# THE DEVELOPMENT OF FATWA ON HOUSE OF WORSHIP IN HANAFI SCHOOL: STUDY ON CHANGES, DYNAMICS, AND JUSTIFICATIONS

**A Thesis**

**Submitted to the Master's Study Program of Islamic Studies at the Faculty of Islamic Studies in partial fulfillment of the requirements for the degree of**

**Master of Arts (M.A.)**


by:

**Waskito Wibowo**

**01212210008**

UNIVERSITAS ISLAM INTERNASIONAL INDONESIA

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# ABSTRACT

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This thesis seeks to reveal the development of *fiqh* rule regarding non-Muslim houses of worship, which is a sensitive object in the history of Muslim societies across the periods. This thesis has two main objectives they are 1) to portray how Hanafi jurists' opinions on non-Muslim houses of worship undergo change and continuity among them along with the influencing factors by taking objects across time and place, and 2) to reveal how several modern Muslim countries, especially countries with the majority of Hanafi madhab adherents, determine their attitude between implementing Islamic law or accommodating the needs of non-Muslims. By employing a literature study using a socio-legal approach that combines legal analysis and sociological perspectives, this thesis proposed an argument that the intellectual pattern and framework of the Hanafi School, which tends to use rationality, often interplay and negotiate intricately with socio-political conditions so that the existence of a *fiqh* rule on the house of worship occasionally becomes erratic between sticking to norms by prohibiting them or being more open by giving permission but with certain conditions.

Keywords: *House of Worship, Hanafi School, Islamic Law, Development*

## ACKNOWLEDGMENTS

All praise is due to Allah, the Lord of all the worlds.

I would like to express my deepest gratitude to my parents, *Abah* Najib and *Umi* Hindun (May Allah have mercy on her), for their unwavering prayers, unrequited sacrifices, and immeasurable support. I always remember their hopes for us, their children, to attain a high level of education. Now, I dedicate this achievement to them. I also want to profoundly thank My eternal love, my heart's haven, and my soul's companion, Berliana Ramadayanthi, who has been a steadfast presence through my times of hardship and joy and witnessed my hard work in completing this thesis. This is a testament that worship (marriage) has never been a hindrance. Now, let us look to the future and achieve our dreams together with optimism while seeking His blessings, *Sayang*. Also, thank you to my brothers and sisters, my wife's family, and my extended family, who have always been a support system that drives me to keep moving forward.

Furthermore, I would like to extend my heartfelt thanks to my supervisor, Dr. Phil. Syafiq Hasyim. Despite amid his busy duties as Vice Rector of UIII, he generously allocated time to provide crucial feedback and critical reviews on this thesis. Being a student under his guidance provided me with a truly phenomenal experience and unforgettable memories. I feel immensely fortunate and honored to have been mentored by a giant scholar of your stature, Prof. I hope this serves as motivation for me to follow in your esteemed footsteps.

Moreover, I would like to extend my sincere gratitude to the Professors at FIS UIII who have significantly contributed to my intellectual growth and the paving of my academic path, especially Prof. Noorhaidi, Prof. Yanwar Pribadi, Prof. Syamsul Rijal, Muhammad al-Marakeby, Ph.D, Zezen Zaenal Mutaqin, S.J.D., Haula Noor, Ph.D, Bhirawa Anoraga, Ph.D, Dr. M. Ilyas Marwal, Farid Fachruddin, Ph.D, Aria Nakissa, Ph.D, Dr. A. Mughzi Abdillah, and Dr. Torkis Lubis. I also would like to express my appreciation to all the staff at UIII, particularly those at the Faculty of Islamic Studies, for their assistance and solutions to the challenges I faced during my studies. Additionally, I am thankful to all the friends of the second batch of Master of Islamic Studies who have shared wonderful memories with me. I hope that this bond of friendship will continue to endure. A special thanks goes to Muhamad Azam Awaludin, who was always the first to offer advice, support, assistance, and even food while on this campus. Hold your head high, Bro, I believe you will shine brightly in the future. I also should express my gratitude to

Universitas Islam Internasional Indonesia (UIII) for giving scholarship for my Master's degree.

I would like also to convey my profound thanks to Dr. Yuli Yasin, Dr. Mohammad Syairozi Dimyathi, Prof. Sudarnoto Abdul Hakim, Prof. Hamka Hasan, Prof. Amany Lubis, Prof. Ali Munhanif, and other lecturers during my bachelor's who has been an inspiration and an ideal role model and has provided much positive reinforcement. I am equally grateful to Dr. Aep Saepulloh, Dr. Sahabuddin, and Dr. Saepul Anwar, who have been willing to be discussion partners and provide significant insight for me. I cannot overlook my spiritual mentors, *Papah* Hasan Hidayat Syarif (May Allah have mercy on him) and *Pak Yai* Akhmad Sodik, whose guidance and prayers have been a constant source of strength for me. Also, no less important, my warmest appreciation to *Ka* Amellya Hidayat, *Ka* Ijal, and my little Spiderman, Apik, who have always infused me with strength from the early struggles of securing the scholarship to the final moments of completing my studies.

Finally, to all the people whom I cannot mention individually, but the help is immeasurable, I thank you as much as possible. *Jazākumullāhu Aḥsan al-Jazā'*.

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# CHAPTER I

# INTRODUCTION

## A. Background

The issue of tolerance in Islam is one of the topics that is popularly debated by academics, either implicitly or explicitly. Those who view Islam as an intolerant religion think that the existing rules in Sharia often discriminate and do not fit non-Muslims living in Islamic areas. They often make the opinions of jurists regarding the rules concerning the dhimmi people and the historical portrait of Islamic political authorities in the past on the policy of state life as the main arguments. The dhimmi is prohibited from building and renovating places of worship[1]. This rule could be found in any classical book of Islamic law within the four schools of Islamic law. However, with the expansion of Islam the fatwa then showed a development that contained changes.

In Islamic law, changes in fatwas frequently happen and are unavoidable. Jurists, with their intellect in understanding and rationalizing Islamic rules, have a tendency to either continue a fatwa or change it. Both involve equally justifiable arguments. The importance for those who continue is the need for arguments that strengthen the fatwa so that it continues to be applied, while for those who change it, they need strong reasons to convince them that the old fatwa must be removed[2].

The fatwas developed by jurists also pay attention to the social and cultural circumstances so that they often adjust to the surrounding situations. The relationship between these subjects and the society and the culture in which they operate and from which they emerge needs to be considered to understand a fatwa more objectively. Furthermore, political conditions also influence many fatwas, which causes them to undergo changes. An example is when the Sultans of Delhi wanted to impose their will on Islamic jurisprudence, noting the Hanafi rulings on taxation and blood money for non-Muslims[3]. This sometimes leads to dualism in perceptions that overlap between rulers and

[1] Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law*, *Oxford University Press*, vol. 5, 2012, 34.
[2] Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001), ix.
[3] Hamza Dudgeon, The Hanafis, in Hamza Dudgeon, "The Hanafis," in *Routledge Handbook of Islamic Ritual and Practice*, ed. Oliver Leaman (Routledge, 2022), 78, https://doi.org/10.4324/9781003044659.

jurists[4]. Also, a fatwa could be said to be part of Muslim scholars' ongoing hermeneutical and intellectual effort in producing applicable legal solutions to challenging and complex problems[5]. Usually, the change is mediated through legitimization and formalization by the *mufti* and author (*musannif*)[6].

Hanafi is one of the schools of Islamic law that experiences many divergences of opinions among its followers as part of the dynamics between its jurists. Also, the Hanafi school has influences in a large area with the most significant number of adherents.[7] This school pays great attention to rational engagement with Islamic law, which will result in a comprehensive understanding of the purpose of Sharia[8]. It is also due to the existence of three primary early references (Abu Hanifa, Abu Yusuf, and al-Shaybani) that are referred to by its adherents and the hierarchy that exists within the Hanafi school of Islamic law[9].

Schacht and Coulson claim that Islamic law developed fully in the so-called formative period and underwent only minor changes in subsequent periods, and any changes that occurred after the tenth century only addressed minor issues of detail[10]. This minor issue and detail changes will be the main focus of this study. This thesis wants to explore the changes and additional details on the theme of dhimma, with specifics on the prohibition of building houses of worship.

### B. Research Objectives

This research portrays how Hanafi jurists' opinions on non-Muslim houses of worship undergo change and continuity among them, along with the influencing factors by taking objects across time and place. Furthermore, this study also examines how several modern Muslim countries, especially countries with the majority of Hanafi madhab adherents, determine their attitude between implementing Islamic law or accommodating

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[4] Wael B. Hallaq, "Juristic Authority vs . State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion* 19, no. 2 (2004): 258.
[5] Emine Enise Yakar, "The Diachronic Change of the Practice of Iftā': From Individual to Collective," *Islamic Studies* 60, no. 4 (2021): 345, https://doi.org/10.52541/isiri.v60i4.1246.
[6] Hallaq, *Authority, Continuity and Change in Islamic Law*, xii.
[7] Hamza Dudgeon, The Hanafis, in Dudgeon, "The Hanafis," 80.
[8] Sohail Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān Al-Dīn 'Alī Ibn Abī Bakr Al-Marghīnānī (d. 593/1197)," *A Theory of Early Classical Ḥanafism* (University of Oxford, 2017), 5, https://ora.ox.ac.uk/objects/uuid:64a8d79a-123a-493c-a864-fb2c48830e7e.
[9] Rudolph Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress*, vol. 51 (Harvard University Press, 2005), 148, https://doi.org/10.1163/9789004420625_032.
[10] Johansen Barber, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (Routledge, 2016), 1.

the needs of non-Muslims. Thus, later, it will be revealed how the rules related to houses of worship will show the shift or even disconnection.

### C. Research Questions

This research tries to answer two questions, they are: First, how have the rules of the Hanafi school on house of worship changed and continued, and why? Second, How does a modern country with a Hanafi-majority population bridge between the application of *fiqh* rules and accommodating the interests of non-Muslims?

### D. Literature Review

Discussions on the theme of house of worship are widely found in various fields and disciplines. Several studies focus on providing an overview of the laws inherent in this problem with various purposes, both pro and con, against non-Muslim houses of worship. The example of a neutral one is the writing of Haydar Samy Abd[11] entitled *Aḥkām Al-Maʾābid Fī Al-Fiqh Al-Islāmī*. In his study, he explains extensively how Sharia addresses houses of worship and the provisions accompanying them. He explores many rules relating to houses of worship, such as the law of establishing houses of worship, renovation, wills, and waqf, damaging, repairing, and moving, turning them into mosques, etc., from the views of the four legal schools of the sunny sect and also from the views of the Shia. Furthermore, some wrote a work to build an argument for the permissibility of the construction of houses of worship for non-Muslims as part of their rights. For example, the works of al-Qaradhawi[12] and Zaidan[13] in which although their writings discuss coexistence with the ahl al-dhimma, they also discuss places of worship, which lean more towards permission for their establishment.

Others wrote a book to convince that the establishment of non-Muslim houses of worship was strictly forbidden by religion, as written by Ahmad al-Damanhuri[14], Abd Rahman al-Usaimi[15], and al-Hussin[16]. Several works, such as Ismail al-Anshari's writings

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[11] Haydar Samīi 'Abd, "Aḥkām Al-Ma'ābid Fī Al-*Fiqh* Al-Islāmī," *Journal of the College of Basic Education* 19, no. 77 (2013).
[12] Yusuf Al-Qardhawi, *Fiqh Al-Jihād: Dirāsah Muqāranah Li Aḥkāmih Wa Falsafatih Fī Ḍawʾ Al-Qurʾān Wa Al-Sunnah* (Cairo: Maktabah Wahbah, 2009).
[13] ʿAbd al-Karim Zaydan, *Aḥkām Al-Dhimmīyyīn Wa Al-Mustaʾminīn Fī Dār Al-Islām* (Dār al-Quds, Muʾassasat al-Risālah, 1982).
[14] Ahmad Al-Damanhuri, *Iqāmat Al-Hujja Al-Bāhira 'ala Hadm Kanā'is Miṣr Wa Al-Qāhira* (Cairo: Dar al-Faruq, 2012).
[15] Abd Rahman b. Dakhil al-'Usaimi, *Aḥkām Al-Ma'ābid Dirāsah Fiqhiyya Muqārana* (Riyadh: Dar Kunuz Ishbiliya li al-nashr wa al-tauzi', 2009).
[16] Ahmad b. Abd 'Aziz al-Hussain, *Mawqif Al-Islām Min Binā' Al-Kanā'is Fī Bilād Al-Muslimīn Wa Yalīhā Iḥtifāl Al-Muslimīn Bi-Al-A'yād Al-Naṣrāniyya* (Kuwait: Maktaba Ma'la, 1994).

aim to build an argument for the prohibition of building churches in response to the publication of Egyptian newspapers that promote the establishment of churches. In addition, a collection of treatises from Hasan al-Shurumbulali which was verified (*tahqiq*) by Abu Abd Rahman Abd Majid Jum'ah aims to portray the law of building a house of worship and specifically to highlight arguments of prohibition of this issue by collecting various manuscripts containing fatwas and opinions of classical scholars about the prohibition[17].

Furthermore, some studies are concerned about the responsibility of rulers to protect and give a guarantee for non-Muslims to live in harmony. Musferah Mehfooz examines the protection of non-Muslim places of worship during the reign of the Prophet Muhammad PBUH and his successors and the extent to which these agreements were effective in maintaining peaceful coexistence in a multi-religious society[18]. A study conducted by Ghazi, et al., examines the phenomenon of restoration and renovation of several churches in Cairo and some of the main factors contributing to this phenomenon. He explained that factors such as political and economic stability, as well as policies implemented by Mamluk and ottomans rulers who were more tolerant of religious minorities[19]. In addition, there is also an article by M Yosef Niteh, et al.,[20] which reviews the law and its application in modern states, especially in contemporary multicultural Malaysia. According to him, Islam does not prohibit straightforwardly; instead, Muslims, especially rulers, are called upon to tolerate and manage the establishment of houses of worship if it is deemed urgent. This is evidenced by the Muslim tradition in ancient times and the provisions of the Prophet in the treaty of Medina.

Regarding the study on the particular fatwa of jurists, there are several types of research which focus on juridic opinions either who show tolerance or oppression. Seth

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[17] Abu Abd Rahman Abd Majid Jum'ah, *Risālatān Fī Ḥukm Al-Kanāʾis Al-Athar Al-Maḥmūd Li-Qahr Dhawi Al-ʿuhūd Wa-Yalīh Qahr Al-Millah Al-Kufriyyah Bi-Al-Adillah Al-Muḥammadiyyah Li-Takhrīb Dayr Al-Maḥallah Al-Jawāniyyah* (Aljazair: maktabah wa tasjilat al-ghuraba` al-athariyyah, 2009).

[18] Musferah Mehfooz, "Safeguarding Places of Worship during the Prophetic Era: Assessment of Early Islamic Covenants and Their Impacts on Early Muslim Polities," *Religions* 13, no. 9 (August 30, 2022): 799, https://doi.org/10.3390/rel13090799.

[19] Ahmad ʿAtiyyah Ghazi, Muhammad ʿAbd al-Wadud ʿAbd al-ʿAzim, and Ahmad Amin, "Tarmīm Wa-Tajdīd Al-Kanāʾis Bi-Madīnat Al-Qāhirah Fī Ḍawʾ Al-Wathāʾiq Al-ʿUthmāniyyah (923-1213 H / 1517-1798 M)," *Al-Majallah Al-Duwaliyyah Lil-Turāth Wa-Al-Siyāḥah Wa-Al-Ḍiyāfah* 14, no. 2 (2020): 23–58.

[20] Muhammad Yosef Niteh, Aminudin Basir Ahmad, and Abdul Latif Samian, "Ḥaqq Binā' Al-Ma'ābid Li-Ghayr Al-Muslimīn Fī Mālaiziyā," *Journal of Islamic Studies* 6, no. 1 (2015): 142–54.

Ward[21] analyzes the writings of al-Subki, a jurist of the Shafi'i school who concerned with the issue of other houses of worship. In this case, al Subki has a position that hangs on his fatwa; on the one hand, he is firm that the establishment and renovation of churches are not allowed and refrains from calling for the destruction of existing churches. Another study by the same author[22] who examined the fatwa against the maintenance of houses of worship by Ibn Rif'a, a Shafi'i jurist in the Mamluk era. This study examines five of Ibn Rif'a's main arguments against the reconstruction of the churches in Egypt after the great unrest. This fatwa received much support, but the church and synagogue eventually returned to their communities. This reflected the attitude of the time and was part of the pressure that led to a greater conversion to Islam. In addition, Janina Safran's paper shows the incorporation and interpretation of a Maliki jurist's fatwa from the sixth/twelfth century that supports the construction of churches in North Africa, particularly in response to the relocation of Christians from Andalusia and the destruction of a synagogue in Tamanṭīṭ, Algeria[23].

### E. Conceptual/Theoretical Framework

Generally, this thesis employs the Critical Discourse Analysis (CDA) as, according to Wodak, the purpose of CDA is to analyse "opaque as well as transparent structural relationship of dominance, discrimination, power, and control as manifested in language[28]. Besides that, this thesis is inspired a lot by Samy Ayoubi's dissertation in which he borrows Sherman Jackson's conceptual framework of legal scaffolding. Legal scaffolding (*al-aṭr al-qānūniyya*), according to Jackson, is the dominant activity in the more advanced stages of *taqlīd*. In legal scaffolding, Jackson argues, "instead of abandoning existing rules in favour of new interpretations of the sources (which would be *ijtihād*), jurists seek adjustments through new divisions, exceptions, distinctions, prerequisites, and expanding or restricting the scope of existing laws. This thesis employs this framework to situate the fatwas of late Hanafi jurists relating to their predecessors, especially those who, in the early period, had the basic rule of church building restriction.

Furthermore, this study, although it focuses on houses of worship, is closely related to the fatwas of scholars as the source of the study. Fatwas is an important link in

[21] Seth Ward, "Taqī Al-Dīn Al-Subkī on Construction, Continuance, and Repair of Churches and Synagogues in Islamic Law," in *Studies in Islamic and Judaic Traditions II*, 1989, 169–88.
[22] Seth Ward, "Ibn Al-Rifa On the Churches and Synagogues of Cairo," *Medieval Encounters* 51 (1999): 70–84.
[23] Janina Safran, "A House of Worship for Every Religious Community: The History of a Mālikī Fatwā," *Islamic Law and Society* 30, no. 3 (2023): 1–40.
[28] Jan Blommaert and Chris Bulcaen, "Critical Discourse Analysis," *Annual Review of Anthropology* 29 (2000): 448.

transmitting knowledge from experts to laypeople and from society across generations. Even if they are simple information about a legal opinion, they may be ignored or even forgotten. Fatwas do not have the power to compel[29]. On the other hand, Fatwa is a Sharia-considered opinion issued by a mufti. Within the spectrum of Sharia discourse, the fatwa sits on the border between the universal address of decontextualized juridical literature and the context-rich character of archival writings[30]. The Sharia division of judicial labor between the roles of judge and mufti also informs the textual quality of the fatwa. Unlike the situation before a judge who engages two parties in litigation that can end in an enforceable decision, the mufti accepts one party, and the resulting fatwa is non-binding[31]. So, the fundamental difference between a court decision and a fatwa is that a judgment is a "creative" (*insya'i*) or performative act, which is the same quality as other categories of binding legal speech acts. In contrast, a fatwa is a discursive act that is "informational" (*khabari*) or communicative and not binding[32].

### F. Research Methodology

This study will employ a literature study using a socio-legal approach that combines legal analysis and sociological perspectives. In data collection, this thesis will look for the materials needed from primary sources. This is conducted by searching through the Maktaba Shamila with keywords related to houses of worship such as *al-ma'abid* or *al-ma'bad*, *al-kanisa* or *al-kana'is* in the books of jurists who are included in the category of the Hanafi school. However, this is not limited to the books in the Maktaba Shamila but also to other online books. In addition, a search was also carried out from secondary sources discussing topics related to this thesis.

Then, to analyze the data, this thesis follows the methodology employed by al-Atawneh[33] who divides the process into three steps. After the data is collected, the data in the form of jurist opinions will be classified based on the type of opinion. The categorization of this thesis revolves around the opinions that allow, prohibit, and allow

[29] Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār Al-Iftā*, 1997, 3, https://books.google.com/books?id=f9uyFx-TGuIC&pgis=1.
[30] Brinkley Messick, *Sharīa Scripts : A Historical Anthropology* (New York: Columbia University Press, 2018), 167.
[31] Messick, 167.
[32] Muhammad Khalid Masud, Brinkley Messick, and David Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard: Harvard University Press, 1996), 19.
[33] Muhammad Al-Atawneh, *Wahhābī Islam Facing the Challenges of Modernity: Dār Al-Iftā in the Modern Saudi State* (Leiden: Brill, 2010).

with conditions. This distinction is important because it will identify who jurists are continuing the opinions of their predecessors and who are showing changes.

Second, the analysis of *fiqh* opinions will explore the postulates used to affirm the opinions of jurists by looking at the existence of postulates from the Qur'an, hadith, scholars' books, *ra'y*, and *ijma*, and other secondary postulates such as *istihsan, 'urf,* etc.

Third, the interaction between the text and its context is studied. This thesis identifies several socio-political factors that affect opinions related to houses of worship. The arguments put forward in certain opinions are examined, as well as the motivations and arguments that led them to produce the collection and source of the cited books or opinions of scholars quoted. Likewise, the justification for his opinion is used.

## G. Outlines (Structure of Thesis)

Chapter 1 presents the introduction, including background, problem and objectives, methodology and conceptual framework.

Chapter 2 provides an overview of the sources and general views of fatwas on houses of worship in the early development of the four schools. It also surveys the problems associated with the source of the dhimmi rule, the pact of Umar.

Chapter 3 discusses the Hanafi school which lays out the development of the school, the use of rational (*ra'y*) in their discourse, and the factors that influence the way of *istinbat* law both internally and externally.

Chapter 4 explores how the Hanafi school maintained the idealism of religious rules but also facilitated the interests of dhimmis.

Chapter 5 will discuss how some modern countries (not limited to countries whose citizens adhere to the Hanafi school) determine their attitude between sticking to religious rules or siding with other religious groups. Chapter 6 contains conclusions and suggestions.

## CHAPTER II

## ORIGIN AND GENERAL VIEW OF THE HOUSE OF WORSHIP RULES

### A. Origin and the Complexity of Dhimmi Rule Source

Discussing the rules relating to houses of worship cannot be separated from the famous Pact of Umar document (*'ahd 'Umar*). A document containing an agreement between Muslims and non-Muslims (*ahl dhimmah*) in Palestine which became one of the bases for jurists to formulate rules governing the lives of dhimmis in Islamic territory. However, the authenticity of the document has been questioned and criticised by some scholars. Therefore, this sub-chapter aims to survey some of the doubts raised by some researchers and the problems that arise with the existence of the document.

The long debate faced at the pact of Umar document focuses firstly on its authenticity with reference to the time it was created and enacted in the dhimmi community in Islamic territory. Rubin explains that one of the reasons this document has been questioned is because the contents of the pact of Umar that was able to govern the lives of non-Muslims at its inception were deemed as too well-established and well-structured a system of Islamic governance. According to some scholars, the sophistication of the document's drafting was almost impossible in the early Islamic period and makes more sense if it was made in later decades[34].

Some scholars assume that the pact of Umar was more accurately drafted and formed in the eighth or ninth century, presumably during the reign of Umar b. Abd al-Aziz (d. 720) who was at the peak of Umayyad glory[35]. Therefore, it is more appropriate that the pact of Umar refers to Umar b. Abd al-Aziz, the caliph during the Umayyad dynasty and not Umar b. Khattab, the second caliph of Islam. In addition, it has been speculated that the time of the pact drafting was around the eighth-ninth century, which was the period of the early development of discourse in Islamic law. This makes this document (as well as other parallel documents of its time) particularly important when trying to trace the establishment of the status of non-Muslims[36].

In this regard, Miller believes that the document existed from an early stage until the second century of Islam, but he claims that it became important only in the fourth

[34] Milka Levy-Rubin, *Non-Muslims in the Early Islamic Empire*, *Non-Muslims in the Early Islamic Empire* (New York: Cambridge University Press, 2011), 2, https://doi.org/10.1017/cbo9780511977435.
[35] Levy-Rubin, 62.
[36] Levy-Rubin, 3.

century of Islam and argues that it became a normative document only in the seventh century. Miller's argument is interesting, but it seems that the dhimmi rule should have become a normative document much earlier than the seventh century. This is because although the rules prior to the seventh century were not yet a law form, they had become ethical guidelines and bottom-up state policies[37].

Another point that scholars take issue with is the oddity and inconsistency of the content of Umar's pact document. According to them, the content of Umar's pact makes little sense when dhimmis come to Umar b. Khattab with rules that restrict their movements and make their lives difficult on their own initiative[38]. Furthermore, the prohibition of dhimmis from studying the Muslim holy book and its contents seems surprising, whereas normally they should be introduced to or at least given the freedom to study the Quran so as to understand Islam and embrace it consciously. Hence, most scholars consider it a pseudo-epigraphic document attributed to mythological caliphs and conquerors[39]. But in fact, the prohibition on studying the Quran may be related to the custom of the people of the book of *taḥrīf*, the distortion of the scriptures regarding the transmission and interpretation of their own scriptures so as to avoid the Muslim scriptures from being blasphemed by dhimmis[40].

As for the unresolved issue of the inconsistency of Umar's pact with the reports of the original surrender treaty and those circulating in the later period. What we need to recognize is that all the original treaties - between Umar and the dhimmi of the conquered cities - were essentially specialized treaties given to each city and differed from each other in that they claimed to be more tolerant than those propagated by the jurists. In Rubin's study, she examines four formal versions of *sulh* written in the books of Abu Yusuf (d. 798), Muhammad b. Idris al-Shafiʿi (d. 820), Ghazi b. al-Wasiti (d. 919), and Ibn 'Asakir (d. 1176). All four claimed to have quoted from classical and reliable sources and showed strong *isnad* in their narration. Of the four, although there are elements common to all versions, there are significant differences between them. The differences in each version seem to reflect the different approaches taken before they were compiled and circulated. In

[37] Daniel E. Miller, 'From Catalogue to Codes to Canon: The Rise of the Petition to ʿ Umar among Legal Traditions Governing non-Muslims in Medieval Islamicate Societies', Ph.D. thesis, University of Missouri-Kansas City, 2000, 3-5

[38] A S Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar* (Rou, 2013), 13.

[39] Levy-Rubin, *Non-Muslims Early Islam. Emp.*, 2.

[40] John Tolan, "Blasphemy and Protection of the Faith: Legal Perspectives from the Middle Ages," *Islam and Christian-Muslim Relations* 27, no. 1 (2016): 42, https://doi.org/10.1080/09596410.2015.1087671.

addition, while jurists sought a middle ground by uniformizing the pact of Umar, by that standard, they nonetheless developed dhimmi law into a uniform set of rules. Yet, it was not consistently applied throughout the Muslim world during the medieval period[41].

In addition, a document that has a more extended version than others does not mean that the version was improved at a later date through the insertion of additional clauses. Conversely, a shorter version does not mean that it can be considered a flawed or less reliable document. In this regard, Zein and el-Wakil have an interesting point of view to borrow in this context; they suggest that the possible reason why one version may be shorter than another is that it is likely that the author decided to omit irrelevant details and focus on the main terms and conditions[42]. Vice versa, the long version may have retained details and added its views to provide additional explanation.

Another allegation, as assumed by Tritton, is that no one knew the exact existence of Umar's agreement and that the document may have simply taken his name as a form of legality. This practice seems to be commonplace in law schools to learn how to draft treaty patterns[43]. While Fattal assumes that it was the work of the *mujtahids* of the third Islamic century [i.e. the ninth century], who could not resist the temptation to compile in one document successive restrictions on the freedom of dhimmis, without considering the circumstances of time and place[44]. A counterargument to the above allegations can be drawn from the assertions of Albrecht Noth and Mark Cohen who argue that it was the product of an ongoing process that combined early elements of the conquest, particularly those relating to the security of the conquered minority, with new elements reflecting later realities[45].

In the Book of *Kharaj*, Abu Yusuf mentioned that the *sulh* agreement between the Muslims and the dhimmi that Umar b. Khattab had made was valid until the Day of Judgement[46] also seems to raise questions. From the point of view of the conqueror, it seems likely normal as the desire to control territory for a long time prompted them to make an endless time limit for the agreement. However, when this agreement becomes the basis of rules and laws, then at any time, it becomes invalid; for example, because it is conquered

[41] Phillip I. Ackerman-Lieberman, "The Muammadan Stipulations: Dhimmi Version of Pact of 'Umar," in *Christians and Jews in Muslim Societies* (Leiden, 2014), 205.
[42] Ibrahim Zein and Ahmed El-Wakil, "The Siffin Arbitration Agreement and Statecraft in Early Islamic Political Documents," *Journal of Islamic Studies* 33, no. 2 (2022): 157, https://doi.org/10.1093/jis/etac001.
[43] Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar*, 15.
[44] Levy-Rubin, *Non-Muslims Early Islam. Emp.*, 60.
[45] Levy-Rubin, 3.
[46] Abu Yusuf al-Ansari, *Al-Kharāj* (Al-Maktabah al-Azharīyah lil-Turāth, 1979), 161.

by another party or the conditions of society have changed or other rules were applied, it seems that its existence as a basis for *fiqh* rules is not very strong. If the source of the rule is revoked (*mansukh*) in the future, the rules relating to dhimmis should also be deleted or no longer apply. One example is when the treaty is no longer valid, then the dhimmis no longer pay *jizyah* or tribute. This would then bring implications for other rules such as the rules of houses of worship as well. In this regard, al-Shawkānī says that the Pact is a historical example that does not preclude the development of new rights and obligations of dhimmis as circumstances change. This debate, and in particular al-Shawkānī's opinion, shows how the protection contract offered a platform for legal debate in which Muslim jurists reflected on the ongoing challenges of governing Muslims amidst the fact of diversity[47].

Moreover, in the book of *Ahkam Ahl al-Dhimmah*, it is mentioned that because of its reputation, there is no need to check the *isnad*, as well as because the Imams accepted it with full faith, cited it in their books and used it as evidence, and it continued to be mentioned both orally and in writing and the caliphs after him applied the rule to the territory of Islam[48]. In fact, the narration that tells us about 'Umar's order was narrated by Abu Bakr al-Khallal (d. 923) in *Ahkam Ahl Al-Milal* from 'Abdullah b. Imam Ahmad (d. 903). Abu Bakr Ahmad al-Bayhaqi (d. 1066) in his *Sunan*, and Sufyan al-Thawri (d. 778) also narrated a similar narration from Masruq b. Abd al-Rahman b. Utbah (d. 737), and each of these narrations has a weak status (*dhaif*), while *hadith dhaif* cannot be used as a legal basis.

The existence of Umar's treaty, which became a source of law in the *fiqh* of *ahl dimmah* beside the Quran and Hadith, was explained by Anver Emon that the agreement between the Muslim ruler and the dhimmi became the basis of the rules of political life as well as religious life. On the one hand, it is political because it is used as a power tool in regulating the lives of citizens who have become multicultural. This agreement also became a political contract between the Muslim ruler and the Dhimmi community with common goals and interests. At the same time, this contract was also normative or legal when it became a reference for jurists to discuss the scope of dhimmi groups' mobility in areas governed by Islamic law[49]. At that time, it was the legal basis or *dustur* that the jurists

[47] Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law*, 5:72.
[48] Ibn Qayyim al-Jawziyya, *Aḥkām Ahl Al-Dhimmah* (Dammam: Rumadi lil-Nashr, 1997), Vol. 3, 164-165.
[49] Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law*, 5:70.

referred to in order to provide the details and particulars of the rule. They used the protection contract to move from the fact of diversity to a commitment to a pluralistic ethic in imperial governance.

### B. The Early Juristic Fatwa on House of Worship in Islamic Law

The rules of jurisprudence devised by jurists relating to Dhimmi's houses of worship lay out several details, such as the rule of building new buildings, the rule of renovating damaged buildings, the rule of destroying buildings, the rule of moving from one region to another, the rule of entering and worshiping in it, the rule of waqf and bequests for Dhimmi's houses of worship, etc. This wide-ranging and detailed discussion has led to many similarities and differences through various approaches and methods in each school.

Also, the implementation of the rule differed based on the status of the land or territory occupied by the Muslims; there were cities built by Muslims after the conquest where the dhimmis were newcomers; there also cities conquered by force (*ʿanwatan*), meaning taken by force and there was no peace agreement, and there also Muslim-held lands that had peace agreements - these cities were previously inhabited mostly by dhimmis but were slowly populated by many Muslim settlers, making the case complicated.

The prohibition of non-Muslim houses of worship in Islamic territories is based on the hadith narrated by Ibn Abbas (d. 687), "*la ikhsa` fil islam wa la binyan kanisah*," and the hadith narrated by Ibn Shihab (d. 741), "*la yajtami' dinani fi jazirah arab*," and Ahmad b. Ady (d. 898), "*la tubna kanisah fi al-islam wala yujaddad ma khariba minha*"[50]. In this discussion, we will not discuss all of them, but only a brief overview of the fatwas from the early Imams of each school on the construction of new buildings and repairing damaged ones, and the destruction of buildings.

#### a. Hanafi School

There is a narration that attributes and claims to be the opinion of Imam Abu Hanifah (d. 767) that he allowed the building of churches if it is in villages and not in cities, but this is refuted by al-Subki. He speculates that Abu Hanifah may have meant that it is permissible to build a church in a village whose inhabitants are isolated from the Muslim community and not all villages[51]. In addition, Abu Hanifah also allows

[50] Al-Khaṭib al-Shirbini, *Mughnī Al-Muḥtāj Ilā Ma'rifat Ma'ānī Alfāẓ Al-Manhāj* (Beirut: Dar al-Kutub al-'Ilmiyah, 1994), 76.
[51] Taqy al-Din Ali Al-Subky, *Fatawa Al-Subky* (Dar al-Maarif, n.d.), Vol. 2, 202.

Muslims to reach an agreement to build a church or rent a house to be used as a church[52].

As for Abu Yusuf, in his book *al-Kharaj*, he narrated from Ibn Abbas that he was asked about the *'ajams* (non-Arab strangers) and whether it was permissible for them to build churches in Muslim territory. He said: As for cities founded by Arabs, they are not allowed to build churches or synagogues inside the cities, they are not allowed to ring bells, they are not allowed to drink wine publicly, and they are not allowed to breed pigs. If the city was founded by the '*ajam*, and then conquered by Muslims and they obey their rule, then the '*ajam* have rights according to what is in their covenant, and the Arabs must fulfill the covenant to them[53].

Abu Yusuf continued that Abu Ubaidah b. al-Jarrah (d. 639) made a treaty with the people of Sham. The treaty contains a decree that they should leave their churches and synagogues, and they are forbidden to build synagogues or churches. Also, the book of *al-Muhit* mentions that if the Imam conquers a city by force and reaches an agreement with them that he will give them dhimmi status, the consequence is they are forbidden to pray in their churches, and they have to change as residents without destroy it[54]. The same narration is also found in Muhammad b al-Hasan's (d. 805) work in the book of *al-Siyar al-Kabir*. However, in another fatwa, Muhammad b. al-Hasan also highlighted that there should be no church, synagogue, or Zoroastrian house of worship in the land of the Arabs.

**b. Maliki School**

The opinion of the Maliki school may be concluded from the summary of various quotes from Imam Malik's companions written in the book *al-Taj wal al-Iklil li Mukhtasar Khalil* by Muhammad b. Yusuf al-Mawwaq (d. 1492). It was narrated from al-Lakhmi from Ibn al-Qasim, saying that dhimmis are forbidden to establish a church in a city built by Muslims and a city conquered by *'anwatan*, and Muslims live with them. While it is permissible for them to establish their house of worship in a city controlled by *sulh*, even if Muslims reside among them. According to Ibn Arafat, it is permissible for dhimmis to build churches in Muslim-controlled territory peacefully if no Muslims are living with them, but if they exist, then there are two opinions

[52] Yusuf Al-Qardhawi, "Musahamat Al-Muslim Fi Bina` Al-Kanisah," 19 May, 2008, https://www.al-qaradawi.net/node/4225.
[53] Hasan ibn 'Ammar al-Shurunbulali, *Al-Athar Al-Maḥmūd Li-Qahr Dhawī Al-'Uhūd Al-Jaḥūd* (Aljazair: Maktabat wa Tasjilat al-Ghuraba' al-Athariyah, 2009), 20–21.
[54] al-Ansari, *Al-Kharāj*, 152.

regarding this: the permissible opinion from Ibn al-Qasim, and the prohibitive opinion from Ibn al-Majishun[55].

Ibn Khwaiz Mundad (d. 873) narrates from the Maliki Imams that the explanation of Surah Hajj 40 includes the prohibition of destroying dhimmi churches, but dhimmis are not allowed to increase the height and width of their houses of worship, and when they do so the buildings must be destroyed[56].

**c. Shafi'i School**

In the book *al-Umm*, al-Shafi'i states about the status of dhimmis that they are not allowed to build houses of worship and make assemblages in Muslim cities because of their misguidance. Furthermore, they are also forbidden to construct buildings that are higher than the Muslim buildings. In addition, symbols related to their religion, such as crosses, are also not allowed to be displayed in public. al-Shafi'i made an exception when the dhimmi community was in a solitary settlement far away from Muslim residences, so they were not prevented from building churches or raising their buildings[57].

In the case that they are in a Muslim town and they already have a house of worship or a building that is as tall as a Muslim building, then the Muslim leader should not demolish their building but tell them to leave it. The same rule applies to cities conquered by '*anwatan*[58]. The Shafi'i school view that building a dhimmi house of worship in a Muslim city means committing a sin. If a new church has already been built, it must be demolished, and if the Muslim leader has allowed they to build a new one, then the contract is invalid in law[59].

**d. Hanbali School**

In the book of *Ahkam Ahl al-Dhimmah*, Ibn al-Qayyim al-Jauzy (d. 1350) quotes the opinion of Ahmad b. Hambal (d. 855) that the dhimmis are forbidden to build churches or synagogues where none existed before, to ring bells, and to raise crosses. As for the Muslim ruler having to prevent them from doing so, the Sultan prevented them from building if their territory was conquered by force. while if they had a peace treaty, then they have what the treaty stipulates and it must be fulfilled for

[55] Muhammad ibn Yusuf al-Mawaq, *Al-Tāj Wa Al-Iklīl Li-Mukhtaṣar Khālīl* (Beirut: Dar al-Kutub al-'Ilmiyah, 1994), Vol.4, 499-500.
[56] Muḥammad ibn Aḥmad al-Anṣari al-Qurṭubi, *Al-Jāmi' Li-Aḥkām Al-Qur'ān* (Cairo: Dar al-Kutub al-Miṣriyah, 1964), Vol. 12, 70.
[57] Muhammad ibn Idris al-Shafi'i, *Al-Umm*, 2nd ed. (Beirut: Dar al-Fikr, 1984), Vol. 4, 2018-219.
[58] Isma'il ibn Yahya al-Muzani, *Mukhtaṣar Al-Muzanī* (Beirut: Dar al-Fikr, 1983), 385.
[59] al-Shirbini, *Mughnī Al-Muḥtāj Ilā Ma'rifat Ma'ānī Alfāẓ Al-Manhāj*, 76.

them[60]. In passing, if the territory was conquered by a peace treaty, then whether or not it is permissible to build a house of worship depends on the contents of the agreement.

The book also mentions the narration of Hamzah b. Qasim (d. 904), Abdullah b. Hanbal (d. 903) and Ismah that according to Imam Hanbal, if the area was peacefully occupied, then the church was left as it was in the treaty, but if it was '*anwatan* then it should not, nor were they allowed to build a church that had never existed before[61]. In addition, if any part of the church is damaged (while the building still standing), then it is allowed to be repaired. However, if the building has collapsed, it is not permissible to do so[62].

Although the fatwas of the early jurists of the four schools show the similarity, this does not eliminate the diversity of legal opinion; the views of the four schools are summarised in the following quote: "All the schools of thought agree that it is not permissible to build new churches or synagogues in Islamic cities. They differ on whether this is permissible in the city area. Malik, Shafi'i, and Ahmad do not allow it; Abu Hanifa says that if the place is one mile or less from the city, then it is not allowed; if the distance is greater and the dhimmi area is isolated, then it is allowed. Another question is whether it is permissible to restore ruins or rebuild destroyed churches or synagogues in Islamic countries. Abu Hanifah, Malik, and Shafi'i allow it. Abu Hanifah added the condition that the church be in a place that was surrendered peacefully; if it was conquered by force, it was not allowed. Ahmad, according to the most probable version, which is also supported by some of his followers and by famous Shafi'is, such as Abu Sa'id al-Istikhari (d. 939) and Abu 'Ali b. Abu Huraira (d. 956), said that restoration of the damaged and rebuilding of the destroyed is never permitted. Another version of his teaching is that the restoration of the broken is allowed, but the rebuilding of the destroyed is not. A third version permits both[63].

### C. Regulation of House of Worship in Muslim Majority Country

In the current era, Muslim countries show rules that manage non-Muslim houses of worship with different faces. There are countries that still follow the classical rules of jurisprudence, there are also those that change to modern regulations but still toe in the

[60] al-Jawziyya, *Aḥkām Ahl Al-Dhimmah*, Vol. 3, 236.
[61] al-Jawziyya, Vol. 3, 204-205.
[62] al-Jawziyya, 213.
[63] Tritton, *The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar*, 35.

Islamic values, and there are also those that abandon them altogether. It depends on how the modern state is shaped and the principles it adheres to. Indeed, in every modern Muslim country, there is a certain school embraced by most of its citizens, but it seems that the tendency not to follow what has been regulated in the *fiqh* of each school tends to be more significant.

The giving of permits for the establishment of non-Muslim houses of worship in Muslim countries is based on various reasons. The most significant reason may be that the concepts of *Dar al-Islam* and *Dar al-Harb* which are considered irrelevant to the current conditions that require the rules inherent in them to disappear. In addition, the rules on absolute prohibition derived from *hadith* about the establishment of houses of worship in the Arabian Peninsula (*Jazira al-Arab*) are also multi-interpreted. The Hanafi scholars and some of the Maliki scholars argue that the land of Arabs is the entire peninsula surrounded by the sea from all sides of the west, east, and south, as well as the northern part bounded by the countryside of Iraq and the outskirts of Syria. Some Maliki scholars say that the land of Arabs is the Hijaz (Mecca and Medina and surrounding villages) and Yemen, and some of them also add the Yamamah region. While the Shafi'i and Hanbali scholars argue that it referred to Hijaz and Al-Yamamah and villages surrounding such as Taif and Khaybar, but they do not include Yemen - and Najran - in their part[66].

Discussing the concept of the Arabian Peninsula certainly cannot be separated from the country of Saudi Arabia as the territory debated by jurists. Although the Hanbali school stipulates that the Arabian Peninsula is Makkah, Medina, and Yamamah, the Saudi government still prohibits the existence of any houses of worship in the kingdom. Saudi Arabia continues to severely restrict freedom of religion or belief, targeting not only non-Muslims but also Shiites[67]. The embedding of the title of "guardian of the two holy mosques" on the king may have had an impact and demand that the country give no space for other religious symbols, one of which is depicted in non-Muslim houses of worship.

A different approach is demonstrated by Egypt. With a reputation as one of the cores of Islamic countries, Egypt Presents a contradictory attitude to Saudi Arabia. Besides issuing certain laws facilitating non-Muslims to have their new houses of worship, a firm stance on the permission regarding this matter is also exhibited by their scholars on the Dar

[66] Ibrahim b. Sulayman b. Ibrahim al-Fuhayd, "Ma'ābid Al-Kuffār Wa-Aḥkāmuhā Fī Bilād Al-Muslimīn" (King Saud University, 2008), 86–89.
[67] Abraham Cooper, Frederick A. Davie, and David Curry, "Annual Report of The U.S. Comission on International Religious Freedom," 2024, 32, https://www.uscirf.gov/sites/default/files/2024-05/USCIRF 2024 Annual Report.pdf.

al-Ifta' website. Through Shawqī Ibrahim ʿAlam's[68] writings, they show this by providing various arguments to refute the postulates used by the classical jurists about the prohibition of establishing churches, etc. Their main argument is that the postulate used by classical jurists is not strong and is not absolute. In addition, the changes of times and conditions are a postulate that forces them to review the rules that once applied in the past with adjustments to current conditions.

Furthermore, Iraq which was once the center of the development of Islamic law, has now also abandoned the classical *fiqh* rules that regulate houses of worship. Even Iraq used to be the center of the Hanafi school, but after the prolonged war, the composition of its society changed. Iraqi Sunni community should share a place with Shi'a followers and non-Muslims. This change in the condition of society forces the government not to make the *fiqh* of the Sunni sect the primary source of reference for their regulations governing the establishment of houses of worship[69].

For a balanced comparison, an overview of the regulation of places of worship in Indonesia is worth looking into. As a country with the majority of Muslims adhering to the Shafi'i School, Indonesia has rules that seem uncertain. As a country that adheres to the principle of Pancasila as the basis of the state, which recognizes the existence of religions other than Islam, Indonesia inevitably has to facilitate adherents of other religions to worship freely and securely because this is written in the foundation of the state. However, the rules appear to promise facility and liberty but have no intention of fulfilling them. The rules are indeed made, but officials who can give permission are passing responsibility back and forth because they lack the courage to grant it. This regard is assumably due to the overlap of interests between the government and the shariatization agenda propagated by the Council of Indonesian Ulama (MUI)[70]. Additionally, the Ministry of Religious Affairs plans to make a new Decree together with the Minister of Home Affairs[71] to find a solution to this problem, but until now, it has not been implemented.

In fact, according to the Shafi'i school, if a house of worship has been built after its inhabitants have embraced Islam or Muslims conquered the city, consequently, its status must be re-evaluated to consider whether the building was built in a remote area or in a

[68] Shawqī Ibrahim 'Allam, "Shubhāt Ḥawl Bināʾ Al-Kanāʾis," 06 August 2017, accessed June 12, 2024, www.dar-alifta.org/ar/fatawa/14039/شبهات-حول-بناء-الكنايس.

[69] Cooper, Davie, and Curry, "Annual Report of The U.S. Comission on International Religious Freedom," 54.

[70] Syafiq Hasyim, *The Shariatisation of Indonesia: The Politics of the Council of Indonesian Ulama (Majelis Ulama Indonesia, MUI)* (Leiden: Brill, 2023), 398, https://lccn.loc.gov/2022051724.

[71] https://ntt.kemenag.go.id/file/file/dokumen/rndz1384483132.pdf

village. In Shafi'i school, it is permissible for non-Muslims to build new houses of worship in villages absolutely as written in the book *Nihayat al-Muhtaj ila Sharh al-Minhaj*'[72]. However, the term 'village' in classical jurisprudence literature needs to be reconsidered because it contains complex explanations, as will be discussed in the next chapter.

From the above discussion, many Muslim countries began to permit the establishment of non-Muslim houses of worship in their territories with the main argument that this had been done by the Prophet Muhammad PBUH. The Prophet devised various treaties called *al-'ahad wa al-shurūt* to respect the autonomy and beliefs of the Christian community of his time. The treaty of Najran, and other treaties, emphasizes the protection for them together with the main terms and conditions defined for Christians[73]. This is imitated by analogizing the principles and rules of the modern country, such as the peace treaty in the time of the Prophet.

In addition, both secular countries and modern Muslim countries, in several dimensions of the house of worship, their regulation could be somewhat matched with the rules of the classical Islamic empire, either from Islamic law or not. For example, the rules adopted by the state of Turkey now have many similarities with what they applied in the former Ottoman Empire. Dimensions such as Church organization, although not legally recognized by the Ottoman State, still exist within its institutions by acquiring administrative and legislative functions. Thus, the leadership of the church had an important role in the administration of the Christian community in the Ottoman Empire[74]. Also, in the process of repairing existing houses of worship buildings, it is necessary to have a building permit issued by High Porte[75].

Six dimensions of houses of worship are usually obtained in the regulations of modern countries, but there may be a reduction or addition to these dimensions. This dimension was a term and condition before the house of worship was allowed, with some similarities to the conditions imposed in the classical period. The six dimensions are local

[72] Shihab al-Din Al-Ramli, *Nihāyat Al-Muḥtāj Ilā Sharḥ Al-Minhāj Al-Muʾallif:* (Beirut: Dār al-Fikr, 1984), Vol. 7, 239.
[73] Mehfooz, "Safeguarding Places of Worship during the Prophetic Era: Assessment of Early Islamic Covenants and Their Impacts on Early Muslim Polities," 4.
[74] Andi Rëmbeci, "Legal Framework and Building Permits: Orthodox Christian Religious Constructions in the Ottoman Empire," in *Living in the Ottoman Lands: Identities Administration and Warfare. Burhan Caglar*, ed. and Hacer Kılıçaslan Çağlar, Burhan, Ömer Faruk Can (Istanbul: Kronik, 2021), 28.
[75] Rëmbeci, 32.

context, regulations, autonomy level, level of formal organizational structure, access to resources, and Congregation profiles[76], with the following detailed explanation:

1. Local context: this dimension includes its status as a majority or minority religion in the local and national context, the geographical location of the house of worship, its demographic conditions, and the possibility of causing conflict or even bringing tolerance in society, etc.
2. Regulation: This dimension includes the rules, Standard Operating Procedures, bureaucratic flow of building houses of worship, the authorities deciding where houses of worship can be built, etc.
3. Congregational profile: this dimension includes the profile of the community that will be used, the demographic characteristics of the worship community, etc.
4. Level of autonomy: this includes the party responsible for the primary authority in decision-making for houses of worship in worship, finance, personnel, etc.
5. Organizational structure: This dimension includes the formal organizational structure for making decisions and executing functions, the Articles of Association and Bylaws that regulate functions, etc.
6. Access to resources: This includes the ability of houses of worship to access financial, property, or other resources from the state, interdependent religious institutions, worshippers, etc.[77]

The boundaries between these dimensions may not be clear, but they reflect differences in the attributes of houses of worship that may impact how each house of worship functions in local and national contexts and the experience of worshippers within them.

### D. Conclusion

Chapter two discusses how the rules govern the dhimmis in the period before the canonization of Islamic law, at the time of the canonization of Islamic law, and in the modern era. At the beginning of the implementation of the Umar pact, some scholars doubted its authenticity for various reasons. One of them considered that Umar's pact at that time should not be as advanced and systematic considering its conditions at that time. However, what was actually forgotten from the accusation was that the model of the peace treaty used by the Umar Pact was common in that era and was promoted by the Byzantines.

[76] Danielle N. Lussier, "Reconceptualizing Houses of Worship to Advance Comparisons across Religious Traditions," *Religions* 15, no. 7 (June 27, 2024): 10, https://doi.org/10.3390/rel15070785.
[77] Lussier, 11.

Likewise, at the time of the emergence of the legal school. The four legal schools display rules that have similarities with each other. This is undeniable because the postulates used in the rules of houses of worship are the same; on the other hand, the conditions in that era were indeed a period of conquest that was not only carried out by Muslims but also by other nations.

The same thing also happens in the contemporary era, where several Muslim countries show different faces in the application of house of worship rules in their respective countries. Many Muslim countries have made regulations on non-Muslim houses of worship by abandoning the classical rules of jurisprudence. However, some still adhere to the values of Islamic law but with a more modern approach. These three models of house of worship rules indicate that each era has its pattern, and these socio-political conditions affect each other.

# CHAPTER III

# THE HANAFI SCHOOL: HISTORICAL SPREAD, METHODOLOGICAL LEGAL REASONING, AND CONTEXTUAL DECISION MAKING

Throughout the classical period, the time when Islamic law was canonized, the four major Sunni schools (Maliki, Hanafi, Shafi'i, and Hambali) dominated the existence of the theory and practice of Islamic law. The schools have established and limited the work of individual interpretation of its members which consequently make the parameters of Islamic law limited. For example, in the Hanafi school, although they tend to have freedom of thought and use logic, they are still limited to the rules set by the founders of the school.

In this regard, this chapter argues that the existence of classes or levels (*tabāqāt*) in the Hanafi school, the concept of freedom embraced, and the use of postulates in legal methodology (*ushul fiqh*) related to subjectivity, and the influence of social context affect the existence of diverse and substantive opinions in the Hanafi school. All of these things are interconnected, and sometimes, one of the elements is more emphasized in groups or Hanafi jurists.

## A. Historical Spread and Development of Hanafi Legal School

At the beginning of its appearance, actually, the method of legal reasoning applied by the Hanafi school is similar to the way of reasoning carried out by the majority of Muslims in the Umayyad era, especially in Kufa, by using the traditions of the prophet, the four caliphs, the *tabi'in*, and coupled with local Arab customs. that is why in Kufa, Hanafi legal school is not a doctrine emanating from outside Kufa which later became dominant and replaced the indigenous doctrine adhered to by the city's residents; rather, it was local traditions that transform to the prominent individual figure's patent and eventually eliminate other traditions. Before preoccupying with the jurisprudence, Abu Hanifah Immerse himself in the theology (*kalam*) and debated with many Islamic sects in Kufa, whose arguments can be found in several books attributed to him, such as the book *al-Fiqh al-Akbar*[89]. Hence, it is difficult to trace back to a specific time when the legal tradition that later became the Hanafi legal school evolved from its predecessor[90]. Some scholars simply state that the Hanafi legal school commanded its existence when Abu Hanifah

[89] Muḥammad Abū Zahrah, *Abū Ḥanīfah Ḥayātuhu Wa-ʿAṣruhu Ārāʾuhu Al-Fiqhiyyah* (Cairo: Dār al-Fikr al-ʿArabī, 2007), 182.
[90] Nurit Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism* (Harvard: Islamic Legal Studies Program, Harvard Law School, 2004), 17.

replaced Hamad as the leader of the *madrasa*[91]. However, considering that this madhhab is presumably a Kufa's legal tradition and Abu Hanifah never stated that it is his madhhab, this claim is not arguable. In fact, it is more appropriate to mention the beginning of Hanafi legal school when Abu Hanifah's friends and disciples spread it to various places.

Interestingly, there is a slight difference between the eminent scholars in Kufa and other cities. Most of the scholars, and especially the jurists, of that era were *Mawali* - people descended from former slaves, who made the pursuit of knowledge their profession[92]. These *Mawali* are stereotyped as not main-class people after the Arabs or other non-slave societies, and the distinction is especially pronounced in political life. The Arab identity elevates the elite class both culturally and intellectually after the conquerors a number of cities into Islamic territory by Arabs[93]. Due to a large number of *Mawali* jurists, most of them, especially those with the most expertise in Muslim regions such as Hijaz, Basrah, Yemen, Khorasan, and Sham, were non-Arab except those in Kufa.

The Kufan jurists at that time, like Hammad b. Abi Sulayman (d. 738) and Ibrahim al-Nakha'i (d. 714) were Arab whom from them Abu Hanifah's expertise in Jurisprudence was gained. These three later became known as the main figures of *Ahl ra'y* in Kufa. Although he had many mentors, Abu Hanifah's views and the way of formulating jurisprudence were much influenced by those two who later became the forerunners of his school and distinguished it from others. After the death of Hammad b. Abi Sulayman, Abu Hanifah was elected at the age of 40 as head of the *halaqah* which his teacher initiated[94].

As for Abu Hanifah, he had four disciples, two of whom were Abu Yusuf and Muhammad b. Hasan al-Shaibany – also among them there is Zufar b. al-Hudhail (d. 774) and Hasan b. Ziyad (d. 819) - who are considered the main disciples who formulated and disseminated the Hanafi legal school. These two companions of Abu Hanifah are considered the most meritorious in spreading the doctrine and method by recording Abu Hanifah's ideas and narrations and disseminating them. Both Abu Yusuf and Muhammad al-Shaibani have books that preserve the opinions of Abu Hanifah. Abu Yusuf is considered the first person to write a book on the principles and Jurisprudence according to Abu

[91] Aḥmad Saʿīd Ḥawwá, *Al-Madkhal Ilá Madhhab Al-Imām Abī Ḥanīfah Al-Nuʿmān Raḥimahu Allāh* (Jeddah: Dār al-Andalus al-Khaḍrāʾ li-l-Nashr wa-l-Tawzīʿ, 2002), 79.
[92] Manna Khalil al Qattan, *Tārīkh Al-Tashrīʿ Al-Islāmī*, 4th ed. (Cairo: Maktabah Wahbah, 2001), 327, https://shamela.ws/book/9995/372#p1.
[93] Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013), 130.
[94] Ahmad ibn Muhammad Nasr al-Din al-Naqib, *Al-Maḏhab Al-Ḥanafī: Marāḥiluhu Wa Ṭabaqātuhu, Ḍawābiṭuhu Wa Muṣṭalaḥātuhu, Khaṣā'iṣuhu Wa Mu'allafātuhu* (Riyadh: Maktabat al-Rashid li-Nashr wa al-Tawzi', 2009), 56.

Hanifah's doctrine. This includes the books of *Athar, al Kharaj,* and *Ikhtilaf Abi Hanifah wa Ibn Abi Laila*. While Muhammad al-Shaibani, his books are considered as the original and main reference of Abu Hanifah's doctrine which later jurists quoted and provided explanations and commentaries. Books such as *al-Jami' al-Kabir, al-Jami' al-Saghir, al-Siyar al-Kabir, al-Siyar al-Saghir,* and *Ziyadat* became the main references for later jurists.

Even tough Abu Yusuf, Muhammad, dan Zufar b. Hudhail are categorically a *mujtahid Mutlaq* in the Hanafi school, who every of them has their opinion and frequently differed from Abu Hanifah, on a bunch of issues regarding Islamic law, but the inscription of the school's name to Abu Hanifah. This is none other than he is the founder of the foundation of the systematic method of issuing the rule and as their teacher[95]. Although they have different opinions, they strictly embrace the fundamental principle established by Abu Hanifah when deriving legal rulings.

The Hanafi legal school spread around the world in multiple ways. One of the most influential factors was the Hanafi jurisprudence literature which is taught and disseminated by its dedicating followers. For example, in Isfahan, the Hanafi legal school is spread through the teaching of books of jurisprudence containing the opinions of Abu Hanifah and Zufar. Besides that, there is a report that told the existence of the scholar who migrated to Egypt and then taught Abu Yusuf's legal views in the Qayrawan mosque. Additionally, al-Shaybani's circulating works, such as his Kitab al-Asl, for example, which was studied first in Iraq in the second half of the second century of Hijri and then spread from Iraq to the Maghrib. This included *al-Jam' al-Kabir* and *al-Jam' al-Saghir* circulated in Egypt, and *al-Jam' al-Kabir* also in Iraq at about the same time[96].

Some of Abu Hanifah's disciples certainly occupied a role in spreading the doctrine of his teacher. Zufar b. al-Hudhayl seems to have had a hand in introducing Hanafism in Basra and Isfahan. While al-Shaybani is associated with the beginnings of Hanafism in Raqqa, Rayy, and to some extent also in the Maghreb. However, many of the early Hanafi spreaders in some places, such as Anbar, Isfahan, and Maghrib, taught other schools' methods also without any commitment to Hanafi school[97]. This production and learning in the training school is included in their curricula[98].

In terms of political factors, it also contributed to the spread of the Hanafi school. Regarding its existence in Baghdad, because of its status as a new city, Baghdad at that time did not have a particular school or authoritative legal tradition attached to a specific

[95] ʿAli al-Khafif, *Asbāb Ikhtilāf Al-Fuqahāʾ* (Cairo: Dar al-Fikr al-Araby, n.d.), 257.
[96] Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism*.
[97] Tsafrir, 116.
[98] Dudgeon, "The Hanafis," 72–78.

prominent scholar. Thus, this prevents this school from facing a clash with other schools, especially in the contestation for influence over the people[99], instead that many royal policies draw the history of jurisprudence.

Furthermore, Bani Abbasiyah, for instance, also assisted in the spread of Hanafi legal school with the form of policy implementation such as from the second half of the second century when the legal apparatus underwent a process of centralization with greater subordination of the Qadi to the will of the state[100]. This is reinforced by the fact that the initial spread of the Hanafi school was greatly aided by the existence of Abu Hanifah's two companions who became royal Qadis. Their position as people in the government, either directly or indirectly, made the Hanafi school spread in line with the expansion of the kingdom. Some dynasties, such as the Ottomans, also made the Hanafi school the official school of the state[101]. When the Ottomans came to power, they restricted the judiciary to the Hanafi school, as it was their school, and this helped the spread of the school and its learning in most Islamic countries.

In addition, several social and theological factors were also influential in spreading Hanafi to several parts of the world. As such, it spread to China through Perso-Turkish-speaking Muslims as it has a long history of interactions between both races people. Different conditions of Hanafi spread in central Asia - Mongolia, Siberia, part of Turkmenistan, and Tibet, which was brought and introduced by Persian Sufi Muslims. In Khurasan, as Madelung points out, Hanafism already existed at the time of Abu Hanifah. The Hanafis gained sympathy from the Khurasans because of the conformity and interesting in faith brought by Murji'i in the region[102].

Due to the wide circulation of the Hanafi school and the existence of *tabāqāt* in this group, it coins to several specific terms related to the jurist figures in the books of this school. This term continues to be used and referenced consistently so that if its meaning is not understood well, it can lead to misunderstandings about who the intended individual giving an opinion. Some examples of such terms are *a'immatunā al-thalāthah* which refers to Abu Hanifah, Abu Yusuf, and Muhammad, *al-shaykhān* which refers to Abu Hanifah and Abu Yusuf, *al-Ṣāḥibān* which means Abu Yusuf and Muhammad, *al-mashāyikh* which is the jurists who did not meet Abu Hanifah *al-salaf* which means the Imams from Abu Hanifah to Muhammad, *al-khalaf* which means *al-mashāyikh* to Al Hilwani, *al-*

[99] Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism*, 40.
[100] Tsafrir, 36.
[101] Samy Ayoub, *Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Hanafī Jurisprudence*. (Oxford University Press, 2019).
[102] Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism*, 21.

*mutaʾakhkhirūn* which means *al-mashāyikh* from Al Hilwani to Hafiz Al Din Al Bukhari, etc.

The spread of the doctrine or method of formulating the law of Hanafi to many jurists, however, did not necessarily make them all Hanafis. In his book, Tsafrir divided them into the unquestionable and questionable Hanafi. Those who are included in the unquestionable Hanafi were jurists who really adhere to the Hanafi doctrine or who have studied with Hanafi teachers and had Hanafi students, or who have written books about the Hanafi school of law. In addition, those who do not belong to the unquestionable Hanafi category, or some scholars who adhere to the Hanafi legal method and other methods simultaneously, or other scholars who contradict Abu Hanifah but adopt Hanafi doctrine at the same time, are included in the questionable Hanafi[103].

### B. Ijtihad and Fatwa Making in the Hanafi School

The roots of the Hanafi school's characteristic of using rationality may stem from the way Abu Hanifah taught his students. One of the methods used by Abu Hanifah was to discuss *fiqh* issues with his students through discussion and exchange of opinions instead of using the dictation and memorization method. In the discussion forum, each of his students would give their opinions accompanied by evidence or arguments. This would later be clarified by the accompanying senior council which was usually composed of Abu Hanifah's companions who were already epistemologically established[104].

It was narrated that if a phenomenon occurred or an issue appeared, Abu Hanifah would invite his companions and disciples to gather and consult with them, argue and debate with them, and ask them. He heard what they got from the *akhbar* and *athar*. It is even said that sometimes they can discuss an issue for up to a month or more until the last statement is released and he confirms it[105]. This is an important legacy that his followers continue to preserve for generations later.

Some scholars claim that the principles mentioned by the Hanafi imams in their books of jurisprudence are actually principles they deduce from the rules of *furu'* which refer to the imams of other schools. They often mention and claim that the rule of *furu'* points to the right principles. However, in fact, Abu Hanifah did not leave a detailed rule for establishing a law; nevertheless, he left the general rule of using the postulate.

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[103] Tsafrir, 1–2.

[104] al-Naqib, *Al-Maḏhab Al-Ḥanafī: Marāḥiluhu Wa Ṭabaqātuhu, Ḍawābiṭuhu Wa Muṣṭalaḥātuhu, Khaṣā'iṣuhu Wa Mu'allafātuhu*, 95.

[105] Muhammad Mahrus al-Mudarris Al-Aʿzami, *Mashāyikh Balkh Min Al-Ḥanafiyyah Wa-Mā Infaradū Bihi Min Al-Masāʾil Al-Fiqhiyyah* (Beirut: Dar al-Kutub al-ʿIlmiyya, 2019), 196.

The above allegation may be true because, in fact, the order of use of postulates in the Hanafi school is not much different from other schools. It can be seen that they relied first on the Qur'an and then on the hadith, the opinions of the Companions but with strict criteria and determined standards, and the opinions of consensus of the scholars[106]. In addition, they also used *qiyas, 'urf,* and *istihsan* in their legal deriving method.

In terms of hadith, the Iraqi jurists – Abu Hanifah and his companions – used the hadith *mutawātir* and *mashhūr* as postulates and preferred what was narrated by trustworthy jurists. This is in contrast to the *mujtahid* of Medina – Malik and his companions – who prefer what the people of Medina believe without dispute, and they ignore certain narrations that differ from them. Meanwhile, the other imams use postulates that are narrated by trustworthy people, both jurists and non-jurists, and both those who agree with the view of the people of Medina and those who disagree.

At other times, Hanafi jurists also sometimes use hadith *mursal* and *dhaif* as postulates, and occasionally Prioritize it rather than *Qiyas*[107]. This is because Abu Hanifah often used hadith with several levels of missing narrator. However, they argue that Abu Hanifah knew the attitudes of his teachers, and he understood that they never attributed a tradition to the Prophet unless they were sure that it was from him. So, in this case, Abu Hanifah did not consider the class of weak hadith just because of the missing link[108]. To minimize the weakness of hadith *mursal*, some Hanafi jurists state that the mentioned hadith could only be used with the missing a narrator from companions and followers (*tabi'in*) and followers of followers (*tabi'i al-tabi'in*), not with the missing of people after them. While for employing hadith *daif* rather *qiyas,* this is only if there is a law based on *qiyas*, but, simultaneously, there is another hadith *shahih* that is exactly opposite to *qiyas*[109].

Furthermore, the early Hanafi followers did not use the six major hadith books (*Shahih, Sunan,* and *Jami'*) as sources of hadith for their arguments but used *Musannaf* San'ani, *Musannaf* Abu Shaiba, and hadith books attributed to Abu Hanifah. This led to a conflict between the hadith scholars and the Hanafis. *Ahl Hadith* did not like this action and became contradictory to Hanafis and even became anti-Hanafis. At the same time, the

[106] Husayn ibn Ali al-Saymari, *Akhbār Abī Ḥanīfah Wa Aṣḥābihi*, 1985, 24.
[107] al-Khafif, *Asbāb Ikhtilāf Al-Fuqahā'*, 258.
[108] Mohammed Akram Nadwi, *Abu Hanifah: His Life, Legal Method & Legacy* (Oxford: Interface Publication Ltd., 2010), 61.
[109] al-Khafif, *Asbāb Ikhtilāf Al-Fuqahā'*, 259.

Hanafi people considered anti-Hanafi as a fanatic group and spreaders of hostility as consequences that the hadith could not be accepted[110].

Also, Abu Hanifah clearly said that he took the opinions of the Companions as a postulate if he did not find it in the Quran or Sunnah. He did not leave out the opinions of one of them if there were differences, but he chose one that was in accordance with *qiyas*, and that was closer to the principles and rules. According to him, it is a necessity to put the views of the companions absolutely above analogies. It also requires that he does not give priority to analogies rather than hadiths *mursal* or *dhaif*[111]. However, this was later refuted by al-Karkhi who stated otherwise that it unnecessarily follows the opinions of companions if they contradict *qiyas*[112].

The Hanafi School, like the legal tradition followed by jurists of Kufa in earlier times, shows the use of rationalism to some degree. Its opponents alleged that they had a tendency to apply rational insights to determine the law, even at the risk of contradicting the Prophet's hadith. This is indeed seen in their use in some applied postulates, such as *qiyas* and *istihsan*, which require subjectivity and the use of rationality by their users. *Qiyas* terminologically is to equate something with something else in Sharia because of the similarity of causes between the two[113]. While *istihsan* can be interpreted by moving in giving the law in one matter to another law, because there is a more robust aspect than the previous law.

The practice of *istihsan* has indeed been exemplified by Abu Hanifah and his companions in many cases with the finding that the frequency of use of *istihsan* by Abu Hanifah, Abu Yusuf, and Muhammad is in accordance with the level of seniority. In other words, Abu Hanifah used *istihsan* the most, followed by Abu Yusuf who also accompanied his dependence on tradition rather than his teacher, and then al-Shaibani with his dependence on tradition compared to Abu Yusuf. Abu Hanifa was the one who reported the most use of *istihsan* and reported the slightest rejection of *istihsan*, while al-Shaibani pointed out the opposite, namely that he rejected *istihsan* more often than used it[114].

In addition, the practice of using rationality is also illustrated by the application of *ḥīlah* which is likely to be said to have two sides of the coin, sometimes it can be one way out for complicated problems, but on the one hand, it is also a cunning way to outsmart the

[110] Dudgeon, "The Hanafis," 70.
[111] al-Khafif, *Asbāb Ikhtilāf Al-Fuqahāʾ*, 259.
[112] al-Khafif, 260.
[113] Ahmad al-Zarqa, *Sharḥ Al-Qawāʿid Al-Fiqhīyah*, 2nd ed. (Damaskus: Dar al-Qalam, 1989), 151, https://shamela.ws/book/6330/104#p5.
[114] Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān Al-Dīn 'Alī Ibn Abī Bakr Al-Marghīnānī (d. 593/1197)."

rule of law in Islam. The Hanafi jurists are considered to apply *ḥīlah* a lot in dealing with some *fiqh* issues. However, some *muhaqqiq* from scholars exonerated Abu Hanifah and two of his companions from charges of using *ḥīlah* which was inclined towards allowing haram and prohibiting halal. Instead, the practice of *ḥīlah* attributed to Abu Hanifah is a fatwa relating to the issue of oath in general and divorce in particular, in which there is no tendency to forbid anything true but rather a jurisprudential deduction to get out of a dilemma[115].

### C. Factors That Influence Hanafi Jurists in Their Opinions

In this sub-chapter, the discussion tries to explore some factors that influence each jurist's decision to lean towards certain opinions, especially from the Hanafi school, which is famous for having differences and multiple opinions within its group. These factors include intellectual chains and ideological orientation, knowledge and experiences, individual feelings and subjectivity, etc. Before that, it will start by exploring the existence of *tabaqat* (classes) in the Hanafi legal school.

The existence of *tabaqat* in a school, especially Hanafi, is considerably essential because through the study of *tabaqat* the status and condition of the jurist whose opinion is being studied. The meant condition of a jurist is not only knowing his name and genealogy but also it includes his position in presenting a problem, his degree of knowledge about the matter, and his class among the classes of jurists. Each level in *tabaqat* will show how broad the jurist's insight is, especially if he includes those who disagree or also when he did *tarjih* on some opinions.

In the Hanafi school, the jurist class has several versions, such as the version of Ibn Kamal Pasha who divided into seven classes which was later also followed by Ibn Abidin, and al Dahlawy who divided into three classes, and Abu Zahra who divided into four classes. However, due to the reason of its fame and having more divisions, the version initiated by Ibn Kamal[116] is preferred.

Typically, according to Ibn Kamal quoted in *Radd Mukhtar*[117], the classes in the Hanafi jurist are divided into 7. The first class is the level of mujtahid in the sharia, such as the four imams of the school. Then the second class is the mujtahid group in the school containing Abu Hanifah's disciples who are able to produce laws from a proposition using

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[115] al Qattan, *Tārīkh Al-Tashrīʿ Al-Islāmī*, 336.
[116] al-Naqib, *Al-Maḏhab Al-Ḥanafī: Marāḥiluhu Wa Ṭabaqātuhu, Ḍawābiṭuhu Wa Muṣṭalaḥātuhu, Khaṣā'iṣuhu Wa Mu'allafātuhu*, 163–90.
[117] Muhammad Amin Ibn Abidin, *Ḥāshiya Radd Al-Muḥtār, ʿalá Al-Durr Al-Mukhtār: Sharḥ Tanwīr Al-Abṣār*, 2nd ed. (Egypt: Sharakah Maktabah wa Maṭbaʿat Muṣṭafá al-Babi al-Ḥalabi wa Awladih, 1966), https://shamela.ws/book/21613/64#p9.

the principles established by Abu Hanifah. This group, although it sometimes has differences of opinion in terms of *furu'*, is still guided by the fundamental rules. The third group is the mujtahid group who formulate laws from problems that have not been discussed by the mujtahid school which they cannot contradict from the level above either in matters of *furu'* or principal. The fourth group is jurists who are experts in performing legal *takhrij* even though they are incapable of ijtihad. The ability to detail general and vague statements from two groups and make possible decisions on two matters is a feature of jurists in this group. The fifth group is the jurists who can distinguish one opinion more precisely than others (*tarjih*). The sixth group is jurists who can only distinguish between the strength and weakness of an opinion and the status of history between *zhahir* and *nadir*. the latter group is the one who cannot perform the mentioned of the six previous groups.

Of the seven groups above, the most potential for causing differences in opinion is sourced from the top three classes who are entitled to do *ijtihad* (legal rationalization for breaking with precedent and de novo determinations). However, the rest of the classes also still have the potential to do so. This is reflected in several opinions that emerged differently between Abu Hanifah and his companions and students, especially Abu Yusuf and Muhammad. However, it may not close the possibility of the mujtahids who had the ability to perform *takhrij* to have variation and alteration of legal opinions, and through the author-jurist (Hallaq's terms) the tradition of the madhhab also likely grow and develop either rapidly or gradually[118]. For this, the group of the below classes simply followed the opinions of the mujtahids above them and then spread into several pivots depending on their suitability and needs of an opinion.

Moreover, in the Hanafi school, there is also the term known as the *zhahir* and the *nadir* of the narration which contains the opinions of the school's imams. These narrations are only categorized from the opinions of Abu Hanifah and his disciples, especially Abu Yusuf and Muhammad. For *zhahir* narration is commonly found in the six main books of Muhammad al Shaibani referred to due to a strong chain of narrations. While the *nadir* narration is usually in 1) the books of Muhammad al Shaibani aside from the six mentioned and 2) books other than the book of Muhammad[119].

The matters of Islamic law, which is categorically as *nawazil*, also open up opportunities for distinctions in intra-Hanafi schools. Not only some of the *nawazil* phenomena to which its fatwa issued are limited to those which there is no narration from the predecessor mujtahids, but many ramifications of opinion could also cause, that this is

[118] Hallaq, *Authority, Continuity and Change in Islamic Law*, 194–208.
[119] Ibn Abidin, *Ḥāshiya Radd Al-Muḥtār, ʿalá Al-Durr Al-Mukhtār: Sharḥ Tanwīr Al-Abṣār*, 69.

illustrated by some agreement of the jurists to differ from other consensus by considering the existence of some postulates and causes arising[120].

This thesis assumes that the flexibility of the Hanafi school in giving laws without being strictly bound to some degree is derived from their concept of freedom. The rules relating to the rights and duties of a person, according to the Hanafi followers, consist of two conditions: reason and freedom. Reason related to the understanding of religious discourse and freedom in choosing attitudes on the discourse. One of the main factors before a person chooses is awareness and prioritizing one choice over another. Hanafi scholars put forward an appropriate theoretical treatment stating that maturity of mind is a condition for maturity of choice, and that quality of choice is an indicator of maturity of choice[121]. In some fatwa collection books, authors will argue why they prefer certain opinions, for example, because they consider those arguments to support certain opinions. Also, it is possibly because their arguments are more potent or because they think that the opinions are better and suited to changing social circumstances. Such favored views can be generally accepted and then incorporated into standard textbooks. But in general, these differences of opinion are juxtaposed without any indication of which opinion is more correct[122].

Furthermore, some jurists in Kufa show a tendency to choose to have a close relationship with a particular jurist and to behave bigotedly towards him. In a sense, if a person has appointed a scholar as his mentor, then he will show loyalty by learning from him even if he stops learning and moves to another scholar when his mentor dies. For example, when al-Nakha'i died, some of his disciples did not take hadith other than him. The same thing was shown by Hammad b. Abi Sulayman and Abu Hanifah when his mentor died by not looking for another mentor. Slightly different, Abu Yusuf's loyalty to Abu Hanifah was shown by leaving Abu Laila's circle when he began to study with him[123]. The practice of selecting *sanad* chains through certain teachers based on suitability and learning loyalty to them becomes a preference that can influence and give nuance to the intellect of a jurist

[120] Al-Aʿzami, *Mashāyikh Balkh Min Al-Ḥanafiyyah Wa-Mā Infaradū Bihi Min Al-Masāʾil Al-Fiqhiyyah*, 179.
[121] Abdulla Iter, "Mafhūm Al-Ḥurriyah Fī Al-*Fiqh* Al-Ḥanafī: Al-Ḥurriyah Fī Ufuq Al-Maṣāliḥ Wa Al-Ḥuqūq," *Journal of Islamic Ethics* 5, no. 1–2 (2021): 164.
[122] Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire."
[123] Sohail Hanif, "A Tale of Two Kufans: Abū Yūsuf's Ikhtilāf Abī Ḥanīfa Wa-Ibn Abī Laylā and Schacht's Ancient Schools," *Islamic Law and Society* 25, no. 3 (2018): 186–87.

Freedom of rational use and detachment of school ties are in line with Brannon Wheeler's compelling argument. He argued that in fact the legal decisions summarized in Abu Hanifah's circle were not intended to be recorded and followed by his followers, but the forum was only to train jurists afterward and disseminate forms of reasoning and legal formulation based on established principles and foundations[124]. Thus, it is not surprising that many branch opinions appear to be contrary to the opinions of the main mujtahids because this school upholds freedom of reason and thought process. For this reason, it is no exaggeration that these two elements – the principle of the school and rationality – become the theoretical doctrines that characterize the Hanafi school[125].

In addition, the existence of various opposing theological factions within the Hanafi school aroused hostility among them. This friction prompted the jurist to choose who he would affiliate with. However, this is not absolute because despite the theological tensions between them, sometimes some Hanafi jurists do not show disagreement and still give respect, especially in the relationship between teacher and student. The non-theological religious knowledge of a Hanafi scholar is not considered flawed because of his dogmatic views. The teaching of Hanafi legal doctrine continued, as mentioned above, almost without interruption, and when viewed from non-theological scholarship, the theological contest did not affect the Hanafi teacher-student relationship.

Social contexts are undeniably a decisive factor in the formulation of Islamic law. In fact, some schools consider a large portion of them so that *fiqh* could be in line with social conditions. This is seen in the Hanafi madhhab, in which its jurists try to uphold the Hanafi precedent law. However, if a part of this law is considered inappropriate due to changes in the environment or different social values, then it will be changed into a more tolerable statement.

If we trace back to this attitude, it will illustrate when Abu Hanifah takes the custom as evidence when there is no *naṣṣ* (text) and sometimes as an explanation for some speculative *athar* (narration). This is a prototype for the late *ahl al-takhrij* (scholars of inference) in the Hanafi school not to be fixated on the opinions of the predecessor mujtahids and to prioritize tradition as long as the tradition does not contradict the existing *naṣṣ*. Thus, this becomes legal in the Hanafi madhhab if a mufti has a view that is different

[124] Hanif, 208.
[125] Hanif, "A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān Al-Dīn 'Alī Ibn Abī Bakr Al-Marghīnānī (d. 593/1197)," 353. 3

from what has been written in their predecessors' books and is not considered to be out of the madhhab[126].

There are several external aspects that can affect the change of opinion in the madhhab. One of the reasons for their disagreement with jurists may have originated from the application of an opinion on a phenomenon. However, this also has an element of jurist subjectivity as the application of a fatwa to an issue requires precision which can be different for each jurist. In many cases, their divergences in opinion can also be triggered by differences in defining standards whom the Imam leaves the determination of the whole substantive law to the perception of the person affected by the calamity, as long as Sharia does not determine it.

The existence of something considered harmful, occasionally, also prompted jurists to adjust the rules of jurisprudence. It is based on the prevention of harm that comes. In one case, it may be that a jurist does not pay much attention to this because he feels that it will not bring difficulties or dangers, but in another situation, it could be that this - the consequences that bring danger - become one of the determining factors for a jurist so they prioritize avoiding. However, this is only a difference related to changing times, and it is not a difference related to postulates and evidence, nor is it due to differences in traditions but only circumstances[127].

An example of the influence of the social context forming differences of view in the Hanafi school is customs. The customs and components of the community in a different area are valid legal considerations according to them. In one of the *fiqh* discussions, such as accidental murder and compensation, three Hanafi groups based on the region emerged; Iraq, Balkh, and Bukhara have different opinions. Balkh jurists felt that the opinions held by the Iraqi population could not be applied in their region because of the different social structures of society that refer to the number of family members and solidarity among them. A different stance is shown by the Bukhara scholar who said that there is a social structure in some societies that have similarities with the Arabs so that the rules related to murder can still be applied[128]. In general, the legal activities of the Balkh and Bukhara groups often ignored the legal opinions of the founders of the Hanafi school or also chose between the

[126] Al-Aʿzami, *Mashāyikh Balkh Min Al-Ḥanafiyyah Wa-Mā Infaradū Bihi Min Al-Masāʾil Al-Fiqhiyyah*, 204.
[127] al-Khafif, *Asbāb Ikhtilāf Al-Fuqahāʾ*.
[128] Eyyup Said Kaya, "Continuity and Change in Islamic Law The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century," in *The Islamic School of Law: Evolution, Devolution, and Progress.*, ed. Peri Bearman, Frank Vogel, and Rudolph Peters (Cambridge: Harvard University Press, 2005), 31.

opinions which made it possible to apply it on its territory, based on a comparison between their conditions and those of Iraqi society at the end of the eighth century.

Actually, the mutual attraction between the opinions of madhhab and tradition in society has been found a middle way. In Wael Hallaq's writings, he summarizes from one of the Hanafi jurists, Awzajandi, that if the issue has been discussed in the *zhahir* narration and shows conformity, then the opinion should be taken. Meanwhile, if the matter raises a dispute, it is returned to the opinion of Abu Hanifah rather than his two disciples. If the difference of opinion is indeed necessary because of the demands of circumstances, then it is still accepted on the grounds of changing conditions of society (*li taghayur ahwal al nas*)[129]. The jurists consider themselves not to oppose what their predecessors have expressly concluded, but rather, they are only subjecting it to common custom as long as no text contradicts the common custom and is not based on the unambiguous *naṣṣ* of the Qur'an and the hadith. Likewise, Ibn 'Abidin stated that necessity (*darura*) requires Hanafi jurists to rethink some legal issues due to the changing times (*ikhtilaf 'asr wa zaman*), current corruption (*fasad ahl al-zaman*), and communal expansion needs (*'umum al balwa*)[130].

In the Mamluk and Ottoman periods, a trend emerged called *tatabbu' al-rukhas* or *ittibā' al-rukhas*. This term is used to refer to decisions to use opinions across schools within the Sunni group that are considered most appropriate to apply. Actions such as combining two or more different opinions for the same matter (*talfiq*) can also be included in this practice. However, this trend for those who oppose it and do not allow it to be applied to certain schools say that the Action is *ittibā' al-hawā* or Action that only follows the desires of lust[131].

This practice first emerged in the Mamluk period and later became a trend in the Ottoman period. Those who support this movement say that their motivation to spread it is to help and facilitate religious leaders in the countryside who may be far more religious than the jurists who are at the center of civilization. In addition, those who carry this trend prioritize legal experts to accommodate the needs of the community with suitable opinions in their area rather than having to rigidly follow the methodology of a certain school by complying with the rules that are built[132].

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[129] Wael B. Hallaq, "From Fatwās to Furū: Growth and Change in Islamic Substantive Law.," *Islamic Law and Society* 1, no. 1 (1994): 49–50.
[130] Dudgeon, "The Hanafis," 76.
[131] Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse University Press, 2015), 63.
[132] Ibrahim, 64.

## D. Conclusion

This chapter has covered topics concerning the Hanafi School in general. In more detail, the exploration in this chapter focuses on several discussions, such as the Hanafi school's emergence and development, the *ijtihad* model of the Hanafi jurists and its characteristics, and the factors that influence Hanafi followers in leaning toward an opinion. This chapter reveals that the existence of classes or levels (*tabāqāt*) in the Hanafi school, the concept of freedom embraced, and the use of postulates in legal methodology (*ushul al-fiqh*) related to subjectivity, and the influence of social context affect the existence of diverse and substantive opinions in the Hanafi school. All of these things are interconnected, and sometimes, one of the elements is more emphasized in groups or certain Hanafi jurists.

This discussion corroborates Ahmed Atif's[133] study about structural interrelation in Islamic law by choosing a sample of literature from different schools. What he calls extra-textual legal sources, which include juristic consensus, utility, and custom—all of which help jurists to make decisions in cases where textual sources do not have clear answers to existing questions. However, the difference between these studies is that this chapter is more specialized in the Hanafi school, with more global references and a more detailed study of various dimensions. In the end, this chapter will provide a big overview of the method of determining law and the factors that affect it, which will later become the frame and foundation of the next chapter; thus, it will be easier to understand the flow and logic as well as the background of the development of *fiqh* rules related to the house of worship.

[133] Ahmad Atif Ahmad, *Structural Interrelations of Theory and Practice in Islamic Law: A Study of Six Works of Medieval Islamic Jurisprudence* (Leiden: Brill, 2006), 189.

## CHAPTER IV
## THE SHIFT OF HANAFI OPINION REGARDING HOUSES OF WORSHIP

The status of land became a substantial thing in the past in Islam. Land, in one part, contributes as the primary source of state revenue; it can also show various pictures of the relationship between the ruler and his people[134]. By knowing the status of the land of an area, the ruler could comply with regulations differently either in the Muslim city or cities conquered by Muslims both by treaty or by force, especially for dhimmi. The division of *Dar al-Islam* (Islamic territory) and *Dar al-Harb* (enemy territory) itself is a relic of war and conquest activities in the past and has nothing to do with the Quran and Hadith. The motive and interest of Muslims at that time in dividing the territory into *Dar al-Islam* and *Dar al-Harb* was to unite forces and categorize the territory to be controlled[135]. In addition, the classification of the status of citizens and regions at that time was indeed commonplace, which was also found in the rules of the Byzantine Empire[136]. Furthermore, the existence of *fiqh* is to provide principles, rules, and laws related to Muslim relations with others as well as relations with non-Muslims[137].

When the *Dar al-Harb* is annexed by Muslims by force, according to al-Kasani, Muslims have the right to manage it and become the full property of Muslims[138], including in applying the laws that exist in Islam or Sharia. The forcibly captured city has changed its status to belong entirely to Muslims – including the houses of worship in it – and Muslims have the right to manage it, including spreading religious values, applying Sharia law, and carrying out worship rituals such as Friday prayers, Eids, and the enforcement of *hudud* (restrictive statutes). Therefore, in order to prevent the enforcement of other rules that are contrary to Islam and avoid the dualism of the application of rules, non-Muslims are prohibited from performing worship because this is considered to promote their religion and a form of insult to Muslims[139].

This is the reason why the rules related to the city that was captured by force are seen as disregarding the welfare of the dhimmi and regulating intolerably. For the same

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[134] Muhammad al-Marakeby, "Could Women Own Agricultural Land? Rethinking the Relationship of Islamic Law and Contextual Reality (Wāqiʿ)," *Die Welt Des Islams*, December 1, 2021, 4, https://doi.org/10.1163/15700607-61040015.
[135] Wahbah Zuhaylī, *Āthar Al-Ḥarb Fī Al-Fiqh Al-Islāmī* (Damaskus: Dar al-Fikr, 2019), 193.
[136] Zuhaylī, 193.
[137] Al-Qardhawi, *Fiqh Al-Jihād: Dirāsah Muqāranah Li Aḥkāmih Wa Falsafatih Fī Ḍawʾ Al-Qurʾān Wa Al-Sunnah*, 867.
[138] ʿAlaʾ al-Din al-Kasani, *Badāiʿ Al-Ṣanāiʿ Fī Tartīb Al-Sharāiʿ* (Damaskus: Dar al-Kutub al-Ilmiyah, n.d.), 114, https://shamela.ws/book/8183/1845#p7.
[139] al-Kasani, Vol.4, 176.

reason, this provision did not apply in villages because, at that time, Sharia was only enforced in cities without villages[140]. In other words, the dhimmi still could practice their religious rituals in villages and places that are not part of the Muslim city or in their villages[141]. In addition, areas seized by Muslims by force can be categorized as part of the spoils of war, although based on the decree of Umar b. al-Khattab that its status is as a waqf for all Muslims[142].

On the other hand, in the areas controlled by peace treaties, the binding rules related to dhimmis appear to be more lenient and give them freedom, including in showing their religious rituals and the existence of houses of worship. Dhimmis who submit peace treaties with Muslim rulers have the option of paying one of several types of payments, such as *al-kharaj* (a tax on land paid by a non-Muslim that he is supposed to administer for agriculture but does not[143]), *al-hudnah* (an agreement of armistice for a certain period that sometimes requires compensation[144]), and *al-jizyah* (a tax taken from non-Muslims in exchange for protection against them[145]) in order to guarantee security while living in Muslim territory. Those who have proposed peace agreements, are recognized their status and enjoy rights as citizens, besides they also promise to coexist together in the homeland peacefully and safely and follow the agreed rules. Referring to Ibn Hajar al-Asqalani's explanation, the peace contract proposed by the dhimmi has the same legal force, whether it comes from one or more people or an elite or ordinary people. So if one of the Muslims has agreed to provide protection and security to non-Muslims, then no one Muslim can cancel it[146].

In addition, the manifestation of *sulh* (treaty) is that there is mutual respect between both sides of the religion and their ability to become citizens bound by Islamic rules, which they share the same rights and obligations as Muslims. This could be said to be a reconciliation that tends towards peace and stability on both sides. On the contrary, *'anwah* (force) is a symbol of rejection of peace, opposition to the established rules, and a tendency to go to war and carry out resistance. In the context of religious competition, they are people

[140] Ibn Himam, *Fath Al-Qadir* (Dar al-Fikr, n.d.), 59.
[141] Zaydan, *Aḥkām Al-Dhimmīyyīn Wa Al-Mustaʾminīn Fī Dār Al-Islām*, 100.
[142] Maʿzuzah Al-Zaytawi and Salma Hawsawi, "Tanẓīmāt Wa Taqṣīmāt Al-Arāḍī Zamān Al-Khalīfah ʿUmar Ibn Al-Khaṭṭāb – Raḍiya Allāhu ʿAnhu," *Majallah Al-Ittiḥād Al-ʿĀmm Lil-Āthāriyyīn Al-ʿArab* 10, no. 1 (2009): 408–9, https://jguaa.journals.ekb.eg/article_2687.html.
[143] al-Ḥajah Najaḥ al-Ḥalabi, *Fiqh Al-ʿIbādāt ʿalá Al-Madhhab Al-Ḥanafī*, n.d., 1431.
[144] Al-Qardhawi, *Fiqh Al-Jihād: Dirāsah Muqāranah Li Aḥkāmih Wa Falsafatih Fī Ḍawʾ Al-Qurʾān Wa Al-Sunnah*, 819.
[145] Badr al-Din al-Asadi Ibn Qaḍī Shuhbah, *Bidāyat Al-Muḥtāj Fī Sharḥ Al-Minhāj* (Jeddah: Dār al-Minhāj lil-Nashr wa-al-Tawzīʿ, 2011), Vol.4, 299.
[146] Ibn Ḥajar al-ʿAsqalani, *Fatḥ Al-Bārī Bi Sharḥ Al-Bukhārī* (Cairo: al-Maktabah al-Salafīyah, n.d.), Vol.4, 86.

who have fanaticism in their religion. If the city is annexed by force, the dhimmi is allowed to practice his religion without restrictions; this will show the powerlessness of Islam to the conquered opponent[147]. On the other hand, there is a possibility that houses of worship will be used as a place to sow seeds of hatred and cynicism, to incite and broadcast propaganda, and even become the beginning of rebellion against governments that have different beliefs.

If there is a debate about the status of the territory, whether the city is conquered peacefully or by force, then the ruler must be discerning in determining it. Territorial status can be known from several pieces of evidence, such as the narration of jurists and hadith narrators or from testimony (*shahadah*), each of which has a different level of validity. Broadly speaking, if there is a difference of opinion between the narrations, then the ruler must be more inclined to determine that the territory is annexed through a peace treaty. However, this will be different if there is a testimony that the territory was conquered by force, so if there is a dispute with any evidence, the ruler must still designate the territory as an *'anwatan* through the testimony evidence[148].

This chapter employs Wael Hallaq's[149] framework as the initial trajectory where he states that the institutionalization of Islamic law always involves reasonable defense and calculative steps, both opinions that continue the predecessor rules and new opinions that are different from the rules adopted by the followers of the madhab. By compiling the opinions of Hanafi jurists across the boundaries of territory and period, this discussion tries to capture the shift in the judicial opinion of Hanafi jurists related to Dhimmi's house of worship.

### A. Early Hanafi

Regarding the views of the founder of the Hanafi school on houses of worship in the Islamic territory, a brief discussion has been covered in the previous chapter. In cities built by Muslims, there is a narration from Hasan b. Ziyad who stated that Abu Hanifah allowed the dhimmi to build his house of worship outside or on the outskirts of cities, in villages, and in agricultural green areas. In accordance with him, Muhammad b al-Hasan, in the book of *al-Siyar al-Kabir*, states that dhimmi are forbidden to build any of their houses of worship in the land owned by Muslims except in villages[150] or other places that

[147] 'Allam, "Shubhāt Ḥawl Bināʾ Al-Kanāʾis."
[148] Niẓam al-Din al-Barahburi, *Al-Fatāwā Al-ʿĀlamkīriyyah Al-Maʿrūfah Bi Al-Fatāwā Al-Hindīyyah*, 2nd ed. (Cairo: al-Maṭbaʿah al-Kubrā al-Amīrīyah, n.d.).
[149] Hallaq, *Authority, Continuity and Change in Islamic Law*.
[150] Muḥammad al-Sarakhsi, *Sharḥ Al-Siyar Al-Kabīr* (Al-Sharikah al-Sharqīyah li-al-I'lānāt, 1971), 1529.

are not categorized as cities. There, they are not prohibited from carrying out all their worship rituals, including building the houses of worship as facilities[151]. As for Abu Yusuf, in his book *al-Kharaj*, he narrated that in all Muslim cities, either built by them or conquered by force or treaty, dhimmis are not allowed to build houses of worship or show their rituals and traditions publicly. However, the city conquered by treaty also had the exception that the dhimmis had the right to build houses of worship according to their covenant[152].

The difference in views of the founders of this school regarding the establishment of houses of worship may be due to several features. First, regarding the meaning of the term *qura* (village), in the specific context, it refers to the narration only of the Kufa villages at that time[153], where the majority or even all of the population was dhimmi, so this implied the number of comparisons between Muslims and dhimmis population in the village as consideration to establish houses of worship. On the other hand, in a more general context, the term *qura* could be interpreted as the opposite of *misr* (city) which in the book of encyclopedia of *fiqh* is defined as a large city in which there are streets, markets, government service units, and there are law enforcers who protect and become a place of complaint for the community[154], so that the *qura* is a place where the above elements are not fulfilled. Second, the difference in the narration used as a postulate. Abu Yusuf perhaps emphasized the use of the hadith of the Prophet, "*Lā khiṣā' fī al-Islām wa lā kanīsah*", on the other hand, Abu Hanifah ignored it as a postulate and was more inclined to use *istihsan*.

This view can be said to be the opinion of the Hanafi school centered in Iraq. Then, in general, this view -with various opinions related to other *fiqh* issues- spread along with the expansion of the Hanafi school to various regions. There are two other branches of the Hanafi school that are pivotal other than in Iraq. Namely the Balkh branch and the Bukhara branch. If Baghdad is the center of the Hanafi school in Iraq, then Balkh is the center of Khurasan, and Bukhara is the center of the school in Transoxania[155]. Balkh has produced many famous jurists such as Abu Muti' al-Balkhi (d. 802), Abu Bakr al-Iskaf (d. 946), Abu Qasim al-Saffar (d. 938), Abu Ja'far al-Hinduwani (d. 973), Abu Hanifah al-Saghir (d. 986), Abu Laith al-Samarqandi (d. 983). In contrast, Bukhara has produced scholars such as Abu

[151] al-Sarakhsi, 1533.
[152] al-Shurunbulali, *Al-Athar Al-Maḥmūd Li-Qahr Dhawī Al-'Uhūd Al-Jaḥūd*, 20–21.
[153] Ibn Himam, *Fath Al-Qadir*, 59.
[154] "Arshīf Multaqá Ahl Al-Ḥadīth - Ṭāmmah Jadīdah Al-Qaraḍāwī Yujīz Bināʾ Maʿābid Al-Kufr Fī Bilād Al-Islām Wa Fī Jazīrat Al-ʿArab," n.d., 294, https://al-maktaba.org/book/31616/24296#p4.
[155] Kaya, "Continuity and Change in Islamic Law The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century."

Hafs al-Kabir (d. 832), Abdullah b. Muhammad Al-Sabadhmuni (d. 951), Abu al-Fadl al-Bukhari (d. 1021), and Abu Ali al-Nasafi (d. 1114). The Hanafi jurists who spread to the circle of Balkh and Bukhara, show the spread of religion and law through a chain of transmission by isnad and genealogy[156].

**B. Hanafi in Balkh**

The jurists of Balkh have their own views differing from the majority of Hanafi jurists regarding the existence of houses of worship for dhimmi. Their *ijtihad* seems to be one of two categories: 1) problems that have been discussed by the previous jurists, but the jurists of Balkh consider the need to adjust to their conditions, or 2) problems that have been discussed by their predecessor and the scholars of Balkh only choose between the existing opinions. The *ijtihad* process of the Balkh jurists in this matter reflects their interpretation of some narratives or *naṣṣ* and the suitability of certain narratives with an issue.

The transmission of the opinion of the Iraq Hanafi to the jurists of Balkh regarding the construction of non-Muslim houses of worship in *Dar al-Islam* has changed. Although both of them forbid dhimmis to build their house of worship in the middle of the Muslim city or the courtyard, the Balkh jurists also prohibit the construction in the village or on arable land. According to Abu Qasim Al-Saffar, this is because the rural conditions in Balkh are different from those in Kufa. If in Kufa, the majority of the countryside is inhabited by Jews and Shia Rafidah, it makes sense that they can still build their houses of worship to carry out their rituals. Meanwhile, the conditions in the Balkh countryside are inhabited by many Muslims in which there are also many Muslim activities such as Friday prayers, religious learning, and religious lectures, like in the city of Baghdad[157].

The view of the Balkh scholar was explained by al-Kasani (d. 1191) as he argued that Abu Hanifah only allowed it (establishment of a place of worship) in his time because, at that time, most of the inhabitants of the region were dhimmi from the Zoroastrian. Thus, the main goal of the prohibition is to prevent Muslims from insulting and disparaging. If, at a certain time, the rural conditions have changed to be like a city, then the law becomes the same as the law in the city[158].

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[156] Azyumardi Azra, *The Origins of Islamic Reformism in Southeast Asia: Networks of Malay-Indonesian and Middle Eastern 'Ulama in the Seventeenth and Eighteenth Centuries* (University of Hawaii Press, 2004), 149.
[157] Muḥammad al-Sarakhsi, *Al-Mabsūṭ* (Cairo: Maṭbaʿat al-Sa'ādah, n.d.), Vol.15, 134.
[158] al-Kasani, *Badāiʿ Al-Ṣanāiʿ Fī Tartīb Al-Sharāiʿ*, Vol.4, 176.

Apart from the influence of socio-geographical and theological conditions, this change shows that this view of *fiqh* is due to its adjustment to different economic conditions. Iraq, which is a fertile region and a metropolis, provides stable economic strength for its people, coupled with the fact that many non-Muslims inhabit it, which influences its jurists to be more flexible on matters. On the other hand, the Balkh region is classified as an arid land with almost all Muslim communities. This assumes to make the jurist more harsh and rigid in seeing the problem of the existence of non-Muslim houses of worship. According to the Balkh jurists, using the logic that no dhimmis were living in Central Asia at that time and that Muslims lived only in small villages, then there were no religious rights and freedoms for the dhimmi as were given by the Kufa jurists because of the different condition of both regions[159].

Generally, some of the issues that prompted the Balkh jurists to differ from the Hanafi school opinion, as summarized by al-A'zami, include problems or phenomena that are completely new (*nawazil*), problems that the fatwa has been issued by Hanafi jurists before but Balkh jurists disagree with taking the opinions of other schools (doing *talfiq*), problems that have been discussed by previous jurists but Balkh jurists have their own *ijtihad* which aims to adjust to their conditions, problems that have been discussed by Hanafi scholars and Balkh jurists only choose between existing opinions[160].

### C. Hanafi in Bukhara

The different attitude has been shown by Bukhara jurists from their colleagues in Balkh. The Bukhara jurists argue that the establishment of houses of worship for dhimmi in rural and remote areas is not prohibited[161], one of which is as said by Imam Abu Bakr b. Fadl[162]. The reason behind that is that the construction of churches and convents is basically allowed because building and construction activities are allowed in Islam. Therefore, if Muslims carry out the construction, then it is permissible. However, the prohibition is due to the purpose of building a place for disobedience, so it becomes *haram* for other reasons. Therefore, because it became haram for other reasons, they were forbidden to build such places in the big cities. However, since it is basically allowed, they are not prohibited from

[159] Mouez Khalfoui, "Together but Separate: How Muslim Scholars Conceived of Religious Plurality in South Asia in the Seventeenth Century," *Bulletin of the School of Oriental and African Studies* 74, no. 1 (2011): 90.
[160] Al-Aʿzami, *Mashāyikh Balkh Min Al-Ḥanafiyyah Wa-Mā Infaradū Bihi Min Al-Masāʾil Al-Fiqhiyyah*, 821–23.
[161] Barhan al-Din al-Marghinani, *Al-Hidāyah Fī Sharḥ Bidāyat Al-Mubtadī* (Beirut: Dār Aḥyāʾ al-Turāth al-ʿArabī, n.d.), 404.
[162] al-Barahburi, *Al-Fatāwā Al-ʿĀlamkīriyyah Al-Maʿrūfah Bi Al-Fatāwā Al-Hindīyyah*.

building it in the villages[163]. In fact, Ibn Mazah al-Bukhari (d. 1220) also stated that if a non-Muslim had a church in a village, then the non-Muslim villagers built many buildings, and its progress resembles that in the city, then according to most of the narration, they were not ordered to destroy it[164].

The opinion of the Ibn Mazah contradicts the provisions mentioned by al-Sarakhsi (d. 1096). Regarding the loss of the boundary between cities and villages, the logic is that if the development is carried out massively, it means that the economy of the area is improving, which may indicate that many people (especially non-Muslims) are coming or this situation will actually invite many non-Muslims to come. Meanwhile, in Sarakhsi's view, if the number of non-Muslims increases to exceed the number of Muslims, then they are ordered to move to a different place from the Muslims, with the condition that the place must ensure their safety from crime and not disturb the Muslim community[165]. Nevertheless, there are also some Bukhara and the surrounding area jurists who prohibit the establishment of non-Muslim houses of worship in the countryside as the view of the Balkh jurists[166].

Interestingly, there was a time when the book Burhan al-Din b. Mazza al-Bukhari al-Marghinani (*al-Muhit al-Burhany*) disappeared from circulation and is forbidden to be quoted, according to Ibn Nujaym (d. 1563). The reason is that it is not allowed to quote from unfamiliar books[167]. Furthermore, a specific and common rule of the period was that all Hanafi jurists had to use *zahir al-riwaya* and *nadir al-riwaya* (i.e., all previous traditions of Hanafi law) and recognized books only[168]. However, according to al-Luknawi (d. 1887), the prohibition of a fatwa from Burhan al-Din al-Marghinany is only because the book is unfamiliar, lost, and not circulated, not because of problems with its contents or issues with the author. When the book is found elsewhere as a reference, and many cite it, then the book is still worthy of being used as a source. This is a matter that varies depending on the era and region[169].

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[163] Burhan al-Din ibn Mazah al-Bukhari, *Al-Muḥīṭ Al-Burhānī Fī Al-Fiqh Al-Nuʿmānī* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2004), Vol.2, 360.
[164] al-Bukhari, Vol.2, 360.
[165] al-Sarakhsi, *Al-Mabsūṭ*, Vol.15, 134.
[166] Akmal al-Din al-Babarti, *Al-ʿInāyah Sharḥ Al-Hidāyah* (Cairo: Shirkat Maktabah wa-Maṭbaʿah Maṣfā al-Bābī al-Ḥalabī wa-Awladuh, 1970), Vol.6, 59.
[167] ʿAbd al-Ḥayy al-Luknawi, *Al-Fawā'id Al-Bahiyyah Fī Tarājim Al-Ḥanafiyyah* (Cairo: Maṭbaʿat al-Sa'ādah bijawār Maḥāfiẓat Miṣr, li-Ṣāḥibiha Muḥammad Ismāʿīl, n.d.), 206.
[168] Dudgeon, "The Hanafis," 72.
[169] al-Luknawi, *Al-Fawā'id Al-Bahiyyah Fī Tarājim Al-Ḥanafiyyah*, 207.

In terms of demographics, the population of Bukhara does have similarities with Muslim life in Kufa. They usually live in large-scale cities[170] so the similarity to the conditions of Muslims in the Middle East allows them to apply and develop the same laws. Although Bukhara and Balkh have somewhat different demographic conditions, they have many similarities in tradition and culture. Moreover, for centuries, they have lived in close contact with their cities[171].

These differences, in my opinion, lie only in the jurist's tendency to be affiliated with whom and his desire to quote from a particular jurist before. Thus, both the jurist groups that allow the establishment of dhimmi houses of worship in the countryside and those who prohibit it have a reference that is pivotal to the founders of the Hanafi school. As stated in the book *al-Ijarat*, it is said that they are not forbidden, while in the book *al-Siyar*, it is stated that they are forbidden to build houses of worship in all places. Similarly, Hasan b. Ziyad narrated from Abu Hanifah that they were forbidden, and this view was taken by the majority of scholars[172].

### D. Hanafi in the Ottoman Empire

Ottoman Hanafism had a certain style that was characterized by imperial laws that were very rigid, centralized, systematic, and controlled by the state. This has a historical precedent with al-Shaybani who claimed that the interpretation of the Qur'an belonged to the state, and the caliph Harun al-Rashid (d. 809) who decided controversial legal cases or in other words, the caliph is the "supreme authority in the system"[173]. In addition, the judges could only adjudicate on what the Ottoman Dynasty considered the "most authoritative" Hanafi opinion unless there was an express order from the Sultan given so that the judges had little room for personal discretion[174]. The jurists of the Ottoman era were trained by the state in schools whose systems were established by the state, so they had their own primary references.[175].

Regarding the *fiqh* madhhab, the Ottomans who considered Hanafi the official madhhab of the state certainly followed the provisions and rules. Although they are more

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[170] Ira M Lapidus, *A History of Islamic Societies*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 362.
[171] Atkin Muriel, "Religious, National, and Other Identities in Central Asia," in Muslim*s in Central Asia: Expressions of Identity and Change*, ed. Gross Joanne (Durham: Duke University, 1992), 50.
[172] Fakhr al-Din Qaḍikhan, *Fatāwá Qāḍīkhān Fī Madhhab Al-Imām Al-Aʿẓam Abī Ḥanīfah Al-Nuʿmān* (Beirut: Dar al-Kutub al-Ilmiyah, 2009), Vol.2, 192.
[173] Dudgeon, "The Hanafis," 73.
[174] Dudgeon, 74.
[175] Dudgeon, 74.

flexible and seem liberal, the majority of the rules are still within the boundaries of the established regulations. As seen in the rules for the size of houses of worship that do not exceed Muslim buildings, renovation of buildings only if it is needed, and the reconstruction of destroyed houses of worship if they get the approval of the authorities[176]. We find many of these rules in the *fiqh* of the Hanafi school related to the construction or rebuilding of the dhimmi house of worship.

In the Ottoman era, rulers' interactions with non-Muslim houses of worship were often inevitable. One such interaction was triggered by the Ottoman military campaign in various countries, including surrounding countries whose majority are Christians. The Ottomans' ambition was to continue to control various regions in the world, from mainland Arabia to Europe.

The Ottomans were famous for being an empire that tolerated many non-Muslims under its rule, such as when Murad allowed non-Muslims in particular city to rebuild the destroyed buildings and restore the attributes of the church to its original place[177]. The Ottoman government also allowed the construction of churches in their territory as a result of their battles with Celalist rebels that destroyed many facilities. Furthermore, the Ottomans attempted to convince their Christian citizens who had fled to the region of Thrace to return to their settlements in north-central Anatolia by building a church for them and exempting them from taxes for three years[178]. At other times, the Ottomans also granted some privileges to their citizens who participated in military campaigns, such as the defenders of the Kamenets, by providing them with a guarantee of life in the form of property and facilities, a guarantee of comfort for worship, including the establishment of houses of worship as many as they wished[179] and giving them the freedom to choose their religious leaders[180].

The Christian and Jewish sects under Ottoman rule acquired all their religious rights. Each sect had a religious leader of their own choice but was sworn in by the Ottoman rulers. Each sect had its own schools, places of worship, and monasteries, and no one interfered with their finances. They were also given the freedom to speak in the language they wanted. This tolerance was also demonstrated by Mehmed II (d. 1481) when he conquered Constantinople.

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[176] Finkel Caroline, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923* (London: John Murray Publishers, 2005), 329.
[177] Caroline, 74.
[178] Caroline, 230.
[179] Caroline, 325.
[180] ʿAlī Muḥammad Al-Ṣilabi, *Al-Dawlah Al-ʿUthmāniyyah: ʿAwāmil Al-Nahwād Wa Asbāb Al-Suqūṭ* (Beirut: dar al-tawzi' wa al-nashr al-islamiyyah, 2018), 111.

On the other hand, however, history also records that due to the financial needs of the kingdom, one of the Ottoman Sultans also once confiscated Christian churches. The confiscation was not to be destroyed but to be repurchased by the owner or his congregation on the advice of Abu Suud Efendi (d. 1574)[181], the person who also passed the law issued by Suleiman I (d. 1566)[182], so the Ottoman could collect the money. This confiscation was related to the system of downsizing and land division in the Ottoman territories. Unfortunately, some of the confiscated churches could not be repurchased by their owners because they did not have strong enough financial power, so many remained confiscated, and some were bought by others.

However, this one phenomenon did not undermine the image of the Ottomans as an empire that was very tolerant toward non-Muslims. There is a study showing that Catholics in Europe who lived in the 15th century preferred the rule of the Ottoman and trusted them more than the rule of Orthodox Greece[183]. In addition, according to Schacht, citizens who had no interests and were not involved in battles, especially those of ideological conflict, were actually more attracted by the lifestyle and tolerance under Ottoman rule. Sometimes, the peasants looked hopefully to the Ottomans as enemies of their rulers[184].

The ease with which the Ottoman rulers granted permission to establish houses of worship is likely based on their need to earn money from taxes and crops from the peasants. This is illustrated by the attitude of one of the top officials of the Ottoman state during the time of Suleiman II (d. 1691) who gave permission to Christians to repair their churches and even gave them residential buildings to return from the refugee camps at the request of Anatolia and Rumeli[185]. As a large empire, they needed citizens from various backgrounds, not just Muslims, to drive the wheels of their economy so that their ambitions to continue expanding into an increasing number of territories could be realized.

In the 1500s, more than 80% of the population in the Ottoman territories were non-Muslims. Because of this large number and to keep their territory intact, the Ottomans made decrees called *millet* addressed to the dhimmi. Ortaylı defines the millet system as: "a form

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[181] Caroline, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, 202.
[182] ʿIṣam Muḥammad ʿAlī 'Adwan, "Shaykh Al-Islām Abū Al-Suʿūd Afandī (898 - 982 H / 1493 - 1574 M)," *Majallat Jāmiʿat Al-Quds Al-Maftūḥah Lil-Buḥūth Al-Insāniyyah Wa-Al-Ijtimāʿiyyah* 22 (2011): 273.
[183] M. Yakub Mughul, "The Ottoman Policy towards Non-Muslim Communities and Their Status in The Ottoman Empire during The 15th & 16th Centuries: Interaction of Civilisation," 2015, 2143.
[184] Mughul, 2146.
[185] Caroline, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, 364.

of organization and legal status arising from the submission of the adherents of a monotheistic religion to Islamic authority after the annexation of territory to the Empire, under *ahidnâme* or treaty that provides protection[186]. This millet has been applied to various non-Muslims in several regions such as Greek Orthodox Christianity, Genoese and Venetian Catholicism, Catholicism in Armenia, Mosul Catholicism, etc., but they also have to pay an agreed amount of money, which the religious leaders are responsible for collecting and depositing to the Ottoman government[187].

As the Ottomans entered a period of decline, Europe, particularly France and Britain, tried to intervene in Ottoman rule[188]. The rules that previously regulated dhimma – *millet*, were later replaced by *tanzimat* around the 1800s. This rule is more of a duplicate of the system that is widely embraced by European countries. This reform was considered necessary to ensure the Ottoman dynasty survived and continued. Among the points of this *tanzimat* is that the Ottomans gave freedom to non-Islamic religions to carry out their religious rituals and build their houses of worship tolerantly but on the condition that the location for the reconstruction and restoration of the buildings is in a city or village in which the population is multicultural or does not consist of only one religion or sect. In addition, *jizyah* was abolished as stipulated by Humayuni's decree and replaced with military allowance contributions which are imposed not only on dhimmis but also on Muslims [189].

The initial motivation for legal reform in the Ottoman Empire by ratifying *tanzimat* as the constitution was the desire to implement the application of the law existing in Europe, especially Britain and France, where coincidentally both countries had a strong influence on this reform initiative in addition to their existence as allies of the Ottomans in the war against Russia. In addition, the starting point of this *tanzimat* was to accommodate the interests of the Christian people to improve their conditions, and to play an important role in introducing reform and Westernization to the empire[190]. Especially in *al-tanzimat al-khairiyah* which almost from beginning to end regulates the issue of the rights and interests of non-Islamic sects. This version mainly emphasizes the principle of legal and civil equality for Muslims of all citizens and their right to serve it[191].

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[186] Mughul, "The Ottoman Policy towards Non-Muslim Communities and Their Status in The Ottoman Empire during The 15th & 16th Centuries: Interaction of Civilisation," 2153.
[187] Mughul, 2153.
[188] Firas Alkhateeb, *Lost Islamic History: Reclaiming* Muslim *Civilisation from The Past* (Oxford University Press, 2017), 223.
[189] Ghaniyah Biʿyu, "Al-Tanẓīmāt Al-ʿUthmāniyyah Wa-Atharuhā ʿalá Al-Wilāyāt Al-ʿArabiyyah: Al-Shām Wa-Al-ʿIrāq Namūdhajan 1839 - 1876 M" (University of Algiers, 2009), 117.
[190] Biʿyu, 88.
[191] Biʿyu, 111.

One of the religious figures who welcomed the existence of *tanzimat* is Vani Efendi (d. 1880), a follower of the Puritan movement who has a fairly good reputation in society as a respected scholar and has qualified religious knowledge[192]. He has writings in the fields of *tafsir*, *fiqh*, history, and poetry, especially with his work called *Araisü'l-Kur'an*; the Qur'an is interpreted from a different point of view[193]. He argued that the potential brought by citizens of Christians and Jews to improve the country's economy and international diplomacy is important, so the government needs to give them a more significant portion of opportunity and equality with Muslims in the life of the country. However, the economic and political concessions given under coercion by the Ottoman were just as damaging as the defeat of the military. In what became known as 'capitulation', the Ottoman government handed over state control over most of its economy and society to Western Europe along with its decline[194].

Permission for the reconstruction of a damaged house of worship has indeed been stipulated in Islamic jurisprudence literature, with most scholars allowing this as long as the size of the building does not exceed the initial construction. Meanwhile, the ease provided by the Ottomans to non-Muslims to establish their houses of worship may be because this is stated in their peace contract, which can be considered *sulh*, even though, in fact, they should be included in the rules of the region controlled by force. The rules in Hanafi jurisprudence state that for areas controlled by force, the residents cannot build new houses of worship, while in the rules of the territory controlled by *sulh*, they are allowed to build them if they pay *kharaj* or *jizyah* and indeed, with the statement of the agreement that they are initially allowed to build new houses of worship. In addition, the composition of the population of the area under force also affects the permission. Although the territory is violently controlled and under Muslim rule, if the majority of the population is non-Muslim, then this is allowed.

As for *millet*, it seems that this decree is a model of what Umar b. Khattab towards the people of Jerusalem during the conquest. They do not refer to the books of jurisprudence related to the application of the rule of law to the dhimmi. Meanwhile, the rules that apply to *tanzimat*, although at first glance the rules seem to slightly adopt what is in the *fiqh* literature by not establishing in a location where the entire population adheres to only one religion. If it is said that it is an Islamic religion, this is indeed in line with the opinion of

[192] Yasin Kılıç, "Bir Hatip ve Eğitimci Olarak Vanî Mehmed Efendi, Hayatı, Edebî Kişiliği, Eserleri," *Journal of Turkish Studies* 10, no. Volume 10 Issue 3 (January 1, 2015): 619, https://doi.org/10.7827/TurkishStudies.7670.
[193] Kılıç, 620.
[194] Alkhateeb, *Lost Islamic History: Reclaiming* Muslim *Civilisation from The Past*, 222.

classical *fiqh*. In the more global context, the main point of the enactment of this rule, both in classical jurisprudence and the rules of that time, is that no majority party is disturbed by the existence of other religious houses of worship that enter their area. However, with a more secular nuance, the *tanzimat* rule still allows the construction of houses of worship if it is in a multicultural society, so this rule does not care about the percentage of the number of Muslims and non-Muslims in the area. Furthermore, *tanzimat* does not seem to be a transformation of classical jurisprudence because the drafters are all statesmen who do not have the basics as a jurist.

It was precisely the Ottoman rule after the *tanzimat* -Mecelle- that was the representation, continuation, and transformation of Hanafi's legal thought. Its base in the maxim genre makes it an authentic representation of the Hanafi law for adherents of the tradition[195]. Unfortunately, this study failed to find any rules in its articles that specifically discussed the establishment of houses of worship. There are only rules related to the transactional activities of Ottoman citizens, both Muslims and non-Muslims.

According to the rules of Hanafi legal maxim, this permission is likely included in the rule of *istihsan* from the rule of the conquered city by peace treaty for permission in the area by force. Also, it prioritizes the existence of *maslahah* rather than *mafsadah*. In addition, they assigned to the sultan as *waliy al-amr* regarding the policy which is legally considered one of various pieces of evidence. The Sultan may decide, for whatever reason, to order the *qadi* in relation to certain cases not to follow a common view but another less authoritative opinion. Sometimes, such an injunction only reinforces the preferences of certain existing muftis over specific opinions. However, often, the sultan is encouraged by prominent jurists to make changes in the legal system by imposing views that were considered weak and lacking authority[196].

### E. Hanafi in the Mughal Empire

The Indian Mughal Dynasty was a phenomenon in which Muslim minorities were able to dominate and lead a majority non-Muslim population (mainly consisting of Hindus, Jains, and Buddhists). This is remarkable because the Indian region is a very wide area with a very strong culture. So, if the Muslim minority can control the territory that is not part of the Arab land and does not establish the city from the beginning (*misr bannahu al-muslimun*), then it could be said that the city is conquered by force or by a peace treaty.

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[195] Ayoub, *Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Hanafî Jurisprudence.*, 150.
[196] Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire," 152.

Regarding the book of *Futuh al-Buldan*, the area around India (written in the book as Sindh) is an area controlled by force[197]. In addition, historically, the Mughal dynasty was founded through the battles won by the Muslim army led by Zahir al-Din Babur (d. 1530) over Ibrahim Lodi (d. 1526). Nonetheless, the status of the territory eventually remains part of *Dar al-Islam* if it refers to the definition of Sarakhsi "*Dar al-Islam* is the designation for a place that is controlled by Muslims, and is characterized by Muslims being able to live safely there"[198].

In the history of the Mughal empire, several royal elites showed a striking attitude regarding their attitudes and policies in treating non-Muslim communities, especially Hindus, both embracing and repressive or restrictive policies. The first group was represented by people such as Emperor Akbar, Prince Dara Shukoh (d. 1659), and Naqsabandhi Sufi, order Mirza Mazhar Jan-i Janan (d. 1781). Meanwhile, on the opposite side were represented by Ziya al-din Barani (d. 1357), Abd Qadir Badayuni (d. 1595), Ahmad Sirhindi (d. 1624), and Muhammad Ma'sum (d. 1641)[199].

With the majority of its citizens being Hindu, it is indeed a reality that prevents Sharia from being fully applied there. Instead of forcing it to be implemented, the emperor Abu al-Fath Jalal al-Din Muhammad Akbar (d.1605) actually made this a value that he highlighted to influence the governmental policies of his reign. During Akbar's reign, he issued some unpopular rules among Muslims, such as the abolition of the pilgrimage tax and *jizyah* for dhimmi and many appointed councils from non-Muslims[200]. Even worse, in his new capital, Fatehpur Sikri, Akbar established the 'House of Worship', the 'Ibadat Khana', and even promoted a new religion called "Din-i Ilahi' which was a merge of Islam and Hinduism[201].

Akbar's attitude of making rules arbitrarily and not in line with Sharia is influenced by the subjectivity of his own interpretation of the decree or mandate granted by Indian Ulama. The mandate was written in a document called *mahdar* which contained the limitation of authority to the emperor who could interfere in enacting canonical law in cases

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[197] Aḥmad ibn Yaḥyá ibn Jabir al-Baladhuri, *Futūḥ Al-Buldān* (Beirut: Dār wa-Maktabat al-Hilāl, 1988), 417.
[198] al-Sarakhsi, *Sharḥ Al-Siyar Al-Kabīr*, 1253.
[199] Yohanan Friedmann, "Islamic Thought in Relation to the Indian," in *India's Islamic Traditions: 711-1750*, ed. Richard Maxwell Eaton (Oxford University Press, 2006), 56.
[200] Iqtidar Alam Khan, "The Nobility under Akbar and the Development of His Religious Policy, 1560–80," in *India's Islamic Traditions: 711-1750*, ed. Richard Maxwell Eaton (Oxford University Press, 2006), 123.
[201] Wisam Saʿadah, "Jalāl Al-Dīn Akbar Wa Tawḥīd Al-Adyān Wa Inqisām Al-Hind," 27 December 2020, accessed June 17, 2024, www.alquds.co.uk/جلال-الدين-أكبر-وتوحيد-الأديان-وانقسا-٢.

where there was a difference of opinion among the jurists. The decree declares the 'just ruler' as the final determinant of authority in terms of the interpretation and application of religious law[202]. Emperor Akbar, however, viewed this document as giving him the absolute authority to perform *ijtihad*[203].

The situation provoked an angry reaction from many people, especially Muslims. Historian Ziya al-Din Barani not only advised the sultan to treat Hindus very harshly but also reminded that not all schools of Islamic law agreed to include them in the category of dhimmi. Barani also reported that some jurists had tried to persuade the sultan to declare that Hindus should accept Islam or be sentenced to death[204].

In the discourse of the categorization of dhimmi, the question arises whether the majority of the population of the Mughal dynasty, which at that time was Hindu, Buddhist, and local religions, could have the same rights as the people of the book. Muslim scholars do have different opinions about non-Muslims who are included in the category of dhimmi. The first opinion says that dhimmi is only people of book and Zoroaster adherent which is supported by the Shafi'i and Hanbali schools. The second opinion is carried by Maliki which states that dhimmi is all non-Muslims without exception. The third is the opinion of Hanafi who states that dhimmi is all non-Muslims from various interfaith except the idolaters of the Arab polytheists. Hanafi Jurist uses the postulate that the Prophet Muhammad took *jizyah* from the Zoroastrians even though they were polytheists, and on the other hand, he continued to fight the pagan Arabs without taking *jizyah* from them. Thus, they rationalize that this narration shows the treaty of protection (*dhimmah*) is permissible for all non-Muslims except the pagans of the Arabs[205]. Considering that Hanafi is a school embraced by the Indian community, it can be concluded that the non-Muslims who live there are included in the Dhimmi because although they are polytheists and idol worshippers, they are not Arabs.

In contrast to Akbar, during Aurangzeb's reign, he ordered jurists in India to create a collection of fatwas that later became known as *al-Fatawa al-Hindiyya al-Amghariyya* to make the Mughal kingdom more orthodox. In running its government system, the Mughal dynasty shared the same method of Ottoman in running their kingdom. While the Delhi

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[202] Alan Guenther, "Hanafi *Fiqh* in Mughal India: The Fatawa-i Alamgiri," in *India's Islamic Traditions: 711-1750*, ed. Richard Maxwell Eaton (Oxford University Press, 2006), 211.
[203] Muhammad Zubair Abbasi, "Al-Fatāwā Al-'Ālamgīriyyah," *Islamic Studies* 59, no. 4 (2020): 460.
[204] Friedmann, "Islamic Thought in Relation to the Indian," 53.
[205] ʿAbd al-Jalīl ʿAbd al-Razzāq Ibrāhīm al-ʿAwadhī, "Ḥuqūq Ahl Al-Dhimmah Fī Al-Islām," *Majallah Kulliyat Dar Al-Ulum* 37, no. 129 (March 1, 2020): 968–69, https://doi.org/10.21608/mkda.2020.161667.

sultan appointed the mufti, they also imposed their policy into the Sharia law by giving some preferences to the state code. According to Alan Guenther, the purpose of making the book *al-Fatawa al-Hindiyya* was to gather all scholars in Indian territory with the agenda of reviewing the existing Hanafi scholars' opinion collection and sorting out between which opinions would be applied in the Mughal government and which would be abandoned. By referring to the older authoritative opinion, the summary of Islamic law maintains its continuity with the books of its predecessors and adapts it to the existing conditions[206]. While Khalid Masud argued that *al-Fatawa al-Hindiyya* was a book for assisting the Hanafi muftis and qaḍi, they were not obliged to follow it strictly[207].

Although Aurangzeb seems to be trying hard to make sharia applicable in India by compiling the book *al-Fatawa al-Hindiyya*, the policy has been accompanied by some controversy. Some speculate that after the scholars' criticism of Akbar for his various policies, as the competition for power among families before his appointment, he needed the support of the scholars to legitimize his position so that he continued to use Islamic symbols and display his orthodox credentials[208]. Another controversy was the process of compiling the book. Every day, Shaikh Nizam, as the team leader, had to read several pages of the work that was being compiled for the emperor Aurangzeb so he could supervise every content of the book[209]. It leaves room for possibilities if the emperor also gives his views or determines which opinion will likely be chosen.

With regard to the article on houses of worship construction in *al-Fatawa al-Hindiyya*, Mouez Khalfoui argues that the Mughal scholars share more similarities with the jurists of Iraq and prefer to quote their opinions compared to the Central Asian branch of the Ḥanafi school. However, the Ḥanafi school is closer to them chronologically and geographically than the Iraqi scholars[210], but it likely showed a misconception. First, that Iraq (Kufa) was the starting point of the emergence of the Hanafi school through its founders, so it is pretty reasonable that the reference point for subsequent jurists will end up with Iraqi ulama. Secondly, suppose Khalfoui concludes that the proximity of the Mughal jurists to Iraq is due to looking at the text of *al-Fatawa al-Hindiyya* based on the opinion of Sarakhsi or Qadikhan (d. 1240). In that case, unfortunately, they are both Balkh

[206] Khalfoui, "Together but Separate: How Muslim Scholars Conceived of Religious Plurality in South Asia in the Seventeenth Century."
[207] Muhammad Khalid Masud, "Religion and State in Late Mughal India: The Official Status of the Fatawa Alamgiri," *LUMS Law Journal* 3, no. 1 (2016): 49.
[208] Guenther, "Hanafi *Fiqh* in Mughal India: The Fatawa-i Alamgiri," 211.
[209] Guenther, 213.
[210] Khalfoui, "Together but Separate: How Muslim Scholars Conceived of Religious Plurality in South Asia in the Seventeenth Century."

scholars. This chapter argues that instead of looking at the fatwa related to houses of worship with regional patronage (Iraq, South Asia, and Central Asia), the option is presented that the selection of the opinion reference followed is due to the reputation of the jurist and the preferences of the opinion as an individual.

In addition, there is also a misunderstanding in the book *al-Fatawa al-Hindiyya* that when referred back to its source, it indicates the opposite. In the book *al-Fatawa al-Hindiyya*, it is stated that Sarakhsi forbade the construction of non-Muslim houses of worship in arable lands (*al-aṣaḥḥu ʿindī annahum yumnaʿūna min dhālika fī al-sawād*)[211]. Meanwhile, if we look directly at the book of Sarakhsi, we find that he only forbade construction in cities (*wa al-qawlu al-awwalu ʿindī aṣaḥḥu fa-inna al-manʿa min dhālika fī al-amṣāri lā yaftatinu bihi baʿḍu juhhāli al-muslimīn*)[212]. As for the explanation afterward, Sarakhsi only clarified by stating that what applies in the prohibition of the construction of houses of worship is the legal factor of cause and effect, which the prohibition exists because the dhimmi shows their rituals contrary to Sharia.

If it is argued that the "permissive" view of Indian jurists toward the non-Muslim population is due to the pressures of social reality in South Asia, which drives them to seek compromise and justification of the jurist opinion living in an environment where Muslims are the majority[213], then this is not the case. This view could be true if the book *al-Fatawa al-Hindiyya* was compiled during Akbar's reign who paid more attention to most Hindus. However, during Aurangzeb's time, he made more repressive policies that restricted the lives of Hindus.

However, some researchers, such as Giunchi, actually assume that the *al-Fatawa al-Hindiyya* was not fully implemented in the Mughal empire. He argued that Mughal judges only used Hanafi law as a moral reference and chose positions that reflected the collective interest (*maṣlaḥa*)[214], aiming not to disturb communal harmony (*mafsada*). The impossibility of applying Islamic law to a society that is predominantly non-Muslim and spread over a vast area requires Mughal rulers to be self-aware of the social realities around them[215]. Thus, what determines the decision is the interest of the community or *maslaha*,

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[211] al-Barahburi, *Al-Fatāwā Al-ʿĀlamkīriyyah Al-Maʿrūfah Bi Al-Fatāwā Al-Hindīyyah*, 247.
[212] al-Sarakhsi, *Al-Mabsūṭ*, Vol.15, 135.
[213] Khalfoui, "Together but Separate: How Muslim Scholars Conceived of Religious Plurality in South Asia in the Seventeenth Century."
[214] Muhammed Ikramul Hoque Miah, "Religion and Civility: A Study of Ibn Al-Qayyim's Aḥkām Ahl Al-Dhimma and A Comparative Reading from the Ḥanbalī and Ḥanafī Schools of Law" (University of Birmingham, 2020), 44.
[215] Elisa Giunchi, "The Reinvention of Sharī'a under the British Raj: In Search of Authenticity and Certainty," *The Journal of Asian Studies* 69, no. 4 (2010): 1121.

which the meaning of the concept of justice is closely related as a way to prevent one group from winning over another group and protect the most vulnerable groups in society[216]. Some studies also report that Aurangzeb was a man who was obsessed with Islamizing mainland India, but in reality, he also continued to pay attention to religious figures and Hindu temples by providing them with substantial aid[217].

## F. Conclusion

This chapter elaborates at length on how Hanafi jurists treat the dhimmi house of worship under Islamic rule and the shift of their opinions across borders. Basically, both the opinion that allows the dhimmi house of worship to be established in Islamic territory and those that prohibit it could be traced back to the founders of the Hanafi school. With the spread of this school to various parts of the world, including the Central Asian Region, judicial rules on houses of worship subsequently reveal divergent views, even in geographically proximate areas (Bukhara and Balkh). The jurists of this region took the opinions of their predecessors by using a judicial approach to justify what they adhered to. This is slightly different from what is shown by the two imperials following Hanafi schools (Ottoman and Mughal), which accommodated the rules related to houses of worship by using political authority.

This change and continuity bolster the assertion that Hallaq said such a process has been embedded in the structure of the madhhab tradition which facilitates the possibility of social change by keeping up with the times. At the same time, however, this discussion also dissents from his argument that the split arises from developed measures systematically and not accidental events. From what has been explored, this study finds that it is overly simplistic to consider that the rupture in the Islamic legal school is solely confined to strategic steps which are implemented systematically. On the other hand, the rupture may be carried out because of the compulsion that requires a jurist to adjust the rules to the conditions of reality. As seen in the condition of the Hanafi Balkh, they inevitably have to take a different stance from the mainstream of the Hanafi circle. However, it should be noted that the scope of *fiqh* is very broad. Perhaps, in one issue this difference of opinion arises, but in another issue it does not, depending on the condition seen by the jurist as requiring adjustment or not.

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[216] Giunchi, 1122.

[217] Parvez Alam, "Temple Destruction and The Great Mughals' Religious Policy in North India: A Case Study of Banaras Region, 1526-1707," *Analisa: Journal of Social Science and Religion* 3, no. 1 (2018): 18.

# CHAPTER V
# THE RULE ON HOUSES OF WORSHIP IN THE CONTEMPORARY ERA

After the process of spreading to various cities and regions in multiple ways, as mentioned in chapter three, as time progressed, Muslims of a number of regions still being adherent to the Hanafi school, but in some regions also, the madhab made an ephemeral appearance and did not show a meaningful existence as observed in Qayrawan[218]. Presently, the map of the spread of Hanafi is still considered the most numerous and most extensive among the four Sunni sects. The map of its distribution in modern countries is now drawn in countries such as India, Pakistan, Bangladesh, Afghanistan, Central Asia, the Caucasus, the Balkans, Turkey, Parts of Iraq, and Egypt.

In this discussion, Turkey, Pakistan, and Egypt were selected as the focus of analysis by considering the diversity of society's attitudes toward religiosity and the existence of rules regulating non-Muslim houses of worship. For instance, Turkey and Pakistan were chosen in line with their historical background discussed in the previous chapter (Ottoman Empire and Mughal Empire), while Egypt was an alternative to Iraq because of the reduced composition of Hanafi adherents in Iraq and the existence of state regulations specifically governing the church in Egypt which merits studying

## A. Turkey

Turkey is a country with 83 million population, more than 99 percent being Muslim, according to a survey from the Turkish government. Other research institutes show that about 88 percent identified as Sunni Muslims, 6 percent as non-Muslims, 4 percent as Alevi, and the remaining 2 percent as "other" groups[219]. Non-Muslim groups are mostly concentrated in Istanbul and other major cities, as well as in the southeastern region of Turkey

Based on the constitution that was drafted, the Turkish state form is a democratic, secular, and social country[220]. This is to reinforce the identity of the Turkish state, which is not bound by any religious influence in its policies and does not recognize the official religion of the state. Nevertheless, the Turkish government still guarantees the religious life of its people.

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[218] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 177.
[219] Cooper, Davie, and Curry, "Annual Report of The U.S. Comission on International Religious Freedom," 63.
[220] GRAND NATIONAL ASSEMBLY OF TÜRKİYE, "CONSTITUTION" (n.d.), https://global.tbmm.gov.tr/constitution#.

Article 24 states that Turkey gives freedom to its citizens in terms of conscience, religion, and beliefs. However, to ensure that the implementation of the article remains within the corridor of the norms and values they adhered to, the constitution then provides additional restrictions and rules so as not to contradict article 14 which contains the abuse of basic rights and freedoms that are contrary to the constitution and threaten the sovereignty of the state. In addition, Article 24 also regulates the prohibition of forced implementation of worship, control of religious lessons, and a ban on religious abuse.

In addition, to facilitate Muslims who are the majority in the country, the Turkish Government established the Directorate of Religious Affairs (*Diyanet*), which aims to supervise and regulate religious activities without interfering in politics[221]. It can be said that the existence of the directorate is an extension of Article 24 of the Turkish constitution but is only aimed at the religion of Islam which can be seen in the main principles and objectives of the ministry[222]. After 1965, the influence of this institution on social life became more noticeable after previously only having minimal functions[223]. As for other religious communities (non-Muslims), the government supervises them through the Directorate General of Foundations (*Vakıflar Genel Müdürlüğü*), in particular through rules on Foundations[224]. The rule also indirectly regulates the establishment of places of worship for non-Muslims.

Under the current legislation, foundations are regulated in the Turkish Civil Code, Book One, Part Three, Articles 101 to 117, and in the special Law on Foundations[225]. This applies to all foundations in Turkey, which are very diverse, including those related to religion, although they are few[226]. Under the Ministry of Culture and Tourism, the Directorate General of Foundations regulates the activities and affiliated properties of all foundations and assesses whether the foundations operate within the objectives stated in their organization's Articles of Association and Bylaws. Several religious communities have registered related associations to get legitimation from the state. To register as an association, a group must submit an application to the provincial governor's office

[221] Presidency of Religious Affairs, "Basic Principles and Objectives," n.d., https://www.diyanet.gov.tr/en-US/Institutional/Detail//4/basic-principles-and-objectives.
[222] Presidency of Religious Affairs.
[223] Omur Aydin and Bulut Gurpinar, "The Right to Have Places of Worship: The Cemevi Case in Turkey," *Religions* 13, no. 8 (2022): 7.
[224] Cooper, Davie, and Curry, "Annual Report of The U.S. Comission on International Religious Freedom," 63.
[225] Directorate general of Foundations, "FOUNDATION LEGISLATIONS," n.d., https://www.vgm.gov.tr/about-us/about-us/the-regulation-for-foundations.
[226] European Commission for Democracy Through Law (Venice Commission), "Opinion on the Legal Status of Religious Communities in Turkey and the Right of The Orthodox Patriarchate of Istanbul to Use the Adjective 'Ecumenical,'" 2010, 11.

accompanied by supporting documents, including bylaws and a list of founding members[227].

Although registration to the government does not explicitly require religious groups to operate, group registration is required to seek legal recognition of places of worship. To obtain legal recognition of a place of worship, a permit from the city government is necessary to construct or appoint a new place of worship. Carrying out worship in a location the central government does not recognize as a place of worship is against the law. The government can fine or close the place for those who break the law[228].

Since the end of the Ottoman Empire in 1923, the government has only allowed renovations of existing churches[229]. In addition, the 1935 law also prohibits the establishment of foundations based on the religion or ethnicity of its members but provides exceptions to houses of worship that existed before the law was enacted. The construction of new houses of worship has only been permitted in Turkey since 2003. In the zoning law, as amended (Article 4928/9), the planning for the construction of houses of worship must be based on consideration of the conditions and needs of the area in the future. In addition, the applicant must obtain permission from the provincial, district, and municipal civil administrators. Places projected for houses of worship are forbidden to be used for other purposes that violate land development regulations[230].

The term of houses of worship in general according to Article 2(f) of Decree no. 2002/4100 of the Council of Ministers—dated May 23, 2002— refers to the houses of worship recognized in Turkey such as prayer rooms, mosques, churches, and synagogues[231]. The classification of a place of worship has some important legal implications. First, places of worship are exempt from various taxes. Second, their electricity bills are paid from the Directorate of Religious Affairs funds[232]. Thus, the particular rules that clearly accommodate houses of worship are houses of worship for adherents of heavenly religions and other houses of worship that have existed since before the establishment of modern Turkey.

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[227] US Department of State, "Report on International Religious Freedom: Turkey (Türkiye)," 2022, https://www.state.gov/reports/2022-report-on-international-religious-freedom/turkey/.
[228] US Department of State.
[229] Marion Sendker, "Türkiye: First New Church in 100 Years Opens Its Doors," accessed June 28, 2024, https://www.vaticannews.va/en/world/news/2023-10/turkey-first-church-syriac-orthodox-mor-st-ephrem-istanbul.html.
[230] "Law on Land Development Planning and Control" (1985), https://www.lawsturkey.com/law/law-on-land-development-planning-and-control-3194.
[231] Aydin and Gurpinar, "The Right to Have Places of Worship: The Cemevi Case in Turkey," 8.
[232] "No Title," n.d., https://hudoc.echr.coe.int/eng#_Toc522875093.

The fundamental problem in Turkish law regarding other religious communities mentioned is that they cannot register and obtain legal status. This is because there is no clear regulation in the legal system regarding religious communities, and so far, no other minority religious community has obtained state legality. Instead, they must operate indirectly through foundations or associations[233].

Generally, the rules on establishing houses of worship in Turkey adhere to a secular approach and are disconnected from classical jurisprudence. In addition to having different rules between houses of worship in Muslims and Abrahamic religions, houses of worship established before the rule of 1935, and houses of worship belonging to other minority religious communities, the laws regulating this issue in Turkey seem very convoluted and separate from each other.

### B. Egypt

Egypt, as one of the centers of the Islamic world, has a population of 105 million people, with 90% registered as Sunni and less than 1% as Shia. Coptic Christians are estimated to be 10% of the population. In addition, there are also Baha'is, Jehovah's Witnesses, and Jews[234].

The multicultural life of Egypt and the management of interfaith life cannot be separated from the Ottoman rule that once prevailed in this country. The Hamayouni Law of 1856 and the Azabi Decree of 1934 once regulated the construction, construction, and renovation of churches (and synagogues) in Egypt which then continued to develop until the emergence of Qanun number 80 of 2016 on church construction law[235]. This law is also part of the implementation of Article 235 of the Egyptian Constitution of 2014[236].

This regulation explains the characteristics and elements of the church and the parties involved in the church application. For the issuance of church permits, this regulation is left to the governor responsible for the area where the church will be established[237]. In addition, actions relating to the church and requiring permission include

[233] European Commission for Democracy Through Law (Venice Commission), "Opinion on the Legal Status of Religious Communities in Turkey and the Right of The Orthodox Patriarchate of Istanbul to Use the Adjective 'Ecumenical,'" 10.
[234] US Department of State, "Report on International Religious Freedom: Egypt," 2022, https://www.state.gov/reports/2022-report-on-international-religious-freedom/egypt/.
[235] The Tahrir Institute for Middle East Policy, "Issue Brief: Egypt's Church Construction Law," 2017, https://static1.squarespace.com/static/5947e4266a49635915ac0a31/t/59ee857a4c0dbfd6070df17a/1511568907468/IB_Egypt+Church+Construction.pdf.
[236] The Tahrir Institute for Middle East Policy, "TIMEP Brief: Church Construction Law," accessed July 2, 2024, https://timep.org/2019/07/29/timep-brief-church-construction-law.
[237] article 1 no. 7

the construction, expansion, strengthening and consolidation, demolition, or detailing of the exterior and additional facilities of the church[238]. The provisions on the size of the church for which permission is being requested must take into account the number and needs of the members of the Christian denomination in the region in which the church is located. In connection with the change in population growth, the Church is allowed to have one or more altars or pulpits, central sections, baptisteries, and towers.

In the process of applying for a permit, the legal representative of the denomination must submit a request to the relevant governor to obtain the legally required permission to perform any action. Then, the Governor approves or rejects the request within four months and must provide a logical explanation if the request is denied. When deciding whether or not to approve the request, the governor may consider "the number and needs of the citizens of the Christian denomination"[239].

As for every church building that existed before this law was enacted and actively held Christian religious ceremonies, it is considered to have a permit as a church. This depends on evidence of structural integrity in the form of reports from certified consulting engineers, compliance with approved structural requirements, and commitment to the rules and regulations required by state defense affairs and state administration laws. state, public, and private, and Cabinet decisions[240].

This rule, although it seems more liberal to give breadth to Christians to build houses of worship as long as they need it, also still implies ambiguity in its implementation, which may be a loophole in remaining restrictive. For example, an article that allows the governor to consider the number and needs of citizens when deciding whether or not to approve a development request, with the lack of existing data, may be a decision given by the governor that will be subjective. In the classical jurisprudence rules themselves, there is indeed a dictum that states that with a comparison between Muslims and dhimmi in a certain number, then they can build their houses of worship. In addition, it refers to Article 2 of the Egyptian constitution which identifies Islam as the state religion and "Sharia principles" as the primary source of the law, and Article 64, which grants "absolute" freedom of belief only to adherents of "heavenly religions" (Islam, Christianity, and Judaism), the rules for freedom of worship and the establishment of houses of worship seem to be limited and do not cover all non-Muslims except pagan Arabs as defined by the Hanafi group as dhimmi.

[238] article 1 no. 10
[239] The Tahrir Institute for Middle East Policy, “TIMEP Brief: Church Construction Law.”
[240] article 9

### C. Pakistan

According to the 2017 Pakistan census, Pakistan has 96.3 percent Muslims (85–90 percent Sunni, 10–15 percent Shi'a), Hindus at 1.6%, followed by 1.59% Christians, 0.22% Ahmadis, and 0.07% other minorities (Sikhs, Buddhists, Baha'is, and Zoroastrians). Hindus mostly live in Sindh province and Christians in Punjab, while Ahmadis are spread evenly across Pakistan. country. Most religious minorities in Pakistan live in rural areas[241].

Pakistan was established as an Islamic republic with an emphasis on special status for Muslims, such as the Islamic religious requirements for the president and prime minister. However, they also continue to accommodate a number of non-Muslims as representatives in several state institutions, such as 10 seats for religious minorities in the National Assembly, four seats in the Senate, and 23 seats in four provincial assemblies. Pakistan's constitution defines "a person belonging to a Christian, Hindu, Sikh, Buddhist, or Persian community, a person from the Qadiani or Lahori group (who calls himself Ahmadi), or Baha'i, and a person belonging to one of the registered castes" as a non-Muslim[242].

Constitutionally, Pakistan has laid down the principles and principles to regulate, protect, and grant rights to its non-Muslim citizens. The constitution provides for "freedom to manage religious institutions." It states every religious denomination shall have the right to establish and maintain its institutions. In addition, in more detail, the provisions of the 1973 constitution regarding minorities in Pakistan, in Article 2 A it is stated that a government that fails to protect minority groups is in violation of Allah's commands and no government can make any changes in the Constitution to reduce the rights of minorities because Islam guarantees these rights. Then, in Article 20, it is stated that every religious school and its stream has the right to establish, maintain, and manage its religious institutions. Also, Article 36 States must protect the interests and rights of legitimate minority groups[243].

Unfortunately, this thesis could not find a detailed and definite regulation on the establishment of new houses of worship in Pakistan. However, it can be concluded that the

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[241] Muhammad Akram, Asim Nasar, and Abid Rehman, "Religious Minority Rights and Their Satisfaction in Pakistan," *International Journal on Minority and Group Rights* 29, no. 1 (August 2, 2021): 88, https://doi.org/10.1163/15718115-bja10044.

[242] Pakistan Bureau of Statistics, "Population by Religion," n.d., https://www.pbs.gov.pk/sites/default/files/tables/population/POPULATION BY RELIGION.pdf; US Department of State, "Report on International Religious Freedom: Pakistan," 2022, 29, https://www.state.gov/reports/2022-report-on-international-religious-freedom/pakistan/.

[243] Akram, Nasar, and Rehman, "Religious Minority Rights and Their Satisfaction in Pakistan," 88.

establishment process bears little resemblance to the process that existed in the previously discussed two countries. Such as the obligation to register a church in the endowment department as the one in charge of the management of holy places, cemeteries, and other similar religious institutions,[244] as evidenced by the possession of an official certificate for religious groups that want to operate in a certain area[245]. In addition, the recent construction of one of the Hindu temples initiated by the Prime Minister indicates that the proposal from the central government requires prior consultation and approval from the Pakistan State Council of Ulema[246].

In implementing what has been written in the constitution, the Government of Pakistan mandates The Ministry of Religious Affairs and Interfaith Harmony to handle matters related to minority issues. In addition to providing assistance to underprivileged minority groups, repairing minority groups' places of worship, and establishing small development projects managed by minority groups, MoRA also established a minority national committee.

The National Commission on Minorities was established in order to give attention to minorities and create harmony among religious believers in Pakistan. Among the functions of the Ministry's National Commission are: 1) providing consideration related to laws that are considered discriminatory against minority groups; 2) Recommend to the Government measures to accommodate minority groups; 3) listen to the complaints of minority groups and make appropriate recommendations to the Government for their resolution; 4) Providing protection to Minority places of worship so that they continue to function and celebrate their religion[247]. In addition, this commission also has funds intended explicitly for minority groups, such as for the repair or maintenance of places of worship[248].

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[244] Auqaf & Religious Affairs Department, "Functions," n.d., https://auqaf.punjab.gov.pk/functions.

[245] Kamran Chaudhry, "Six Churches Reopen in Abbottabad, Osama Bin Laden's City," n.d., https://www.asianews.it/news-en/-Six-churches-reopen-in-Abbottabad,-Osama-bin-Laden's-city-42893.html.

[246] Al Jazeera and News Agencies, "Pakistan's Top Islamic Body Approves Construction of Hindu Temple," n.d., https://www.aljazeera.com/news/2020/10/29/pakistan-clerics-approve-hindu-temple-construction-in-capital.

[247] Ministry of Religious Affairs and Interfaith Harmony, "National Commission for Minirities," n.d., https://www.mora.gov.pk/Detail/NDBhZWViZDUtZmEzOC00ZDlhLWJiMzEtM2MwZDQzZjNiMWM5.

[248] Ministry of Religious Affairs and Interfaith Harmony, "Minorities Welfare Fund," n.d., https://www.mora.gov.pk/Detail/OThlMWZhYTctZjdhNi00YTJiLWEwZWQtZTNjM2I2OWM5NTc1.

In addition to the application of new houses of worship and their management, there are also existing and abandoned houses of worship and holy places since the partition of British India where the responsibility of these places is charged to the provincial and federal governments through the Evacuee Trust Property Board (ETPB). The Evacuee Trust Property Board (ETPB) itself has functions such as financing expenditures for the repair or maintenance of shrines in accordance with those approved by the Federal Government, maintaining religious shrines, and providing facilities for pilgrims[249]. To date, ETPB has about 200 Sikh gurdwaras and 150 Hindu temples across the country. The Sikh Committee of Gurdwara Prabandhak Pakistan (PSGPC) is responsible for maintaining gurdwara[250].

Although the constitution and the government have guaranteed freedom of worship for non-Muslims, it seems that in reality the decree is often powerless in the face of a society that is more guided by the Criminal Code on blasphemy. The blasphemy code adopted from the Indian Criminal Code[251] is often a justification for people to commit acts of vandalism, anarchy, and intolerance against non-Muslim citizens. Many see Pakistan's blasphemy laws as another consequence of Islam's failure to carry out the reform process needed to transform it into a more modern and tolerant form. Others also argue that the law provides an opportunity for greedy clerics to arouse the religious passions of the Muslim community, which are then cynically manipulated by the clerics to gain greater political power[252].

In general, in the context of *siyasah shar'iyya* discussions, the application of the rules for the establishment of houses of worship can be different and in accordance with the context of the circumstances in their respective countries. The rules in *siyasah shar'iyya* are not binding by requiring to follow a standard form, but this is a flexible thing with the main rules on obedience to the ruler. Thus, rules with a secular form, such as Turkey, strict giving of high priority to non-Muslims as illustrated by the state of Pakistan, and more moderate rules such as those applied in Egypt, are all valid from the perspective of *siyasah shar'iyya*. In the rules of jurisprudence, it is stipulated that "the decision of the ruler to settle disputes" (*anna hukma al-hakim yarfa'u al-khilaf*). If when the government chooses a school of jurisprudence or even one that is not in accordance with *fiqh* in the life of the state by looking at the public interest and social security, then it becomes binding on all those who are under the rule.

[249] The Evacuee Trust Property Board, "Functions," n.d., https://etpb.gov.pk/functions/.
[250] US Department of State, "Report on International Religious Freedom: Pakistan."
[251] Farhat Haq, *Sharia and the State in Pakistan: Blasphemy Politics* (Routledge, 2019), 17.
[252] Haq, 1.

Every ruler in a certain country, with different ideologies and state models, has the right to determine regulations related to houses of worship because they are the ones who know the conditions of their country best. According to Ibn Asur, interests can differ from one region to another, and from one group to another according to their needs and nature[253]. The shift in rules and changes from classical jurisprudence rules to modern rules (positive law) is related to interests that are tied to changes in time and place, a large number of public interests, and changes in the conditions of society and culture.

The provision of facilities for worship for followers of other religions is considered necessary because in addition to giving them the right to practice their religion, it is also to realize a harmonious life in society. Some of the principles that need to be emphasized and become the basis of common life are such as recognition of the existence of others, recognition of the nature of diversity, maintaining the dignity of fellow human beings, maintaining the principles of justice and equity, and fulfillment of agreements[254]All of this is important to be able to guide, especially for rulers who are followers of other religions and who entrust and depend on them for their lives.

In another rule, it is stated, "*tasarruf al-imam ala al-raiyya manutun bi al-maslahah*" (Policy and actions from the rulers upon their citizens are bound to the maslahah). This is a rule in *siyasah shariyya* requiring a leader to make policies towards his people must be based on the public interest. This rule emphasizes the importance of leaders in making decisions based on wisdom, justice, and prioritizing the public interest. If the policy adopted is not in accordance with this principle, then he has violated the rules of *fiqh*. In addition, the form of justice of the leader is reflected in the provision of facilities to his people so as not to give privileges and privileges to some with the exact condition of need. In fact, al-Shafi'i analogized a leader to his people as a guardian for orphans.[255].

Perhaps, in the context of managing the establishment of houses of worship and making regulations in several Muslim countries, especially in the countries that are the object of this research, the use of the rules of *fiqh* "*al-hajah al-'ammah tunazzalu manzilat al-darurah al-khassah*" [256] (Public necessity is treated as private necessity) is the most

[253] Ibn ʿAshur, *Maqāṣid Al-Sharīʿah Al-Islāmīyah* (Doha: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah, 2004), 228–29.
[254] Abū al-Khayr Nashʾat Aḥmad 'Aṭā, "Qawāʿid Al-Fiqh Wa-Al-Siyāsah Al-Sharʿīyah Al-Ḍābiṭah Li-Al-Taʿāyush Al-Silmī Dirāsah Taʾṣīlīyyah Taḥlīlīyyah," *Majallat Al-Sharīʿah Wa-Al-Qānūn Bi-Al-Qāhirah* 40, no. 40 (October 1, 2022): 704–7, https://doi.org/10.21608/mawq.2022.270331.
[255] Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, *Al-Ashbāh Wa-Al-Naẓāʾir Fī Qawāʿid Wa-Furūʿ Fiqh Al-Shāfiʿīyah* (Dār al-Kutub al-ʿIlmīyah, 1983), 121.
[256] Abū al-Maʿālī al-Juwaynī, *Nihāyat Al-Maṭlab Fī Dirāyat Al-Madhhab* (Dār al-Minhāj, 2007), Vol. 8, 67.

important principle in determining the provision of facilities for places of worship for non-Muslims. *Al-hajah al-'ammah* can be understood as a general need in fulfilling human rights as a whole. Although in the context of this house of worship, this need is only aimed at non-Muslims who live in the area, but still, this need for worship is his right as a human being who adheres to a religion. Al-Ghazali divides *maslahah* related to the general interest of all beings; some are related to the interests of the majority, and some are related to one's personal interests in rare events[257]. While *al-darurah al-khassah* is the right of Muslims living in the area. In another editorial, al-Kasani mentions "*al-ghalabatu tunazzalu manzilat al-darurah*[258] (Overwhelming necessity is treated as dire necessity). *Al-ghalabah* can be understood as an urgent need that has not been met or, in other words, a lack of a means

In addition, the determination of regulations on the establishment of houses of worship in the context of *fiqh* proposals can also be associated with other rules such as "*dar' al-mafasid hall min jalb al-masalih*" (Avoiding harm takes precedence over securing benefits). In social life, especially in the contemporary era, there is often a clash between two interests which has consequences for both the harm and the benefit. When these two things appear at the same time, then Sharia prioritizes the prevention of damage rather than obtaining goods. Therefore, abandoning the obligation to avoid difficulties is allowed, but it is not allowed to do things that are forbidden, especially the great sins[259]. When non-Muslims put forward their need for a house of worship, the government needs to weigh various possibilities, such as whether this need is really urgent with the existence of their community, whether there are other possible alternatives[260], or if this is rejected, whether it will cause jealousy and affect the state, or conversely, if this is approved, whether there will be horizontal conflicts between citizens. Both jealousy from non-Muslims and the sensitivity of ordinary people can harm the community, so it is necessary for the government to conduct polls, public hearings, and consultations with many parties to determine this matter carefully.

However, if after the consideration process sometimes there are *mafsadah* and *maslahah* that are interconnected and occur at the same time that it is impossible to handle them separately, then it must be decided which one has the greatest consequences. If the benefits outweigh the losses, then the benefits must be obtained, even if it causes the losses

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[257] Abū Isḥāq Ibrāhīm Al-Shāṭibī, *Al-Muwāfaqāt* (Dār Ibn ʿAffān, 1997), Vol. 2, 6.
[258] al-Kasani, *Badāiʿ Al-Ṣanāiʿ Fī Tartīb Al-Sharāiʿ*, Vol. 6, 30.
[259] Zayn al-Dīn Ibn Nujaym, *Al-Ashbāh Wa-Al-Naẓāʾir ʿalā Madhhab Abī Ḥanīfah Al-Nuʿmān* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1999), 78.
[260] Hishām bin Muḥammad bin Sulaymān Al-Suwayyid and Al-Sharīʿah, *Qāʿidah Al-Ḥājah Tatanazzal Manzilat Al-Ḍarūrah Wa-Taṭbīqātuhā Fī Fiqh Al-Aqallīyāt Al-Muslimah* (Riyadh: Imām Muḥammad bin Suʿūd University, n.d.), 46.

to arise; Because the losses will sink in addition to greater benefits. However, if the loss is greater, then the loss must be eliminated, even if it causes a smaller loss of benefit compared to the loss.

In terms of the type of *maslahah* based on the strength of its urgency (*maslahah daruriyya, hajiyya, and tahsiniyya*)[261], the procurement of non-Muslim houses of worship is *maslahah tahsiniyya*. Which by facilitating this benefit, the state of Muslims can achieve perfection in their rules so that they live in security and tranquility, and have the beauty of the scenery of society in the eyes of other nations so that Muslims become something that is desired to join or approach them[262]. However, with the current contemporary political conditions, where political pressure from outsiders, especially more superpower countries, can urge the condition of Muslim countries, then in terms of security, this may also be included in the category of *daruriyya* benefits which is to maintain the safety of citizens and the country.

But what about the change in the rules that prohibit non-Muslims from building houses of worship in urban areas and allowing or also prohibiting in the countryside (from the two Histories) then become permissible? Basically, every *fiqh* rule has a reason (*illa*) that underlies the emergence of the law itself. So, in this case, what needs to be seen is the *illa*. If the conditions at that time required a ban on development (maybe) due to the contestation of the hegemony of world powers (Islam, Rome, Persia, Mongols, etc.) and endless wars that required jurists to formulate rules to minimize the entry of enemy influence (non-Muslims) and save Muslims as citizens under Islamic rule. However, when this condition changes and the *illa* no longer exists, the emphasis is on using methods, evidence, and attention to *maqasid* (for the present era).

In addition, one of the main reasons for permitting non-Muslims to set up houses of worship in the countryside is because of the number of people who live in the countryside and the interior. In contrast, the current condition is the opposite of the number of non-Muslims living in large cities. This requires the state to facilitate them in carrying out their religious worship rituals and ignore the prohibitions written in the classical *fiqh* rules. Furthermore, the reason for the concern that the existence of non-Muslim houses of worship will shake the faith of Muslim citizens in most areas seems to be irrelevant, considering the spirit of inter-religious harmony that is carried by many Islamic countries today.

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[261] ʿAbd al-Ḥamīd ʿAlī Ḥamad Maḥmūd, "Al-Maṣlaḥah Al-Mursalah Wa-Taṭbīqātuhā Al-Muʿāṣirah Fī Al-Ḥukm Wa-Al-Nuẓum Al-Siyāsīyah" (Jāmiʿat al-Najāḥ al-Waṭanīyah, 2009), 56.
[262] Ibn ʿAshur, *Maqāṣid Al-Sharīʿah Al-Islāmīyah*, 224.

Thus, according to Qaradawi, the laws that are established when they are based on a certain benefit, they will remain valid as long as the benefit still exists, which is the basis of the law and its reason. On the other hand, if the benefit is lost, then the law must change according to the loss of the benefit; because the law exists along with the reason[263]. So, it is necessary to focus on the reason for the existence of the law, not on the law itself. Moreover, the issue related to houses of worship is something that has changed (*mutaghayyir*) and is not something fixed (*thabit*).

From a socio-political point of view, from the three countries above, there is a common thread that can be drawn in relation to this discussion, namely that the three are countries with a majority of the Muslim population adhering to the Hanafi school and have regulations on non-Muslim houses of worship that have been disconnected from the Hanafi classical jurisprudence rules. Although some of the rules seem to take the source of *fiqh* rules as the basis, such as the existence of non-Muslim numbers, they prioritize the modern ideology that they carry so that it is more colorful the laws and regulations for the establishment of houses of worship for non-Muslims. The interests of each country in carrying out its government are the basis for decision-making. The assessment and standards vary depending on the environment in which the lawmaker is located.

If we look further, the rules related to non-Muslim life have been amended in each country from the beginning of its establishment or independence to the current era. In the colonial and post-colonial periods, the Muslim tradition of knowledge was forcibly entangled with the European-American tradition of knowledge as colonial[264]. The tradition of knowledge, directly or indirectly, has an impact and influence on making legal rules and their patterns in the form of favorable laws. Likewise, in the post-colonial era, the early forms of independence received various influences, especially from globalization, which produced new hybridities.

The change in the status of the three countries can be said to be part of transculturation[265]. After the original or previous culture (both Islam and the culture formed in the era of colonialism and afterward), society and state were uprooted and replaced with another new culture. However, the new culture is also not necessarily solid; it is influenced by other cultures that have finally experienced syncretism which we see today.

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[263] Yusuf Al-Qardhawi, *Al-Siyāsah Al-Shar'iyyah Fī Ḍaw' Nuṣūṣ Al-Sharī'ah Wa Maqāṣidihā* (Maktabah Wahbah, 2011), 113.
[264] Ebrahim Moosa, "Colonialism and Islamic Law," in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Edinburgh: Edinburgh University Press, 2009), 177.
[265] Moosa, 158–59.

Therefore, this thesis asserts the opinion that in the era of post-colonial, political coercion, aggression of outsiders, and ideological contestation have an essential role in the formation of the latest rules of these countries related to non-Muslims and, more specifically, in the provision of facilities in the form of permits for the establishment of houses of worship. In the management of life between religious communities, especially the lives of non-Muslim minorities, they are bound by agreements and agreements related to human rights that are under the supervision of superpowers, so they inevitably have to heed the agreements and rules agreed with them[266].

Although this kind of social life has a good effect by producing harmony between communities, it is not an exaggeration if, from another point of view, this is a form of neo-colonialism due to the loss of freedom and state sovereignty in managing its political life. In this regard, Edward Antonio stated that in former colonial countries, globalization became a model of sustainable colonialism that repeated social, economic, and cultural imbalances such as when the era of colonialism took place. Although indirectly, the existence of power relations is undeniable in the era of globalization[267].

### D. Conclusion

This section examines the rules of jurisprudence regarding houses of worship in modern countries where the majority of people are affiliated with the Hanafi school. By selecting Turkey, Egypt, and Pakistan, it is hoped that this research can provide a brief picture related to the study of the contextualization of changes in the rules of houses of worship in modern countries. In addition, there are still many opportunities for future studies on similar topics in other Hanafi countries, such as Iraq, in which the condition of its society has changed a lot compared to the beginning of the emergence of Hanafi there. Furthermore, countries with other legal schools and also countries with a majority of Hanafi adherents but as a minority Muslim condition are also worthy of comparison.

Furthermore, this chapter tries to unravel the rules that have changed significantly from the classical *fiqh* rules about houses of worship by using the lens of political jurisprudence (*fiqh al-siyasah*) and its socio-political context. By referring to the concept of *fiqh al-siyasah* and the jurisprudential principles (*qawa'id fiqhiyyah*), there will be many justifications, whether the rules have changed to be stricter or more flexible. In fact,

[266] European Commission for Democracy Through Law (Venice Commission), "Opinion on the Legal Status of Religious Communities in Turkey and the Right of The Orthodox Patriarchate of Istanbul to Use the Adjective 'Ecumenical,'" 7.
[267] Jonathan Dunn, Heleen Joziasse, and Raj Bharat Patta, "Introduction," in *Multiple Faiths in Postcolonial Cities Living Together after Empire* (Palgrave Macmillan, 2019), 4.

although, the rules of jurisprudence are applied similarly also in the broader context, they are more flexible by following the changes of places, times, and conditions. In addition, factors such as socio-politics are also considered in this chapter to see the background of the changes in the rules that are enforced. Therefore, it seems that both *fiqh* and socio-politics play a role and support each other for justification related to whatever form of rules applied by each country treating its citizens of non-Muslim.

# CHAPTER VI
# CONCLUSION

This thesis has tried to answer two questions: First, how have the rules of the Hanafi school on worship changed and continued, and why? Second, how does a modern country with a Hanafi-majority population bridge between the application of *fiqh* rules and accommodating the interests of non-Muslims?

Although other scholars have written many discussions on the law of non-Muslim houses of worship, many of them only collect all the laws related to it, such as the law of building, damaging, renovating, relocating, giving endowment, entering, praying in it, etc. Moreover, several studies also choose particular legal views to build an argument both in favor of establishing houses of worship and those that reject based on Islamic law. This study is not interested in delving into that discussion. Nor does this thesis want to prove that the rules about houses of worship in Islam align with the various regulations embraced by modern countries. Rather, this study wants to show how the opinions of jurists change and shift across time and place (in this case, limited to Hanafi school).

Chapter three has covered topics concerning the Hanafi School in general. In more detail, the exploration in this chapter focuses on several discussions, such as the Hanafi school's emergence and development, the *ijtihad* model of the Hanafi jurists and its characteristics, and the factors that influence Hanafi followers in leaning towards an opinion. This chapter reveals that the existence of classes or levels (*tabāqāt*) in the Hanafi school, the concept of freedom embraced, and the use of postulates in legal methodology (*ushul al-fiqh*) related to subjectivity, and the influence of social context affect the existence of diverse and substantive opinions in the Hanafi school. All of these things are interconnected, and sometimes, one of the elements is more emphasized in groups or as Hanafi's jurist. This discussion corroborates other studies about structural interrelation in Islamic law. The term extra-textual legal sources include juristic consensus, utility, and custom—all of which help jurists make decisions in cases where textual sources do not have clear answers to existing questions.

Chapter four elaborates on how Hanafi jurists treat the Dhimmi house of worship under Islamic rule and the shift of their opinions across borders. Both the opinion that allows the dhimmi house of worship to be established in Islamic territory and those that prohibit it could be traced back to the founders of the Hanafi school. With the spread of this school to various parts of the world, including the Central Asian Region, judicial rules on houses of worship subsequently reveal divergent views, even in geographically

proximate areas (Bukhara and Balkh). The jurists of this region took the opinions of their predecessors by using a judicial approach to justify what they adhered to. This is slightly different from what is shown by the two imperials following Hanafi schools (Mughal and Ottoman), which accommodated the rules related to houses of worship by using political authority. For the former, The Empire structurally formed a team of jurists to draw up a legal guideline by selecting the opinions of predecessor jurists based on the ruler's approval. Meanwhile, for the latter, the empire with a more varied type of rule prioritized political policy rather than Islamic law principles.

This change and continuity bolster the assertion what Hallaq said that such a process has been embedded in the structure of the madhhab tradition which facilitates the possibility of social changes by keeping up with the times. At the same time, however, this discussion also dissents from his argument that the split arises from strategic steps implemented systematically and not accidental events. From what has been explored, this study finds that it is overly simplistic to consider that the rupture in the Islamic legal school is solely confined to strategic steps implemented systematically. On the other hand, the rupture may be carried out because of the compulsion that requires a jurist to adjust the rules to the conditions of reality. As seen in the condition of the Hanafi Balkh, they inevitably have to take a different stance from the mainstream of the Hanafi circle. However, it should be noted that the scope of *fiqh* is very broad. Perhaps, in one issue, this difference of opinion arises, but in another issue, it does not, depending on the condition seen by the jurist as requiring adjustment or not.

In addition, chapter five examines the rules of jurisprudence regarding houses of worship in modern countries where most people are affiliated with the Hanafi school by selecting Turkey, Egypt, and Pakistan as subjects. This chapter tries to unravel the rules that have changed significantly from the classical *fiqh* rules about houses of worship by using the lens of political jurisprudence (*fiqh al-siyasah*) and its socio-political context. By referring to the concept of *fiqh al-siyasah* and the jurisprudential principles (*qawa'id fiqhiyyah*), there will be many justifications, whether the rules have changed to be stricter or more flexible. In fact, although the rules of jurisprudence are applied similarly in the broader context, they are more flexible by following changes in places, times, and conditions. Overall, this thesis proposed an argument that the intellectual pattern and framework of the Hanafi School, which tends to use rationality, often interplay and negotiate intricately with socio-political conditions so that the existence of a *fiqh* rule on the house of worship occasionally becomes erratic between sticking to norms by prohibiting them or being more open by giving permission but with certain conditions.

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