the International University of Africa in Sudan, he stated (1998) that many of the African countries that appear to have a Christian administration and a general Christian 'appearance' consist, in fact, of larger idolater populations than that of Christian or Muslim. According to him, countries in the Southern parts of Africa consist of a large idolater percentage. Other countries, although having the overall Christian appearance, are only such in cities and big towns, whilst the rural parts are predominantly adherent to indigenous religions or idol worship. Moreover, according to him, both the Muslim and the church polls indicate that the percentage of idolaters in South Sudan exceeds 55% of the total population. Africa, in general, is a religious continent, he states, as most of its peoples are deeply affiliated to religious beliefs, and non-affiliation to any religion is a rare thing to witness. In this continent rich with religious traditions and

cultures, Muslims appear to be socially and geographically separated from the other religions in Africa, and Ali sees the reason to be primarily colonialism. The colonialist military and social policies deliberately administered a system in Africa that would cut off the North from the South and the East from the West. This was done through various means, including limiting transportation routes between different parts of the continent and, at times, drawing borders that certain religion members were forbidden to cross, signifying colonial powers to be a considerable hinder to attempts of inclusion based on religious traditions.

Another concept that challenged the inclusive view which the Islamic law has presented is nationalism. This is exemplified in the case of the Indian subcontinent. This thesis explored the major trends in the Muslim view of the status and inviolability of the Hindu populations ruled by Islam, arguing that the traditional *fiqh* scholarship offered adequate grounds for inclusion and for affirming the axiomatic rights regardless of religious affiliation. Recent rises of nationalistic trends, however, appear to work in the opposite direction. An overview of the political and partisan arena in modern day India suffices to conclude that religion and nationalism in the country are intertwined in a complex manner. Parties like the Indian National Congress, which is the first national movement that emerged in India under the British rule (Marshall, 2001: 179), is thought to uphold Indian nationalistic ideology. Other parties embody a form of religious nationalism, displaying elements of 'social movement that claims to speak in the name of the nation and that defines the nation in terms of religion' (Gorski and Türkmen-Dervişoğlu, 2013: 2). A clear example of such ideology is the Bharatiya Janata Party ('Indian People's Party'; abbr. BJP), which is currently in political power and displays expressions of social and political thought based on the native spiritual and cultural traditions of the Indian subcontinent. Likewise, the Muslim political involvement in India is naturally affected by the nationalistic atmosphere. Future comparative studies on the discourse of nationalism and that of the religious legal tradition regarding the other could offer promising insights on the status of people of different religious affiliations.

The history of Islam displays that the vision it created for its adherents in the course of expansion is one of incorporation of the other cultures rather than the obliteration of every aspect of it. Removing injustice, and introducing Islam in place of the

'distorted' religious traditions, were priorities that Islamic law emphasized and called for actualization. History offers many examples of cultures and religious traditions that were severely affected, and whose cultural reach was dramatically minimized, after the expansion of another culture on its behalf. Yet, practically, a form of synthesis is the case when a culture or a religious tradition met another, even in the course of conquest. Such was the case that is evident throughout the Islamic history; although the expansion of Islam was primarily fueled by a religious motive, a various number of elements of the local religious traditions in whichever area Islam reached have been assimilated within the newly Muslim – or governed by the Muslim rule – societies in those areas. As was shown in the thesis, the longstanding and established tradition of Islamic law was, in itself, capable to provide the theoretical ground for the Muslims to assimilate and include people even from religious circles that are deemed far from Islam in terms of theology.

The scholarship of the Islamic schools of *fiqh*, particularly the one classified as adhering to the Adamiyyah paradigm, embodies the principles of inclusion, as the inviolability of all the faiths' adherents are guaranteed, regardless of their geographical residency or numbers in the society. It is true that the Muslim world has nowadays been engulfed with the modernity fashioned by the West, and that the domain of *fiqh* has been narrowed to familial and perhaps personal issues of the Muslims. The system of nation-states and citizenship which marks the modern geopolitical map of the world has, largely, replaced the system of *dhimma* and classification based on religious affiliation which *fiqh* has extensively elaborated on. Still, the scholarship of Islamic law, and the concepts in entails, presents a module of thought that is capable of overcoming the problems of exclusion violation of rights which are based on a certain understanding of religious principles. Phenomena which some have, wrongfully and ironically, accused the whole body of *sharī'a* to be responsible for.

The world we live in today is rich with its diversified religious demographics. As was indicated before, about half of the world's population today can be categorized as non *ahl al-kitāb* (Pew Research Center, 2017b). This poses a significant need to understand the view that Islam and the Muslims have towards the status of these communities, and bring the debates within the Islamic tradition to the discussions around human rights, diversity management, and civilization studies. This worldview that we find in

the Islamic legal tradition not only includes affirmation of inviolability and rights for peoples of different affiliations, but is also represents a discourse that is enriched with philosophical debates, schools of thought, and thousands of learned scholars, all the way continuing to offer insight and room for exploration on crucial concepts such as the status of the human, the universality of rights, and the dignity of human beings.

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