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REFLECTIONS ON RELIGIOUS DIFFERENCE AND PERMISSIVE INCLUSION IN MUGHAL LAW

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ABSTRACT

This article investigates the "pre-history" of the colonial and postcolonial personal (status) laws of India, which tie religious identity with legal status, particularly in matters of family law. It examines the concept of law and legal jurisdictions in Mughal India (1526-early eighteenth century; officially 1857): a unique political formation in which an Islamic state ruled over a populace which was predominantly non-Muslim. Using Mughal official orders, Persian-language legal documents produced between the sixteenth and eighteenth centuries, and Persian-language legal formularies, the article proposes that despite frequent local delegation, the Mughals, their officials, and their subjects did not conceive of law as divided up into several religion-based jurisdictions. Instead, an inclusive operationalization of *shari'a*[1] (Islamic moral code, in a more specific sense Islamic law) appears to have popularized Islamic legal concepts and forms, and a host of pragmatic concerns attracted many who were not Muslims to the courts of the imperially appointed *qazis* (Islamic judges). Based on this evidence, this article proposes that Mughal India represents an instance of widespread "permissive inclusion" into *shari'a*, whereby in non-criminal matters the *qazis*' courts allowed and attracted, but did not require, all Mughal subjects to avail of their civil jurisdiction. This proposition is examined further in connection with the acrid debates between late Mughal administrators (particularly, Muhammad Reza Khan of Bengal) and their British overlords. It is thus suggested that while instituting colonial rule in the late eighteenth century, British imperialists also introduced a new concept of religion-based distribution of legal authority to India.

KEYWORDS: Islamic law, Mughal India, *insha*, British colonialism, Muhammad Reza Khan

Created under British colonial rule, the Indian legal system today recognizes and administers a complex system of personal (status) laws, whereby cases of family, property, and religious institutions are decided on the basis of Hindu, Muslim, Parsi, and Christian personal law—depending on the

1 Note on transliteration: For Persian and Arabic words, I have used a transliteration system based on a modification of F. J. Steingass, *A Comprehensive Persian-English Dictionary* (London, 1892). I have avoided the use of diacritics in general, except for the 'ayn. I have therefore not indicated the length of vowels, nor used the hamza to indicate consecutive distinctly pronounced vowels. In case of Arabic words commonly in use in Persian, and Hindi/Urdu (such as *qazi*), my transcription reflects the South Asian pronunciation pattern; for the same reason, I have indicated the possessive *ezafe* with *–e* rather than *–i*. I have used the English plural signifier *s* to pluralize Arabic, Persian, and Hindi/Urdu words. The exceptions are book titles in which other scholars have preferred to use different transcription systems.

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religio-legal identity of the litigants in question. Beginning with "early departures" towards the idea of legal pluralism,[2] British jurists and statesmen came to see the preservation of "native institutions," "customs," and the religion-based personal laws in particular as evidence of the outstanding liberalism of British imperial rule.[3] The deeply ideological commitment of the British colonial government to the personal laws as a system came to be a part of a larger corpus of quintessentially imperial political argumentation that sought to explain why and how Britain may legitimately rule a country as distant and different as India. Recently, Robert Travers has beautifully examined the contradictions inherent in the early (eighteenth-century) British arguments, which not only claimed continuity with Mughal policy and formal endorsement by the much-reduced Mughal emperors but also asserted that British rule was a distinct improvement on the practices of India's erstwhile Muslim rulers.[4]

Much has been written about British appraisals of pre-colonial Indian law, and the combination of expediency and theory—social as well as political—used to transform it.[5] Far less has been written about legal governance under the prior Mughal rule and the nature of Mughal legal practices in dealing with the persistent "problem" of religious diversity on the Indian subcontinent. This article proposes to add to the findings of a small body of scholarship produced since the 2000s that has dealt specifically with religious codes as a source of Mughal law and religious identities in the structuration of Mughal legal governance.[6] It intends to do so with particular attention to the role and

2 See Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement*, 2nd ed. (New Delhi: Orient Longman, 1982), 12–23, for a brilliant discussion of the earliest British schemes for legal preservation, and of the ethical and political arguments made to justify them. Of course there were also arguments made for the sweeping away of meaningless and harmful traditions, in the name of progress and humanitarianism. On the whole, however, the tenacity of the personal laws is testimony to the strength of the conservative and conservationist strand of the colonial tradition.

3 For a mid-twentieth-century British judge's fulsome praise for Warren Hastings, the founder of the system, see George Rankin, "The Personal Law in British India," *Journal of the Royal Society of Arts* 89 (1940–1941): 426–42. For a more detailed discussion, and other relevant examples, see Nandini Chatterjee, "Muslim or Christian? Family Quarrels and Religious Diagnosis in a Colonial Court," *American Historical Review* 117, no. 4 (2012): 1101–22.

4 Robert Travers, *Ideology and Empire in Eighteenth Century India: The British in Bengal* (Cambridge: Cambridge University Press, 2007). For one of the best known efforts to combine the two arguments (that the British were maintaining and also improving the Mughal constitution), see Alexander Dow, *The History of Hindostan from the Death of Akbar to the Complete Settlement of the Empire under Aurungzebe*, 3 vols. (London, 1792); see especially "Dissertation on the Origin of Despotism in Indostan," in ibid., 3:i–cx.

5 See, for example, Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998); Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of Bengal Criminal Law, 1769–1817* (Wiesbaden: Steiner, 1983).

6 Travers did so through the framework of transition to colonialism in *Ideology and Empire*, 100–40. Michael Dodson provides a very useful, brief history of projects translating Sanskrit texts with legal relevance. Michael Dodson, *Orientalism, Empire and National Culture: India, 1770–1880* (Basingstoke: Palgrave, 2007), 19–39, 45–48. Farhat Hasan has offered the clearest statement of the role of *shari'a* in Mughal legal governance. Based on his use of Persian-language court records, mainly from Surat and Cambay, he proposes that *shari'a* was a normative code, flexible in practice, that was widely subscribed to and claimed in legal disputes, and not only by Muslims. Farhat Hasan, *State and Locality in Mughal India: Power Relations in Western India, 1572–1730* (Cambridge: Cambridge University Press, 2004), 71–90. Based on a different body of sources and a distinct disciplinary standpoint, Mouez Khalfaoui has written on the nature of jurisprudential argumentation in the best-known Indian compendium of *fatwas* (responsa) the *Fatawa-yi 'Alamgiri*, sponsored by the emperor Aurangzeb 'Alamgir and compiled by a team of *'ulama* (scholars) between 1664 and 1672. Mouez Khalfaoui, "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 (2011): 87–96.

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meaning of *shari'a*, commonly but questionably translated as "Islamic law," in Mughal India.[7] In doing so, this article aims to address two sets of historiography that have not been traditionally connected although they are clearly mutually relevant: first, the growing body of literature produced since the 1990s and mostly unrelated to India that has hugely enriched our understanding of Islamic law as a jurisprudential, professional, and social tradition; and second, the enormous body of literature on the Mughal state that, despite the acclaimed efforts of Muzaffar Alam and Sanjay Subrahmanyam, remains geographically focused on the Indian subcontinent.[8] The Mughal state was indeed an Indian phenomenon, but it was also a locally specific dispensation of an early modern Islamic state,[9] uniquely ruling over a majority non-Muslim population. The Mughal state also provided the foundations for the British Empire in India in terms of fiscal techniques, scribal cultures, and skilled personnel, and it supplied, alongside the Roman Empire, a key legitimating self-image for British imperialists.[10] Thus, understanding Mughal management of religious identities and status in law has the potential of enriching our understanding, not only of early modern India as an Islamic polity, but also offering broader insights into the historically various routes of "managing religion" more generally—whether in theory, governance, or everyday social interactions.

While talking of law, this article does not deal with jurisprudential (*fiqh*) texts. Instead, it uses more traditional historical sources, such as Persian-language legal records, as well as formal notes describing the system written by Indian contemporaries, available in English translation. The article ends with an analysis of the written statements of a high-ranking late-Mughal administrative official, Muhammad Reza Khan, who unwillingly oversaw the transition from late Mughal forms of governance to the formation of the Company state in Bengal, between 1757 and 1773. Reza Khan argued that, contrary to British claims, the personal law system being produced in India was neither legitimate, nor derived from Indian tradition.[11] Famously, he denied the admissibility of Brahmin co-judges and non-Islamic legal codes in a proper court of law in a country ruled by a Muslim sovereign (as he still deemed India to be in the eighteenth century). As we shall see, Reza Khan was not alone in his vision of a unified legal and political structure, centered on Islam. Many other persons—litigants, scribes, and bureaucrats—expressed similar nonchalance about abstract social differences based on religious subscription, at least in the context of legal disputes and concerns, and instead articulated vigorous claims to justice based on the shared

7 Wael B. Hallaq's *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), is both an excellent introduction to the subject and an expression of caution regarding the incommensurability of certain key categories of translation. As Hallaq forcefully argues, to translate *shari'a* as Islamic law is to expect state power and coercion where moral authority proved effective in most cases (obviously a debatable point), and to fail to take note of the tremendous, locally sensitized diversity of *fiqh* that the actuation of *shari'a* was based on. The book also provides a detailed and systematic (also systemic) picture of the process of evolving jurisprudence.

8 See Alam and Subrahmanyam's appeal for comparative and connected, pan-Asian research and study of the early modern world, but also their note of caution regarding the static and institutional focus that studies of Mughal law, are, in their opinion, likely to slip into. Muzaffar Alam and Sanjay Subrahmanyam, eds., *The Mughal State: 1526–1750* (New Delhi: Oxford University Press, 1998), 1–71; see especially page 6.

9 There is a vast body of literature and divided historiography on the nature of the Mughal state; for a very useful summary, see ibid., 1–71.

10 For one brief discussion of British references to the Roman model, see Ronald Hyam, *Understanding the British Empire* (Cambridge: Cambridge University Press, 2010), 2. For British efforts to draw on the Mughal tradition, see Travers, *Ideology and Empire*; Bernard Cohn, "Representing Authority in British India," in *The Invention of Tradition*, eds. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 165–210.

11 For an overview of this period in history, see Peter Marshall, *Bengal: The British Bridgehead* (Cambridge: Cambridge University Press, 1987), 70–92.

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experience of Mughal administrative rules and their local application. Of course, these accounts were normative in their own fashion, being articulate claims regarding not only what was or had been, but also what ought to be. Contrasting these visions with the emerging British one, which eventually came to define modern Indian legal practice, and indeed "Indian secularism," the article ends with a reflection on the different historical meanings of religious difference, toleration, and legitimate laws in multi-religious societies and states.

PERSONAL LAWS, *SHARIʿA* AND *FIQH* IN THE INDIAN SUBCONTINENT

Even without considering the Mughal legal system in detail, South Asianists and others have long been aware that the now highly controversial personal laws of India[12] were neither substantively nor procedurally continuous with pre-colonial, specifically Mughal, legal, and adjudicative practice. Although the personal laws are purportedly based on religious codes, they are not religious laws in any straightforward sense—being hybrids of certain elements of substantive law selected from vast bodies of sacred and didactic texts, added to through legislation, and modified by modern rules of procedure.[13] They are administered by a unified judiciary with no religious qualification and, since 1864, without formal provision for special officers to advise the judge on cases of religious law.[14] The two major personal laws—those of Hindus and Muslims—were not codified

12 The personal laws, or personal status laws, are controversial for a number of reasons. Since the first decades after India's independence, they have been the subject of both academic and popular criticism for representing the incursion of religious laws into the fabric of a constitutionally secular state and for allegedly offering disproportionately greater accommodation of the religious codes of minority communities over others. Given that the personal laws are gender discriminatory, they also pose a serious conundrum for liberal feminists arguing for legal reform but unwilling to act as pawns of majoritarian agendas. See Donald Eugene Smith, *India as a Secular State* (Princeton, NJ: Princeton University Press, 1963); Gregory James Larsson, *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington: Indiana University Press, 2001); for a somewhat different view, see Gary Jacobson, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton, NJ: Princeton University Press, 2003); Marc Galanter, "Hinduism, Secularism and the Judiciary," in "Symposium on Law and Morality: East and West," special issue, *Philosophy East and West* 21, no. 4 (1971): 467–87; S. K. Mitra, "Sacred Laws and the Secular State: An Analytical Narrative of the Controversy over Personal Laws in India," *India Review* 1, no. 3 (2002): 99–130; Kumkum Sangari, "Gender Lines: Personal Laws, Uniform Laws, Conversion," *Social Scientist* 27 (1999): 17–61; Zoya Hasan, "Gender Politics, Legal Reform, and the Muslim Community in India," in *Resisting the Sacred and the Secular: Women's Activism and Politicized Religion in South Asia*, eds. Patricia Jeffery and Amrita Basu (New Delhi: Kali for Women, 1999); Partha Ghosh, "The Politics of Personal Laws in India: The Hindu-Muslim Dichotomy," *South Asia Research* 29, no. 1 (2009): 1–17; Nawaz Modi, "The Press in India: The Shah Bano Judgment and Its Aftermath," *Asian Survey* 27, no. 8 (1987): 935–53; Amrita Shodhan, *A Question of Community: Religious Groups and Colonial Law* (Calcutta: Samya, 2001).

13 For an outline of this process, see J. Duncan M. Derrett, "The Administration of Hindu Law by the British," *Comparative Studies in Society and History* 4, no. 1 (1961): 10–52; Michael R. Anderson, "Islamic Law and the Colonial Encounter,"' in *Institutions and Ideologies: A SOAS South Asia Reader*, eds. Peter Robb and David Arnold (London: Curzon, 1993), 165–85; Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 257–313; Ayesha Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam since 1850* (London: Routledge, 2001), 139–52; Hallaq, *Sharīʿa*, 371–83. Hallaq calls the process "jural colonization"—an inexorable steamroller uprooting Islamic law from its "interpretive-juristic soil." Hallaq, *Sharīʿa*, 376.

14 These officers were removed by An Act to Repeal the Law relating to the Offices of Hindu and Muhammadan Law Officers and the Offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the Former Offices, Act XI of 1864.

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throughout the colonial period, thus allowing vast scope for judicial interpretation by theologically untrained judges and radical reinterpretation during moments of legislative intervention.[15]

In India today debates over the implications of having "sacred laws in a secular state" have reached a stalemate—both politically and intellectually.[16] Recent scholarship has demonstrated far greater interest in the social appropriation and usage of the personal laws—for defining community identities with or without reference to vilified "others,"[17] for active "forum-shopping" (which reveals the unquenched agency of colonial litigants),[18] for proposing alternative legal structures premised on resistant models of moral and religious authority,[19] and for defining the self at its most intimate in the process of being gendered and accoutred in kinship and property relations.[20] What remains missing in this varied and rich scholarship is an empirically grounded investigation into the interaction of *shariʿa* and other laws with processes of state building and governance in early modern India.

Led by the pioneering work of Wael Hallaq, there is now a valuable body of research dealing specifically with the nature of *shariʿa* as a system of jurisprudence,[21] which urges us to discard completely the dated notion that *shariʿa* was and is a socially unresponsive and static code of law, having progressed no further since the gates of *ijtihad*—argumentation by experts—were allegedly closed in the tenth century.[22] Hallaq has shown instead how *shariʿa* consisted of a system of

15 For instances of such radical judicial and legislative interpretation, see J. D. M. Derrett, *The Death of a Marriage Law: Epitaph for the Rishis* (New Delhi: Vikas, 1978); Lucy Caroll, "Law, Custom, and Statutory Social Reform: The Hindu Widows' Remarriage Act of 1856," *Indian Economic and Social History Review* 20, no. 4 (1983): 363–88; Alan Guenther, "A Colonial Court Defines a Muslim," in *Islam in South Asia in Practice*, ed. Barbara D. Metcalf (Princeton, NJ: Princeton University Press, 2009), 293–304; Rohit De, "Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act," *Indian Economic and Social History Review* 46, no. 1 (2009): 105–30. De, however, emphasizes the association of traditional *fiqh* experts and others in the advocacy movement of the 1930s, which led to the Muslim Personal Laws (Shariat) Application Act, XXVII of 1937 and the Dissolution of Muslim Marriages Act, VIII of 1939.

16 For the conundrum faced by Indian feminists, see Sangari, "Gender Lines."

17 Hasan, "Gender Politics, Legal Reform, and the Muslim Community in India"; Ghosh, "The Politics of Personal Laws in India"; Modi, "The Press in India"; Shodhan, *A Question of Community*.

18 For several such articles, see the essays collected in "Forum: Maneuvering the Personal Law System in Colonial India," *Law and History Review* 28, no. 4 (2010): 973–1065.

19 Justin Jones, "'Signs of Churning?' Muslim Personal Law and Public Contestation in Twenty-First Century India," *Modern Asian Studies* 44, no. 1 (2010): 175–200.

20 Mytheli Srinivas, "Conjugality and Capital: Gender, Families and Property under Colonial Law in India," *Journal of Asian Studies* 63, no. 4 (2004): 937–60; Eleanor Newbigin, "A Post-Colonial Patriarchy? Representing Family in the Indian Nation-state," *Modern Asian Studies* 44, no. 1 (2010): 121–44.

21 While too many to list here, the works that have inspired this article include, apart from the works by Hallaq, the earlier work of N. J. Coulson, "Doctrine and Practice in Islamic law: One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies* 18, no. 2 (1956): 211–26; N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969); Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998); Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993); Judith Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); David Powers, *Law, Society and Culture in Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002); J. Makdisi, "Legal Logic and Equity in Islamic Law," *The American Journal of Comparative Law* 33, no. 1, (1985): 63–92. Many of these authors frequently and vigorously disagree with each other, which demonstrates both the vibrancy of the field and the space for greater research. See David Powers, "Wael B. Hallaq on the Origins of Islamic Law: A Review Essay," *Islamic Law and Society* 17, no. 1 (2010): 126–57.

22 Wael Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16, no. 1 (1984): 3–41.

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evolving jurisprudence connected to real-life legal disputes and decisions—how scholars of *fiqh* (law more specifically) collated legal responses (*fatwas* or *fatawa* in Arabic plural) issued by *ʿulama* in response to specific disputes and produced further derivative works, extracting both principles and compendia on specific topics.[23] While the innovativeness and importance of Hallaq's work is beyond dispute, a significant question not addressed by his book is the problem of religious difference and its resolution within *shariʿa*—surely a key question for the very large number of the world's Muslims who lived in South Asia and religiously diverse contexts. It appears implausible to assert, as did another scholar, that "Islamic polities had traditionally left each non-Muslim community to administer its own law to its own members through its own specialists as long as the community maintained certain limits on public religious practices and offered up financial compensation in taxes."[24] Such an assertion may be supported by Hallaq's own non-statist and communitarian view of Islamic law, such that, allegedly, "in pre-modern Islamic societies, disputes were resolved with a minimum of legislative guidance, the determining factors having been informal mediation/arbitration, and, equally, informal law courts."[25] This community-focused view of *shariʿa* is replicated in the works of South Asianists, dealing with the vitality and capacity for self-renewal both as an ideational system within *shariʿa* and among those who pursued it seriously,[26] although none of these scholars deal with the jurisprudence as such. In fact, Mouez Khalfaoui's research, which is methodologically comparable to Hallaq's but focuses on Islamic jurisprudence in South Asia, has demonstrated that, in the seventeenth century, religious scholars, commissioned by Mughal emperor Aurangzeb ʿAlamgir to produce a compendium of *fatwas*, made careful choices between the *fiqh* authorities they relied upon, deliberately choosing older Iraqi compilations over more recent Central Asian ones in order to extract precedents from what used to be a predominantly non-Muslim context.[27]

While Khalfaoui's research offers crucial insights into Indo-Islamic jurisprudence, in order to understand what "law" really meant in Mughal India, it is important to return to the question of the state and its role in legal administration. The only early modern Islamic state (the Ottoman Empire) for which we have research based on voluminous court records points to a central role played by the state machinery and state-appointed officials (judges and legal experts) in the shaping and application of *shariʿa*, both through state legislation (the Ottoman *kanuns*) and the incorporation of such legislation into the opinions of juriconsults (*muftis*) working within a state-controlled legal system. Rather than pragmatic accommodation to state power, the impression is one of systematic and evolving jurisprudence connected to real-life legal processes.[28] Research has also demonstrated that Ottoman *mahkama* courts, which applied Ottoman-Islamic law, were popular with Jewish,

23 Wael Hallaq, "From *Fatwā*s to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no. 1 (1994): 17–56; Hallaq, *Sharīʿa*, 159–96.

24 Kugle, "Framed, Blamed and Renamed," 263; see also Jalal, *Self and Sovereignty*, 139–52.

25 Hallaq, *Sharīʿa*, 159.

26 Francis Robinson, *The ʿUlama of Farangi Mahall and Islamic Culture in South Asia* (London: C. Hurst, 2001); Barbara Metcalf, *Islamic Revival in British India, Deoband, 1860–1900* (Princeton, NJ: Princeton University Press, 1982).

27 Khalfaoui, "Together but Separate."

28 Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994). Gerber is careful to discard any notion of the Weberian *kadijustis*, agreeing instead with David Powers, "A Court Case from Fourteenth-Century North Africa," *Journal of the American Oriental Society* 110, no. 2 (1990): 229–54.

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Coptic, Orthodox, and Armenian Christian litigants in Jerusalem,[29] Cyprus,[30] and Damascus between the sixteenth and nineteenth centuries. In spite of the occasional effort of certain Muslim litigants to employ their preferred legal status, substantive justice, in general, appears to have been delivered.[31]

Compared to the Ottomans, for whom non-Muslims were significant minorities, the Mughals' subjects were predominantly non-Muslim.[32] However, this has only led most South Asianists to highlight the "ambiguities" of South Asian Islam, such that practice codes derived from Islam are said to have been ambiguously combined with other norms, until a sense of crisis instigated by colonial rule led to the pursuit of clearly demarcated and inevitably sectarian rules of being and belonging.[33] Although similarly negligent of the juristic tradition, Muzaffar Alam has argued differently when studying *sharīʿa* as a source of policy. Rather than seeing religious toleration in pre-modern India arising out of *sharīʿa* being compromised, or supplanted by other codes (such as *adab* [good manners]), he suggests that the category *sharīʿa* had other widely accepted meanings beyond the juridical sphere and that it acquired the implication of justice in a capacious sense especially in three sets of writings, all in the Persian language: *akhlaqs* (ethical texts),[34] *maktubat* (epistles) and *malfuzat* (conversations) of Sufi saints; and *shaʿiri* (court poetry). Attributing both ideological coherence and a significant legal role to the Mughal state, Alam has suggested that a transcendent, nonsectarian idea of justice became dominant in the Mughal polity and remained thus even during periods imagined to be more sectarian, such as the period of rule by Aurangzeb ʿAlamgir.[35] Few other works have presented such a coherent view of the Mughal interpretation of *sharīʿa*, based on contemporary sources. Alam has certainly transcended older works

29 Morris S. Goodblatt, *Jewish Life in Turkey in the XVIth Century as Reflected in the Legal Writings of Samuel de Medina* (New York: Jewish Theological Seminary of America, 1952), 132–33; Ammon Cohen, *Jewish Life under Islam: Jerusalem in the Sixteenth Century* (Cambridge, MA: Harvard University Press, 1984), 1. Both works are cited in Lauren Benton, *Law and Colonial Cultures* (Cambridge: Cambridge University Press, 2002), 102–14.

30 Ronald C. Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean World, 1571–1640* (New York: New York University Press, 1993), 69.

31 Najwa Al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination," *International Journal of Middle Eastern Studies* 31, no. 3 (1999): 429–44. This both confirms and refines the argument by Bernard Lewis that distinctions between Muslims and non-Muslims were significant and legally regulated in all medieval and early modern Muslim states; but such distinctions rarely descended to oppression before such states were weakened by European incursions. Bernard Lewis, *The Jews of Islam* (Princeton, NJ: Princeton University Press, 1984), 1–66, 121–48.

32 The Mughals officially ruled from 1526 to 1857, although the area under their dominion varied widely during this period, generally expanding until 1707, and then falling back gradually until they were officially removed following the Indian rebellion of 1857–1858. There are said to be "Great Mughals": Babur, Humayun, Akbar, Jahangir, Shah Jahan, and Aurangzeb ʿAlamgir (d. 1707).

33 Katherine Ewing, ed., *Sharīʿa and Ambiguity in South Asian Islam* (Berkeley: University of California Press, 1988), 1–22.

34 Alam points to the key text *Akhlaq-e Nasiri*, written by Nasir al din Tusi, around 633 AH/1235 CE. Tusi's text circulated widely in Mughal India, and several *Akhlaq* treatises produced in India were modeled on his work. Tusi expressly left out any discussion of *fiqh*, or "Islamic jurisprudence" in the precise sense, on grounds that his concern was with universal principles, such as the Divine law (*sharīʿa*) enacted by the Divinely inspired lawgivers (in the plural, and possibly referring to ideal kings), whereas *fiqh* was something that changed with the times. See Nasir al-din Tusi, *The Nasirean Ethics*, trans. G. M. Wickens (London: George Allen & Unwin Ltd., 1964), 191–92.

35 Muzaffar Alam, *Languages of Political Islam: India 1200–1800* (London: Hurst, 2004). For a criticism, see Iqtidar Alam Khan, "Tracing Sources of Principles of Mughal Governance: A Critique of Recent Historiography," *Social Scientist* 37, no. 5/6 (2000): 45–54, which merely claims a different ideational genealogy for admittedly tolerant Mughal policies.

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on Mughal "law," which generally dealt with a small number of policy matters that remain controversial until the present day, such as religious conversions, the destruction or maintenance of religious buildings, and discrimination in government employment. Those older works did not distinguish executive action from judicial, nor classical treatises on political theory and principles of *fiqh* produced in Iraq from early modern Indian legal practice. Affected by a certain cultural pride and their own professional training, some lawyer-historians even managed to discover several eccentric English legal devices in Mughal law.[36]

Taking a cue from Alam, but unlike him, focusing on law and legal processes rather than on royal ideology and elite ethical codes, I suggest that *shariʿa* in Mughal-ruled India was not the law of Muslims alone, as it was to become under colonial rule. Instead, it was a "permissively inclusive" legal system, one that acknowledged differences in religion without drawing rigid legal boundaries around them, paying equal attention to other markers of difference. Furthermore, as I discuss below, rather than communitarian consensus, it was the need for secure commercial transactions, the smooth functioning of the state, and the resultant creation of entitlements, as well as a shared culture of Indo-Persian legal forms, that brought litigants into the ambit of these formally Islamic courts. This legal culture survived until the late eighteenth century, and only then, with crucial, British-inspired shifts in ideals of sociopolitical existence and legal governance, was *shariʿa* turned into "Mahomedan law"—or personal status laws for Muslims in British-ruled India.

THE MUGHAL JUDGES

European observers have, since the seventeenth century, frequently asserted that there was no law in India at all under the Mughals' despotic regime; the king's will was law, for better or for worse. In many cases, Mughal India has served as a foil for discussing and criticizing the situation back home. For example, when the seventeenth-century French doctor François Bernier observed that the *qazis* were powerless against tyrannical lords, themselves viciously corrupt, and (ironically) capable of offering prompt justice only to the poor (because there was no point in stringing them along), this sweeping generalization was not based on any specific observation, but served principally as an argument in favor of the political virtues of private property.[37]

Mughals themselves, on the other hand, had a tradition of writing about the institutions and purposes of government, including legal government. The best known and most-cited Mughal administrative and revenue manual and survey, the *Ain-i Akbari*, compiled by Abul Fazl (1551–1602), courtier, personal friend, and ideologue of Jalaluddin Muhammad Akbar, the third Mughal emperor, was also a clear statement of a Mughal political theory of kingship. Royal power, emanating from God's bounty, was, the *Ain-i Akbari* asserted, intended to quell strife,

36 S. R. Sharma, *Religious Policy of the Mughal Emperors* (London: Oxford University Press, 1940) (Sharma also mentions attitudes towards conversion to, and apostasy from, Islam); K. A. Nizami, *Akbar and Religion* (Delhi: Idarah-e Adabiyat-e Delli, 1989); J. F. Richards, "Crown Versus Ulema" in *The Mughal Empire* (Cambridge: Cambridge University Press, 1993), 36–40 (based on Nizami); Muhammad Basheer Ahmad, *Judicial System of the Mughul Empire: A Study in Outline of the Administration of Justice under the Mughul Emperors Based Mainly on Cases Decided by Muslim Courts in India* (Allahabad: Aligarh Historical Research Institute for Aligarh University, 1941); B. S. Jain, *Administration of Justice in Seventeenth Century India* (Delhi: Metropolitan Book Co., 1970); Wahed Husain, *Administration of Justice during the Muslim Rule in India* (Calcutta: University of Calcutta, 1934).

37 François Bernier, *Travels in the Mogul Empire AD 1656–1668* (London: Humphrey Milford, Oxford University Press, 1916), 200–38.

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establish peace, and ensure social stability and propriety—not through coercion alone but through righteousness, moderation, wisdom, and generosity, and through the functioning of well-oiled governmental machinery.[38] This manifesto-cum-manual-cum-gazetteer described the role of various officials performing judicial duties in combination with military and administrative offices. The longest description pertained to the post of the *sipah salar*, commander of forces, effectively the provincial governor, also known as *subahdar*. In what appeared to be a re-statement of the role of the king himself, the governor of a province was admonished to be cultivated, restrained, well-informed, fair, and wise, and specifically in judicial matters, to refuse to be satisfied with witnesses and oaths and instead investigate the matter thoroughly.[39] There were also other officials charged with the maintenance of "law and order" who we may see as possessing judicial functions, such as *faujdars* at the district or *pargana* level,[40] and *kotwals*,[41] although the *Ain* conceived of the first mainly as a military-police official and the latter as a police-intelligence officer. There was indeed provision for the centralized appointment of the classic Islamic judge, the *qazi*, and he was similarly exhorted to pursue investigations thoroughly—because "[f]rom the excessive depravity of human nature and its covetousness, no dependence can be placed on a witness or an oath."[42] In this, these judges were no doubt meant to be supported by the local officer of police and intelligence—the *kotwal*—whose much longer list of duties was enumerated right afterwards.

This exhortation to judicial investigation was an interesting gloss on, not necessarily a deviation from, the classical Islamic legal theory of evidence (*shahadat*), with its emphasis on oral testimony, whether of the parties themselves or of witnesses,[43] a gloss that was based on a pragmatist social-psychological analysis. Similar advice to not proceed simply "by the book" was recommended in a *dastur al-ʿamal* (rules of government) of 1594, which included much of the material in the *Ain* discussed above. In these rules of government, royal princes (often appointed provincial governors), high-ranking officers, tax officials, and *kotwals* were advised to counsel people away from wrongdoing, if possible, and, if not, to modulate punishment according to the circumstance and the status of a person—because, as it said, "[s]ometimes a smaller fault may deserve greater punishment, while an apparently bigger one may have to be overlooked." Where punishment was essential, capital punishment should be awarded with extreme restraint, for the sensible and humane reason that "a severed head can never be joined," and such cases should be sent to the royal court for confirmation. In all cases, punishment had to be customized according to the rank of the person in question—since, for a noble person a "stern look would amount to a capital punishment while even a beating may not be

38 Abul Fazl ibn Mubarak, "Abul Fazl's Preface," in *The Ain i Akbari*, ed. and trans. H. Blochmann (Calcutta: Baptist Mission Press, 1873), 1:i–x.

39 *Ain i Akbari*, 2:37–40.

40 Ibid., 2:40–41; see also Noman Ahmad Siddiqi, "The Faujdar and Faujdari under the Mughals," in *The Mughal State, 1526–1750*, eds. Muzaffar Alam and Sanjay Subrahmanyam (London: Oxford University Press, 2001), 234–51 (discussing the *faujdar's* judicial functions); see especially Siddiqi, "The Faujdar and Faujdari," 248–51 (based on legal documents at the Uttar Pradesh State Archives, India, within what is called the "Allahabad Collection."). However, this analysis is not fully convincing—since in the case discussed, that of a land property dispute in AH 1080/CE 1669, it appears that the litigants were directed to *first* appear in the court of the *qazi* of the small city of Gorakhpur, the *faujdar* merely issuing the order according to the judgment. However, like his superior the provincial governor, the *faujdar* would have had more independent jurisdiction in law and order cases. Although it is problematic to designate all such actions as "criminal trials," some of these did involve investigation and evaluation of evidence, not mere executive action.

41 *Ain i Akbari*, 2:41–43.

42 Ibid., 2:41.

43 See for example, Al-Marghinani, "Book XXI. Of Shahadit, or Evidence," in *Hedaya*, ed. and trans. Charles Hamilton (London: T. Bentsley, 1791), 2:665–727.

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helpful with a low person."[44] Even though the judge in *fiqh* texts was allowed discretion in the vast majority of offenses that were not the extreme ones (*hadd*), the Mughal policy directive to consider social status reads very differently from the exhortations to *qazis* to treat everyone equally.[45]

It was also policy that shaped repeated instructions not to interfere in the customs of people of other religions—in one case with the somewhat tautological gloss that people were unlikely to be mistaken in their pursuit of something as important as spiritual salvation, and, if they were, then they deserved pity and not punishment.[46] This statement of policy was effective law in Mughal India, as a poor Bengali Muslim villager discovered when he killed a peacock for a travelling Portuguese Augustinian friar and found himself incarcerated by the local official or *shiqdar*. Reportedly, this local official refused to be swayed by the Portuguese monk's theological argument that Islam did not prohibit the killing of creatures such as peacocks. This petty official was simply enforcing the emperor Akbar's decree ordering respect for local customs, which included, for Hindus of this region, a strong distaste for killing peacocks.[47]

There are many episodes in Mughal history that could sustain the thesis that the Mughals, like the Ottomans, tried to appropriate and expand the *shari'a* for policy reasons, founding their authority in a theory of divinely inspired kingship. The third, oft-termed "liberal" emperor, Akbar (in)famously arranged for the leading *'ulama* of the realm, including the *qazi al-quzzat* (the chief imperial *qazi*), to sign a declaration (*mahzar*) that acknowledged that in a situation where the religious scholars (*mujtahids*) failed to agree among themselves, the king's opinion would be binding.[48] In several less abstract instances, imperial orders (*farmans*) created a corpus of judiciable law, similar to the Ottoman *kanuns*. In some cases, such imperial orders created new sets of rights, which could then be taken to court by disputing parties. One such notable instance is the *farman* of the sixth (and reputedly most orthodox) emperor Aurangzeb, in the year 1690, turning all grants of subsistence (*madad-e ma'ash*), intended in theory for the destitute or other-worldly, into inheritable allocations. This order was accompanied by a full set of rules regarding succession and explicit instructions to *hakims* and *qazis* for applying these rules in case of disputes. These rules, aimed as they were at securing succession to unfragmented estates, stipulated succession by a grandson (where the son had died) or by a daughter (in the absence of sons, and to the exclusion of agnatic male heirs) or exclusion of a married daughter with property of her own where there was a surviving son. All of these stark deviations from well-known Sunni laws of inheritance were justified on the basis that such grants were not property as such, but *'ariyat* (loans) from the state.[49] This order was repeated in 1720 by a high-ranking officer, Mu'azzam Khan.[50]

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44 "Akbar's *Dasturu'l-'amal* (a Circular Enumerating the Duties of Officers) addressed to the 'Ummal and Mutasaddis of the Empire," in *Mukatabat-e-'Allami (Insha'-i Abul Fazl)*, Daftar I, ed. and trans. Mansura Haider (New Delhi: ICHR, 1998), 79–88.

45 See "Book XX. Of the Duties of the Kazee," in *Hedaya*; see especially ibid., 338.

46 Both in *Ain*, and in the *Dastur al-'amal* of 1594.

47 Benton, *Law and Colonial Cultures*, 80–81.

48 Abdul Qadir Badauni, *Muntakhab al-tawarikh*, trans. Ranking, Haig, and Lowe, revised B. P. Ambasthya (Patna: Academica Asiatica, 1973), 2:279–80. For a discussion of the evolution of Akbar's religious policies, and the unsuccessful place of the *mahzar* within it, see Iqtidar Alam Khan, "The Nobility under Akbar and the Development of His Religious Policy, 1560–80," *The Journal of the Royal Asiatic Society of Great Britain and Ireland* 1, no. 2 (1968): 29–36.

49 *Farman* of Aurangzeb, thirty-fourth regnal year, 1690, Persian manuscript no. 2608/12, National Archives of India (henceforth NAI), New Delhi. This order has been commented on by several scholars, including Irfan Habib and Muzaffar Alam, to demonstrate the increasing entrenchment of grants-holders and loss of control by the state. This article, on the other hand, looks on the order as an instance of state creation of property rights.

50 *Parwana* of Mua'zzam Khan, second regnal year of Muhammad Shah, 1720, Persian manuscript no. 2714/11, NAI.

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In all this, the role of the *qazi* remains shadowy, although the documentary evidence of their appointment and functioning in Mughal India is abundant. Rather than having a separate "judicial" department, the Mughal *Sadarat* oversaw all religious affairs, managing land grants to the religious scholars/practitioners and the appointment of *qazis*. The headship of this department, the post of the *sadr us-sudur*, was the highest imperial office that an *ʿalim* or religious scholar could aim for, and until the fifth emperor Shah Jahan's reign in the mid-seventeenth century, the chief *sadr* and the chief *qazi* (*qazi al-quzzat*) were usually the same man. The emperor appointed the chief *qazi* and formally appointed the *qazis* and *mir-ʿadls* (supporting judicial officers) at provincial and district level, although these latter appointments were frequently made on the basis of local recommendations or transgenerational service.[51] In all cases, the appointment and payments had to be endorsed by the central and provincial *Sadr* departments.[52] In terms of their rank and pay, the provincial and district *qazis* were in a far weaker position compared to the governor (*subahdar*) and *faujdar*.[53] Occasional efforts by provincial *qazis* to claim equivalence of position with the *subahdars* ended badly for the *qazis*.[54]

The role of the *qazi*, although not articulated in the *Ain*, is outlined in various extant documents of appointment. Whereas court chronicles show the chief *qazi* as (among other things) a consultant on the legality of policy decisions, the roles of district *qazis* were far more mundane. Thus in a *farman* or royal order, issued in 1629 by the fifth Mughal emperor, Shah Jahan, Qazi Barkhurdar was appointed *qazi* of *pargana* Malanawah, in the province of Awadh, in place of his deceased father. His duties were described as "exterminating and settling dealings (*ʿaqd*) and differences (*khasumat*), settling and deciding law-suits, contracting marriages with guardian and without guardian, distributing inheritances (*qismat*), [and] drawing up legal sentences and decrees (*sijillat*)." In carrying out these duties, he was exhorted not to consider it *jaiz* (legitimate) to deviate even a *mu* (hair, hair's width) from the *minhaj-e shariʿa sharif* (road of the noble *shariʿa*).[55]

In a very similar vein, a non-royal order appointed a *qazi* in the *pargana* of Batala in the Punjab in 1748, outlining the duties as follows:

i) adjudication of law suits and disputes (*fasl-e qazaya wa khusumat*);

51 Zameeruddin Siddiqi, "The Institution of Qazi under the Mughals," *Medieval India, a Miscellany* 1 (1963), 240–59.

52 Ibn Hasan, *Central Structure of the Mughal Empire* (New Delhi: Munshiram Manoharlal, 1980, first published 1936), 306–44; see especially ibid., 310–16. This chapter in Hasan on the "judicial system" of the Mughals is very heavily reliant on non-Indian medieval *fiqh* texts which describe what the legal system ought to be like. See also Rafat M. Bilgrami, *Religious and Quasi-Religious Departments* (New Delhi: Munshiram Manoharlal, 1984); M. L. Bhatia, *The Ulama, Islamic Ethics and Courts under the Mughals: Aurangzeb Revisited* (New Delhi: Manak Publications, 2006), 124–25, 160.

53 See the eighteenth-century gazetteer of Gujarat, written by the last *diwan* (chief revenue official) of Mughal Gujarat, *Mirat-i Ahmadi, Supplement*, ed. Syed Nawab Ali (Baroda: Oriental Institute 1930), 169, 174. In addition to the emoluments associated with their *mansab* (position), which included payments for *zat* (personal) rank as well as *tabinan* (pay for whatever *sawar* or military contingent they were required to maintain), offices frequently had additional *mashrut* (conditional) pay attached to them. In Gujarat in the eighteenth century, for example, such conditional additional emoluments for the provincial governor included a payment for fifteen hundred *sawar* (horsemen); 20,185,900 *dams* (copper coins), and *pishkash* (tributes) from land holders. The provincial *qazi* was entitled to, besides his personal *mansab* (including *zat* and *tabinan*), a conditional payment for twenty *sawar* (horsemen) only. For an explanation of the *mansabdari* system and calculation of payments in relation to the composite ranks, see M. Athar Ali, *The Mughal Nobility under Aurangzeb* (Delhi: Oxford University Press, 1997), 39–53.

54 Siddiqi, "The Institution of Qazi," 249.

55 "A farman-i-thabti (Letters patent)," in Momin Mohiuddin, *The Chancellery and Persian Epistolography under the Mughals* (Calcutta: Iran Society, 1971), 77–79. I have read the facsimile of the Persian document, opposite p. 77, as well as Mohiuddin's translation.

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ii) enforcement of penal law (*ijra-ye hudud*) and awarding punishments (*taʿzirat*);
iii) installation of Friday prayers (*iqamat-e jumʿa*) and prayers in congregation (*jamaʿat*);
iv) inducing people to practice religious devotion (*targhib-e mardum be taʿat*);
v) marriage of those who do not have guardians (*nikah min la wali lahu*);
vi) division of legacy (*qismat-e tarikat*);
vii) taking care of doubtful (that is, unclaimed) property (*hifz-e amwal-e ghaib*) and the property of orphans (*aitam*);
viii) determination of legatees or guardians (*taʿin-e ausiya*);
ix) establishment of equity (*nasb-e qawam*).[56]

None of these documents appointing the *qazis* of these two north Indian *parganas* (districts) made any reference to the restriction of their civil jurisdiction to Muslims alone. Indeed we have positive evidence (based on the names and signatures) that the non-Muslim residents of the *pargana* of Batala, such as Jhajju Singh, Gulab Rai, and Har Dyal Sandhi were as concerned as Muhammad Sadiq, Muhammad Fazil, and Muhyi al-din (and many others) about the court and character of their local *qazi*, and in fact had clear expectations of the nature of this official and the law he applied.

In 1710/11, these self-described "craftsmen and artisans of the town and district (*pargana*)" of Batala recorded a declaration or *mahzar nama*, to this effect:

> We the craftsmen of the town (*qasba*) and *pargana* of Batala liked and were pleased with the agreeable behaviour of Ghulam Muhammad the hereditary *qazi* who was honest and just in enforcing the laws of God (*ahkam-e shariʿa*) and decided law suits according to the provisions of the illustrious *shariʿa* (*shariʿat-e gharra*). We now suffer at the hands of Wali Muhammad the present *qazi* who is the son of the deposed (*mazul*) Qazi Hibatullah. Like his father he has adopted cruel and unjust ways of behaving towards the residents of the town and the whole *pargana* of Batala. He seizes property (*imlak*) and goods (*amwal*) of the people by inventing lies and false accusations under the pretext of enforcing law. He settles cases by usurping half of the property under dispute as his share and refuses to help the honest and poor people who are not able to bribe him. He seizes the old deeds of sale and purchase of property from the parties concerned. He even inflicts physical punishment like a police office (*faujdar*) without any legal grounds.
>
> We therefore request that Qazi Ghulam Muhammad be re-appointed in his place, so that we may live in peace without being forced to leave our native land. Such is the situation.[57]

Shariʿa, as Muzaffar Alam had suggested, had a capacious range of meanings in Mughal India all explicitly related to expectations of righteousness (*haq*) and justice (*ʿadl*). Alam's discovery of the concatenations of the meanings of *shariʿa* in works of ethics, mysticism, and poetry resonate with both the official notations of the role of the Islamic judge (*qazi*) and the ordinary, including non-Muslim, litigants' expectations of his role. *Shariʿa*, from which the judge was exhorted not to deviate, and deviation from which provoked righteous condemnation by the residents of a Punjabi town, required honesty, uprightness, humanity, and conformity with state orders—with seemingly few barriers to the utilization of these courts and the laws by non-Muslim subjects of the Mughal empire.

56 A *hukm nama* dated 24 Ram 1162 (7 September 1749) issued by Shamshir Begh Khan during the second regnal year of Ahmad Shah, Document 66 of the Batala collection, as per the detailed descriptive catalogue of M. Z. A. Shakeb, *A Descriptive Catalogue of the Batala Collection of Mughal Documents, 1527–1757* (London: British Library, 1990), 60–61; I.O. Islamic 4720/66, British Library, London.

57 A *mahzarnama* of c. 1122 (date on latest seal) (1710/11), submitted by craftsmen and artisans of Batala, Document 34 in Shakeb, *A Descriptive Catalogue*., 30–31; I.O. Islamic 4720/34, British Library.

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TOLERATION AND LEGAL FORMULAE

The motives that propelled the very large numbers of non-Muslim Mughal subjects to access the non-compulsory jurisdiction of the *qazi* may well have been prosaic. Existing legal records, held at the central and state archives in India, demonstrate that the majority of people approached the *qazi* as a registrar—in order to record their rights rather than to establish them by disputation. In the recording of such predominantly contractual transactions, people highlighted both the non-compulsory and permissive nature of the *qazi*'s jurisdiction *and* the importance and value of a state endorsement of their entitlements. Quite like the documents related to the appointment and criticism of incumbent *qazis*, discussed above, these documents of registration also demonstrate the ubiquity of Islamic legal terms, again pointing to an inclusive legal culture in which *shari'a* acquired a widened meaning for Muslim and non-Muslim users of these state-appointed courts. These numerous documents also provide pointers to the overlapping incidence of language and locality, as well as religion, in the formalization of such judiciable rights.

Of the approximately 6,000 "acquired" Persian-language documents held at the National Archives of India, derived from a variety of private collections, there are certain dense clusters derived from Cambay (in the western coastal *subah*, or province, of Gujarat), Dhar, and Ujjain (in the landlocked *subah*, or province, of Malwa in central India). These record a variety of transactions, of which the most common are sales (recorded in *bai' namas*), mortgages (recorded in *rahn namas*), gifts (recorded in *hiba namas*), general acquittance of claims (recorded in *ladawa sulhnamas* and *ibra namas*), division of inheritable property (recorded in *taqsim namas*), detailed declarations that often referred to and summarized ongoing legal disputes (recorded in *mahzar namas*), and marriages and incidental obligations (recorded in *nikah namas* and *kabin namas*). Barring the last category, which dealt with Muslim marriages, the vast majority of attesters in the other categories were non-Muslims.

Thus, when in 1672 a Brahman woman called Goran, daughter of Parasram, inhabitant of the city of Ujjain in Malwa decided to transfer a house located in the neighborhood called Sangpuri in Ujjain to a certain Hari Ram Byas, she recorded the transfer in a *hibanama* in the court of the local *qazi*. The document bore the header *-sarnama* "*hu*," meaning "He (God) exists." The lawful declaration (*iqrar-e shari'a*) was said to have been made in the right condition (*hal-e sahih*), while in full possession, and contained a detailed description of the property being transferred. It included, in addition to the Persian-language text in the top and central half of the document, a Hindi summary at the bottom, written in the Nagri script. It also contained a veritable host of signatures on the right-hand margin, under the notation "witness" (written *gawah* in the Persian script and *sakshi*, shortened to *sah*, in the Nagri script). The "*qaum*" of the *zunnardar* translated to the "*jat*" of the Brahman—both terms focusing on the caste status rather than a religious identity as such.[58] Similar documents from western and northern India, studied by a handful of other scholars, establish that actively seeking registrations through the *qazi*'s court and seal, and the use of legal forms that declared a formal respect for the *shari'a* and what was legitimate according to it, was common practice in several provinces of Mughal India.[59] This confirms the picture also presented by

58 Persian manuscript no. 2738/8, NAI, New Delhi. For a careful study of legal deeds, particularly those pertaining to sale, from Qajar Iran and the role of formularies, see Christoph Werner, "Formal Aspects of Qajar Deeds of Sale," in *Persian Documents: Social History of Iran and Turan from the Fifteenth to Nineteenth Centuries*, ed. Kondo Nobuaki (London: Routledge, 2003), 13–50.

59 Farhat Hasan cites the document of registration enacted by two Hindu women who registered the sale of their house in Cambay in 1657, to record that the transaction was lawful according to the *shari'a*. Hasan, *State and Locality in Mughal India*, 72.

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M. L. Bhatia based on several documents from *qazis*' courts in present-day Uttar Pradesh, in north India. In one case, a person transferring certain of his property also had his will recorded.[60]

These documents were produced according to legal formularies that were part of an Indo-Persian literary genre in its own right: the *insha*. Cultivated with specifically Indo-Persian features at least since the time of Amir Khusrau (1253–1325)—poet, Sufi, and exuberant historian and geographer—there developed in India a substantial body of *munshats*, treatises intended for the training and use of *munshis* who manned the chanceries of the Mughals and their regional successors. Although commonly translated as "epistolography," *munshats* were not merely letter-writing guides, comprising, as they did, a wide spectrum of prose compositions organized in terms of their purported audience (such as specific persons or the "public," superior or inferior addressee), their social or administrative functions, and sometimes their rhetorical features.[61] From the late sixteenth century onwards, mirroring the process of administrative standardization (which Alam and Subramanyam have picturesquely called *qanunisation*) through the multiplication of rules of governance (*dastur al-ʿamal*s), the *munshat* treatises began including forms for a variety of legal transactions.

While Abul Fazl's "model" sixteenth-century *munshat*, the *Insha-ye Abul Fazl*, contained no such example of (legal) *insha*, the *Munshat-e Namakin*, composed in the late sixteenth or early seventeenth century by a contemporary high-ranking officer, Saiyid Abul Qasim "Namakin," contained a whole chapter (*bab*) on the drafting of legal documents.[62] So did Harkaran Das Kanbuh's *Insha-ye Harkaran*, composed a few decades later around 1625, which had an entire section on *khatut wa qibale-ye sharīʿa* (rendered "Of instruments and contracts of law" by the first British translator). Kanbuh's "legal" section included forms for sale, manumission (of slaves), security bonds, declaration of claims (*mahzar nama*), court orders, service certificates, passports, and so on.[63] While in Kanbuh's book, the first *munshat* composition by a Hindu *munshi*, the hypothetical legal subjects were all Muslim, "Namakin" had been less prescriptive—all his attestors were described by the generic "so-and-so" (*falan*). By the eighteenth century a historian providing legal forms in the appendix to his book captured the Indian social reality far more accurately. In the *Tarikh-e Shakir Khan-i*, Shakir Khan, son of a high-ranking Mughal officer during the reign of Muhammad Shah (1719–1748), blithely visualized a certain Rai Chand, son of Nayan Singh and grandson of Hardairam, of the *qaum* (caste) of *zunnardar* (Brahman), making a legal declaration (*iqrar-e sharīʿa*) and witnessing a transaction in which Udairam and Jaikishen, also Brahmans, mortgaged a house to Beniram, who brought it under his legal possession (*qabz-e sharīʿa*).[64]

While further work needs to be done on the vast corpus of manuscripts containing Mughal legal formularies, it is reasonable to describe the legal forms as catching up with an evolving and

60 Bhatia, *The Ulama, Islamic Ethics and Courts under the Mughals*, 194–99.

61 M. Mohiuddin, *The Chancellery*, 16–28; see also Riazul Islam, *A Calendar of Documents on Indo-Persian Relations* (Tehran: Iranian Culture Foundation, 1979–1982), 1:1–37, which mentions a sub-genre of "purely" literary *inshas*—dedicated, for instance, to the beauties of spring and the like.

62 Ishtiyaq Ahmad Zilli, ed., *The Mughal State and Culture 1556–1598: Selected Letters and Documents from Munshaat-i-Namakin* (New Delhi: Manohar, 2007). This book is a selectively abridged Persian edition, compiled from three manuscripts, with a helpful introduction. The chapter on legal forms is titled "Miscellaneous" (*mutafarriqat*).

63 "Chapter VI: Of Instruments and Contracts of Law [*Dar khatut wa qibalat-e sharīʿa*]," in *Insha-ye Harkaran* [*The Forms of Herkern*], trans. and ed. Francis Balfour (Calcutta: 1781).

64 *Tarikh-e Shakir Khani*, Add. MSS 6585, British Library, relevant folios reproduced in Ibn Hasan, *Central Structure*, 362–63.

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inclusive legal culture that had seen not only the suffix *-e shariʿa* come to mean "legal" in a broad nonsectarian sense, but also the dissemination of legal forms relating to commercial transactions that had long been the subject of classical Islamic jurisprudence or *fiqh*.

TITLES, TAXATION, AND DISPUTES

Apart from notarizing such transactions under his seal, in theory as well as in reality, the *qazi* of the district also heard disputes involving the inter-generational transfer of property among Muslim as well as non-Muslim parties. The records of such cases reveal a number of motives for approaching the *qazi*'s court—including the effects of sharing a broadly Islamic legal culture, on the one hand, and the effects of state action, on the other. Notwithstanding Alam and Subrahmanyam's cautionary tale regarding what is called "the tax trap" of Mughal studies, such that all studies of the Mughal state inevitably tend towards a vision of a centralized structure primarily geared towards tax collection and carrying everything else in its wake, the tax-collection arrangements of the Mughal state did indeed bring grist to the *qazis*' mill. The actions of the state—both in terms of demands and concessions—generated claims of entitlements that brought the diverse subjects of the Mughal empire once again to the court of the *qazi*, who stamped the resultant documents with the seal bearing the legend *khadim-e shariʿa* (servant of law/*shariʿa*). And indeed it was over the legal status of a revenue-paying entity, the *zamindar*, that one of the largest legal and policy debates was precipitated in the earliest years of British rule in late eighteenth-century India.[65]

Upon the death of a substantial *chaudhri*—a local village headman-cum-tax collector—of *pargana* Dhar in the province of Malwa, a man with fingers in many departmental pies, his sons and heirs rushed to the district *qazi*'s court to dispute their relative shares in his legacy. The elder brothers, Narsingh Das and Kaher Chand, who had taken possession of the office of *chaudhri*, claimed that the disputed property (eight villages) was attached to the office, while a younger brother, Hamir Chand, claimed that certain lesser offices and their perquisites had been specifically given by their father to him. In the end, inheritance and customary dues of office were separated, the younger brother granted some villages for his maintenance, and all exhorted to be content with what they had received.[66]

Qazis also heard disputes over inheritable entitlements unrelated to the fiscal demands of the state. Farhat Hasan, using documents from Gujarat preserved at the National Archives of India (NAI), has demonstrated how some women of commercial Hindu castes actively sought the intervention of the *qazi* in their inheritance disputes and has provided some clear clues as to why they may have found it attractive to do so. For example, when a Hindu merchant died in Ahmedabad, his two sons and one daughter approached the *qazi*'s court with the result that the daughter was awarded a one-fifth share—fairly basic Islamic law, whereas she would have received nothing under any school of Hindu law.[67]

The Mughal state created nested sets of rights in land and its produce through a huge range of claims, grants, and exemptions, which not only acknowledged the claims of locally recruited,

65 The classic monograph on this subject remains Guha, *A Rule of Property for Bengal.*

66 Persian manuscript no. 2703/27, NAI, New Delhi.

67 Farhat Hasan, *State and Locality in Mughal India: Power Relations in Western India, c. 1572–1730* (Cambridge: Cambridge University Press, 2004), 71–90. The two main schools of Hindu law were the *Mitakshara* (and its regional sub-schools) and the *Dayabhaga*. J. Duncan M. Derrett, *Introduction to Modern Hindu Law* (London: Oxford University Press, 1963), 22–27.

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village-level officials and intermediaries but also sought to or was compelled to regulate them. While the distinction between "private property" and perquisites of office may never have been as clear as the British later sought to discover, the weakening of the central structure in the early eighteenth century may indeed have led to an explosion of claims of entitlements, still processed through the courts of the *qazis*, the latter themselves becoming increasingly locally entrenched.[68] In the making and processing of such claims, the formulaic language of adherence to *shari'a* continued to be used, apparently with utter nonchalance regarding religious identity and distinct religious sources of law for Muslims and non-Muslims.

MUHAMMAD REZA KHAN'S OBJECTION

This nonchalance would not last long. Out of the political and institutional dislocations of the eighteenth century, there arose practically autonomous regional states in India, and one such state—that of Bengal—was usurped, through battle and intrigue, by the English East India Company. In 1765, further British military and diplomatic victories saw the powerless Mughal emperor hand the *diwani* or taxation and treasury department to the East India Company.[69] Following several years of utter misgovernment, a devastating famine in Bengal, and the near bankruptcy of the Company, the British Parliament intervened to establish regulatory structures on the odd entity, and appointed an old India hand, Warren Hastings, who had significant prior experience of India, to reform Bengal's governing machinery, including the revenue and judicial systems. In seeking to do so, Hastings found himself struggling not only against the old guard of late-Mughal bureaucrats, but also his own colleagues—for both factional and ideological reasons.

During this period, one man acquired the reputation of having epitomized the utter chaos and corruption of the years of transition from Mughal to British control in Bengal, a man who had been the practical head of the administration between 1765 and 1772—an Iranian émigré called Muhammad Reza Khan.[70] Within a few months of his appointment, Hastings managed to have Reza Khan arrested and investigated for corruption, and to end his career fairly soon thereafter. What followed was a standoff between Hastings and Reza Khan over proposed judicial and legal reforms and, particularly, over the separation of laws and tribunals by religion.

Quite a few years before arriving in Bengal as governor, Warren Hastings had given some thought to the nature of legal administration appropriate for Bengal. In his proposed regulations for the government of Bengal there was a clause stipulating that "The Mahomedan and Gentoo inhabitants shall be subject only to their own laws." At this stage, Hastings does not appear to have distinguished between the preservation of indigenous laws and the preservation of *several* and *separate* indigenous jurisdictions. He merely suggested that, although some legislation may be essential and the jurisdiction of the Mayor's Court of Calcutta had to extend to all of Calcutta, "the laws and customs prescribed by their [the Indians'] own religion should be inviolate and cases of property between one another decided by their own courts." He explained this, ironically considering his later career, with reference to the unfairness of applying certain features of

68 As Muzaffar Alam has shown in *The Crisis of Empire in Mughal North India: Awadh and the Punjab, 1707–1748* (Delhi: Oxford University Press, 1986), 110–16.

69 Marshall, *Bengal: The British Bridgehead*, 70–92.

70 For the authoritative biography of Muhammad Reza Khan, see Abdul Majed Khan, *The Transition in Bengal: A Study of Saiyid Muhammad Reza Khan* (Cambridge: Cambridge University Press, 1969).

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English criminal law to Indians who were not acquainted with them, and hence who might suffer unexpectedly severe punishments for acts they did not classify as reprehensible.[71]

Hastings was not alone in his ideas; Alexander Dow's *History of Hindostan*, published in 1768, similarly proposed a hierarchical system of courts, with British judges assisted by *qazis* and Brahmins—allegedly based on Mughal precedents—since neither Hindus nor Muslims would accept each other's laws. Although he admitted that some parts of Muslim law did apply to Hindus, these he proposed rescinding.[72] Matters came to a head when, working on the apparently well-intentioned principle that different religions required different laws, the Court of Directors wrote on December 2, 1771, that Indian judges should be prohibited from imposing arbitrary fines, that the "Sunnuds (documents) appointing *judges for the Mahomedans and Bramins for the Hindoos*" [emphasis mine] should be registered, that records of legal proceedings should be maintained, and that, in order to encourage the determining of all causes by arbitration, the tradition of charging a fourth of the value of property so arbitrated should be abolished.[73] When told of these new directives, Muhammad Reza Khan wrote back that this was all wrong:

> That from the first propagation of the faith, the power of deciding the disputes and controversies has been vested in the Mussulmen. Brahmins never having been appointed for the trial of Hindoos, many of whose disputes are settled agreeable to the Mahommedan laws, and others such as relate to the customs of their cast [*sic*], their rules of society and the like after being referred to the arbitration of Bramins [*sic*] and people of their own cast [*sic*] are ultimately decided by the Mussulmen.

In other words, Brahmins had never been judges for Hindus, and there was no reason why they should be now.

Khan also disagreed with the blanket recommendation of arbitration—not all "civil" disputes were matters for arbitration, he said.

> The Disputes and Contests of Parties are of various kinds. Such of them as fall under the Cognizance of the Magistrate are enquired into by People acquainted with the laws of religion and the precepts of commentators, after which they are ultimately decreed by the Magistrate. Others of nature fit for arbitration are adjusted by that Mode and the decree made out accordingly and now if People who have causes to settle can adjust them by arbitration it is a mode highly eligible.[74]

To this argument, Warren Hastings, who had recently taken up his position as governor of Bengal, responded that he had no wish to subvert existing laws and that he merely wished to facilitate the course of justice.

Having no notion of how Mughal courts actually functioned, Hastings was committed to his idea that in certain kinds of disputes, among them inheritance, the laws for Hindus and Muslims were separate, and, although the Muslim judge might write the formal decree, decisions

71 "Regulations Proposed for the Government of Bengal, Composed by Mr Hastings, I Believe about the Year 1765," Orme Collection, British Library Orme, 41.

72 Alexander Dow, *History of Hindostan*, 3:ci.

73 "Letter from Fort William to the Chief of the Controlling Committee of Revenue at Murshidabad, 20 December 1771," in Proceedings of the Controlling Committee of Revenue at Murshidabad, 4 January 1772, IOR G/27/6, pp. 10–11, British Library, London.

74 "Representation on the Subject Thereof (the President and Council's Letter of 2nd December Recorded in the Consultation of 4th January) Delivered by the Naib Duan," in Proceedings of the Controlling Committee of Revenue at Murshidabad, 26 March 1772, IOR G/27/6, [no page numbers], British Library, London.

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in such cases involving Hindus should really be made by Brahmin assessors. Thus he proposed "that all cases of inheritance, marriage or other matters for which Mahomedan law has made a provision should be decided by the established magistrate with the assistance of the expounders of the law" and similarly "that all matters respecting inheritance and the particular laws and usages of the casts of Gentoos should be decided by the established magistrate assisted by Bramins and the heads of Casts according to Gentoo law."[75]

This time, Muhammad Reza Khan made things clearer. What Hastings proposed was inadmissible, he said, for four reasons. First of all, there could only be one law:

> The Gentoos are subject to the true faith and to order a magistrate of the faith to decide in conjunction with a Brahmin would be repugnant to the rules of the faith—and in a country under the dominion of a Mussulman emperor it is improper, that any order should be issued inconsistent with the rules of his Faith, or that innovations should be introduced in the administration of justice.

Secondly, he said, if Hindus were able to decide their disputes themselves or with reference to their Brahmins or heads of castes, why come to the court at all? They were certainly not required to do so, and if they did, they did so because the "Magistrates" were far more skilled than the Brahmins et al. Thirdly, he said (foreshadowing later British complaints), Brahmins were bound to disagree among each other and undermine the sanctity of the ruling.

The fourth and final reason offered by Reza Khan relates so closely to the cases of Hindu women in *qazis*' courts that it is worth quoting in full:

> The sect of Gentoos is composed of a number of different tribes, namely of Bengallees, Hindoostanees, Khetrees, Kashmeeerees, Guzerattees etc [but] the Brahmins of this country who excel in learning and on this account are raised to the eminence of Batta Charge are uniformly of the tribe of Bengallees. Each separate tribe has its own distinct customs and laws, differing from each other, according to the decrees of a Bengallee Batta Charge, a daughter who by our laws would be entitled to a share of her father's estate, is entirely rejected. The divisions given to the several sons are more or less according to their age—and adopted son is deemed by them a valid heir—and if a son and daughter are born of the same mother, the one is allowed the whole estate of their deceased father, the other is totally deprived of any claim. Besides these instances many others might be produced, wherein the Gentoo and the Mussulman laws differ for which reason none of the former emperors down to the present ever appointed Brahmin to assist a magistrate.[76]

Thus, on the basis of unity of the law, expertise of the judges, non-compulsion, and (shall we say it?) women's rights, Muhammad Reza Khan argued against parceling out laws and legal processes by religion. However, by this time Reza Khan was already in jail on corruption charges, thus Warren Hastings's proposal became law in November 1772.

On another occasion, asked more specifically regarding the rules of succession to *zamindaris* (landholding and revenue-paying posts) Reza Khan had said, more shrilly, that, according to the "laws of the Coran," *zamindaris* were always inherited and it was not in the power of kings to remove an heir, whether a royal decree was acquired, whether the heir was male or female, and

75 "Letter from Fort William to Chief of the Council of Revenue at Murshidabad, 13 April 1772," in Proceedings of the Controlling Committee of Revenue at Murshidabad, 20 April 1772, IOR G/27/6, [no page numbers], British Library, London.

76 "The Persian Translator Sends in a Translation of the Naib Subah's Representation in Reply to the Honourable the President and Council's Letter Regarding the Administration of Justice," in Proceedings of the Controlling Committee of Revenue at Murshidabad, 4 May 1772, IOR G/27/7, [no page numbers], British Library, London.

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whether the heirs were in possession. Consulted simultaneously, the *Rai Raiyan*, or the head of the treasury, the *'ulama*, and the *pandits* came to similar conclusions—with or without reference to the "laws of the Coran." It is notable, however, that, possibly because of the novelty of their situation and their previous lack of involvement with state courts, the *pandits* found nothing in their "Shasters" regarding the necessity for a royal decree, *sanad* or otherwise.[77]

Muhammad Reza Khan's objections, noted by a number of scholars, have recently been analyzed by Robert Travers, who has proposed that, in defending the unity of true religious law and asserting the exclusiveness of the office of the judge, this late Mughal official was fighting a rear-guard action against the encroachments of an alien state, rather than accurately describing the nature of legal practice in Mughal India, which, being a "flexible system of jurisprudence," could not have consisted of the imposition of Islamic law on the vast majority of non-Muslim subjects.[78] In line with the historiography outlined at the beginning of this article, this conclusion depends upon an idea of "Islamic law" that is either necessarily rigid, intolerant, and oppressively discriminatory against non-Muslims—or not Islamic law at all. This article has argued otherwise.

CONCLUSION: RELIGIOUS DIVERSITY, RELIGIOUS TOLERATION, AND ETHICAL GOVERNMENT

During the transition from Mughal to British rule in late eighteenth century in India, a radical transformation occurred in what constituted religious toleration, within the broader question of what constituted ethical government in a multi-religious society. Epitomized by the exchange between Warren Hastings and Reza Khan, it appears that the British idea, which came to be dominant, assumed religious freedom to consist of collective right(s) to a clearly defined set of religion-based laws, multiple and equivalent, each deriving authority from the state. The Mughal idea, on the other hand, centered on a formal and not merely rhetorical commitment to the supremacy of Islam as a source of law, actuated through a permissively inclusive and widely dispersed legal culture that attracted litigants both through formulaic familiarity and effective functionality. It is common to contrast British legal centralization (based on claims of undivided sovereignty) with Mughal distributive justice. And yet, as with the litigants discussed in this article, it is precisely because Mughal justice was not entirely parceled out to religious communities that the Mughal *qazis*' courts may have been attractive to these people. The spread of Mughal justice was no doubt thin on the ground, and the majority of disputes resolved at the village level by *panchayats* (councils, literally of five people) of various compositions and levels of formality.[79] Such geographic and social devolution of legal jurisdictions was both permissive (because even villagers, at least those with some resources had the possibility of approaching the *qazi*'s court) and distinct from a religion-based fragmentation. In fact, as surviving records of legal cases demonstrate, not only did a variety of townsfolk and substantial villagers possess clear knowledge of the Mughal court system, they were motivated to access it for transactions and disputes that under British rule came to be seen as religiously demarcated concerns. From the other side, Muhammad Reza Khan's defense of the

77 Extracts from the Consultations Respecting the Administration of Justice, Add. MSS 29079, British Library, London.

78 Travers, *Ideology and Empire*, 171. This view is also taken by Dodson, *Orientalism, Empire and National Culture*, 45–48.

79 For a seminal article on the subject, see Bernard Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change* 8, no. 1 (1959): 79–93.

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system demonstrated that administrative and judicial experts were well aware of the attractions of the system that they so vigorously defended.

In explaining the transition in India from one sense of justice to another, Francis Robinson has alerted us not to rely exclusively on ideas based in an Orientalist fantasy emanating from the British side alone and to keep in mind those communitarian and particular appeals that had always been expressed within the constraints of the Mughal state. Indeed, the first compilation of Gentoo (Hindoo) laws in India, commissioned by Warren Hastings, produced by a group of Bengali Brahmins, is said to have been preceded by a declaration of gratitude for deliverance from the rigors of Islamic law: "The laws of Mahomed were the Standard of Judgement for the Hindoos. Hence terror and Confusion found a Way to all the People, and Justice was not impartially administered."[80] For many in early colonial India, the new British idea of justice and toleration patently offered unprecedented opportunities. The connection between the *pandits*' jubilation and the realities of Mughal law, however, is a more complex matter.

80 Quoted in Travers, *Ideology and Empire*, 126.

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