

Religion and State in Late Mughal India: The Official Status of the *Fatawa Alamgiri*

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Following the advent of the phenomenon of the nation-state in modern Muslim countries, the issue of the relationship between the state and religion assumed great significance. Islamic scholars have differed over the scope of this relationship, and a key factor underpinning this inquiry has been different interpretations of the various schools of Islamic law. In this regard, the Hanafi school, due to its wide following, has been the center of attention of Islamic scholars since long. This article examines the *Fatawa Alamgiri*, a compilation of authoritative Hanafi doctrines, with respect to the meaning of the official recognition of the Hanafi school and the relationship between the state and *madhhab* (school). The meaning of official recognition is explored in the context of personal *madhhab* of the kings, royal patronage of *madhhab*, *madhhab* as a source of legislation, requirements for judges to interpret *madhhab*, and prevalence of *madhhab* among the masses. This article concludes that official recognition of *madhhab* cannot be obtained only on the basis of the evidence of personal adoption of *madhhab* by kings, its royal patronage, and its prevalence among the masses. In fact, official recognition is obtained when a *madhhab* becomes the exclusive source of legislation in the state, and judges are required to adhere to it exclusively. In this sense the Hanafi *madhhab* was never recognized as an official *madhhab* in pre-colonial India.

1. Introduction

The formation of the nation-state in modern Muslim countries raised some important questions about the place of Islamic law in the structure of the state. Such questions relate to the role of the state in the administration of Islamic law, the codification of Islamic law, and the status of various schools of Islamic law. Past practices in Islamic legal history varied and do not provide clear guidance on the questions of codification and state legislation. The colonial legal system in India produced Anglo-Mohammedan law, a hybrid body of laws not strictly recognizing one specific school of Islamic law as exclusively official. In the pre-modern Muslim legal systems, judges were appointed from different schools and sometimes all four Sunni schools were recognised as official schools.¹ In pre-colonial India, Ibn Battuta (d.1368),² a Maliki, and Nurullah Shustri (d. 1611),³ a Ja'fari served as *qadis* respectively under Sultan Muhammad b. Tughlaq (re. 1324 - 1351) and Jalaluddin Akbar (re.1556 - 1605). The Ottomans, however, recognized the Hanafi as the exclusive official school in their empire. Writing about the position of the Hanafi *madhhab* (school) of law in the Ottoman

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¹ Joergen S. Nielsen, 'Sultan al-Zahir Baybars and the Appointment of Four Chief Qadis, 1265' (1984) 60 *Studia Islamica* 167.

² For the problems of administration of justice in that period see, Jerry Bently, *Old World Encounters: Cross-Cultural Contacts and Exchanges in Pre-Modern Times* (Oxford University Press 1993) 121.

³ See for details about the nature of this appointment, Moojan Momen, *An Introduction to Shi'i Islam: The History and Doctrines of Twelver Shi'ism* (Yale University Press 1985) and Rafat Mashood Bilgrami, *Religious and Quasi-Religious Departments of the Mughal Period, 1556-1707* (Munshiram Manoharlal 1984).

period, Joseph Schacht remarked that it ‘enjoyed exclusive official recognition in the whole of the Ottoman Empire’.⁴ He described its position in Afghanistan in similar terms.

Most scholars presume that in India also the Hanafi *madhhab* was the official school during the Muslim period. Schacht describes the position of the Hanafi *madhhab* in India as ‘well represented’.⁵ Like Schacht, some scholars describe this status in rather cautious terms. Jadu Nath Sarkar mentions that the Muslim kings regarded it as an ‘orthodox’ school.⁶ Ishtiaq Hussain Qureshi writes that the courts under the Sultans of Delhi as well as the Mughals ‘administered the Hanafi system of Law’.⁷ Zafarul Islam clearly states that the Delhi Sultanate alone ‘recognized it as the only official school’.⁸

The subtle differences in these descriptions reflect the diverse relationship between the state and the schools of law in the eyes of these scholars. Most focus on the *Fatawa Alamgiri*, a compilation of authoritative Hanafi doctrines, as evidence of patronage of the Hanafi *madhhab* by the Mughal Emperor, Aurangzeb Alamgir (d. 1708).⁹ More importantly, it also illustrates the growth of the Hanafi *madhhab* as one of the laws of the land. This article explores the *Fatawa Alamgiri* with two points of inquiry: the meaning of ‘official recognition’ and the relationship between the state and *madhhab*.

Before going further, we should clarify the term ‘official status’. Although limited to the Ottomans, a study by Rudolph Peters entitled ‘What does it mean to be an Official Madhhab?’¹⁰ might be very helpful to explore the question: Does this definition apply to the status of the Hanafi *madhhab* in the Mughal India? Peters uses the term *madhhab* for the doctrines as well as for the community of jurists belonging to the Hanafi school of Islamic law. Followed by other scholars,¹¹ Peters argues that Hanafi jurists in the sixteenth century joined hands with the Ottoman Empire in the transformation of the Hanafi doctrines as ‘unequivocal body of rulings’ which he calls the ‘Ottoman Hanafism’. He designates it as ‘positive law’ against the previous body of equivocal laws. He identifies the following three semantic signifiers in determining the Hanafi *madhhab* as the Ottoman official *madhhab*: (1) imperial decision to support a particular *madhhab*, (2) transformation of Hanafi doctrines into an ‘unequivocal body’ of authoritative rulings, and (3) limiting judicial discretion by obliging the judges to abide by this body of rulings. Since I have not been able to find any document declaring the Hanafi *madhhab* to be the only official school of Islamic law in Mughal India, I would like to investigate the position of ‘official recognition’ in the following possible

⁴ Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1966) 65.

⁵ Ibid.

⁶ Jadunath Sarkar, *Mughal Administration* (Sarkar and Sons 1952) 101.

⁷ Ishtiaq Hussain Qureshi, *The Administration of the Mughal Empire* (University of Karachi 1966) 189.

⁸ Zafarul Islam, ‘Development of Islamic Jurisprudence in the Sultanate Period’ (1990) 13 *Hamdard Islamicus* 15, 21.

⁹ See Mona Siddiqi, ‘Law and the Desire of Social Control: An Insight into the Hanafi Concept of Kafaá with reference to *Fatawa Alamgiri*’, in Mai Yamani (ed), *Feminism in Islam: Legal and Literary Perspectives* (New York University Press 1996); J. Duncan M. Derrett, *Religion, Law and State in India* (Oxford University Press 1999 (first published 1968)); Alan Guenther, ‘Hanafi Fiqh in Mughal Empire: The *Fatawa Alamgiri*’, in Richard Eaton (ed) *India’s Islamic Tradition* (Oxford 2006 (first published 2003)) 209-231; and Jamal Malik, *Islam in South Asia: A Short History* (Brill 2008).

¹⁰ Rudolph Peters ‘What does it mean to be an official *madhhab*: Hanafism and the Ottoman Empire’ in P. Bearman, R. Peters, F. Vogel (eds) *The Islamic School of Law: Evolution, Devolution, and Progress* (Harvard University Press 2005) 147-158.

¹¹ See for instance G. Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (Cambridge University Press 2015).

meanings: (1) as a personal *madhhab* of the kings, (2) royal patronage of the *madhhab*, (3) as a source of legislation, (4) requirement for judges, and (5) its prevalence among the masses.

2. Personal Madhhab of the Kings

Was the Hanafi *madhhab* a personal *madhhab* of the kings in India? And if the answer is in the affirmative, does this mean that it was an indication of an official *madhhab*? To explore this, we need to have a general overview of the history of the Hanafi *madhhab* in India.

It is often claimed that Sultan Mahmud Ghaznawi (988-1030) was the first ruler in India who introduced the Hanafi *madhhab* in the country.¹² He is also claimed to be the author of a book, *al-Tafrid*, in the Hanafi *fiqh*.¹³ While almost all Hanafi biographers count the Sultan among the Hanafis, the Shafi'i scholars regard him as a Shafi'i. Al-Qaffal Marwazi, Imam al-Haramayn al-Juwayni¹⁴ Ibn Khallikan and Taj al-Din al-Subki mention that Sultan Mahmud changed from the Hanafi to the Shafi'i *madhhab*.¹⁵ Diya al-Din Barani,¹⁶ a medieval historian of India, and Ustadh Khalili,¹⁷ a contemporary historian of Afghanistan, also believe that Mahmud was a Shafi'i. Hanafi scholars, such as Mas'ud b. Shayba,¹⁸ refute Subki's view and uphold that the Sultan was a reputed Hanafi jurist and author.

The story of Mahmud's change of *madhhab* was first told by al-Qaffal al-Marwazi in his *fatawa*. According to him, Sultan Mahmud inquired about the manner of prayer in the Hanafi and the Shafi'i *madhahib* (plural of *madhhab*). Both manners of prayer were demonstrated before him. He found that the Hanafi method disregarded purity and the proper recitation of the Qur'an in prayer. Mahmud showed his disgust for the Hanafi manner and opted for the Shafi'i *madhhab*. This story was later narrated by Imam al-Haramayn, Ibn Khallikan and al-Subki. In fact, the example illustrated the worst aspects of Hanafi doctrines about the performance of prayer. As mentioned above, Ibn Taghri Bardi and Mas'ud b. Shayba refute this story claiming that Mahmud needed nobody to consult on the differences between the Shafi'i and the Hanafi doctrines, since he himself was a great scholar of *fiqh*. Clifford Edmund Bosworth also finds no support for the story in any historical sources.¹⁹

The story exaggerates the change and may not be true in details. However, it reflects a struggle for power between the Hanafi and the Shafi'i *madhahib* in this period. In fact, the story finds place in Juwayni's (d. 1089) book *Mughith al-Khalq*, which was designed to prove the supremacy of Shafi'is over the Hanafis.²⁰ Hanafi writers tell similar stories about

¹² Muhammad Qasim Farishta, *Gulshan-i Ibrahimi* (Urdu translation N.D); Khawaja Abd al-Hayy, *Tarikh Farishta* (vol 1, Sahykh Ghulam Ali N.D) 113-14.

¹³ Carl Brockelmann, *Geschichte der Arabische Litteratur* (Brill 1937) SI: 36.

¹⁴ Imam al-Haramayn Abd al-Malik al-Juwayni, *Mughith al-Khalq fi Tarjih al-Qawl al-Haqq* (Matb'a Misriyya 1934) 57.

¹⁵ Taj al-Din al-Subki, *Tabaqat al-Shafi'iyyat al-kubra* (vol 4, Dar Ihya al-Kutub al-Arabiyya N.D.) 316.

¹⁶ Diya al-Din Barani, *Fatawa Jahandari* (Idara Tahqiqat Pakistan 1972) 18.

¹⁷ Ustad Khalili, *Saltanat-I Ghaznawiyan* (Kabul, Matba' Umumi 1333H) 47.

¹⁸ Mas'ud b. Shayba, *Muqaddima Kitab al-Ta'lim*, Abd al-Rashid al-Nu'mani (ed) (Lajnat Ihya al-Adab al-Sindi 1965) 31.

¹⁹ Clifford Edmund Bosworth, *The Ghaznavids: Their Empire in Afghanistan and Eastern Iran, 994-1040* (Pennsylvania State University 1963) 291.

²⁰ (n 14).

the change of *madhhab* by Mamun al-Rashid,²¹ Nizamul Mulk, Sultan Mahmud Saljuqi²² and Malik Abu Bakr b. Ayyub in Egypt.²³

At the end of the ninth century and in the early tenth century of the Islamic calendar, the political situation in the Muslim world was very complex. Among the various dynasties ruling in the eastern regions, the Buyids and the Samanids had emerged as strong opponents. Their conflict expressed itself in religious terms, as the Buyids supported the Shi'a and the Samanids supported the Sunni *madhhab*. The Buyids succeeded to control the caliphate in Baghdad. In 991, the Buyids appointed al-Qadir Billah as the caliph in Baghdad. The Samanids supported the deposed caliph. Khurasan and the Transoxiana, where the Samanids dominated, were already the center of various religious controversies. The strongest religious group in this area was the Karramiyya who supported mysticism, the Hanafi *madhhab*, the Mu'tazila school and the Alawis. All of these elements were threats to the Abbasids and the Buyids, as they were a potential source of support for the rising Isma'ili power in the form of Qaramita in India and Fatimis in Egypt.

Sultan Mahmud began his career in the service of the Samanids with whom his family had strong connections, but he soon stood against them and finally destroyed them in 999. Reporting his victory to the Abbasid Caliph, he particularly mentioned that he destroyed the Samanids because they refused to recognize al-Qadir as the caliph. He presented himself as a warrior of faith, clearing the land from Isma'ili *da'is*.²⁴ Mahmud restored the *Khutba* in Khurasan in the name of Caliph al-Qadir. The Caliph awarded him the investiture for Khurasan from Baghdad and the titles *Wali Amir al-Mu'minin* and *Yamin al-daula wa Amin al-milla*.²⁵

Some historians²⁶ also tell stories of Mahmud's conflict with the Abbasid Caliphate, but more probably, he was negotiating for the consolidation of his power in the region. He wanted the Caliph's support for the expansion of his rule in India against the Isma'ilis. On the other hand, the Shafi'is in Baghdad were also negotiating terms with the Caliph. Abu Hamid Isfara'ini, the leader of the Ash'ari Shafi'i scholars, asked the Caliph for the appointment of a Shafi'i *qadi* to replace the then Hanafi *qadi*. Isfara'ini then wrote to Sultan Mahmud that the Caliph had transferred the *qada* (judgeship) from the Hanafis to the Shafi'is. The Hanafis resented this change and skirmishes broke out. The Caliph wrote to Mahmud asking him to restore the position of the Hanafis. This happened in 1004, according to Maqrizi.²⁷ Isfara'ini threatened the Caliph of insurrection in the eastern region but Mahmud had already established himself there.

According to Dhahabi, after the Shi'a-Sunni riots in 1018 in Baghdad, al-Qadir Billah asked Mahmud to campaign against heresies in Khurasan.²⁸ Mahmud appointed Abu Bakr Muhammad b. Ishaq b. Mahmashadh to carry out this campaign. People in Baghdad were not

²¹ Manazir Ahsan Gilani, *Hazrat Imam Abu Hanifa ki Siyasi Zindagi* (Nafis Academy 1960) 512.

²² (n 18) 327.

²³ Ibid 285.

²⁴ (n 19) 53.

²⁵ Ibid 46.

²⁶ Ibid 182.

²⁷ Taqi al-Din Ahmad Maqrizi, *Kitab al-Khitat al-Maqriziyya al-musammata bi'l-Mawa'iz wa'l-I'tibar bi Dhikr al-Khitat wa'l-Athar* (vol 4, Matba' al-Nil 1326 H) 145.

²⁸ Al-Hafiz al-Dhahabi, *Al-Ibar fi Khabar man Ghabar* (vol 3, Kuwait 1961) 98.

happy with this appointment. Abu Bakr belonged to the Karramiyya²⁹ and there were frequent complaints against his oppressive methods. Caliph al-Qadir Billah was already apprehensive of the strong position of the Karramiyya and the Hanafis in the region. He decided to consolidate the support of the Ash'ari and Shafi'i *ulama*. In 1031, he issued a statement of creed, which came to be known as *Risala Qadiriyya*. The treatise supported the Shafi'i school of law and Ashari school of theology. The book, following the pattern of the *Hadith* scholars, contained the merits of the *sahaba* and condemnation of the Mu'tazila as infidels. The book was read every Friday in the mosques.³⁰ George Makdisi explains in detail the historical and intellectual context of this treatise. He particularly relates the *Risala* to the rise of the Shafi'i *madhhab* as juridical theology in this context.³¹ The Caliph, at the same time, expressed his concern about the 'heresy' of the Karramiyya to Mahmud through the latter's Qadi, Abu'l Ala Sa'id b. Muhammad, who visited the Caliph. After an enquiry, Mahmud dismissed his Karramiyya preacher and put him in jail.³²

Karramiyya were known for their support of Hanafism, asceticism, literalism, anthropomorphism, and for allowing *salat* (prayer) in dirty clothes. It appears that Qaffal's story of Mahmud's changing to the Shafi'i *madhhab* after witnessing the difference in the performance of prayer had its origin in this enquiry. It is quite possible that Mahmud's withdrawal of support from the Karramiyya was seen as his conversion to the Shafi'i *madhhab*. Mahmud's successors are all described as adherents of Hanafism. It appears that the Hanafi *madhhab* was re-established in the region after Mahmud. It did not, however, replace the Shafi'i *madhhab* completely. The Ghawris who replaced the Ghaznawis in Ghazni were Shafi'is. Mu'izz al-Din Ghawri changed from the Shafi'i to the Hanafi *madhhab* when he conquered Ghazni and found most of the people following the Hanafi *madhhab*.³³ Ghiyath al-Din Ghawri, on the other hand, opted for the Shafi'i *madhhab* after seeing in a dream himself praying behind Imam Shafi'i.³⁴

This brief overview shows that the eastern region of the Abbasid Caliphate continued to be a center of political struggle between the Abbasids and their opponents. When the Shafi'i *madhhab* came to be associated with the Abbasids, they tried to win over the Hanafis in India. Stories of the Sultans of Delhi changing their political and religious affiliations mostly belong to that political transition. The significance of the change of *madhhab* was personal; it did not signify the declaration of an official *madhhab*. To legitimize their rule, the Sultans of Delhi often received investiture from the caliphs in Baghdad. Sultan Firuz Tughlaq, an adherent of the Hanafi *madhhab*, received robe of honour from the Fatimid Caliph al-Hakim Billah in Egypt in 1356.³⁵ However, the Sultans in India generally chose what suited their political interests. Sultan Muhammad Tughlaq was Hanafi but he chose his title as Imam A'zam which was a popular title for Imam Abu Hanifa. The following titles on his coins indicate that he regarded himself as the restorer of the legacy of the Prophet, great Imam and God's caliph: 'Muhammad b. Tughlaq Shah Muhyi Sunan Khatim al-Nabiyyin'³⁶

²⁹ Utbi, *Tarikh Yamini* (Matba' Muhammadi 1300H) 324.

³⁰ (n 19); Dhahabi 1961, 3:148, Khatib Baghdadi, *Tarikh Baghdad* (vol 4, Matba' Sa'ada 1931) 37-38.

³¹ George Makdisi, 'The Juridical Theology of Shafi'i: Origins and Significance of *Usul al-Fiqh*' (1984) 59 *Studia Islamica* 5, 47.

³² (n 20); (n 29) 324.

³³ Minhaj Siraj, *Tabaqati Nasiri* (Ghulam Rasul Urdu tr, Mihr, vol 1, Urdu Science Board 1985) 649.

³⁴ *Ibid*.

³⁵ Abd al-Qadir ibn Muluk Shah Al-Badauni, *Muntakhabat Tawarikh* (George S. A. Ranking tr, vol. 1, Karimsons 1976) 327.

³⁶ Agha Mahdi Hussain, *Tughlaq Dynasty* (S. Chand 1976) 201.

and ‘al-Imam al-A’zam Khalifat Allah fi’l Alamin’,³⁷ Muhammad Tughlaq considered himself a *mujtahid* in his own right.

The position of the Shafi’i *madhhab* changed after the fall of the Abbasids at the hand of the Mongols. The early Mughal emperors were conscious of their image as ‘good Muslims’ in the Central Asia, the land of their origin. Zahir al-Din Babur, the founder of the Mughal Empire, belonged to the Hanafi *madhhab*. Jalal al-Din Akbar tried to reduce the growing power of the Hanafi *madhhab* in the Mughal polity. With an official document, known as *Mahdar*, he attempted to assume final authority in case of conflicting doctrines of *madhahib*.

Historians often mention Aurangzeb Alamgir’s (1617-1708) high regard for and strict adherence to the Hanafi *madhhab*. His historian Musta’id Khan wrote that Alamgir was a strict adherent of Abu Hanifa’s *madhhab*.³⁸ He ‘put all his efforts in the direction that all the Muslims should adhere to the unanimous views of the Hanafi jurists’, and therefore patronized the compilation of the *Fatawa Alamgiri*.³⁹ Apparently, Aurangzeb chose to emphasize his adherence to the Hanafi *madhhab* to gain the support of the Sunni *ulama* and the Turani *umara* against the Rajput and Irani *umara* who had sympathies for his rivals. Some modern historians also regard the *Fatawa Alamgiri* as an attempt to re-establishing the prestige of Muslim *ulama* in India. It was lost in Akbar’s time.⁴⁰

Before looking at the significance of the compilation of the *Fatawa Alamagiri* in the next section, we must sum up the above argument. In my view, the example of Sultan Mahmud illustrates that the personal interest of a king does not count as evidence of the official recognition of a *madhhab*. It reflects the significance of a *fiqhi madhhab* in the power play and Mahmud’s adoption of the Shafi’i *madhhab* needs to be studied in the context of the power struggle between the Abbasid Caliphs and their opponents. The religious groups and ideas that were not tolerated in the center often found shelter in the peripheries. Zahiris, Mu’tazila, Qarmata, Isma’ilis and others flourished in India in the tenth and eleventh centuries. To establish his legitimacy against his Shi’i and Isma’ili opponents, Abbasid Caliph al-Qadir Billah needed a strong Sunni ally in this region and Mahmud needed Abbasid support for the legitimacy of his conquests and rule in the area. The political vision of the caliphs that unifying the state required unifying the *madhahab* did not work in the peripheries.

3. Royal Patronage of a Madhhab

Patronage is generally seen as an expression of the generosity of kings towards artists and the learned.⁴¹ Recent studies⁴² look at patronage as an expression of legitimacy for the royal policies and as a vision for the future society. Mughal kings patronized paintings, music,

³⁷ Ibid 520.

³⁸ Muhammad Saqi Musta’id Khan, *Ma’athir Alamgiri* (Publisher unspecified 1871) 525.

³⁹ Ibid 529.

⁴⁰ Burton Stein, *A History of India* (John Wiley and Sons 2010) 177-8.

⁴¹ B. K. Shaky, *Education and Learning under the Great Mughals* (New Literature Publishing Company 1918) 190.

⁴² See for instance, Catherine B. Asher, *The Patronage of Sher Shah Sur: A Study of Form and Meaning in 16th Century Indo-Islamic Century Architecture* (University of Minnesota 1984); *Architecture of Mughal India*, (Cambridge University Press 1992); and *Architecture of Mughal India* (Cambridge University Press 2000).

architecture and literature. Patronage established a king's competence in the arts which he sponsored. It also provided evidence of his knowledge in those matters and thus legitimated his authority in the eyes of the elite. Royal patronage also encouraged the elite to follow the king in his patterns of patronage.

Mughals were competing with the Safavids and the Ottomans as patrons of the arts and architecture. A more generous royal court would attract more artists from Iran, Central Asia and South Asia. Patronage was not limited to the imperial courts, but was also practiced in the provinces of the empire and in smaller states.

Aurangzeb Alamgir represents a significant shift in the meaning of patronage. He discouraged arts and music in his court. His patronage of architecture was limited to building mosques. B. K. Shahy finds the sponsorship of the *Fatawa Alamgiri* as a continuity of the Mughal tradition of patronage of the art and culture.⁴³ Due to his continuous involvement in wars and the administrative complexities of a large empire, Alamgir had no time to build monuments like the other Mughal kings.⁴⁴ Monumental work like the *Fatawa Alamgiri* exemplified another form of the royal patronage. That, however, cannot be claimed as official recognition of a *madhhab*.

With the exception of Aurangzeb Alamgir, very little is clearly known about the other kings with regard to their patronization of the Hanafi *madhhab*. Ishaq Bhatti mentions eleven major *fatawa* collections in India, all belonging to the Hanafi *madhhab*, and attributed to kings.⁴⁵ The *Fatawa Ghiyathiyya*, the *Fatawa Qarakhani*, the *Fatawa Tatar Khaniya*, and the *Fatawa Baburi* are attributed respectively to the following kings: Ghiyath al-Din Balban, Jalal al-Din Khilji (1290-1294), Muhammad Tughlaq (1325-1351), and Zahir al-Din Babur (1483-1530). They are the same type of *fatawa* collections as the *Fatawa Alamgiri*. It is, however, not clear whether these texts were officially patronized or recognized by the sultans to whom they were dedicated. They do reflect the desire of the compilers for official recognition of their work. Probably, jurists in India regularly compiled collections they deemed to be authoritative by updating 'previous rulings'. The case of the *Fatawa Alamgiri* is different. There is contemporary evidence that the emperor officially patronized this project. The first sentence of the statement of the objectives of the compilation of the *Fatawa Alamgiri* as stated in the Royal Farman ('Whereas the royal will is that all Muslims follow the authentic doctrines developed by the Hanafi Ulama')⁴⁶ may be interpreted to imply official support for the Hanafi *madhhab*. The next sentence ('and whereas, these doctrines as found in the *Fiqh* books have been muddled up with weaker traditions and conflicting statements, and furthermore there does not exist one comprehensive book where all these doctrines are found in one place'),⁴⁷ however, clarifies that the project responded more to the need for an authentic text than to the need of an 'official' *madhhab*.

Musta'id Khan, Alamgir's official chronicler, also cites the same text but suggests that the Emperor was motivated by his personal zeal for the Hanafi *madhhab*.⁴⁸ Musta'id Khan has provided details about the objectives, expenses and execution of the project.

⁴³ Shahy (n 41) 190.

⁴⁴ Ibid.

⁴⁵ Muhammad Ishaq Bhatti, *Barr-i-saghir Pak wa Hind main 'ilm-i-fiqh* (Idara-i-thaqafat-i Islamiyya 1973) 30.

⁴⁶ Muhammad Bakhtawar Khan. *Mir'at al-Alam* (Sajida Alawi ed, vol 1, Idara Tahqiqat Pakistan 1979) 387.

⁴⁷ Ibid.

⁴⁸ Muhammad Saqi Musta'd Khan (n 38) 525.

According to him, the Emperor had resolved that all the Muslims in India should adhere to the unanimous views of the Hanafi jurists. It was, however, difficult. The opinions of the *muftis* and the *qadis* were severely divided. In the Hanafi *fiqh* books these doctrines were mixed with weaker views and divergent opinions. In addition, these doctrines were scattered in several books, most of which were not available in India. Both, however, strongly hoped that on its completion, the book will relieve everyone from depending upon *fiqh* books.⁴⁹ The Emperor appointed a group of Hanafi scholars in India to compile a collection of unanimously accepted Hanafi doctrines based on extracts from the Hanafi texts available in the royal library. Shaykh Nizam was assigned the leadership of this group. Everyone in this group was given a proper function and salary. With an expenditure of about 200,000 Rupees, the book entitled the *Fatawa Alamgiri* was compiled. These details also clarify that the Emperor was worried about the conflicting views of the Hanafi jurists and judges, and wanted a book containing unanimous views. The fact that the collection retained the conflicting opinions demonstrates the tension between the jurists and the Emperor.

Some recent studies tend to describe the *Fatawa Alamgiri* almost as a code. If this is correct, then one may also conclude that this compilation was an evidence of the recognition of the Hanafi school as the official *madhhab* in the Mughal India under Emperor Aurangzeb Alamagir. Jamal Malik describes the *Fatawa Alamgiri* as a collection of judicial opinions compiled under the rule of the Mughal Emperor Aurangzeb during 1662-1672, with the aim of achieving an authoritative body of the Hanafi law.⁵⁰ Richard Eaton, a well-known historian of medieval India, observed, ‘The Emperor also used the finished text to guide the *farmans*, or Imperial decrees, although this did not prevent him from tailoring his interpretations of the text to fit particular circumstances.’⁵¹ Aziz Ahmad regards the *Fatawa Alamgiri* as ‘theoretic crystallization of Aurangzeb’s theocratic principles’.⁵² Alan Guenther disagrees with such descriptions. He makes two important points: first that the *Fatawa Alamgiri* was an outcome of a tension between the jurists and the Emperor, and second that it was essentially a legal Hanafi text, not a piece of legislation.⁵³

Rulers did not wish to compromise their supreme authority and jurists refused to be fully integrated into the state structure.⁵⁴ Two events illustrate these differences. First, when Aurangzeb seized power, the Chief Qadi refused to recite sermon (*khutba*) in his name. Aurangzeb asked another scholar (*alim*) to seek his approval.⁵⁵ Second, there was a rebellion in Gujarat. Both Muslim and Hindu rebels were captured. The Emperor ordered the Chief Qadi to rule in this case. He prescribed light punishments for Muslims and ordered Hindus to be released if they converted to Islam.⁵⁶ The Emperor remarked: This decision is according to the Hanafi school, decide the case in some other way so that control over the kingdom is not lost.⁵⁷ The revised decision referred to the *Fatawa Alamgiri* and ruled for the execution. According to Guenther, with this compilation, the Emperor wanted to ‘free himself from the

⁴⁹ Ibid.

⁵⁰ Jamal Malik, *Islam in South Asia: A Short History* (Brill 2008) 194.

⁵¹ Richard Eaton (ed), *India’s Islamic Traditions* (Oxford University Press 2003) 168.

⁵² Aziz Ahmad, The Role of Ulema in Indo-Muslim History, 30 (1970) *Studia Islamica* 2, 9

⁵³ A.M. Guenther, ‘Hanafi Fiqh in Mughal India: The Fatawa-i Alamgiri’ in Richard Eaton (ed) *India’s Islamic Traditions* (Oxford University Press 2003) 211.

⁵⁴ Ibid 209.

⁵⁵ (n 53) 211 on the authority of recent studies by Rif’at Bilgrami, Aziz Ahmad and Iftikhar Ghawri.

⁵⁶ Ibid 224, foot note, 86, referring to Jadunath Sarkar (ed) *Ahkam Alamgiri, Anecdotes of Aurangzeb and Historical Essays* (MC Sarkar and Sons 1912) 141-2.

⁵⁷ Ibid.

independent influence of the religious leadership by sponsoring this definitive compilation of judicial decisions.⁵⁸

According to Guenther, the *Fatawa Alamgiri* is a comprehensive legal text of the Hanafi *fiqh*.⁵⁹ Arranged on the pattern of the *Hidaya* and *al-Jami al-Saghir*, it added five new sections on judicial proceedings (*muhadir*), decrees (*sijillat*), legal formulation (*shurut*), and legal devices (*hiyal*). The *Fatawa Alamgiri* provides a comprehensive view of all the hitherto written major Hanafi texts.⁶⁰ It includes major *Fatawa* works by Indian scholars like *Fatawa Ghiyathiya*, *Qarakhaniya*, and *Tatar Khaniya*, consistent with the tradition of *fatawa* collections.⁶¹ This was a tradition continuing ‘from the time of the earliest caliphs, as Muslim scholars had been active in producing legal opinions from which the ruler could draw assistance in formulating laws.’⁶² This tradition, however, seldom succeeded in reducing the tension between the ruler and the *ulama*; the rulers remained reluctant to compromise their supreme authority.⁶³

Zafarul Islam also observed that Alamgir did not rely on the *Fatawa Alamgiri* which was only one of the several sources of law like *Dawabit Alamgiri* and *Qanun Urfi*. According to Zafarul Islam, Aurangzeb’s *Farman* of Gujarat does not accord with the *Fatawa Alamgiri*.⁶⁴ He finds that the ‘penal laws of the Muslim jurists were crude and insufficient and did not meet the requirements of the society’.⁶⁵ Zafarul Islam remarked that the *Fatawa Alamgiri* was written by the *ulama*, for the *ulama*, while the *farmans* were for *qadis* and administrators.⁶⁶

One may agree with Guenther that the *Fatawa Alamgiri* was neither *fatawa* written by *muftis*, nor decisions rendered by *qadis*, and also not the *farman* of the Emperor. It was not a code promulgated by the Emperor.⁶⁷ As we shall see soon, various royal *farmans* did not strictly follow the doctrine given in the *Fatawa Alamgiri*. The *Fatawa Alamgiri* was a text for the help of the Hanafi *muftis* and *qadis*, but they were not obliged to follow it strictly. In fact, the idea of an exclusive authoritative text emerged more forcefully during the colonial period, when the *Fatawa Alamgiri*, along with the *Hidaya*, came to be known as the only authorities on the Hanafi *madhhab*. The British judges ‘declared that this work [the *Hidaya*] has surpassed all previous books on the law, and all persons should remember the rules prescribed in it and that it should be followed as a guide through life’.⁶⁸ The British officially patronized the translation of the Hanafi texts, but it was not the exclusive official *madhhab* in India.

⁵⁸ Ibid 213.

⁵⁹ Ibid 223.

⁶⁰ Ibid 215.

⁶¹ Ibid 215-216.

⁶² Ibid 209.

⁶³ Ibid 209.

⁶⁴ Zafarul Islam, ‘Development of Islamic Jurisprudence in the Sultanate Period’ (1990) 13 Hamdard Islamicus 70.

⁶⁵ (n 53) 224, foot note, 85 referring to Wahed Husain, *Administration of Justice* (University of Calcutta 1934) 137.

⁶⁶ Ibid.

⁶⁷ (n 53) 225.

⁶⁸ Standish Grove Grady, *A Manual of the Mahomedan Law of Inheritance and Contract* (W.H. Allen 1869) 189, xliii.

4. Source of Legislation

An official *madhhab* implies its recognition by the state as an exclusive source of religious law. The idea of legislation by the state (ruler) is not clearly formulated in *fiqh*. Various attempts by the rulers were opposed by Muslim jurists. Historians name various Abbasid Caliphs who decided to enforce *al-Muwatta* as the law. According to Ibn Sa'd, it was Caliph Mansur (754-775) who tried to do that but Imam Malik refused to allow this. Suyuti names Harun al-Rashid (786-809) and Tabari states that it was Mahdi. Most probably, all three of them tried to do so, but Muslim jurists did not accept their proposal. It implies that jurists were not in favor of a uniformed law. On the other hand, rulers and state officials insisted on a uniform law and on the central role of the ruler in the process of codification. Ibn Muqaffa' (720-756) wrote to Mansur for the control of the state over the law.⁶⁹ Jurists disagreed even to adopt a single text as the law of the state.

Jurists were, however, divided on the role of the ruler in the law-making process. *Fiqhi madhhab* developed as jurists' law, whereas the official law developed independently though often using *fiqh* as its source. The Hanafi *madhhab* developed in two regions: Central Asia and the Middle East. Due to different political and social environments, the development of *fiqh* in these regions differed significantly. In the Middle East, Muslim society was socially homogenous and politically continuous but in Central Asia, the society was politically unstable and socially disparate. India was influenced by Central Asia with a significant difference: Muslims here were a minority who ruled for centuries. The centre of influence for the Hanafi *madhhab* remained Central Asia. Apparently, the *Fatawa Alamgiri* was the first text patronized by an Indian ruler.

Marghinani's (d. 1196) *Hidaya* served as a digest of the Hanafi *madhhab*. As mentioned earlier, several *fatawa* books compiled by jurists and attributed to various Indian rulers were meant to supplement and update the Hanafi *madhhab*. Such *fatawa* were compiled in the *fiqh* tradition after the establishment of the *madhhab* that came to be known as *Tadwin al-raje*h (compilation of the preferred opinion), a type of *ijtihad* exercise within a *madhhab*. It was required to assist *muftis* and *qadis* but also to organize juristic differences. It was a juristic activity to prevent the interference of rulers in *Shari'a*. In their interest, some rulers encouraged and some patronized it. It is arguable if it may be called the 'positive law' or the 'unequivocal body of rulings' as Rudolph Peters claimed.⁷⁰ The *fatawa*, like regular *fiqh* books, continue to include diverse opinions of jurists. It is also arguable to define *Multaqa al-Abhur*⁷¹ as a second formulation of the Hanafi *madhhab* in the sixteenth century or the Ottoman Hanafism.⁷² In fact, Ibrahim al-Halabi (d. 1549)⁷³ mentions his compilation *Multaqa al-Abhur* as an abridgment of the Hanafi doctrines formulated in the Hanafi texts of *al-Quduri*, *Mukhtar*, *Kanz al-Daqa'iq*, and *Wiqaya* in the tradition of *tarjih*.⁷⁴ The abovementioned *fatawa* in India predate the sixteenth century. Such exercises included the collections of *fatawa* like the *Fatawa Alamgiri*, the *Fatawa Ghiyathiyah*, attributed to Balban (1287), the *Tatar Khaniya*, attributed to Tughlaq (1388), and collections by Mu'in al-Din

⁶⁹ (n 4) 5.

⁷⁰ (n 10) 147.

⁷¹ (n 11).

⁷² (n 10) 147.

⁷³ Amir Shahzada Khan, '*Multaqa al-Abhur* of Ibrahim al-Halabi (d. 1549): A Hanafi Legal Text in its sixteenth century Ottoman Context' (MA Thesis, Central European University Budapest 2014).

⁷⁴ Ibrahim al-Halabi, *Multaqa al-Abhur* (Dar al-Kutub al-'ilmiyya 1998) 13.

Muhammad b. Khawaja Mahmud al-Naqshband (d. 1674) and Mufti Abu'l Barakat Husam al-Din Dihlawi (d. 1698) based on authority books.⁷⁵

The question of the role of the ruler in the law-making process came to the fore quite strikingly during the Mughal period in India. The Mughal Emperor Akbar had consolidated his authority by weakening the power of the *umara* (lords) and the *mansabdars* (bureaucrats). The *ulama* felt that the authority of the king should be limited by subjecting it to *Shari'a*. A document was prepared in 1579. The king saw it as an assignment of the authority of *ijtihad* or interpretation of *Shari'a* to him. The *ulama* read it as limiting king's authority only to arbitrate between the conflicting opinions of the jurists. This document is known as *Mahdar*. In order to appreciate the nuances of the debate on the role of the ruler, I shall quote the relevant sentences in full:

Should therefore, in future a religious question arise, regarding which the opinions of the Mujtahids differ, and his majesty in his penetrating intellect and clear wisdom opts, for the benefit of the people and for the betterment of the administration of the country, any of the conflicting opinions and issues a decree to that effect, it would constitute a unanimously agreed opinion. Such a decree shall be binding on all the nobles and commons. Further, they agree that should his majesty think fit to declare one of the existing opinions as law which is not opposed to the injunctions of the Qur'an and is of real benefit to the people, it will be final and binding for everyone. Any opposition to such an order shall cause damnation in the world to come and suffer spiritual as well as worldly loss.⁷⁶

The document has been a source of debate among the scholars. Badauni calls it a step in the direction of heresy. English historians call it a Decree of Infallibility. Dr Ishtiaq Hussain Qureshi calls it a 'dishonest document' because Akbar was not qualified or knowledgeable enough to perform the duty prescribed for him in the document. He, however, remarks that Akbar or other kings never invoked the document.

Now, let us consider the case of the *Fatawa Alamgiri*: was it a source of legislation during the reign of Alamgir? There were several *farmans* (laws) issued by the Emperor Alamgir whose texts have been preserved in *Mirat-i-Ahmadi*, a history of Gujarat. Among them the following *farmans* are notable: *Appointment of Muhtasibs in the Empire* (1072/1662),⁷⁷ *Farman on the Acquisition of Kharaj* (1079/1668),⁷⁸ *Farman-i-'Adalat*, consisting of thirty three Articles (1082/1671),⁷⁹ *Collection of Zakat from Muslims* (1089/1678)⁸⁰ and *Promulgation of Jizya* (most probably 1090/1679).⁸¹

None of these *farmans* makes any reference to the *Fatawa Alamgiri*. In fact, the *Fatawa Alamgiri* (completed in 1672) was still in the process of preparation when most of these *farmans* were issued. Only the *farmans* on *jizya* and *zakat* seem to have been issued

⁷⁵ Zafarul Islam, *Fatawa Literature of the Sultanate Period* (Kanishka Publishers 2005) 20-28.

⁷⁶ Al-Badauni (n 35) vol 2, 279-280, 391-2.

⁷⁷ Muhammad Hasan, *Mirat-I-Ahmadi* (Oriental Institute 1928) 249-253.

⁷⁸ Ibid 268-274.

⁷⁹ Ibid 277-283.

⁸⁰ Ibid 298-300.

⁸¹ Ibid 296-298.

after its completion. Therefore, it is difficult to establish any direct relationship between state legislation and the project on the *Fatawa Alamgiri*.

The *farman* on *jizya* explains in its preamble that since the Emperor had resolved to bring all the matters of the state, including financial and political policies, within the framework of *Shari'a*, the *ulama* and the jurists pleaded with him to impose *jizya* on the non-Muslim subjects as required by *Shari'a* and by the practice of the *Millat Bayda'* (i.e. Muslims).⁸²

Significantly, the *farman* explicitly mentions that the *ulama* presented to the Emperor the *fiqh* books to argue that *jizya* was enforceable on the non-Arab idol worshippers (apparently referring to the Hindus in India). This statement reveals an ongoing debate at that time between the Shafi'is and the Hanafis about the imposition of *jizya* in India. The classical Shafi'i view maintained that only the People of the Book had the option to continue practicing their religion after the payment of *jizya*. This option was not available to the idol worshippers, Arab or non-Arab, who must choose between Islam and death.⁸³ Quite obviously, the Emperor could not opt for the Shafi'i view in India, as majority of the population was the Hindu.

By studying Aurangzeb Alamgir's *Farman*s in detail, Zafarul Islam found that the contents of the *Farman* were quite selective in matters of the Hanafi *fiqh*. He especially observed that the 'provisions of the Farman have not been expressed entirely in terms of Islamic law.'⁸⁴

The *Farman-i-Adalat* was issued in 1671 in the name of Muhammad Hashim, the Diwan of the province of Ahmadabad (Gujarat), on behalf of the Emperor Aurangzeb Alamgir.⁸⁵ The 33 articles of this *Farman* deal with the following offences: (1) Offences against property, which include theft (Articles 1-4, 7), grave robbery (Article 5), highway robbery (Articles 6 and 8), arson (Article 12), and fraud (Articles 14-17); (2) Offences against life and person, which pertain to murder including killing by strangling, poisoning, and drowning (Articles 10, 18, 24, 29), abduction (Article 19), calumny (Articles 2 and 6), absconded slaves (Article 27), and emasculation (Article 30); (3) Offences against Law and Order, which include rebellion, civil disobedience (Articles 9 and 13) and violence (Article 25); (4) Prohibitions, which include gambling (Article 20), sale and use of alcohol and other intoxicants (Articles 21-23); and (5) Procedural matters (Articles 28, 32, 33).

⁸² Ibid 296.

⁸³ Diya al-Din Barani presents this position very forcefully. He narrates that Qadi Mughith explained to Ala al-Din Khilji: 'No Imam other than Abu Hanifa whom we follow, allows receiving *Jizya* from the Hindus. According to others, Hindus have only two choices Islam or death.' Diya al-Din Barani actually laments that Sultan Mahmud did not apply the Shafi'i *madhhab* to the Hindus in India. Diya al-Din Barani, *Tarikh Firuz Shah* (Mu'in al-Haqq, Urd tr, Urdu Science Board 1983) 427. The *Fatawa Alamgiri*, on the other hand maintains that those were only the idolaters in Arabia who had no choice, all other idolaters had the choice, like the People of the Book, to pay *Jizya* to avoid war with the Muslims. See for detailed discussion. Shaykh Nizam, *Fatawa Alamgiri* (vol 2, Qadimi Kutub Khana N.D) 268-71.

⁸⁴ Zafarul Islam, 'Aurangzeb's Farman on Land Tax: An Analysis in the Light of Fatawa Alamgiri' (1978) 52 *Islamic Culture* 52: 117, 126.

⁸⁵ The term '*hasb al-hukm*', used in the beginning of the *Farman*, signifies that it was issued on behalf of the Emperor.

It is worth noting that the *Farman* uses the terms *hadd/ta'zir* and *Shari'at/siyasat* as parallel terms. An analysis of their usage reveals some significant aspects of the state-*madhhab* relationship in that period. It must be remembered that *madhhab* laws distinguished between *hadd* and *ta'zir* as two different types of penalties. *Hadd* refers to a few crimes with fixed punishments (theft, fornication/adultery, false accusation of fornication/adultery, robbery and rebellion). Evidently, the terms *hadd*, *ta'zir* and *siyasat* in this *Farman* all refer to penalties, but with fine distinctions. For out of more than sixteen offences, the *Farman* uses the term *hadd* only regarding theft and highway robbery. Significantly, even in the case of these two offences, the *Farman* does not provide *hadd* punishment as prescribed in the *fiqh*. The term *ta'zir* has been used with reference to almost all other offences except those against the state and those relating to prohibitions. In such cases, the term *siyasat* is used. The term *shari'at* is used only in the articles relating to prohibition of the enslavement of a Muslim, marriage between a Muslim and a Dhimmi other than the People of the Book, use of alcohol and intoxicants, apostasy, and an absconding slave. In such cases, a *qadi* is clearly authorized to judge cases according to *Shari'a*. However, it is significant that there is no reference to the Hanafi *madhhab* even at this point.

The *Farman* more frequently uses the term *thubut shar'i* which means either a proof as required by *Shari'a* or simply a legal proof in the general sense. The term has been used regarding the following offences: theft, highway robbery, murder and fraud. The usage refers mainly to the proof of the commitment of the offence, but it also denotes other aspects, eg proof of ownership and proof of compensation. This usage indicates that the term *thubut shar'i* has not been used in the restrictive sense, namely, that the proof must be established according to a particular *madhhab*. Rather, it denotes a legal proof in the general sense.

The use of the term *siyasat* may appear ambiguous. An analysis of its usage nevertheless clarifies some of the intended meanings. Firstly, the term has been used about most of the offences mentioned in the *Farman*. It is not mentioned in the articles of the *Farman* relating to fraud, poisoning, and prohibitions. It is difficult to argue that *siyasat* means punishment only and that it is prescribed only to supplement, complement or relax the *hadd* or *ta'zir* punishments. The *Farman* uses the term *siyasat* in two types of phrases. The first type uses the term in simple form, which may be translated as 'sentencing' (eg '*siyasat numayand*', '*siyasat kunand*' and '*siyasat rasanand*'). The other type of usage employs the construct form, eg '*ba siyasat ba qatl rasanand*' (sentenced to death by way of *siyasat*) and '*ba qat' yad siyasat numayand*' (sentenced to amputation of hand by way of *siyasat*). In fact, both types of usage should be combined to understand the meaning of the term. Thus, to me, the term *siyasat* denotes a general meaning of dealing with a crime in the better interest of the state and society. The usage of the term in the *Farman* clearly suggests that *siyasat* in the Mughal period was a principle of Islamic law, which is independent of *madhhab* and even overrides the *madhhab* doctrines of specific punishments for specific crimes.

In case of theft, the *Farman* neither follows nor takes into consideration the doctrines stated in the *Fatawa Alamgiri* on this point. The *Farman* recommends that after establishing the crime according to the *hadd* procedure, the thief must be sent to prison until he repents.⁸⁶ According to the *Fatawa Alamgiri*, on the other hand, one of the hands of the thief must be amputated after the proof of the theft has been legally established.⁸⁷ The *qadi* may take a

⁸⁶ (n 77) 278.

⁸⁷ Shaykh Nizam (n 83) 189.

lenient view in case of the proof by confession, but not when it is proven by evidence. The *Fatawa Alamgiri* recommends imprisonment in case when the theft is not proven although the accused is notorious for commitment of theft on other occasions.⁸⁸ The *Farman* recommends death sentence in case of repeated thefts and when imprisonment fails to deter the culprit from committing thefts.⁸⁹ The *Fatawa* recommends imprisonment in case of the third commitment of theft, when the culprit's one hand and foot have been already amputated in the previous two sentences. The *Fatawa Alamgiri*, in this case, also allows the state to sentence the culprit to death by way of *siyasa*.⁹⁰ It is significant to note that there is no mention of amputation of hands as punishment in the *Farman*. It prescribes death sentence as *siyasat* punishment, in addition to the *ta'zir* and prison punishments.

The *Fatawa Alamgiri* and the *Farman* both agree on two points: first, the death sentence in this case is allowed on the principle of *siyasat*; and second, *siyasat* is an independent principle. The *Fatawa Alamgiri* explains the application of the principle of *siyasat* 'on the grounds of his [culprit's] attempt to disrupt law and order in the land'.⁹¹ Thus, the *Fatawa Alamgiri* seems to define *siyasat* as a general principle that could override the *madhhab* doctrines in the greater interest of the state and society. Leaving the formulation of *siyasat* entirely to the discretion of *imam* (state), the *madhhab* also seems to agree to its independence as a source of state legislation.

The *Farman* clearly adopts this position in case of the offence of a grave robbery. The Hanafi *madhhab* doctrines do not treat a grave robber (*nabbash*) as thief because the property in the grave does not belong to anyone, and certainly not to the dead person in the grave. The Hanafi *madhhab* clearly does not prescribe amputation of hands for grave robbers.⁹² The *Farman*, on the other hand, prescribes the punishment of amputation of hand, if the governor of the province and the officers of the judiciary reach this judgment unanimously.⁹³

We find that the *Farman* also overrides the punishments prescribed under the Hanafi *madhhab* in other cases on the grounds of *siyasat*. For instance, in case of highway robbers, even when their crime is established according to the rules of *Shari'a*, the governor of the province and the officers of the judiciary may decide not to sentence them to death and instead punish them according to the principle of *siyasat*.⁹⁴ Similarly, if a person kills someone by strangling, the *Fatawa Alamgiri* does not prescribe the punishment of death (*qisas*) for such a person. According to the Hanafi *madhhab*, murder is a private offence and the state acts only at the instance of the aggrieved party. However, in case of a person who has committed this offence repeatedly, the *Fatawa Alamgiri* allows death sentence on the ground of *siyasat*.⁹⁵ The *Farman* prescribes for the offender of this crime the punishment of imprisonment for the first time, and simple *siyasat* for the habitual offender, without specifically mentioning death.⁹⁶

⁸⁸ Ibid 190.

⁸⁹ (n 84).

⁹⁰ (n 83) 208.

⁹¹ Ibid.

⁹² (n 83) 197.

⁹³ (n 77), 279.

⁹⁴ Ibid.

⁹⁵ (n 87) vol 6, 5.

⁹⁶ (n 77), 279.

In fact, we find several foreign travelers, such as Thomas Roe, interpreting this situation as the absence of any written law.⁹⁷ This situation also led to a distinction between the criminal and civil laws during the colonial period. The British found the Mughal criminal law and the Hanafi *fiqh* too lenient to control crimes. While the British restricted the application of the Hanafi *madhhab* to personal matters, they subjected the criminal law to state legislation.

5. Requirement for the Judges

I have not been able to find any official document regarding the appointment of a *qadi* which requires him to follow the Hanafi *madhhab*. The medieval historians provide the lists of *qadis* in the reign of several kings without specifying the *madhhab* of the *qadis*.⁹⁸ However, it is generally presumed, and some modern studies on the administration of justice in Muslim India claim as well, that the *qadis* followed the Hanafi *madhhab*.⁹⁹

It appears that with reference to *madhhab*, the judicial system was pluralist, not specific, and personal. Ideally, a *qadi* must be a *mujtahid*, but even when he was a *muqallid*, follower of a *madhhab*, he could be appointed to adjudicate disputes among the followers of other schools of law. The parties usually went to the *qadis* of their own *madhhab*. However, the *madhhab* was not determined by the personal *madhhab* of a *qadi*, but by his jurisdiction defined in the letter of his appointment (*taqlid*). We have mentioned above that Shustrai and Ibn Battutah, respectively belonging to the Ja'fari and Maliki schools of Islamic law, were appointed *qadis* in India. This system was too complex to be simply described as a system of personal law. The manuals of law which were prepared for the help of the *qadis* shed some light on this intricate system. The *Fatawa Ghiyathiyya*, a compilation during Sultan Balban's regime, allowed a plea for the annulment of a marriage before a Hanafi *qadi*. If the marriage was valid according to the Hanafi *madhhab*, he may refer the plea to a Shafi'i *qadi* provided the marriage was invalid according to the Shafi'i *madhhab*. The judgment of the Shafi'i *qadi* would be validated under the authority (*taqlid*) of the Hanafi *qadi* if the Shafi'i had no *taqlid* (jurisdiction) in the case.¹⁰⁰ This rule is elaborated in the *Fatawa Alamgiri* distinguishing between a *mujtahid* (unrestricted jurisdiction) and a *muqallid qadi* (appointed with restricted jurisdiction of following a *madhhab*). If a *qadi* was a *mujtahid* but still decided a case on the basis of someone else's views, the Hanafi school was divided on the validity of his judgment. It was enforceable according to Abu Hanifa, but not in the view of his disciples. The *Fatawa Alamgiri* adopted the view of Abu Hanifa's disciples stating that a *mujtahid qadi* could not discard his considered opinion. If he did so, he would do only for a wrong personal motive (*hawa batil*), not for a noble cause. A *muqallid qadi* had no authority to oppose the Hanafi school and he could be dismissed if he did so since he was appointed only to judge according to the school of Abu Hanifa.¹⁰¹ The English judicial system differed from the Mughal system in many significant ways. Verma explains that the Anglo-Mohammedan Law operated on the presumption that an Indian Muslim was a Sunni of the Hanafi sect and that the law to be observed was the law of the defendant.¹⁰²

⁹⁷ MP Jain, *Administration of Justice in Seventeenth Century India* (Metropolitan Books 1970) 31.

⁹⁸ (n 8).

⁹⁹ Muhammad Bashir Ahmad, *Judicial System of the Mughal Empire* (Pakistan Historical Society 1978) 48.

¹⁰⁰ Da'ud b. Yusuf Al-Khatib, *Al-Fatawa al-Ghiyathiyya* (Maktaba Islamiyya 1403 H) 85.

¹⁰¹ (n 83) vol 3, 301-2.

¹⁰² BR Verma, *Islamic Law* (Law Publishers 1994) 67-68.

The British bureaucratized the administration of justice.¹⁰³ Warren Hastings derived his authority both from the English and Mughal legal systems. Until 1772, the English only got the civil (*diwani*) authority from the Mughals. Warren Hastings assumed the title of Nawwab Governor General to claim both the civil and criminal jurisdictions. Like the Mughals, he also relied on the doctrine of *siyasa*, which is the right of a ruler to intervene in the administration of justice.¹⁰⁴ The 1772 Regulation introduced the concept of personal law based on religion. In the early colonial period, two parallel judicial systems operated; the English systems in the Presidency towns under the Supreme Court, and the native systems in the other areas. In 1862, the Anglo-Mohammedan law, an English reconstruction of the Hanafi doctrine, replaced the older system.¹⁰⁵

Rankin explains how Halheld understood the continuity of the Mughal system in some matters and its discontinuity in others on the model of the Roman law that distinguished between foreign subjects and citizens. The local Indian laws were to be tolerated in matters of religion and in such original institutes of the country that did not clash with the laws or interests of the conqueror.¹⁰⁶ Galloway justified the change of the local criminal law as a right of conquest. Macaulay found the Mohammedan Criminal Law mild because the sanctions though barbarous could be rarely imposed due to the strict procedure. Like the Mughals, Hastings wanted to intervene in the penal laws as a right of *siyasa*.¹⁰⁷

These questions arose especially when the Hanafi *qadis* refused to pass death sentences in robbery cases where no murder was committed. In his letter of 10 July 1773, Hastings recalled that the custom recognized the sovereign's right to interpose in special cases to strengthen the efficiency of the law (*siyasa*), and proposed that a general order or commission should be obtained from the *Nazim*, authorizing that the penalties prescribed in 1772 should be inflicted on the professed and notorious robbers.¹⁰⁸

In 1793, the Privy Council held that one uniform law should be adopted in all cases affecting Muslims, but that the Muslim law, whatever it is, shall be adopted. Further, if each sect has its own rule according to the Muslim law, then that rule should be followed with respect to the litigant of that sect.¹⁰⁹

Islamic law was reduced to a level of personal law, and its personal nature was further limited by restriction to personal matters that related to property, family and religious rites. *Madhhab* that meant doctrine of a particular school of law, rather than a school of theology, gradually came to mean a religious sect. The influence of this development is evident in Pakistani laws. Although the Constitutions drafted in the history of Pakistan, and the majority of the jurists no longer refer to the Hanafi *madhhab* as the only official *madhhab*, yet the various the Constitutions and the Enforcement of the Shari'ah Act 1991 recognized the right of the Muslim sects to interpret the Qur'an and Sunna according to their principles.

¹⁰³ David Gilmartin, *Empire and Islam: Panjab and the Making of Pakistan* (I. B. Tauris 1988) 13.

¹⁰⁴ M.P Jain, *Hindustan ki Qanuni Tarikh* (Anwar al-Yaqin Urdu tr, Taraqqi Urdu Bureau 1982).

¹⁰⁵ Ibid.

¹⁰⁶ George Claus Rankin, *Background to Indian Law* (Cambridge University Press 1946) 166.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 169.

¹⁰⁹ Kashi Parsad Saksena, *Muslim Law* (Eastern Book Co 1963) 13.

6. Prevalence Among the Masses

It is not clear when the Hanafi *madhhab* came to India. Maqdisi (d. 988), who visited this part of the world in 980, found the people of *Hadith* in the majority in India. He also met people of the Daudi *madhhab*. In fact, the *qadi* of Mansura was a Daudi. In Multan, people were Shi'a. However, he elaborates that while these places were not without Hanafi jurists no Mu'tazila or Hanabila jurists were to be found.¹¹⁰ Derryl Maclean also notices, in the early sources, the presence of the Shafi'i and Zahirī jurists in Sindh, but no Hanafi jurists.¹¹¹

It appears that the Hanafi *madhhab* gained popularity with the support of *sufis* who preached Islam between the tenth and twelfth centuries in India. Shaykh Hujwiri, who called Abu Hanifa Imam Azam,¹¹² presented the Imam as a great *sufi*.¹¹³

One of these clashes emerged on the issue of *sama'* (listening to music), which the jurists forbade while the *sufis* enjoyed it. *Sama'* was very popular among the *sufis* in India. Nizam al-Din Awliya, the famous *sufi*, and his disciple Qadi Hamid al-Din Nagawri, were in favor of *sama'*. The jurists believed that it was forbidden in the Hanafi *madhhab*. Qadi Jalal al-Din complained that Shaykh Nizam al-Din Muhammad, who was the leader of the people during those days, practiced *sama'* while it was forbidden in the *madhhab* of Abu Hanifa. He issued a *fatwa* against Qadi Nagawri. The sultan called the Shaykh to defend himself. Fakhr al-Din Zarradi (Shafi'i), Wajih al-Din Pa'ili (Hanafi), Qadi Muhiy al-Din Kashani (Hanafi) and others helped the Shaykh to prepare his defense. The Shaykh cited *ahadith* to support his case. Qadi Jalal stated that these *ahadith* were not acceptable according to the Hanafi principles. They supported the Shafi'i principles.¹¹⁴ The Shaykh protested against the rejection of the *ahadith*. The disputation did not come to a clear judgment. Qadi Jalal requested the king to adhere to the *madhhab* of Abu Hanifa and *forbid sama'*. Nizam al-Din Awliya asked the king not to issue any such order.¹¹⁵

While attesting to the popularity of the Hanafi *madhhab*, the story also shows the presence of Shafi'i views and its adherents in India. In fact, the number of Shafi'is living in Delhi should be large enough to produce skirmishes against them. Minhaj Siraj mentions that in 634 AH, during the reign of Raziyya Sultana, Nur Turk, a Qaramati, instigated people against the Hanafis and Shafi'is.¹¹⁶ Ibn Battutta also affirms the prevalence of the Shafi'i *madhhab* on the eastern coast of India.¹¹⁷

It is possible that during the Mughal period, the Hanafi might have been the majority *madhhab*. Writing on the Mughal administration of justice, J.N. Sarkar and M.B. Ahmad both regard the Hanafi *madhhab* as the 'orthodox' or the majority *madhhab* during that period.¹¹⁸ During the later Mughal period, while the Hanafi *madhhab* developed a relatively rigid

¹¹⁰ Shams al-Din al Maqdisi, *Ahsan al-Taqaṣim fi Ma'rifat al-Aqalim* (Brill 1906) 481.

¹¹¹ Derryl N. Maclean, *Religion and Society in Arab Sind* (Brill 1989).

¹¹² Hujwiri, *Kashf al-Mahjub* (Saman Publications 1995) 56, 77.

¹¹³ *Ibid*, 125, 30.

¹¹⁴ Amir Khurd, *Siyar al-Awliya* (Ijaz al-Haqq Quddusi tr, Markazi Urdu Board 1980) 805.

¹¹⁵ *Ibid*, 797.

¹¹⁶ (n 33) 811.

¹¹⁷ Ibn Battutta, *Tuhfat al-Nuzzar fi Gharaib al-Amsar wa Ajaib al-Asfar* (vol 2, Bulaq 1934) 177, 183.

¹¹⁸ (n 6) and (n 99).

attitude, there also developed trends questioning the doctrine of *taqlid*. Shah Waliullah raised voice against the preference of one *madhhab* over the others.¹¹⁹

As we have already noted, the colonial system of law reinforced the idea of *taqlid* by insisting on *madhhab* as personal law. Grady cites Morley saying, ‘The general law of the country is that of Abu Haneefa, and no other is administered in the supreme court in cases of Mohommadan inheritance.’¹²⁰ Grady disagrees with Morley and observed that Muslims in India were not only Hanafis, there were Shi’as and Sunnis, and the Sunnis were further divided.

7. Conclusion

I have argued that evidence for the personal adoption of the Hanafi *madhhab* by kings and royal patronage, and prevalence of a *madhhab* among the masses does not mean exclusive official recognition. Official recognition is obtained when a *madhhab* is the exclusive source of legislation and the judges are required to adhere to it exclusively. I conclude that in this sense, the Hanafi *madhhab* was never recognized as an exclusive official *madhhab* in the pre-colonial India.

The phenomenon of the official recognition of the Hanafi *madhhab* also raises the question about the relationship between the state and *madhhab*. The early development of the Hanafi *madhhab* was closely related to the power struggle. In this phase, it meant more than a legal doctrine. It symbolized the choice of one of the contending political rivals. Consequently, *madhhab* gathered more and more theological underpinnings. A Hanafi text, *Al-Sarrajiyya*, rules that a person who changes to a Shafi’i *madhhab* must be punished.¹²¹ *Al-Nasafiyya* narrates that a Shafi’i who had turned Hanafi, wanted to return to the Shafi’i *madhhab*, and he asked if it was allowed. Qadi Abul Hasan al-Maturidi ruled that if he returned to Shafi’i *madhhab*, he would be treated as an apostate. Further, he would be punished severely until he gave up a lower *madhhab* and returned to the higher *madhhab*. According to *Jawahir al-Fatawa*, Fakhr al-Din Mahmud ruled regarding a Hanafi, who had turned Shafi’i, that if he were an ordinary person, he would be declared an unreliable person, his word would not be accepted and he would not be a qualified witness. If he is a scholar, he would be declared an innovator and heretic who must be punished.¹²²

The theological foundation shaped *madhhab* into a religious sect. However, we have seen that since the law of the state did not treat *madhhab* in that sense, the official treatment differed. *Madhhab* in the official legal system was tempered with *siyasa*. The Hanafi *madhhab* in the British system, however, turned into a sect, mainly because *madhhab* was treated as religion and was regarded as personal law. Duncan M. Derret suggests that the British might have been influenced by their familiarity with the division of jurisdiction between the secular and the ecclesiastical courts in England.¹²³ Consequently, the Hanafi

¹¹⁹ J. M. S. Baljon, *Religion and Thought of Shah Wall Allah Dihawi, 1703-1762* (Brill 1986) 165.

¹²⁰ (n 68) xxxvii.

¹²¹ Ansari cites *Al-Sarrajiyya*. Alim bin al-Ala’ Ansari, *Al-Fatawa al-Tatar Khaniyya* (Qadi Sajjad Husayn ed, vol 5, Idarat al-Qur’an wa’l-Ulum al-Islamiyya 1990) 144.

¹²² Ibid.

¹²³ See John H Mansfield, ‘The Personal Laws or a Uniform Civil Code?’ in Robert B. Baird (ed) *Religion and Law in Independent India* (Manohar 1993) 139, 145.

madhhab no longer remained a legal doctrine. It acquired the meaning of a religion. The present debates about legislation and Islamization of laws in Muslim countries arise from the gradual disappearance of the distinction between the law and religion.