ISLAMIC CRIMINAL LAW DURING THE MUGHAL PERIOD (1526-1857)

A COMPARATIVE STUDY OF STATUS OF *FARĀMĪN-I-SHĀHĪ*

Thesis submitted for the partial fulfillment of the requirement for the degree of Ph.D in Sharī'ah (Islamic Law & Jurisprudence)

Submitted by

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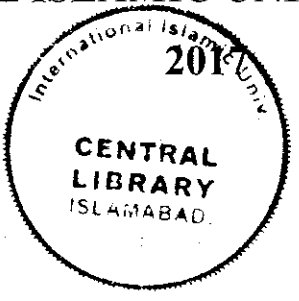

Criminal Law (England)
Criminal Law (Great Britain)
Evidence (Law)

In the name of Allah,
the Most Beneficent,
the Most Merciful

DEDICATED

TO MY MENTOR

Prof. Dr. Muhammad Zia-ul-Haq

MY LIFE PARTNER

Khalid Rasheed

&

MY LOVING DAUGHTER

Subeeka Khalid

ACCEPTANCE BY THE VIVA VOCE COMMITTEE

TITLE OF THESIS:

"ISLAMIC CRIMINAL LAW DURING THE MUGHAL PERIOD (1526-1857): STATUS OF FARAMEN-E-SHAHI"

Submitted by: Mamoona Yasmeen

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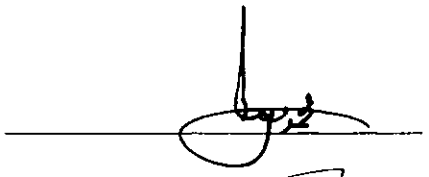

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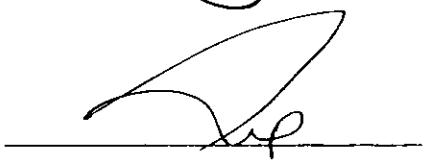

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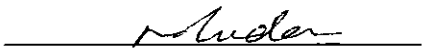

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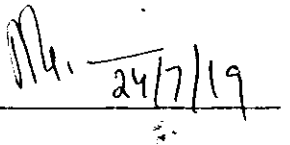

DECLARATION

I, Mamoona Yasmeen D/O Muhammad Ishaq, Reg. no. 33-SF/Ph.D/F09 hereby declare that this dissertation entitled **"Islamic Criminal Law During The Mughal Period (1526-1857): A Comparative Study of Status of *Farāmīn-i-Shāhī*"** is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

Signature: 

Mamoona Yasmeen

Contents

Chapter No. 2:

Abstract

This research intends to highlight the issue of legislation through *Farmān-i-Shāhī* issued by the *Mughal* establishment during the entire *Mughal* period spanning over 1526-1857 in the light of the Islamic criminal procedure. This research intends to shed light on the role of *Farmān-i-Shāhī* in the evolution of procedural code to see it in the light of the Islamic jurisprudence after reviewing it in the broader prism of Islamic *Sharī'ah.* It is also going to trace its own historical use in the subcontinental legal context. It answers the questions posed in this regard and explore to show how *Farmān-i-Shāhī* has been used over centuries and is still considered a valid legal evolutionary document. The research is significant in that it will not only review the past of the *Farmān-i-Shāhī* in terms of legislation and role of *Farmān*, the evolution of *Farmān* into legislated injunctions and development in the light of the Islamic jurisprudence, but also in terms of its reconciliation and accommodation in the modern democratic dispensation. The literature review spans over the start of the *Mughal* Empire the establishment of a *Farmān* issuing authority, the role of religion, social, military, political and religious aspects of the *Farmān*, force for the legitimization and above all its linguistic constructs. The linguistic constructs also include its composition and articulation. It also reviews its role in the light of the Islamic jurisprudence and its consequential role in the development of procedural and penal codes in the British India and in the countries established as a result of the partition of India such as Bangladesh, Pakistan and India.

The research gives details of Islamic jurisprudence including procedural and penal codes to show that *Farmān* has done a legislative role in the development of

Islamic criminal procedure in India. It also reviews the past use of Islamic jurisprudence and different collections of *Fatāwā* which played an important role in the evolution of the *Farmān-i-Shāhī* itself. Despite the fact that it has been mostly leaned to *Ḥanafī* sect, this research has shown that the role of *Farmān* in the evolution of procedural and penal codes and their compilation has been tremendous whether the context was *Shī'ah or Sunnī*. It has also been reviewed that Islamic *Fiqh*, specifically, *Ḥanafī Sunnī* jurists, have played an important role in its evolution in the judicial contexts where *Sharī'ah* based laws were often applied and implemented in letter and spirit. It has been highlighted more clearly in the significance section where the evolution of judicial system has confirmed the legal role of *Farmān* in the development of rules and regulations of the entire judicial process, setting the stage for judicial development in India and resultantly in countries established after the partition.

Acknowledgement

Primarily, I want to thank *Allāh* for blessing me with patience, fortitude and courage to start and finish this arduous task that has captured my imagination as well as trapped my entire life during the last seven years. I am really indebted to that Great Almighty for which I cannot adequately thank Him for blessings and kindness on sinners like us. I manifest my sheer reverence and esteem for the Holy Prophet (peace be upon him) whose sayings and teachings are like a silver lining in the dark cloud of ignorance and backwardness and proved a bulwark against the evils of society.

Besides expressing my gratitude for the Great Almighty, there are many people who have extended direct and indirect help during this entire period. They played the role of real mentors. Some of them helped me and stayed with me for a brief period, while some others are still with me like lighthouses in the dark oceans. I hope that these great persons would stay with me until the final moments.

The people who have always stayed with me like great mentors include Professor Dr. Muhammad Zia-ul-Haq, who also happens to be the head of the Islamic Research Institute as its Director General. He has supervised this entire research from the very first page to the last until I have not achieved the required scholarship on the topic. He has not only been kind and keen but also very meticulous and marvelous. His constant encouragement has been a source of information for me at times when I was feeling lost and paralyzed, for research has proved such a painstaking and strength-depleting job for me. I am often speechless before his great erudition, his scholarship and his all-know capacity to guide me. I really have no words to thank this great learned menor. Along

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There are many other teachers who have helped me a great deal during the course of this research. Dr. Safiullah Wakeel, Professor of *Sharī'ah*, at IIU, Islamabad has been a great helping hand during the research. I also want to thank Dr. Fazal-e-Rabi for his arduous job of doing Persian translation that I used here. Professor Dr. Muhammad Tahir Hakeem and Dr. Muhammad Munir, always encouraged me whenever I felt stragling. I also want to thank all other teachers and colleagues of Govt. Khadija Umer Degree College for Women, Tench Bhatta, Rawalpindi and Govt. Degree College for Women, Dhoke Ellahi Buksh, Rawalpindi who proved a great help during trying times.

As research is a time-consuming task, some of the family members, though helped indirectly, suffered directly, for I, too, spent their time in my scholarly activities. Khalid Rasheed, my husband is one of them, whose verbal encouragement, though not substantial, has been a constant stimulus. He has played a vital role to complete the research. He proved to be an oasis in the desert. The second person who suffered from this preoccupation is my daughter, Subeeka Khalid, who did not become picky or touchy when attention could not be paid to her. I want to highlight the exquisite role played by my mother, my sisters, especially my loving sister Rubina, my elder sister Asia, Shahan, Saad Salman and Samreen. I want to express my gratitude for their valuable suggestions and occasional visits for encouragement. Another indirect but moral help was from Manzoor Ahmed Mirza, my role model, former session judge, District and Session Court, Gujranwala, who paved my way towards this arduous task . I thank him, too.

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And the final word of thanks is always reserved for thel liberarian of Dr. Hameedullah Library, Islamabad and of IIUI Central Library, specially Mr. Shair Noroz, Mr. Hibād, Mr. Imran, Mr. Rauf, Mr. Farooq and their associates. They had a great share in this final piece. I thank people, who helped in scholarship, are also scholars in their own fields. Thanks to Mrs. Noureen Qaiser (Librarian Govt. Degree College for Women, Dhoke Ellahi Bakhsh, Rawalpindi), Fayyaz Bukhari Librarian and Library Clerk Mr. Muhammad Usman Gordon College, Rawalpindi and my other colleagues. I thank my classmate and friend Ms. Shazia Kiyani, Lecturer School of Law, University of Gujarat for my moral sport. I acknowledge their valuable material, verbal and non-verbal support.

Mamoona Yasmeen

Note on Translation and Transliteration

This work relies on the Dr. Muhammad Taqi-ud-Din Al-Hilali, Ph.D. & Dr. Muhammad Muhsin Khān, https://noblequran.com/, translation of *al-Qur'ān*. This work relies on sources available primarily in English, Arabic, Persian, and Urdu. The transliteration system of the IRI Journal of *Islamic Studies* is followed. At times a single expression is described differently in these languages, for example qaḍā (Arabic), and qaza (Urdu). Generally, Arabic transliteration is preferred for the sake of consistency.

For some ferequently used terms English and non-English both plurals are used. For example, 'farāmīn' and 'farmāns' are used for the plural of farmān.

In citations and bibliography the names of books and their translations are given as they appear in the original print.

Sharī'ah and *Fiqh* are used in their original terms and explained in footnotes. Islamic (Arabic) original terms for the classification of crimes and punishment are also used as in Arabic format for example *ḥudūd,* , *ta'zīr*, *siyāsah*, *qiṣāṣ*, *diya* etc. Likewise, titles of farāmīn-i shāhī are kept in their original Persian pronounciation, for example *suyūrghāl, ta'līqah* etc. It must be noted that various authors spelt the expression 'Muhammad' differently such as 'Moohummud', 'Mohammed', 'Mohamed'. Gradually, uniform spellings 'Muhammad' were adopted. Similarly, instead of 'Mughul', 'Moghul', the expression 'Mughal' is adopted in the research.

Translation of excerpts from different languages into English is my own unless otherwise indicated. Words appearing in quotations have not been transliterated.

Introduction of the Research

Introduction of the Research

The *Mughal* period, after the *Sultanate* of Delhi, has been a turbulent one, spanning over almost three centuries.[1] During this most turbulent period, the *Mughal*s used to issue military, criminal and civil commands, which took the form of *Farmāns* or *Farmān-i-Shāhī* and helped the *Mughal*s establish their control.[2] The *Mughal* emperors, very adroitly, used their *Farmāns* in written as well as in oral shapes to wield greater power. In the absence of a legitimate democratic dispensation and in the background of medieval power structure, where only military might rule the roost, the *Mughal*s looked back to their own familial heritage and Islamic perspective and used their *Farmāns* to consolidate their power and bring victory to calm down the public through judicial dispensation.[3] Therefore, *Farmāns* were used in the backdrop of the absence of a judicial system to consolidate power and bring peace and stability in the empire. However, when the first objective was achieved, the *Mughal*s turned their attention to the public. The best way to pacify the public was to take care of their welfare and prosperity, providing them speedy justice decreasing crimes. However, they found out that they did not have a fully codified indigenous legal system, they looked to their previous rulers who laid the foundations of a good judicial administration in India.[4]

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[1] Ishwari Parsad, *The Mughal Empire* (New Delhi: Chūgh Publications, 1974), 102-103.
[2] K. P. Srivastava, *Mughal Farmāns: 1540 A.D. to 1706 A. D* (Utter Pradesh: Utter Pradesh State Archives, 1974), vi-vii.
[3] 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* (Karachi: Pakistani Historical Society, 1978), 23, 56.
[4] Wahed Hussain, *Administration of Justice during the Muslim rule in India with a History of the origin of the* Islamic *Legal Institutions* (New Delhi: Idārah-i-*Adabi*yyāt-i-Delhi, n.d), x-xi.

The *Mughal*s were aware of the previous system and set upon to add their own touch in the shape of legal injunctions but through *Farmāns*. This foundation was laid down during the time of Bābur. Yet it is strange that this continued even during the brief period of what can be called as *un-Mughal* period of Sher Shāh Sūrī.[5] The *Farmāns* were not only used for legal manipulation but also for appointments, changes and alternation in laws and administration.[6] Even the method of articulation of the *Farmān* was a specialized one, which led to the type of *Farmāns* with specific names and specific tasks. They contain fiats, ordinances and even edicts of religious nature, which led to the consolidation of the *Mughal* power in India.[7]

The *Farmāns* were also used to develop procedures and codes. In several cases, the specific and unconventional acts, which later transformed into complete procedures and codal formalities such as the *Farmān* of Aurangzēb to the *Dīwān* of Gujarat which dilates upon the codal formalities in detail.[8] Even the compilation of various *Fatāwā* collections was the handiworks of *Farmāns* issued by different emperors during their lifetime. Although these *Farmāns* were not strictly codified shapes of any specific legislation, they were, nonetheless, very forceful and bore semblance of legislation, the reason they were followed in letter and spirit and they achieved intended results, too. Therefore, they have been analyzed for their political, legal and social significance in the backdrop of the Indian empire and its social structure.

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[5] Ibid., 28-29.
[6] Ibid., 28.
[7] Ibid. 37.
[8] J. N. Sarkār, *Mughal Administration* (Patna: Patna University, 1920), 197.

1. Significance of This Research

No legal code can work appropriately if it does not confirm to the social and cultural setting of the land. Perhaps, that is the very reason that both the Islamic countries which separated from India have yet not reconciled to the idea of democracy, while the pure Hindu culture has immediately adopted it a way of life. In this backdrop, it becomes imperative to study the past of the Muslim period, specifically, the *Mughal* period, which held away over the Indian empire very successfully. If analyzed and evaluated from the legal prism, it seems that the *Mughal* emperors were purely despots, and their word of mouth was considered laws. This word of mouth was called *Farmān,* which has been analyzed in detail in this study.

As even the despots used to win legitimacy for their actions, the *Mughal*s used a handy way of taking cover under the *Fiqh* and *Sharī'ah* of *Islam*. Islam provided complete jurisprudence system to the *Mughal*s, as the jurists and Islamic clerics wrote commentaries and compiled crimes and their punishments, the *Mughal*s used them sparingly, but they also ordered their own compilation. This study is going to focus the use of their *Farmān* for legitimacy under the Islamic cover, its significance through its composition and articulation, its importance in the Islamic criminal jurisprudence, and above all its role in the evolution of Islamic procedural laws and penal codes.

The study will also focus on the Islamic procedural laws and compare it with the amendments, additions or changes that the *Mughal*s made and their further workable implemented examples during the English period in India. The study will conclude with the role of *Farmān-i-Shāhī* in the evolution of criminal procedure code in the light of the Islamic jurisprudence in India. Moreover, the study will also highlight the use of *Farmān*

in the compilation of Islamic *Fatāwā*, criminal procedural laws and penal codes during *Mughal* period and post-*Mughal* period in India.

2. Thesis Statement

The *Farmān-i-Shāhī* issued during the *Mughal* periods as a fiat of the emperor was used in administrative, legal and judicial dispensation in the Subcontinent. This *Farmān* played an important role within the context of Islamic jurisprudence to create a shade of legitimation for the *Mughal* Empire. The *Farmān* was not only legal and judicial, it was also constitutional and led to the evolution of a complete codified legal and penal codes in the judicial systems of the *Mughal*s. Therefore, its review within the Islamic jurisprudence leads to the conclusion that it has a judicial legal significance and played an important role in running the judicial systems of that time and even is important in the evolution of the Islamic criminal code in the Subcontinent.

3. Statement of the Problem

The *Mughal*'s *Farmān-i-Shāhī,* couched in the religio-political and social constructs for legitimizing the *Mughal* rule, has been instrumental in bringing reforms in Islamic criminal jurisprudence in the *Mughal* India. *Farmāns* also helped streamline *Islamic* criminal jurisprudence in terms of procedural laws and penal codes. *Farmān-i-Shāhī* is also significant regarding paving the way for the evolution of procedural laws and penal codes.

4. Research Questions

The research endeavors to explore the answers of the following research questions regarding role of *Farmān-i-Shāhī* in the evolution of Islamic criminal jurisprudence in the subcontinent during the *Mughal* rule.

1. How did the *Mughals* use *Farmāns* after assuming power in India? How was the role of religion in the consolidation of power of the *Mughals* and how it was used to back up *Farmān-i-Shāhī*?
2. How did *Farmān-i-Shāhī* win the legal status? What was the procedure of writing and what type of language was used in *Farmāns* that it won legal status? Also, what type of sources did help *Farmān* win the necessary legal status?
3. How did Islamic jurisprudence evolve in India during the *Mughal* rule and how did it reconcile with *Farmān-i-Shāhī?* How did *Farmān* impact the implementation of *Sharī'ah* and Islamic criminal procedure?
4. How did *Farmān-i-Shāhī* help in the evolution of procedural laws in judicial trials and other rules and regulations? What was the role of *Farmān* in the compilation of criminal laws?
5. How did *Farmān-i-Shāhī* help evolve procedural laws in judicial matters? What was the role of *Farmān-i-Shāhī* in the codification of penal codes and procedural codes?
6. How is *Farmān* showing its impacts on the future evolution of legal codes and codification of criminal laws?

5. Objectives of the Research

The major objectives of this research are as follows. This study has been conducted :

- To analyze the role of religion, politics and social circumstances of the issue of releasing a *Farmān* and its role in the consolidation of power in the *Mughal* India.

- To understand the legality of the *Farmāns*, their linguistic style, their types, recording status and how they helped win legal status in *Mughal* India.
- To analyze the evolution in Islamic criminal jurisprudence in the light of the *Farmān-i-Shāhī* and how *Farmāns* helped implementation of *Sharī'ah* in India.
- To evaluate the ways of how *Farmān* got reconciled with Islamic criminal jurisprudence.
- To analyze the significance of *Farmān* in the evolution of procedural laws and penal codes during the *Mughal* period in India and its impacts on the future legal evolution in India.

6. Literature Review

The literature review has been conducted in the start with specific books and research articles.

The Administration of Justice in Medieval India by Muhammad Basheer Ahmad is a book about the study of the judicial system before and during the *Mughal* period. Published by Aligarh Historical Society. This book gives a good view of the documents that Muhammad Basheer Ahmad has used to outline the judicial system. Starting with conditions of the Medieval India, Muhammad Basheer has given the detail of pre-*Mughal* judicial system, its work and its standing in the society to review the judicial officers and officials and role of the Islamic jurisprudence during the *Mughal* period. The author has also given a good account of the officials attached with the *Mughal* judicial system, their duties and performance and significance within the system. The author has also given a

good account of some of the *Farmāns* which played a significant role in the evolution of the *Farmān* as a legal document.

The Administration of Justice during the Mughal Rule in India is a book written by Wahed Hussain, a lawyer from Calcutta and also an author of Theory of Sovereignty in *Islam*. However, its subtitle gives a better view of the book that is *A History of the Origin of the* Islamic *Legal Institutions*. The book comprises a lengthy preface written by the author about the objective of the study and its results. The author has also listed Persian history books, law books and other historical studies that he studied in writing this book. This book is useful for this research as it is an exhaustive account of the judicial system that the *Mughals* set up in India, used the Islamic criminal jurisprudence and issued *Farmāns* to strengthen it. The writer has divided his book into different chapters, taking review of the idea of justice of different emperors, their administration, changes and use of Islamic *Fiqh* in the dispensation of justice. The book is a good source to trace the cases.

Administrative Structure of the Great Mughals is a very important book by an Indian bureaucrat, Ram Parsad Khosla. The book not only presents the full administration of the government, but also the structure and administration of the judiciary. As this book gives full account of the administration of justice and dispensation of punishments, it has highlighted the use of religion by the *Mughals* through their *Farmāns*. The author has highlighted the role of Islamic *Fiqh* and *Fatāwā* collections in the administration of justice during the *Mughal* period.

The Central Structure of the Mughal Empire is another important book by a Pakistani researcher, Ibn Ḥasan. The author has divided this book into different chapters

comprising role of different officials in the *Mughal* empire and their responsibilities and duties. He has highlighted the central role of the judicial system and its alignment with the Islamic jurisprudence specifically the *Sunnī Ḥanafī* sect. The author has also discussed different officials from *Qāḍī to Muftī* and then the complication of *Fatāwā* during the final *Mughal* period.

Akbar and the Mughal State: the Quest for Legitimization in Hindustan is a research paper written by Professor Christopher P. Holland. This paper is a very good document to trace the history of the *Farmān* written during the time of Akbar and its legitimation process. However, he points out that his desire was to centralize his authority through a hierarchical process that he set up is called his *Farmān*. He also shed light on the creation of a new ideology and court ritual and role of *Farmān* in the process. This, he argues, gave India a new way to stabilize governments.

The Administration of Justice in the Reign of Akbar and Awrangzib: An Overview, is a study by Dr. Muhammad Munir. The Doctor has focused on the *Mughal* judicial system during the period of Akbar and Awrangzib. He has highlighted the judicial administration and reforms brought about by both the emperors and their impacts on the dispensation of justice. He has also reviewed the wrongs committed by Akbar and the role of Awrangzib in thrusting religious touch in the judicial system. This study is very important regarding the role of the emperors in reforming and changing the Islamic jurisprudence specifically with reference to crimes and punishments.

Justice and Punishment during Mughal Empire (Based on Foreign Travelogues) is a very important study about the *Mughal* judicial system by Dr. Shaikh Musak Rajjak. Starting the medieval civilization and working of the *Mughal* emperors,

Dr. has stated that travelers from far off countries used to visit India, considering it a cradle of civilization at that time. They learned valuable lessons from India not only in culture but also in government and judicial administration and reported it in their travelogues. He has focused on their accounts about *Mughal* judicial system, considering their accounts as neutral voices.

Judicature of Islamic Law in Medieval India is a paper presented by Sabah Bin Muhammed of Hamdard University, New Delhi India. The author has beautifully presented his analysis of the application of Islamic law in the Medieval India specifically during the *Mughal* period and their role in moulding this Islamic law into local settings through their *Farmāns*. He is of the view that *Mughal*s brought new changes into the Islamic jurisprudence through their *Qāḍī* system that they borrowed from previous rulers and Iranian governments. He argues that the *Mughal* judicial system used Islamic laws and became popular for the power *Qāḍīs* enjoyed during the *Mughal* period.

Moreover, the start is made from the issuing of *Farmāns* which the *Mughal*s used to do from time to time.

The *Mughal Farmāns* have been part of the word *Mughal* which has its own connotative as well as denotative meanings.[9] Since the emergence of the *Mughal* Empire, *Farmāns* were streamlined in accordance with the *Sharī'ah* and *Fatāwā* books used from time to time. It means that the *Mughal*s understood their social and political conditions and exigencies of the circumstances in which they made their *Farmāns* forceful enough to have legal values in the light of the Islamic *Sharī'ah* which most of the Muslim rulers

[9] Sri Ram Sharma, *Mughal Empire in India: A Systematic Study Including Source Material*, Vol. 2 (New Delhi: Atlantic Publishers & Dist, 1999), 672.

thought better to follow, at least in their existential circumstances.[10] And it used to happen during the worst palatial machinations.[11] The legal force behind the *Farmān* has various factors such as religion, *Fiqh*, social and political circumstances and even military force.[12] That is why different writing styles were adopted for different *Farmāns* and even there was many types of *Farmāns*; each having its own legal value according to the circumstances.[13] That is also, how the status of the *Farmān* was determined by the administration of the *Mughal* Empire. This could have been the awareness of the *Mughal* rulers about the legal terminology to be used besides the style and writing of the *Farmāns*.

In fact, they kept a difference between different *Farmāns* on the basis of the same terminology that they deemed very important. They even refused others to copy that language and style and also made people accept that language. Members of the royalty were barred from imitating that style.[14] There was also a royal seal of different types to be put on the *Farmāns* before issuing.[15] This entire exercise was executed to bring legitimacy. The same was the case in the matters of criminal procedures. In this connection, the major sources of *Farmān* were almost the same Islamic sources which

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[10] Muḥammad Zaki, *History of Muslim Rule - The Prophet and the Early Rulers* (New Delhi: Beacon Publishers, 2006), 273-274.
[11] Mahajan V.D. & Savitri Mahajan, *The Muslim Rule in India* (New Delhi: Chang & Co, New Delhi, 1963), 199.
[12] Francis Bernier, *Travels in the Mughal Empire*, Tran. by Archibald Constable (Oxford University Press, 1916), 125.
[13] Ḥamid-ūd-dīn Khān Bahādūr, *Aḥkām-e-Ālamgīrī*, Trans. Jādūnāth Sarkār (Calcutta: M. C. Sarkār & Sons, 1925), 35.
[14] Balkrishan BRahmān, *Letters written by Shaikh Jalal Hisari and Balkrishan*, BM. MS., add. 16859 (Aligarh: Rotograph in the Department of History Library, AMU), 97.
[15] Jahāngīr, *Tuzuk-i-Jahāngīrī or Memories of Jahāngīr*, Trans. by Alexander Rogers, Ed. by Henry Beveridge (London: Royal Asiatic Society, 1909), 18.

were in the back of *Sharī'ah* and *Fiqh* or better to say Islamic jurisprudence.[16] Several noted scholars have traced the sources of different *Farmāns* issued by different *Mughal* emperors and have arrived at the same conclusion that Islam was a dominant force behind the issuing of *Farmāns*.[17]

Although *Farmān-i-Shāhī* has its own significance, in the light of the Islamic criminal law it does not hold any weight. The *Mughals* used it in the social circumstances where the Islamic clerics supported the *Mughals*. However, when there was some urgent necessity, the clerics were immediately summoned to support the *Mughals* in the name of *Islam*. That is why *Farmāns* were used to mould the Islamic jurisprudence in several ways.[18] There are instances where several concepts of the Islamic punishments were modified, altered and changed to suit the circumstances during the period of Bābur and Akbar. The changes, however, were made to suit the circumstances in such a way that they fitted with the existing situations which suited the consolidation of the *Mughal* power. It is, however, very interesting that even the compilation of the procedural laws was made in the light of the Islamic laws and then *Farmāns* were added to it. In this connection, the role of *Qāḍīs* cannot be overlooked. Their appointment, salaries and rules and regulations for conduct of trials, evidence presentation and even post-punishment period were added to that.[19] However, the *Mughal* emperors took a very careful review of the Islamic criminal procedure before making any change or intervening through *Farmān* though they used *Farmāns* to bring many changes such as role of lawyers in the later part of the *Mughal* period, the post of the *Qāḍīul Quḍāt* and *Muḥtasib* and other

[16] Norman Cadler, Islamic *Jurisprudence in the Classical Era* (Cambridge: Cambridge University Press, 2010), 117.
[17] Raj Kumar, *Essays on Legal System in India* (New Delhi: Discovery Publishing House, 2003), 43.
[18] Sidney J. Owen, *The Fall of the Mughal Empire* (London: John Murray, 1912), 1–4.
[19] Ibid., 3-4.

unconventional judicial institutions.[20] Therefore, *Farmān-i-Shāhī* has been quite relevant for setting up and establishing all these institutions and bringing transformations in judicial structure whatever it was.

The evolution was natural with the passage of time, but the *Mughal* emperors stayed cognizant of the fact that there must be evolution and development in the procedural laws. However, there was codification of such laws a la Roman codified laws that the English brought in India later. Different *Mughal* emperors brought different changes in the Islamic procedural laws. These changes were also in the penal codes. If those changes are compared with the Islamic procedural laws, it becomes clear that until *Fatāwā-i 'Ālamgīrī*, the *Mughal*s did not dare do anything beyond the Islamic jurisprudence except in procedural laws or occasional regal punishments.[21] However, still the importance of *Farmān* was there, and it played an important role in evolving procedural as well as penal codes.

7. Research Methodology

As this is a qualitative research involving research of the relevant literature for literature review, descriptive, analytic and comparative approaches have been adopted to compare evaluate and analyze the relevant texts and commentaries. The assumptions were already set to prove that the *Mughal*s used *Farmān-i-Shāhī* to consolidate their power through religion, it stayed critical in evolving Islamic jurisprudence and it has been a legal and quasi-legal instrument. It also has its own unique language, and that it was instrumental in the evolution of criminal procedural code as well as penal code.

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[20] J. N. Sarkār, *Mughal Polity* (New Delhi: Adarah-I Adbiyat-i Delli, 1984), 133. 173.
[21] S. M. Azizuddin Hussain, *Structure of Politics Under Aurangzeb: 1685-1707* (New Delhi: Kanishka Publishers, 2002), 183-186.

The specific research methods adopted and used in this research include analytic, empirical, evaluative, comparative and legal comparative. Legal historical method has also been used wherever necessary to compare two or more legal opinions regarding the legality of the Islamic jurisprudence during the *Mughal* era. The data collection in this connection has been made through collection from various sources, which was evaluated for credibility and authority.

A specific method was historiographic that was used when reviewing the historical documents to analyze them through legally objective language to deduce neutral meanings and evaluate their merit in the true *Mughal* perspective. Therefore, a quasi-historical method was also used to separate facts from fictions and cases from stories.

Furthermore, a comparative analysis of the Islamic jurisprudence with regard to procedural laws and penal codes with addition and amendments made by the *Mughal* emperors from time to time and their implications on the future of Indian legislation has also been made by the end.

8. Chapterization/ Outline of the Research

This dissertation comprises five chapters including the introduction, a separate section on the sources, and a conclusion.

The first chapter deals with the arrival of the *Mughal*s and introduction of their genealogy, its Connotation and its association with the Islamic caliphate, religious, social and general administrative conditions during the *Mughal* period. Its objective is to present background to the legitimacy of *Farmān-i-Shāhī*. The chapter also dilates upon the *Mughal* legal conditions with reference to the *Farmāns* of the *Mughal* emperors and

their legislative and administrative significance. The four sections of this chapter review the arrival, and consolidation of power, religious, social, political and legal conditions and their impacts on the future, leading to the action of the issuing of *Farmān* in the second chapter.

The second chapter deals with the status of *Farmān-i-Shāhī*. It opens with meanings, status and writing style of *Farmān* including its articulation and purpose. The chapter continues with the procedure and composition of *Farmāns* and further discusses its sources. Then it discusses the legal status of *Farmān* during different periods until the compilation of *Fatāwā-i 'Ālamgīrī*. The chapter ends with critical review of the legal status of the *Farmāns* in the light of the criminal law in Islamic jurisprudence which then leads to the next chapter.

The third chapter presents the Islamic criminal law in detail. It explains classification of the crimes and punishments and discusses in the light of *Sharī'ah*. Moreover, it also evaluates its enforcement in India during the *Mughal* period. The chapter goes on to discuss the implementation of *Farmāns* and their impacts on criminal law in British India. Moreover, the last section has also included the British reforms in the light of the Islamic criminal jurisprudence moulded by the *Mughal Farmān*.

The fourth chapter sheds light on the role of *Farmāns* in the light of the Islamic Criminal Laws. It also discusses the role of Islamic *Sharī'ah*, scholars and above all mufits having a good say in the *Mughal* courts. It also gives details on the roles of lawyers, the evolution of accountability and *Muḥtasib* and then the relevance of the *Farmāns* to the evolution of Islamic criminal procedure.

The fifth chapter is the longest in this dissertation due to its significance in the research. Not only does it present Islamic criminal law briefly, but also dilates upon the procedural laws and their evolution in *Sharī'ah*. Then in the second point, it discusses the *Mughal* judicial system with reference to the procedural laws and evolution of these procedural laws through rules and regulations that deal with the entire judicial procedure. Moreover, it presents unconventional regal judicial institutions too which used to set conventions of some of the regulations. The chapter then presents *Mughal* penal codes, the role of *Sharī'ah* courts in the evolution of procedural laws and compares the Islamic and *Mughal* procedural laws through the lens of the legal force of *Farmāns* issued by the *Mughal*s from time to time to run the judicial administration. The chapter concludes with some references to the *Farmāns* which evolved from some Islamic procedural codes and laws.

The end of the research discusses the results of the literature review. It concludes the dialectic about the legal significance of the *Farmāns* with respect of Islamic criminal procedures and proves that the *Farmāns* were rather used judiciously in evolving Islamic criminal procedures, procedural laws and penal codes in the *Mughal* India and their impacts have been far reaching which are being felt even now in all the countries which came into existence from the United India.

Mamoona Yasmeen

Chapter No. 1

The *Mughal* Rule in the Subcontinent:

An Introduction

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1. Introduction To The *Mughals*

1.1. The Word "*Mughal*" And Its Connotations

Although the word '*Mughal*' is not intertwined with the word *Farmān* (command or decree), it has something to do with it in a way that it seems inseparable. Literally, it means an influential person or a very rich person as online *Oxford Learner's Dictionaries* define it, adding it a race that ruled India, but the word has been given as 'Mogul' and not '*Mughal*'.[22] Etymologically, it means a specific race, as Oxford has defined it, but is associated with Muhammadanism or Islam when it entered India as stated[23] by S. R. Sharma.[24] On the other hand, Oidov Nyamdavaa[25] sheds some light into the phenomenon of associating Islamic or Muhammadanism with *Mughal* saying, "the word '*Mughal*' has been often misinterpreted to mean 'Muslim,'" though it has nothing to do with it[26]. He further states that it rather comes from the distortion of "Mongol," though *Mughal*s did not relate themselves to the Mongol lifestyle save only through lineage.[27] Bābur[28] (1483-

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[22] *Oxford Learner's Dictionaries*, s.v. "Mogul." Accessed August 03, 2017, http://www.oxfordlearnersdictionaries.com/ definition/american_english/mogul

[23] Sharma, *Mughal Empire in India: A Systematic Study Including Source Material*, Vol. 2, 672.

[24] Sri Ram Sharma was a professor of history, politics and public administration in various Indian universities and wrote books on *Mughals*. He has been a fellow of the Royal Historical Society, member of the Indian Historical Records Commission and Director of Public Administration in Himachal Pardesh.

[25] He is an Indian author, having authority on Mongols and their links with *Mughal*s and India.

[26] Odivo Nayamdavaa, *Insights into the Mongolian Crescent of India* (New Delhi: Himalaya Publishers, 1999), 59.

[27] Ibid., 59.

[28] Ẓahīr-ud-Dīn Bābur was born in February 14, 1483 in a central Asian state of Fergana and died in December 25, 1530 in Delhi as the first *Mughal* emperor of India. See Dilip Hiro, Bābur *Nāmah, Journal of Emperor* Bābur (New Delhi: Penguin Classics, 2006), 1, 3, 1520.

1530) could be traced to have lineage from the famous Mongol ruler Chengēz Khān.[29] Central Asian Muslims had various reasons for hating Mongols, who played havoc with the Muslim caliphate, specifically when they ransacked Baghdād in 1258.[30] The Mongol empire, however, disintegrated following death of Chengēz Khān after three centuries. The *Mughal* Empire, on the other hand, emerged in 1527 after Bābur uprooted Ibrahim Lodhi[31] and his great army in the famous battle of Panipat. His final moments of breaking the wine pots may have some Islamic touch, but it is not sure whether it was result of his fiat or not. However, what is sure according to Ovidov Nayamdavaa is that his mother has some linkage with the great Chengēz Khān[32].

1.2. Background to the *Mughal* Rule and Their Islamic Association

It is fair to touch upon the Islamic background of the *Mughal* rule due to its relevance to the *Farmāns* of the *Mughals*. Although Islam is touted as a religion having democratic nature in which people have complete equality, it does not present any evidence except semblance of democratic caliphate during its initial phase. The evidences of democracy are often drawn from the last address of the Prophet (PBUH) in which He declared equality among all the Muslims whatever his lineage is without having any superiority on the basis of color, or ethnicity or any other quality except piety.[33] This was the groundwork laid down by the Prophet (PBUH). Although, there is also a contention

[29] Born as Temujin belonged to a nomadic tribe of Mongolia born in approximately 1162 and died in August 18, 1227. He won fame due to his relevant invasion of the Central Asia and merciless killings of his enemies and opponents alike. See George Lane, *Genghis Khan and Mongol Rule* (Cambridge: Indianapolis, Hackett Publishing Company, 2004), 13-15.

[30] Ziauddin Sardar, Merryl Wyn Davies, *The No-Nonsense Guide to Islam* (UK, Oxford: Internationalist Publications Ltd., 2004), 63-64. See John Keay, *India: A History* (New York, Grove Press, 2000), 289-290.

[31] He became the *Sulṭān* of Delhi in 1517 after the death of his father Sikandar Lodhi and faced defeat from Bābur in Panipat in 1526. Ethnically, he was a Pakhtun Muslim. See Deepak Shinde, *Indian Civilization* (Sholapur: Deepak Shinde Publisher, 2016), 201-203.

[32] Sardar and Davies, *The No-Nonsense Guide*, 27.

[33] Muḥammad Husayn Haykal, *The Life of Muhammad.* Trans. by Isma'il al-Faruqi (Washington: American Trust Publications, 1976), 472.

over caliphate between different Islamic sects, is however, it presented as the first symbol of Islamic democratic system.[34]

As the Prophet (PBUH) is stated to have laid the foundations of caliphate, it burgeoned a contention that settled soon with Abū Bakar, leading the Muslims. The people soon swore allegiance to him. He addressed them saying he had authority over them and that they should support him in good deeds and stop him from doing bad ones.[35] The stress is still on the public and the system given by *Sharī'ah*. This explicitly indicates that the system derived by Arabs had concept of the public support or consent to rule. The first Caliph is clearly asking the Arab Muslims of that time to hold him accountable, if he goes astray from the right path enshrined in the Holy Qur'ān and *Sunnah*[36]. This is a sort of legitimacy he is drawing from these sources for his future edicts. This also is a good point of reference for the future Muslim rulers.[37] Certainly, the *Mughal*s had a clear path before them in the shape of these precedents of governing a country.

Even in the early Islamic period, the legitimacy was to be given by the people. This fact of public assent is clear from the Syrians when they raised the Qur'ān on spears to settle the dispute though they dissented against the ruling caliph.[38] This is a sign that Islam derives its legal authority from the *Qur'ān*, and the sacred text for the Muslims around the world.

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[34] John L. Esposito, John Obert Voll, *Islam and Democracy* (New York: Oxford University Press, 1996), 26.

[35] Zaki, *History of Muslim Rule - The Prophet and the Early Rulers*, 273-274. See Haykal, *The Life of Muhammad*, 494.

[36] The ways and sayings of the Prophet (PBUH) Muḥammad (PBUH) which have been documented in different books called *Ṣiḥāḥ Sittah*.

[37] Haykal, *The Life of Muhammad*, 177.

[38] William Muir, *The Caliphate: Its Rise, Decline and Fall: From Original Sources* (London: Religious Tract Society, 1891), 280-285. See Haykal. *The Life of Muhammad*, 177.

An unusual event, however, followed this with the death of the fourth caliph. The caliphate soon became a family inheritance and transformed into a monarchy. The caliphs became monarchs and ignored the public or the *Sharī'ah* as the guiding principles.[39] Perhaps the same became a practice in India, where there was not any democratic movements. Monarchy is based on family heritage and power without no political backing, says R. P. Khosla[40] who has written extensively on the *Mughal* administrative system. He says that that such a system is in the "self-interest of the few and the utter helplessness of the many." He further adds that Pathans followed the same thing of not winning public will.[41] It does not mean that the early *Mughals* left *Islam*. Rather they stuck to the idea of caliphate and swore allegiance to the Islamic caliph of that time, but stood entirely independent.

Khosla further states that it could have been the expediency of their time, multiplicity of religions in India and cohesion of their Indian empire that they did not express desire to follow the caliphate model and seek legitimacy of their dictates from the elite class rather than the religion.[42] This shows the astuteness of the first *Mughal* which continued during the entire *Mughal* rule.

The 16th century witnessed political upheavals. It was a period when governments and political entities around the globe were preoccupied with making adjustments. The world was witnessing a religious chaos, ideological revaluation and cultural

[39] Akbar Shāh Khān Najīb Ābādī, *History of Islam,* Vol. 2 (Lahore: DarusSālam, 2001), 612-614.
[40] R. P. Khosla has been an officer of the Indian Civil Service and a noted historian on the *Mughal* period. He served the government of India on many important positions.
[41] Ram Parsad Khosla, *Administrative Structure of the Great Mughals* (Delhi: Kanti Publications, 1991), 3-4.
[42] Ibid., 46-47.

transformations. According to Major Waller Ashe,[43] a noted historian and writer, the Muslim societies and governments were facing new challenges to meet demands of the changing times. Great empires, he argues, emerged in the Islamic world which reshaped the entire Muslim history and laid the foundations of the future empires. The Ottoman empire emerged in the western Asia, the Safavids entrenched themselves in Iran and the Turks, laid the foundation of the *Mughal* Empire in India. In neither way, these empires were connected with Islamic religion. Rather Ottoman and Safavids[44] were at loggerheads for representing two contradictory points of view about the caliphate which was considered a model in the Islamic world.[45] The situation in India, too, was not encouraging for a stable empire to practice democratic *Islam*. Rather it was murky. However, the encouraging sign of stability was emerging out of this chaos. According to KhwandaMīr,[46] "The entire range of the kingdom of India was revitalized up to the borders of Qandahar and Zabūlistan."[47] He means that the time was not suitable for the *Mughals* in India to practice or implement the Islamic system as they thought of, nor it suited their power structure.

[43] Major Waller Ashe was in the Dragon's Guards in the British Army who took part in Kandhar Campaigns undertaken by the British Government during the later half of the 19th century.
[44] The Ottoman and Safavid Empires were two great Muslim empires of the 16th century. Ottoman was established by the Turks while Safavid Empire was established in Persian, now Iran. The Ottomanians were *Sunnī* Muslims, while Safavids were *Shī'ahs*.
[45] Major Waller Ashe, *Personal Records of the Kandahar Campaign* (London: David Bogue, St Martin's Place, 1881), xxviii.
[46] Khawandamir or Khwanad Mir was the title of Ghiyasuddin Muḥammad (1474-1475), a noted noble and scholar of Humāyūn. He wrote *Qānūn-i- Humāyūn*.
[47] Khawandamir, *Qānūn-i- Humāyūn's*, trans. by Baini Prasad (Calcutta: The Royal Asiatic Society of Bengal, 1940), 36.

The western historians have taken a very favorable view of Bābur, the founder of the *Mughal* Empire. Talking about him, the respected historian Arnold Toynbee[48] calls him "the most centrally placed and most intelligent observer among notable non-westerners."[49] In fact, he is referring to the western invasions of India in pre- and post-Bābur period. He also has mentioned his Islamic heritage saying that "he knew his Islamic history," but he has not stated that he was found of implementing the Islamic caliphate system despite swearing allegiance to the caliphate[50].

1.3. Bābūr: Founding Father of the *Mughal* Rule in India

Kingdoms and empires are not just built by a single man. Certainly, there is something in his dictates which come into being in the shape of actions of the men he commands. Bābur has been highly effective as a founding father of the *Mughal* dynasty in India, for he not only laid down the foundations of a dynasty but also laid down the foundations of long Islamic rule which itself turned into a civilization. His journey form Farghana, his ancestral home, to India have been a prolonged adventure full of brutal battles, conspiracies, machinations, family feuds and deaths.[51] He conquered cities after cities and villages after villages until he reached Kābul after ravaging Samarkand and knocked at the doors of India. There are no such details about his devoutness or that his association with Islam had been very strong, but there is an anecdote in history that when

[48] Arnold Joseph Toynbee was a British historian, philosopher and professor at University of London and Kings College and held very important academic positions. He is best known for his work *A Study of History* in 12 volumes.
[49] Arnold J. Toynbee, *Civilization on Trial* (New York: Oxford University Press, 1948), 65.
[50] Ibid., 66
[51] Farzana Moon, *Babur: The First Mughal in India* (New Delhi: Atlantic Publishers, 1997), 6-11.

he fought with Ibrahim Lodhi[52] in Panipat[53], he broke all the wine related utensils and asked his soldiers to become the soldiers of *Islam*.[54] This anecdote could be wrong. However, after this defeat of Ibrahim, the Indian culture, which was dominantly Hindu, became harmonious. This defeat "led to the foundation of *Mughal* Empire whose illustrious monarchs shed the foreign outlook and played a great role in evolving a new cultural pattern of Indian society based on harmony and cooperation between Hindus and Muslims."[55] Although this is just a historical reference, it shows that Bābur brought some Islamic associations with him, which led to harmony between Hindus and Muslims, as Hindus chieftains were gaining grounds as compared to the Muslims during the Afghan rule[56]. This cultural and religious harmony led to the consolidation of the *Mughal* rule in India which lasted several centuries until the British disrupted this continuity and finally ended it in 18th century after Aurangzēb, the last independent *Mughal* emperor.

1.4. Consolidation of the *Mughal* Rule: Question of Legitimacy (1526 – 1800)

Consolidation of power at any place, where a newly arrived conqurer just sets his foot, is not easy. Bābur found himself in hot waters of India when he turned to Delhi and other cities. P. R. Khosla, commenting upon the administration and creation of legitimacy for the rule of the *Mughal*s, says Bābur did not take much rest during his lifetime. He was

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[52] Ibrahim Lodhi was the ruler of India when Bābur invaded India. He was of Afghan origin and the last king of the Lodhi dynasty. See Satish Chandra, *Medieval India: From Sultanate to the Mughals-Delhi Sultanate (1206-1526* (Delhi: Har-Anbad Publications, 2004), 224-225.

[53] It was a vast and barren plan in India near Delhi in old times where two great wars were fought. This was the first Battle of Panipat. See John F. Richards, *The Mughal Empire* (Cambridge: Cambridge University Press, 1995), 8, 13, 75.

[54] Moon, *Babur*, 417. See Abraham Early, *Emperors of the Peacock Throne: The Sage of the Great Mughals* (New Delhi: Penguin Books, 1997), 25-26.

[55] Dr. Khalid Basheer. "Conquest of India by Bābur." *Scholarly Research Journal for Interdisciplinary Studies* (Jan-Feb, 2016): 1352. http://oaji.net/articles/2016/1174-1457340805.pdf. See Robert H. G. Charles, *Mission to Distant Land* (Bloomington: Author House, 2013), 74-75.

[56] Ibid., 1353.

ever busy in consolidating power at one station or at another garrison. He might have realized that the system run by generals would not be legally sound. He did not find any such opportunity to have time to relax and think about it. It also could be that he found legitimacy in power as used by his successors very fondly in every matter.[57] In other words, though Islam provided the *Mughal*s bedrock to lay the foundations of a great empire and the *Mughal*s from Bābur to the last emperor did not budge from this question of being Muslims. It is yet surprising that they did not use only Islam to consolidate powers. They rather first used the motto of 'might is right' and later turned to different religious arguments to entrench themselves. It was used to create harmony among Muslims and Hindus to gain ground which they might have lost otherwise.[58]

However, the question of legitimacy is still debatable, for they used various factors, considering various aspects regarding variety of the ethnic clans and religions in India. Harbans Mukhia[59] in his great book, *The Mughals of India,* has shed a detailed light on the question of legitimacy of the *Mughal* rule. He is of the view that legitimacy is quite recent in the legal and political polemic but for the *Mughal* state it has never found any favorable ground to be debated upon in detail. Referring to the hypothesis of Stephen P. Blake, he puts forward his argument that despite terming it a "patrimonial-bureaucratic state" with edicts issued from the top of the hierarchy or the emperor, it has won some legitimacy in the shape "corporate kingship" in the words of William Buckler.[60] He further adds that despite these interpretations, the legitimacy rests on various structures

[57] Khosla, *Administrative Structure of Great Mughals*, 5. See John F. Richards, *The Mughal Empire* (Cambridge: Cambridge University Press, 1995), 6-7. Early, *Emperors of the Peacock Throne*, 30.
[58] Basheer. "Conquest of India by Bābur", 1352.
[59] Herbans Mukhia is a great Indian historian who has done extensive work on medieval Indian history and historical personalities. He has written various books on Indian history and has won many awards for his scholarship.
[60] Harbans Mukhia, *The Mughals of India* (Malden: Blackwell Publishing, 2004), 15-16.

and "Islam was one durable structure, for its presence at almost every level of the state's function was emphatic."[61]

1.4.1. Situation after Bābūr: Power, Struggle and Legitimacy

Bābur hardly gained full power when he had to depart leaving his young son, Humāyūn incharge of his vast empire rigged with internal strife and external threats from the east and the west including the minor *rājās* of different states. In other words, Bābur's control was just through force and otherwise superficial. Soon, Humāyūn, as per the action of his father on the maxim of 'might is right' faced the choice to confront the most formidable rival in the shape of another Afghan, Sher Shāh Sūrī, who easily snatched away the entire *Mughal* kingdom within a few battles.[62] Humāyūn found an opportunity to flee to Persia (then Iran) and returned with a vengeance. However, he soon met his fate by falling from the stairs and left his entire kingdom to his son, Akbar, a lad of just 13 years.[63] He inherited this vast and unruly kingdom in 1556 in which legitimacy was hard to come by due to multiple ethnicities, races, nationalities, religions and even smaller tribes and clans[64].

As far as the system Akbar inherited form his father is concerned, that was the same old system of might is the best tool to rule. The only legitimacy was the might. The entire country was divided into stations and independent camps ruled by generals appointed by the emperor and subsequently supervised by the advisors the emperor

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[61] Ibid., 16.
[62] Ruby Lal, *Domesticity and Power in the Early Mughal World* (Cambridge: Cambridge University Press, 2005), 121-125.
[63] Basheer, *Conquest of India by Bābur*, 1359-1364.
[64] Ibid., 1359-1364.

appointed. It was double-tier system as Khosla points out in his book.[65] He further argues that there were "two nations" behind both the father as well as the son. That is why they had to create façade of harmony by creating a balance between Hindu and Muslim advisors and ministers. Although the system was not legitimate in terms of Islamic rule or other democratic norms, but who cares when the king was to rule at every cost.[66]

Khosla further highlights the point that though *Mughal*s were Muslims, their arrival in India little changed the true nature of kingship as being an autocratic method (*Istabdilūn*) of ruling the public. Khosla has argued his point by explaining that it might have two reasons behind it.[67] The first was that Islam travelled a long way from its first caliphate to the Ottoman Caliphate which was just a semblance of the first one but not democratic or Islamic at all. The second factor was that India or Hindustan as it was called then, was a country having diverse communities, clans, families, tribes, nations and religions. It was impossible to manage it through such a democratic dispensation what he calls it in modern terms. More power to Hindus means to face the wrath of not only the common Muslims but also of the Muslim preachers and more power in the Muslim hands mean to give reason to Hindus to feel the heat of the estrangement. Hence, they faced two choices; set up a central monarchic system of government and issue their *Farmāns* with ruthless force at the back or fade in the onslaughts of the invaders and internal strife of the *rājās*. In fact, none of these factors emerged as possible legitimacy grounds for their rules or edicts they issued. Their foremost task was to make people respect and honor them, or at least feel awe in their presence or in their absence. Moreover, the system the fathers and sons inherited from the old Pathans would not have

[65] Khosla, *Administrative Structure of Great Mughals*, 6.
[66] Ibid., 6.
[67] Ibid., 6-7.

to be changed overnight, for it would have created a chaos of the worst sort. Therefore, they first paid attention to the consolidation of power instead of making arrangements for legitimacy and legality for the masses to create a welfare state.[68]

The *Mughals*, nevertheless, were not too simple to ignore the power of *Islam*. They readily embraced it but with a bit of twist in the teachings, showing the king or the ruler as the ultimate viceroy of God. A famous historian of the Akbar era, Abū 'l-Faẓl[69] shed a detailed light on this view propounded by Akbar himself and his courtiers. In the preface of his phenomenal work, Abū 'l-Faẓl writes, "No dignity is higher in the eyes of God than royalty; and those who are wise, drink from its auspicious fountain. A sufficient proof of this, for those who require one, is the fact that royalty is a remedy for the spirit of rebellion[70], and the reason why subjects obey.[71]"

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[68] Ibid., 6-7. See Sharma, *Mughal Empire in India,* 338, 399. In both instances, *Farmāns* have the same objective.

[69] Abū 'l-Faẓl (January 14, 1551-August 12, 1602) also known as Abū 'l-Faẓl or Abū 'l-Faẓl 'Allāmī was the son of Shaykh Mubārak and grand wazīr of Akbar. His brother Faizi was a poet laureate in the court. His father was from Nagpur but originally, they were from Yemen and settled in India. He wrote famous *Akbar Nāmah, Ā'īn-i Akbarī* and translated the Bible into Persian. See Sajjad H. Rizvi, "ABŪ 'L-FAZL 'ALLAMI (1551-1602)" In *Medieval* Islamic *Civilization: An Encyclopedia,* vol. 1, ed. Joseph W. Meri, (New York: Routledge, 2006), 8.

[70] Islamic term *Bughāt* means rebellion as stated يعرف البغى لغى بأنه طلب الشىء which means that it is a speech or act that is against the peaceful coexistence and cause strife. In *Sharī'ah*, it means to cause strife in the peaceful life of the people by inciting them against the government. In fact, a person is a rebel who incites others to rise up against the ruler who is just in the light of the *Sharī'ah*. It is an offense against the state and hence falls under political offense. Al-Sarakhsī, *al-Mabsūṭ Vol. 9*, 62. See Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i' Vol. 5II*, 33-39. Abū Al-Ḥasan 'Alī Bin Abī Bakr, *Al-Marghīnānī, Hidāyah Vol. 2,* (India: Maktaba Rahimiya Devbund, n. d.),487-489. *Imām Mālik* Bin Anas, *Al-Mudawwanah Al-Kubrā Vol. 10VII* (Cairo: Qāhirah, 1323) 16, 35-59. *Imām Shāfi'ī, Al-Umm Vol. 5I* ,119-121. Ibn Qudāmah Al-Maqdisī, Muwaffaq al Dīn Abū Muḥammad 'Abdullah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī, Vol. 5III* (Riyādh: Dār 'Ālam al-Kutub, n. d.), 673) The Holy *Qur'ān* has stated;

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الأَمْرِ مِنكُمْ

"O, you who believe! Obey God and obey the Apostle and those of you who are in authority (power)." (The *Qur'ān*, 4: 59).

Islamic jurists have defined this *Ḥadd* in a different way such as;

البغى هو الخروج على الامام مغالبة

Awdah, Abd al-*Qādīr*. *Al-Tashri' al-Jina'I al-Islāmī Muqaranan bi'l-Qānūn al-Wad'i.* Vol. 2. Beirut: *Dār al-Kātīb al-Arabī*, n.d. *Criminal Law of Islam,* Trans. by S. Zaikr Aijaz, (New Delhi: Kitab Bhavan, 1999), 674. See for details Ibn Qudāmah Al-Maqdisī, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī, Vol. 10*, 48-49. Al-

This clearly shows that the *Mughals* and their advisors propagated the western idea that the king is a representative of God on earth, or that he is a divinely appointed person whose disobedience means inviting the wrath of God. Even in *Islam*, there is something to do with this sort of kingly or regal divinity. It is because if rebellion is accepted as a legitimate struggle even if it is against an unjust ruler, it would sow the seeds of rebellion among the masses. That is why even the rebellion of the grandson of the Prophet (PBUH) is not supported by a Wahabi sect of Islam as a just rebellion.[72] Elie Elhadi[73] in his book, *The* Islamic *Shield: Arab Resistance to Democratic and Religious Reforms*, has shed some light on this issue calling it a long contention over the heir of the Prophet (PBUH), saying that even today's *Jihādī* movements are sans permission of the incumbent rulers which is against the tenets of *Islam*[74]. What Elie Elhadj means is that legitimacy is given or taken with the back of the people known just and unjust or right and wrong. That is why he has discussed various rebellions which emerged out of the rebellion of Hussain, but they did not serve the purpose of Islam in a good way.

Perhaps, it was fed to the public and the scholars like Abū 'l-Faẓl by the *Mughals* themselves. Certainly, the source has been the ruthless power and wealth. He has

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Ramli, Abi al-Abbas. *Niyat al Muhtaj Ila Be Sharha al-Minhāj.* Vol. 7, (Cairo: Matbah al-Babi al-Halabi, n.d), 382-383. Abi Yāḥyā Zakariyyā Anṣārī, *Asni al-Maṭālib Sharḥ Rawḍ-ul-Ṭālib, Vol. 4* (Beirūt: Dar al *Fik*r, n.d), 105-114. Ibn 'Ābidīn, Muḥammad Amīn ibn 'Uthmān ībn 'Abd al-'Azīz, *Hashiya Radd al-Muḥtār 'alā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Absār. Vol. IV* (Cairo: Al Matbah Ameeriya, n.d), 430-428).

البغی: هو الثورة أو الدعوة الی قلب الأنظمة من غیر الطریق المشروع أو بالقوة، ویسمی الداعون له بغاة، کما یسمی الفریق المؤید للحالة القائمة أهل العدل، والبغاة أمرهم مختلف فیه. فیری مالک والشافی وأحمد انهم معصومون الا فی حالة الحرب.....

(Awdah, *Al-Tashri-ul-Jana'i, Vol. 2*, 21).

[71] Abū 'l-Faẓl Ibn Mubarak, *Ā'īn-i-Akbarī*, Trans. by H. Blochmann (Calcutta: Asiatic Society of Bengal, 1872), ii-iii.

[72] Elie Elhadj, *The* Islamic *Shield: Arab Resistance to Democratic and Religious Reforms* (Florida: BrownWalker Press, 2006), 41-42.

[73] Elie Alhadj is a Saudi banker having done his PhD in London University. He words in America in banking sector.

[74] Ibid., 41-42.

discussed the meanings of king in his book. Shedding light on the very literal meanings of the word of king in Persian that is *'Pādshāh,'* Abū 'l-Faẓl says that it sows stability in a state. God does not like chaos and disorder. Therefore, rebellion or the very action of rebellion against the kingly powers is a sign of unjust struggle[75]. It is not clear whether Bābur was aware of these Connotations. However, it seems that he had been fully aware of this western as well as eastern meaning of the kingly powers and regal privileges associated with the rulers intended to subdue the people. Its only evidence is found in his own diary. He wrote in *Bābur Nāmah* or, Memoirs of Bābur, "I ordered that people should style me Pādshāh."[76] This reference shows that Bābur was a bit aware of this as how to grind his own axe through such misinterpretation or re-interpretations of Islam and Islamic history. However, as far as Humāyūn is concerned, it seems that he merely rests on the laurels won by his father. He did nothing else expect to try to consolidate his power but then he left too early to leave Akbar struggling in his early years of youth.[77]

As Akbar was too young, he found very good collaborators in the shape of his minister such as Bairam Khān[78], who used to supervise each and every action of the young king. Both of them used tactics based on compromise and cooperation to win the trust of two major communities, the Hindus and the Muslims. Sometimes, they used ruthless tactics of fear to win their support. Even marriages were based on the convenience of consolidation of the rule. Akbar's marriage to the daughter of a Raja of Jaipur is a case in point. Although it led to the Muslim estrangement, he skillfully

[75] Abū 'l-Faẓl, *Ā'īn*, iii-iv.
[76] Zahir Ud Dīn Bābur, Bābur*'s Memoirs*, trans. by Henry Beveridge (London: Gibb Trust, 1905), 344.
[77] Aditya Gupta, *Babur and Humayun: Modern Learning Organization*, (U.S.A: Lulu Inc, 2009), 48-49.
[78] Bairam Khān (1501-1561) was a great noble and commander of Humāyūn and seconded Akbar after his coronation. He helped Akbar consolidate his authority at this age and had been instrumental in winning the Second Battle of Panipat. See T. C. A. Raghavan, *Attendant Lords: Bairam Khan and Abdūr Rahim, Courtiers and Poets in Mughal India* (New Delhi: Harper and Collins India, 2017), 02-09.

managed to pacify the Muslims through his own interpretations of Islam with a strong back of the army and constant invasions of the non-Muslim territories. It is called the Rajput Policy of Akbar saying that though this act of Akbar of marrying in Rajputs was a ploy to win their loyalty, "the fact remains that Akbar's broadmindedness and ability to rise above petty religious barriers made such harmonious inter-religious alliances possible."[79]

In fact, Akbar ended the religious differences through his marriages, the point remains to sore. He won the support of the martial race as the "vital reason for winning over the Rajputs was to exploit their militant nature to combat the Afghans" who posed a serious threat to the consolidation of the *Mughal*s in India[80]. Akbar soon departed for his everlasting abode, leaving his son Jahāngīr to wrestle with the idea of legitimacy and win support for that purpose.

Although Jahāngīr succeeded in consolidating the power base, he had to deal with various contentious issues, Satish Chandra[81], a notable Indian historian writes. He had to deal with the same Rajputs and several other *rājās* again. Despite this, he showed some emblems of wisdom in consolidating his power. He blinded his own son Khusru[82] who was engaged in machinations against him, Chandra argues, saying that he empowered and promoted several of his close associates in his attempt to consolidate his powers

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[79] Salma Ahmad Farooqui, *A Comprehensive History of Medieval India: Twelfth to the Mid-Eighteenth Century* (New Delhi: Pearson Education India, 2011), 242.
[80] Ibid., 242.
[81] Satish Chandra is an Indian historian having specialization in medieval Indian period and *Mughal* era. He is considered the leading *Mughal* scholar in India at this time. He has authored several books on *Mughal* period and taught in several Indian universities.
[82] His full name was Khusru or Khusrau Mirzā, and was the eldest son of Jahāngīr, who rebelled against his own father in 1606 for which he was punished to be blinded.

further[83]. One important development was that a feministic trend crept into the *Mughal* Kingdom in the shape of his wife Nur Jahān and her clique who wielded great power. Through such acts, Jahāngīr brought a semblance of normalcy in the empire.[84] But his new title again brought the idea of mixing religion to consolidate power came in the fore when he adopted the title of *Nūr-ud-Dīn*, which was interpreted as "light of the faith" in the words of Richards who argues that much of his appeal, other than the use of force, comprises of his "attachments to the forms and beliefs of orthodox *Sunnī* Islam -- consistent with the tenets of the order."[85] In this situation, it is fair to comment that along with force or power, religion and ethnic relations, another factor entered in the use of *Farmāns*. This was a feminine perspective, which stayed in the background for as long as Nur Jahān was alive.

1.4.2. Architecture, Prosperity and Religion: Legitimacy Achieved

Until Shāh Jahān (1628-1658) arrived on the scene, the *Mughal* rule won enough legitimacy to include various Muslim clerics in the court. They could issue religious edicts or accept edicts issued from the *Mughal* court. *Farmāns*, until this period, had become a daily activity with having legitimacy of the public and religion as well as the force of the state. According to Ishtiaq Hussain Qureshi[86], Shāh Jahān ushered a golden period of the *Mughal* rule but not without bloodshed and brutal killings and murders within the family. During this prosperous rule of thirty years, Shāh Jahān spread peace, art and architecture along with giving birth to a new fervor for religion in the shape of his

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[83] Satish, *Medieval India: From Sulṭanate to the Mughals Part - II*.
[84] Ibid., 238. For feministic trend see Lal, *Domesticity and Power*, 02-03.
[85] John F. Richards, *The Mughal Empire* (Cambridge: Cambridge University Press, 1995), 102-103.
[86] Ishtiaq Hussain Qureshi has been leading Pakistani historian, scholar and writer. He has been a great activist and also a titled bureaucrat. He also taught in Karachi University and University of the Punjab.

son Aurangzēb Ālamgīr, who is very famous among the Muslim for his piety and devotion to *Islam*.[87]

Perhaps this impact of the fratricide committed by Shāh Jahān ran deep into this family of kings. Aurangzēb heralded the so-called Golden era of the *Mughal* Empire starting with the death of his father, who was imprisoned by none other than the emperor himself. Although I. H. Qureshi's argument has been built due to the foundation of Pakistan, a newly established Muslim state that he has stressed upon this orthodox version of Islam and its strict enforcement[88]. However, John M. Koller[89] has stressed upon the point of the unification of the country and not religious piety that was the reason of his reversion to religion and its strict enforcement. In his book, *The Indian Way: An Introduction to the Philosophies and Religions of India,* he argues that this tradition broken by Aurangzēb also ended the great harmony established by Akbar between Hindus, Jains, Parsis, and Jesuits.[90] He alleges that though scholars blame Akbar for the enforcement of a new religion, *Dīn-i Ilāhī*[91], it is a fact that religious tolerance and openness was clearly discussed in the court. It could be that there was a revival of Hinduism at various levels and that Aurangzēb was looking at some possible rebellion from Hindus and consequential threat to his legitimacy and ultimately to his *Farmāns*, the reason that he reverted to strict interpretations of Islam to be cosy with the Muslim

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[87] Ishtiaq Hussain Qureshi, *Administration of the Mughal Empire* (New Delhi: Atlantic Publishers & Distributors (Pvt.) Limited, 1998), 7. For details of his coronation and bloodshed see Raj Kumar and Raj Pruthi, *India Under Shah Jahan* (New Delhi, Anmol Publications Pvt. 2000), 160-161.

[88] Ibid., 7-9.

[89] A Professor of Philosophy, John M. Koller is now teaching at Rensselaer Polytechnic Institute. His area of specialization is Asian thoughts and practices.

[90] John M. Koller, *The Indian Way: An Introduction to the Philosophies and Religions of India* (New York: Routledge, 2016), 304-305.

[91] Details for Akbar's idea of Divine religion. See Abū 'l-Faẓl, *Ā'īn, Vol.1.* 3-9. Also see Sarkār, *Mughal Polity*, 391-392.

population. John M. Koller argues that, "Aurangzēb[92] insisted that his kingdom was Muslim and that it be governed and administered strictly according to Muslim law."[93] Perhaps that is the reason that Muslims and Hindus started eying each other as competitors instead of equal citizens. This development paved the way for slow and gradual disintegration of the country and decline of the *Mughal* Empire despite the fact that *Farmāns* won the same legitimacy which they used to when there was brutal force behind them.[94]

Soon after the death of Aurangzēb, a spiral of violence erupted in Delhi which took over the entire country. More than eight *Mughal* emperors came and went away in these 58 chaotic years during which Nadir Shāh ruled the roost in almost all areas of India. This virtually led to the arrival of the British and capture of various states until the war of mutiny of 1857 when the British captured Delhi.[95]

2. Religious Conditions during the *Mughal* Period

Laws, whether they are approved by a parliament or issued by a dictator, must have legitimacy. In the case of the *Mughal*s, this legitimacy was achieved through force, religion, social harmony, palatial machinations and political situations. Laws are mostly drawn from social conventions, religious traditions, injunctions and customs. Therefore, it is but imperative to review the religious conditions during the *Mughal* period.

As it has been stated, earlier kings and emperors before the arrival of *Mughal*s were also Muslims. Ibrahim Lodhi to whom Bābur defeated ignominiously in Paniput

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[92] Abū'l Muzaffar Muhi-ud-Dīn Muḥammad was the last *Mughal* emperor of India, who ruled India ruthlessly. He has been described as a very devout emperor. He is famous for *Fatāwā-i 'Ālamgīrī*.
[93] Koller, *The Indian Way*, 304-305.
[94] Ibid., 305.
[95] Qureshi, *Administration of the Mughal Empire*, 8-9.

was a Muslim Pakhtun. It was, therefore, natural that the *Mughal*s should continue supporting Islam and Islamic clerics, such as *Ṣadr-u-Ṣudūr*, a religious position in the *Mughal* empire points to this fact. The position of the chief justice was combined with the position of *Ṣadr*. It means that *Ṣadr* was responsible for Islamic religion and jurisprudence[96]. That is natural that the *Mughal*s won religious legitimacy as has been stated earlier. In fact, it was an imitation of the Abbasside Caliphate[97] in Baghdād. The *Mughal*s followed the Persians about Islam and Islamic teachings, yet they adopted the *Sunnī-Ḥanafī* sect and kept good relations with *Shī'ah* of Persia as well as *Sunnī* Caliphate and enjoyed blessings of Islam to keep religious harmony and tolerance in their kingdom. The Turko-Afghan kings did not pay attention to create harmony which the *Mughal*s did. Most of the Hindus were second class citizens during their period. J. N. Sarkār has shed some light on the plight of Hindus in Pre-*Mughal* period, but during *Mughal* period, they enjoyed full civil rights, he says.[98]

2.1. Religious Policy of *Mughal*s: Beginning From Bābur

It is very surprising to observe that the religious strategy of the otherwise liberal and cultured Bābur was hardly tolerant. He interwove an amalgamation of *Sunnī* and *Shī'ah* religious rites to please Baghdād as well as Persia. It is said that he was fanatic like Lodhi and popular like Rāna Sanga[99]. His two-pronged policy of waging *Jihād* and levying taxes on the followers of other religions brought "dividends" in the shape of more

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[96] Abū 'l-Faẓl, *Ā'īn*,Vol.1, 19

[97] Abbasside dynasty ruled as caliphs of *Islam* from Baghdād after the Umayyad dynasty. See Hugh Kennedy, *The Early Abbasside Caliphate: A Political History* (New York: Routledge, 2016), 15-35.

[98] Sarkār, *Mughal Polity*, 390.

[99] Maha Rāna Sangram Singh (1484-1528) was the raja of Mewar and head of the Sisodiyah Rajput tribe ruling Rajputana. He was also called Rāna Sanga when he waged bloody fight against the Delhi *Sulṭanate* and later against the *Mughal*s. For details see Jaywant Joglekar, *Decisive Battles India Lost (326 B. C. to 1803 A. D)* (Somaiya Publications Pvt. Ltd., 1995), 55-58.

regional victories. However, in terms of legitimacy, Bābur's advice to Humāyūn had been to exercise tolerance, says J. N. Sarkār, adding that this proved rather fake in the wake of new universal tolerance exercised by Akbar during his own reign.[100] This religious tolerance was even more pervasive between different Muslim sects such as *Sunnī* and *Shī'ah*. In this connection, the *Mughal* court kept a balance between the Safavid rulers of Persia and *Sunnī* Caliphate of Baghdād and later Ottoman. This continued to be the backbone of their *'Farmāns'* with no clear support to any section in all sort of edicts, argues Andreas Reick[101] in his phenomenal work, *The Shī'ahs of Pakistan: An Assertive and Beleaguered Minority*, in which he has reviewed the entire history of *Shī'ah* in the Subcontinent. He argues that *Shī'ah* dominated during Akbar's reign despite anti-*Shī'ah* campaigns launched by different clerics later. The traditional *Mughal* tolerance started by Akbar continued to stay intact during the entire *Mughal* period except some rare sectarian strifes which were duly quelled, argues Reick[102]. This clearly shows the level of tolerance established and exercised by the *Mughal*s in the initial period served them the best.

Despite this, Bābur's outlook towards Hindus stayed inimical. He did not like their machinations. Hence, he declared *Jihād* against them and considered it a sacred duty for all the Muslims in his book, *Bābur Nāmah*. Bābur describes the killings of different Hindus as if they are infidels and are being thrown in the hell. He even anticipated to have the title of *ghāzī* (a living jihādist) for himself. He went on to destroy temples and

[100] Sarkār, *Mughal Polity*, 390-391.
[101] Andrea Rieck is a German scholar with Ph.D in Islamic studies from Hamburg University. He has lived in Afghanistan and Pakistan with UN and served in the German Politics, too.
[102] Andreas Rieck, *The Shī'ahs of Pakistan: An Assertive and Beleaguered Minority* (New York: Oxford University Press, 2015), 12-13.

statues in various areas wherever he fought wars, as he states in his memoir.[103] This could be handiwork of some *Sunnī* clerics used present with him all the times and coaxed him to be alert against the Hindus[104], says 'Abd al-Qādir Badā'ūnī (Badāyūnī).[105] He says that this cleric declared the emperor as "*Kahba-i-Murādāt* (sanctum of desires), and *Qiblah-i-Ḥājāt* (goal of necessities)" and he even involved some religious myths to support his claim.[106]

2.2. Humāyūn and Akbar: Piousness, Liberal Religious Policy and *Dīn-i-Ilāhī*

Like Bābur, Humāyūn's piety also starts from power and ends with power. His discrimination against Hindus has been a legacy of his father. J. N. Sarkār in his *Mughal Polity* writes that he followed the footsteps of his father by using Muslims against Hindus and creating tolerance between Muslim sects. Perhaps, Sher Shāh Sūrī, he argues, observed deeply the success of this policy and continued with *jizyah* (tax on non-Muslims).[107] However, he abolished suppression and oppression of Hindus to some extent and tried to merge them with the other followers of his kingdom. He also tried to provide them government employments and this policy continued until his death. However, Sarkār berates his son for turning to *Mughal* extremism of the earlier period[108].

About his personal views and observance of Islamic rites, 'Abd al-Qādir Badā'ūnī writes in *Muntakhab-al-Tawārīkh (English)* with great reverence that he used to stay in

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[103] Bābur & Abdūr Rahīm Khān, *Bābur Nāmah: Hīndustān*. trans. Wheeler McIntosh Thackston (Cambridge: Massachusetts: Harvard University, 1993), 281.
[104] 'Abd al-Qādir Badā'ūnī, *Muntakhab-al-Tawārīkh English*. Vol. 2, trans. G. S. A Ranking (New Delhi: Atlantic Publishers, 1990), 293-294.
[105] 'Abd al-Qādir Badā'ūnī (1540-1605) was a scholar, translator and historian of *Mughal* period who vied with Abū 'l-Faẓl in having an impact on the *Mughal* emperor Akbar. He also wrote several books.
[106] Ibid., 293-294.
[107] Sarkār, *Mughal Polity*, 391. See Early, *The Mughal World*, 226-227.
[108] Ibid., 391.

place.[121] From the way *Shī'ah* flourished during his reign, it seems that they found considerable freedom of practice of their religion. A noted scholar, S. M. Ikram[122], attributes the arrival of *Shī'ah* scholars and people from Iran to the conversion of Shāh Ismael-II[123] to *Sunnī*sm in 1576, stating that *Shī'ah* migration accelerated during this period due to less bitterness in *Sunnī-Shī'ah* rift in India.[124] Another protection for *Shī'ah* was perhaps Bairam Khān who was impacted by Abdul Latif, his teacher, the reason that he appointed another *Shī'ah* Shaykh Gadai as *Ṣadr* or chief law officer in his kingdom. However, he highlights, that both of them did not openly embrace *Shī'ah* version of Islam and practiced it only in their personal lives[125]. It is stated that both Bairam Khān as well as his *Shī'ah* teacher made Akbar to be open to other sects and religions.[126]

According to Richard Frye,[127] a very important Persian influence was the celebration of *Nourūz* (festival of spring) which has nothing to do with religion[128]. The second was the issue of act of adoration or (*sajdah imtiyāz*) or bowing before the king.[129] Even Abū 'l-Faẓl has mentioned it *Ā'īn* as equal to *zaminbosi* or bowing to the ground.[130] Although it was propagated that it was a religious ritual, it had nothing to do with religion and even still has nothing to do with it. At that time, some noted scholars refused to bow

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[121] Badā'ūnī, *Muntakhab al-Tawārīkh English*, 256.
[122] S. M. Ikram or Shaikh Muḥammad Ikrām (1906-1973) was an IAS officer. He was also a very good writer and literary person and wrote many books on history.
[123] Ismail Mirzā known by his first name of Ismail II (1537-1577) was the third Shāh of Persia from Safavid Dynasty.
[124] S. M. Ikram, *Muslim Civilizations in India*, ed. 2nd by Ainslee T. Embree (New York: 1965,), 34.
[125] Roy Chawdhury and Makhan Lal, *The State and Religion in Mughal India*, (Calcutta: Indian Publicity Society, 1951), 122.
[126] Iqbāl Hussain, Iranian Ideological Influences at Akbar's Court, from *A Shared Heritage: The Growth of Civilization in India & Iran*, Ed. by Irfan Habib (New Delhi: Tulika Books, 2002), 118.
[127] Richard Nelson Frye (January 10 1920 to March 27, 2014) was a US Scholar on Central Asian and Iranian Studies in Harvard. He wrote books on *Shī'ah* influence on *Mughal* and various other Central Asian historical events.
[128] Richard Nelson Frye, *The Golden Age of Persia* (London: Weidenfeild and Nicolson, Rpt. 1977), 3.
[129] Gavin Hambly, *Cities of Mughal India: Delhi, Agra and Fatehpur Sikri* (London: Paul Elek Productions Ltd., 1977), 113.
[130] Abū 'l-Faẓl , *Ā'īn, Vol. I*, 61.

down before Akbar and Akbar did not mind that too. That is why Akbar refused to accept some interpretations of clerics regarding marriage. He himself married more than four times. Even some of his notables also married more than four times and a not so known jurist Abū Bin Laila is said to have nine wives.[131] It certainly seems that this policy of polygamy, reverence for the emperor and various other acts which seem anti-Islamic or un-Islamic to the Muslim scholars, seem to have complied to his changes either under the force of the circumstances or under the impacts of status and position.[132] A few, who put up a sort of resistance, soon gave way to Akbar's rising influence.

2.3. *Dīn-i-Ilāhī* (Divine Law Theory): Impacts on Consolidation and Legitimacy of Rule

Following victories, Akbar turned to the stability of his state. It, however, proved highly tricky issue in the wake of religious people having contradictory attitude towards every other concept of life and death. Jainism, Christianity, *Islam*, Hinduism and Sikhism; his court was a home to scholars from all these religions which sometimes created very heated debates. He sensed that the empire would not be run if this issue of differences in religion is not bridged. Therefore, he turned to the creation of a new religion, a syncretic type of faith, which could take hold of every other faith, as Annemarie Schimmel[133], a noted religious scholar says in her book, *The Empire of the Great Mughals: History, Art and Culture*. She is of the view that his intention for the creation of such a faith was to merge all the irreconcilable religious elements in his

[131] Badā'ūnī, *Muntakhab al-Tawārīkh English*, 213.
[132] Ibid., 214.
[133] Annemarie Schimmel (born on April 7, 1922 and died on January 26, 2003) was a great Islamic scholar of German origin. She wrote books on *Islam*, Christianity and Sufism.

kingdom to create harmony and bring stability during those tumultuous times.[134] Dr. Moon Arif Raḥmān in his article "Religious Policy of Akbar," says that this religion was based on sufistic type of teachings. Akbar initiated the policy of bowing down before him when accepting his religion that usually took place on Sunday.[135] He further stated that though more than 18 persons were later attributed to have started this religion, the most important figures who had a hand in its initiation were Faizi, Birbal and Abū 'l-Faẓl[136].

According to Sarkār, this religion mostly supported the monarch and created a sort of rift among the elite and the king himself.[137] In other words, he means that *Sunnī* and *Shī'ah* rift rather widened due the impact of Persia about which Colin Paul Mitchell[138], a great historian, states that the "the identical nature of light and kingship in the Perso-Islamic world was, of course, one of the many cultural features adapted from the Persian Sassanide tradition."[139] Even terms of light and shade are also said to have transferred from this Persian impact. Although it is clear that Abū 'l-Faẓl has been behind the *Dīn-i-Ilāhī* and its promulgation, it is little wonder that he has dilated upon the same in his well-known book *Ā'īn-i-Akbarī* in which he has termed Akbar as having inherited the divine right to rule due to his being the son of Adam.[140] That must have been the handiwork of some *Shī'ah* supporter of the emperor and a person having more knowhow of *ṣūfī* theology. On the other hand, it was also Abū 'l-Faẓl who stressed upon Akbar's

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[134] Annemarie Schimmel, *The Empire of the Great Mughals: History, Art and Culture* (London: Reaktion Books, 2006), 251-59.
[135] Moon Arif Rahmān, *Religious Policy of Akbar* (New Delhi: Pratiyogita Darpan, 2008), 648-50.
[136] Ibid., 650.
[137] Sarkār, *Mughal Polity*, 71.
[138] Colin Paul Mitchell is an Associate Professor and Director of Minor in Middle East Studies at Dalhousi University. He has done extensive research on Safavid Period of Persian and *Mughal* Period.
[139] Colin Paul Mitchell, *Sir Thomas Roe and the Mughal Empire* (Michigan: Area Study Centre for Europe, University of Michigan, 2000), 120.
[140] Abū 'l-Faẓl, *Ā'īn-i-Akbarī*, Vol.1,3.

divine right to rule. He called Akbar an illuminating light and divine light too.[141] That is why later researchers have attributed the confidence of the emperor in his ability to the interpretations of Abū 'l-Faẓl, as Iqtidār Ālam Khān writes in his paper, "The Nobility under Akbar and the Development of his Religious Policy." He further says that this theory installed in the emperor with necessary features of ruling an empire. He not only demonstrates faith in God, but also shows his devotion to religion that he propagated, and this is truly the influence of the *Shī'ah* teachings and sufī theology of Islamic mysticism of Persia. He further states that the emperor's efforts to call himself an emperor in Persian lexis is also a direct reference to the *Shī'ah* influence in the court. Iqtidar Ālam Khān has gone deeper into certain other far-fetched ideas taken from *Shī'ah* Iran, but they do not seem to have any credence, for no other historian has mentioned those ideas that Iqtidar attributed to Akbar with reference to *Dīn-i-Ilāhī*.[142]

It seems, however, that there is some iota of truth too, as Muhammad Zia-ud-Din and Abdul Ghafoor Baloch[143] are of the opinion that this has been entire handiwork of Abū 'l-Faẓl, as it is clearly narrated in his book too. Starting their paper with the interpretation of *Islam*, they say, it means "surrender." They go on to say that Abū 'l-Faẓl has propounded this theory that a king is a light from God and that he deserves to be obeyed in every respect. They argue that the king nears God by becoming neutral to ordinary human sorrows and happiness as he sits on his throne.[144] The accusation against Abū 'l-Faẓl that he propounded this religion can be verified from Badā'ūnī's account of

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[141] Ibid.,Vol.1, 631.

[142] Muhammad Zia-ud-Din and Abdul Ghafoor Baloch, "Persian's Diaspora: Its Ideological Influence on the Religious Convictions of *Mughal* India During 1526-1605", *Pakistan Journal of History and Culture*, 32: No, 1, (2011). 108-109. http://www.nihcr.edu.pk/latest_english_journal/5.pdf

[143] Muḥammad Zia-ud-Din and Abdul Ghafoor Baloch are both working teachers in Federal Urdu University of Arts, Science and Technology, Karachi and have interested in *Mughal* Period.

[144] Ibid., 109.

Mīrza Jani, the governor of Thatha who openly declared to reject Islam as stated by Arthur Vincent Smith in his book, *Akbar the Great Mughal 1542-1605.*[145] Smith further recounts that it is Badā'ūnī who has given hints about Abū 'l-Faẓl as being the *Mujtahīd* (jurist) behind these interpretations that new administrative officials began to become apostates. He further argues that this Divine Faith was the stupidity of Akbar, instead of Abū 'l-Faẓl.[146] Even Wolseley Haig[147] also supports Vincent Smith in his argument that Akbar was behind this faith but the assistance was provided by three persons among whom Abū 'l-Faẓl came at the last, while other two were Shaykh Mubārak and his elder son Faizi. They infused Akbar with the thinking that he was the successor of Islamic caliph as he delivered his first address in the mosque of Fathapur Sikri in the same way.[148] It was perhaps started from Bhera, the place he visited before Fathapur Sikri. The impacts of this transformation on wider scale have been tremendous in the whole empire.[149]

The account of Stanley Lane-Poole[150], a distinguished professor of history, seems more plausible. Instead of accusing Shaykh Mubārak and his sons, he rather attributes this invention of the divine faith to Akbar's own nature. Quoting Professor Holden, he says that Akbar was habitual of experimenting with everything that came his way including metallurgy and religion. About *Dīn-i-Ilāhī*, he says, it was "an eclectic

[145] Arthur Vincent Smith, *Akbar the Great Mughal: 1542-1605* (Oxford: Clarendon Press, 1917), 215.
[146] Ibid., 160.
[147] Lt. Gol. Sir Thomas Wolseley Haig (August 7, 1865-April 28, 1938) was a celebrated British Army officer and a civil servant in British India. After his retirement from the army, he was appointed as a Professor at Trinity College Dublin, where he taught during the rest of his career and wrote books on Indian history.
[148] Wolseley Haig, *The Cambridge History of India*, Vol. IV (Cambridge: Cambridge University Press, 1928), 121.
[149] Ibid., 121.
[150] Stanley Edward Lane-Poole was born on December 18, 1854 and died on December 29, 1931. He was a British writer and academician. He was a professor at Dublin University where he taught Arabic Studies.

pantheism, contained elements taken from very diverse creeds."[151] Stanley Lane-Poole, however, has pointed out the indifference of other courtiers such as Birbul, while the rest of the researchers have termed "the elect" few as movers behind this new invention of a religion.[152] In other words, Lane-Poole means that Akbar was intelligent enough to think about the consolidation of power first, legitimacy of his own rule and his laws and then pay attention to administrative issues. Regarding religion, it was perhaps the influence of the *Shī'ah*, *Sunnī* and Hindu courtiers on him, but he was "singularly sensitive to religious impressions of every kind" says Lane-Poole[153]. In other words, Akbar himself was the architect behind this move. However, it is another thing that this consolidation of his rule through amalgamation and coinage of new religious terms and invention of new religious rites lasted only until his death.[154] With the new prince inherited his seat, the concept of Divine Faith stopped flourishing. Its impacts, however, have been wide-ranging, not only on the government but also on the Muslims and Islam in general. Not only his "Divine Faith" failed, but it also provoked strong "orthodox *Sunnī* reaction among the insulted *'ulema'"* (religious scholars), the reason that the new *Mughal* era witnessed strong separation between Muslims and Hindus. This bridge could not be filled by other *Mughal* emperors despite presenting a good example of religious harmony howsoever artificial it might have been[155].

The question whether *Dīn-i-Ilāhī* helped Akbar consolidate his power and provide a legal background or legitimacy to his system of government seems to have answers in

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[151] Stanley Lane-Poole, *History of India: From the Reign of Akbar the Great to the Fall of the Mughal Empire*, Vol. IV, ed. by A. V. William Jacksons (New York: Cosimo Classics, 2008), 44.
[152] Ibid., 44.
[153] Ibid., 44.
[154] Early, *Emperors of the Peacock Throne: Saga of the Great Mughals*, 200-202.
[155] Peter R. Demant, *Islam vs. Islamism: The Dilemma of the Muslim World: The Dilemma of the Muslim World* (London: Praeger, 2006), 47.

yes as well as no. From the critical review done so far, it seems that it has helped him to bring a semblance of stability and peace in the court. However, as far as the outside world is concerned, it seems that his major intentions were to keep his grip on the major cities very strong.[156] Rest of the rural areas does not have much information about the people what they thought of it or what happened to the religion at lower level. Strong though the grip of Akbar seems to be, the religious differences and sectarian fissures seemed to have appeared later, which proved very problematic to his successors who faced serious rebellious attempts from different Hindu as well as Muslim *rājās* apart from stiff opposition from *Sunnī* clerical hierarchies as Peter R. Demant has also pointed out that "The communities grew progressively apart until they had become two nations."[157] It clearly means that it has placed a wedge between two communites, tearing apart the social fabric and making the communities feel separate entities; Hindus and Muslims.

2.4. Aftermath of *Dīn-i-Ilāhī*: Jahāngīr to Shāh Jahān

Jahāngīr, or Prince Saleem, as he was called, was not prone to giving up the tolerant legacy of his father, sensing it as bedrock of legitimacy to his rule argues Wolseley Haig. The conflict, however, in his court, was between the incumbent clerical elite and the orthodox Muslim theologians who wanted to regain their lost glory. This led to his renewed interest in *Islam*[158]. J. N. Sarkār has voiced the same opinion that some theologians such as Mullāshan Ahmed tried to convince Jahāngīr, who seemed to yield initially, but later on he reverted to his own ways, sensing his stupidity of becoming a

[156] Ibid., 48. For more details, see Ṣaiyīd Athār Abbās Rīẓvī, *Religious and intellectual history of the Muslims in Akbar's reign, with special reference to Abū'l Fadl, 1556-1605* (New Delhi: Munshiram Manoharlal Publishers, 1975), 186-88.
[157] Ibid., 48.
[158] Haig, *The Cambridge History of India*, 122.

clerical plaything.[159] A romantic young man, Jahāngīr, perhaps, did not want to become a plaything and stay confined to the strict interpretations of Islam done by the clerics. It also does not mean that he totally rejected it and preferred the Divine Faith of his father; rather, he respected the true Islamic concepts but only those which he understood himself.[160] In other words, he stayed neutral until Nur Jahān, his influential queen, took charge of the decrees used to be issued in his name. At that time, *Shī'ah* influence was ruling the roost in his court, it was anti-Islamic feminism exerted by his wife which threw obstructions in the path of the traditional theologians.[161] This situation clearly points to the pluralistic sort of atmosphere that used to rule the court of Jahāngīr, leading to his tolerant policy of issuing edicts or *Farmāns.* It could be that Nur Jahān saw orthodox theologians and clerics hostile to her all-pervasive influence in the court as well as to the emperor, for "Nur Jahān's general affinity in politics and religion was pro-Shi'ah and anti-*Sunnī.*"[162]

Despite these *Shī'ah* leanings, he continued to blow hot and cold with Muslims and Hindus and both sects of Islam and also followers of the other religions at the same time. According to Sri Ram Sharma, Jahāngīr mostly followed his footsteps, continued invading Hindu states, demolishing temples and treating them and their religious places with respect at the same time. He even kept with the abolition of *jizyah* and other taxes for the non-Muslims.[163] In other words, Jahāngīr was also very shrewd emperor like his father and grandfather. He continued celebrating Hindu and Muslim festivals and taking

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[159] Sarkār, *Mughal Polity,* 403.
[160] M. P. Srivastava, *Politics of the Great Mughals* (California: Chug Publications, 1978), 96.
[161] Ellison Banks Findly, *Nūr Jahān: Empress of Mughal India* (New York: Oxford University Press, 1993), 212-13.
[162] Ibid., 204.
[163] Sri Ram Sharma, *Religious Policy of the Mughal Emperors, 1st ed.* (New Delhi: Asia Publishing House, 1940), 62.

part in *Rakhi,*[164] *Nīghādāst* and *Ramẓān* simultāneously.[165] All these activities of Jahāngīr are very well documented in his memoirs in minute detail.[166] However, it seems strange that he strictly prohibited marriage of Muslim women with Hindu men along with tolerant attitude to vice versa, perhaps an influence that he took from his father, as Akbar married various Hindu girls. Even though it seems that he was lenient toward Muslim clergy and scholars, Sri Ram Sharma points out that he, at times, took very harsh measures against Muslim heretic for which he quotes the examples of *Qāḍī* Nūrullāh[167] and Shaykh Aḥmad Sarhindī[168], who were either imprisoned or killed.[169] There was another development taking place in Islam that was the pernicious influence of Mujaddid who declared *Shī'ahs* heretics and wrote a pamphlet declaring all *Shī'ah*s infidels. Despite this, Mujaddid or Shaykh Aḥmad Sarhindī stayed a popular person among the *Sunnī* Muslims despite his imprisonment, for he influenced the gentry of that time.[170]

Sarhindī's impacts continued to reverberate throughout the empire during the lifetime of Jahāngīr. It is not sure how he tackled it, as it made ripples among the public too. However, one thing is certain that Jahāngīr did not leave any stone unturned to bring stability whether it was through imprisoning such fiery clerics or treating harshly Hindu rebel *rājās*. It is because ultimately his object was to make his *Farmāns* to be obeyed at every cost, so that his empire could witness stability and prolongation of the *Mughal* rule.

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[164] Rakhi is a Hindu ritual of tying a thread-woven band to a young man by a young woman to declare him as her brother and pray for his safety.
[165] Sharma, *Religious Policy of the Mughal Emperors,* 62-63.
[166] Jahāngīr, *Tuzuk-i-Jahāngīrī*, 224.
[167] *Qāḍī* Noorullah Shustari (1542 -1610) was called third martyr and was a *Qādī* of *Shī'ah Fiqh*. He was later punished for some of his decisions in Agra and Kashmir. For details see Early, *The Mughal World,* 223-32.
[168] Aḥmad Al-Sarhindī (1564-1624) was an Indian *Sunnī* scholar and belonged to Naqashbandī order and has been declared reviver of the second thousand years due to his opposition to the heretic ideas of Akbar.
[169] Sharma, *Religious Policy of the Mughal Emperors*, 177. See Early, *The Mughal World,* 223-24.
[170] Mohammad Yasin, *A Social History of* Islamic *India, 1605-1748* (New Delhi: Munshiram Manoharlal Publishers, 1974), 163-64.

Though born of a Rajput mother, Shāh Jahān was quite an orthodox in his religious beliefs. Not only he abolished Akabrian rituals of bowing before the king, but also abolished solar calendar to be followed in his empire along with giving new life to Islamic festivals given up during the reigns of Akbar and Jahāngīr. Sri Ram Sharma says that it was the rise of the *Sunnī* era again after a long time and decline of *Shī'ah* influence. However, he, as Professor Sharma has argued, did not imposed *jizyah* again but tried to extract money from other taxes upon Hindus.[171] He also did not stay silent against Hindus or their machinations as Abdūl Ḥamīd Lahori[172] has stated in his book, *The Pādshāh Nāmah*. Like his father and grandfather, his anti-Hindu campaigns did not stop. He demolished temples and stopped building of new temples wherever he faced stiff resistance as in the case of Bir Sing Bandela[173] in Urcha.[174] Jahāngīr also put a restriction on Hindu-Muslim marriages in various areas where such events used to take place, and also ordered forced conversion of religion to be stopped.[175] However, things used to take place vice versa, which did not stop. The emperor also issued a *Farmān* for the conversion of Hindus to Islam by hook or by crook.[176] It is also stated that the emperor not only encouraged conversion, but also used to confer titles and distinctions on the converts in the shape of monetary rewards. However, they were barred from converting back to Hinduism.[177] He mentions two cases of Raja Bakhtawar Sing as well as of his son

[171] Sharma, *Religious Policy*, 86.
[172] Abdūl Ḥamīd Lahori, whose date of birth is unknown, was a great traveler and a great historian of Shāh Jahān Era. He is famous for his book Padshāh *Nāmah*.
[173] Vir Singh Deo was also called Bir Singh was a Rajput who ruled Orchha. He killed Abū 'l-Faẓl on the orders of Prince Salim, or Shāh Jahān when he was a prince.
[174] Abdūl Ḥamīd Lāhaurī, *Pādshāh Nāmah, Vol. I*, ed. by Kabīr-uḍ-ḍin Aḥmad and Abdūl Rahīm (Calcutta: Bib. India Series, 1867-68), 452.
[175] Srivastava, *Policies of Great Mughals*, 100-101.
[176] Banarsi Prasad Saxsena, *History of Shahajahan of Delhi: 1526-1765* (*Allāh*abad: Central Book Depot, 1958), 294-95.
[177] Lāhaurī, *Pādshāh Nāmah*, 302.

Purushottam, while Lahori has also mentioned both of them that they were heavily loaded with rewards and awards.[178][179] This shows that Shāh Jahān faced stiff resistance or at least felt fear from some Hindus that he was trying their religion to bring them under his subordination either by force or by persuasion. He knew that subduing one and appeasing others would not only consolidate his rule but also provide legitimacy to his *Farmāns*.

However, it was used as far as it was practical. Banarsi Parsad Saxsena[180] says that in the places far off from the capital city, these policies were non-existent.[181] R. P. Khosla has also mentioned these policies of Shāh Jahān with a comment that he took positive measures for the propagation of Islam and ended Muslim conversion to other religions.[182] However, his ultimate aim was to bring stability and consolidation of his rule, and not propagation of solely *Islam*.

2.5. Domination of *Islam*: Aurangzēb and His Successors

A very popular emperor among Muslims, the situation of the ascendency of Aurangzēb Ālamgīr to the *Mughal* throne was murky and suspicious, for several of his brothers, too, were claimant to the throne. Whatever the circumstances were, once he ascended the throne, he initiated a series of very tough policies to bring Islam into domination, as Srivastava has claimed vehemently. He says that Aurangzēb started various Islamic practices to bring back the influence of orthodox Islam into the court.[183]

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[178] Ibid., 303.
[179] Ibid., 58.
[180] Banarsi Parsad Saxsena was a great historian who taught in *Allāh*abad University and after his Ph.D from the University of London. He wrote more than two books only on Shāh Jahān and rest on the Indian medieval history.
[181] Saxena, *History of Shahjahan*, 295.
[182] Khosla, *Religious Policy of the Mughals*, 406-407.
[183] Srivastava, *Policies of the Great Mughals*, 102.

Dr. M. L. Roy Chawdhary[184] has also endorsed Srivastava's opinion, saying that it was actually his obsession to set examples first to let the public follow.[185] At the same time, there started some inner conflicts between Islamic sects, *Shī'ah* and *Sunnī*, which kept simmering throughout his career, Sarkār notes it, saying that Aurangzēb has been highly inclined to *Sunnī* sect, keeping *Shī'ah*s at bay.[186] It means that Aurangzēb kept the lid closed on the sectarian conflict, for he knew that this would weaken his religious base in the face of the dominating Hindu majority. On the other hand, It is also a fact that Aurangzēb rose to power through his *Sunnī* alliance as opposed to *Shī'ah*s, which means that the Persians were kept at bay.[187] It could have been a superficial impression, but he had the support of the Persians in anyway and they had been highly instrumental in his ascension to the throne.[188] It is very surprising that Mohammad Yasin, a fresh Pakistani researcher, has declared Aurangzēb antagonist to *Shī'ah*s to the point of thinking them heretics but keeping the able officers at their places arguing that every person has his own religion which should not be the basis of prejudice or removal from the office.[189] Propagating *Sunnī* faith, Aurangzēb started giving Islamic touch to his coronation and other proceedings in the court, says Sarkār.[190] Music was prohibited in the court.[191] Hindu astronomers and scholars were dismissed, and Muslim fortune tellers were given a place in the court.[192] In short, Aurangzēb again used the same base as Shāh Jahān once used that was of the Islamic leanings to attract Muslims, a martial race which was integral to

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[184] R. M. L. Roy Chawdhary has been a writer and professor at the Calcutta University. He wrote extensively on the *Mughal* period in India.
[185] Chawdhary, *The State and Religion in Mughal India*, 220.
[186] Sarkār, *Mughal Polity*, 102.
[187] M. Ather Ali, *The Mughal Nobility Under Aurangzeb* (Delhi: Oxford University Press, 1997), 19.
[188] Ibid., 20.
[189] Yasin, *A Social History of* Islamic *India*, 8-9.
[190] Sarkār, *Mughal Polity*, 410.
[191] Sri Ram Sharma, *Mughal Government and Administration*, (New Delhi: Hind Kitabs, 1951), 184.
[192] Ibid., 185.

the consolidation of power. However, the accusation of temple demolition may be too far-fetched against Aurangzēb, for it would have caused a widespread commotion which he could not put up with.[193] Although it could be stated that Aurangzēb was Islamic, and that he employed *Shī'ah* nobles and officers merely due to their material and political worth, it seems plausible that the charge against him regarding demolition of temples is a far-fetched one, for he must have desired stability in his state and consolidation of his power which he snatched away from his several brothers.

As the rebellions rose in different parts of empire, it is fair to assume that Aurangzēb had, indeed, been orthodox and anti-Hindu. It is also that he had brought Islam into play to counter Hindus and rally Muslims around him, but this policy created wide fissures in the court, too. This could have been, he says, the failure of his policy that religious revivalism provided temporary stability that could not last long.[194]

The approach to evaluate Aurangzēb's religious policy seems to be very balanced with Satish Chandra who says that though historians are divided, as some alleges that "he reversed Akbar's policy of religious toleration," undermining the Hindu loyalty leading to insurgencies in various parts of his empire, and some support him for his harsh policies and alleges that Hindus were undermining his authorities due to "laxity of Aurangzēb's predecessors."[195] In this connection, the analysis of Koller seems balanced, who says that Aurangzēb did all this to strengthen his own base of Islam and curb the power of Hindus who even refused to pay Islamic tax or *jizyah,* adding that "political activity, because of its far-reaching effects became a central area of religious concern and a target for

[193] Zahir ud din Faruki, *Aurangzeb and His Times* (New Delhi: Idarah-i-*Ādāb*iyat-i Delli, 1935), 117.
[194] Athar, *The Mughal Nobility Under Aurangzeb*, 174.
[195] Satish, *Medieval India: From Sultanate to the Mughals*, 274.

religious influence."[196] In fact, Aurangzēb had always been wary of Hindus and close to *Sunnī* Muslims only because of their majority and their passion for *Jihād*, or Holy war against the infidels.[197] He needed strong support of a Muslim army to keep his power consolidated and he did just that. However, immediately after his death, this consolidation of power seemed to crumble down.

The situation following Aurangzēb during Bahādūr Shāh-I and other successors not only deteriorated but also went from bad to worse. They continued with the policies Aurangzēb initiated to consolidate his power through reversion to Islamic association in letter and spirit. The treatment meted out to Hindus during the time of Aurangzēb continued unabetted and conflict arose between *Sunnī* and *Shī'ah* scholars which led to somewhat a declining influence in the court but there were various notable *Shī'ah* nobles who gave stability to the empire in its falling stage.[198] Another scholar, Ishtiaq Hussain Qureshi also sheds some light on this conflict between two sections but argues that the *Mughal*s played a very fair game by keeping a balance between the two and maintaining close and balanced relations with *Shī'ah* Iran and *Sunnī* Ottoman Caliphate.[199] He further states that it was perhaps this rapproachment created by the *Mughal*s that worked well when Awadh came under attack where *Sunnī*s collaborated with *Shī'ah*s to save the state.[200] This situation continued until Shāh Rafī'ullāh[201] came on the scene to unite

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[196] Koller, *The Indian Way*, 306.
[197] Ibid., 306.
[198] Abdūr Reḥmān, *Hīndustān Kay Sālāṭīn, Ulemah Aur Mashaiq Key Talluqaat per Aik Nazar* (Karachi: National Book Foundation, 1990), 83.
[199] Qureshi, *Administration of the Mughal Empire*, 89.
[200] Ibid., 99.
[201] Shāh Walīullāh (1703-1762) was a great religious scholar of the late *Mughal* era who tried his best to end sectarian differences and rise up against the invading British. See Muḥammad Ikrām Chūghatai, *Shāh Walīullāh (1703-1762): His Religious and Political Thought* (Lahore: Sāng-e-Meel Publications, 2005), 1-29.

various Muslim sects against the common British threat. Muḥammad Ikrām Chughtai[202] has shed a detailed light on this deterioration of the *Mughal* rule and the services of Shāh Walīullāh to unite the Muslims who saw something very useful in the policies of Akbar and his son. He not only tried to unite different sections but also tried to give full explanation of the rising Islamic mysticism.[203] His all efforts, however, went in vain and India fell into the laps of the British, ending the *Mughal*s and their ultimate *Farmāns* forever. One thing, however, is certain that not only religion provided the *Mughal*s a good support for legitimacy of rule, but also social circumstances created customs, norms and traditions, enabling them to transform them into *Farmāns* to consolidate their power.

3. General Social Conditions during *Mughal* Period

A comparison of social conditions under *Mughal*s period with those of modern times shows sluggish but visible changes, particularly among the upper and the educated strata of society. In the *Mughal* period, early marriage was very much in trend amongst Hindus. Even seven years was considered a good age for girls.[204] Monogamy was the norm but polygamy was by no means rare-specialty amongst the elite. Like the *Mughal* rulers, the public was also interested in astrologers and charmers.[205] However, it is very important to note that difference exists among the Muslim, Hindi and English writers regarding social conditions of India during the *Mughal* period. Most of the Muslim writers argue and dilate upon the court, victories, defeats and biographies of the nobles and kings, but little about the society, public, social conventions and public problems.

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[202] Muḥammad Ikrām Chūghatai is a great writer, prolific literary person and a historian. He is better known for his works on Maulana Room and Urdu prose writers of the 19th century.
[203] Chūghatai, *Shāh Waliūllāh*, 258-59.
[204] ChAwdhary, *The State and Religion in Mughal India*, 186.
[205] Chūghatai, *Shāh Waliūllāh*, 611.

Arthur Vincent Smith argues that it is only with the Muslim writers, while the Hindu writers dig out only suppression of the Hindus.[206] Smith further says that the entire *Mughal* history is not more than the history of three or four major cities, while little has been told about the conditions of the poor rural folks.[207] It shows that though India witnessed fissures on political level, it was culturally a harmonious country with open-arm policy of the public to welcome all. They specifically mention the Bhakti Movement[208] which brought Muslims and Hindus close to each other.[209] Actually, a village was the smallest entity in social and finanical sectors in India and various measures were taken by the *Mughal*s to improve the conditions of the rural areas including the conditions of the peasants such as betterment of the irrigation system and agricultural farming. Crafts and arts were also promoted, and people were urged to get education, but the areas far flung from the major cities stayed uneducated and inaccessible at the time when conflicts were raging in the nearby states, leaving little time for the emperors and his nobility to pay attention to them.[210] This means that social conditions were limited to cities, while far-flung areas stayed independent except becoming a revenue base.

3.1. Social Strucure during *Mughal* Period

There were various social classes living in India during the *Mughal* period; the upper class living in the cities, the middle urban class and the rural classes were mostly

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[206] Smith, *Akbar*, 386.
[207] Ibid., 386-387.
[208] The Bhakti Movement was a religious movement for the revival of Hinduism which stated in the 25th century and reached its peak during the 16th and 17th century.
[209] S. M. Edwards, and H. L. O. Garrett, *Mughal Rule in India* (London: Oxford University Press, 1930), 278.
[210] N. Jayapalan, *Social and Cultural History of India Since 1556* (New Delhi: Atlantic Publishers, 2000), 6-8.

living in towns and villages, who had nothing to do with the government. On religious level, there were two major classes; Muslims and Hindus. Muslims were mostly nobles employed in the *Mughal* court, while Hindus were mostly traders. Some *Mughal* emperors such as Akbar and Shāh Jahān employed Hindus too. M. L. Roy Chaudhary has shed light on the lifestyle of the Muslim nobles and their living conditions as an upper stratum of life, though Chaudhary is not a socialist.[211] He further highlights their superior manners, their etiquettes and their education. It was, he says, perhaps the requirement of the time as well as the position, for the *Mughals* needed to show it to the foreign visitors to impress them.[212] Although he has not touched upon Hindus, in his book, *History of Gujarat*, M. S. Commissariat[213] has stated that their situation and social condition also improved under the *Mughal* rule until Aurangzēb. He states that though Islamic law and its implementation in a dominantly Hindu India spurred problems and raised conflicts, the strategic and clever handling of the Hindu majority by the *Mughals* paid them well. Commissariat states that this position was even better than their past position when they were in *Sultanate*.[214] Sri Ram Sharma has also pointed out the same thing that Hindus were in a better position during the entire *Mughal* period specifically during Shāh Jahān era and even better than the British era.[215] S. M. Ikram also supports the same view, saying the Hindus rather rejuvenated due to obstacles they faced in the Muslim population or at the hands of the Muslim governments.[216] Sharma has presented another fact about this truth that Hindus grew strong at some places and occasionally put up

[211] Chaudhary, *The State and Religion in Mughal India*, 201.
[212] Ibid., 205.
[213] Manek Shāh Sorab Shāh Commissariat or M. S. Commissariat (1881-?) was a bureaucrat in Gujarat who wrote extensively on the issues of Gujarat including its history during the *Mughal* period.
[214] M. S. Commissariat, *History of Gujarat* (Gujarat: Gujarat Vidya Sabha, 1980), 69-76.
[215] Sharma, *Mughal Government and Administration*, 186.
[216] S. M. Ikram, *A History of Muslim Civilization in India and Pakistan* (Lahore: Institute of Islamic Culture, 2000), 613.

strong resistance against the *Mughal* forces, while at some places they refused to pay *jizyah*[217]. He states that these resistances came from places unknown for rebellions such as Udaipur and Gujarat. He also states that although Hindus suffered much when they were vanquished in fresh *Mughal* attacks, and their religious places were destroyed, yet they always kept a hold on financial matters until the time of British.[218] Despite these views about the social circumstances of Hindus as compared to Muslims, Sri Ram Sharma is of the view that the foreign and specifically European visitors were often flabbergasted at the religious harmony which India witnessed during the *Mughal* rule.[219] In other words, the *Mughals* considered Hindu-Muslim harmony the bedrock of the stability of their empire, the reason that they tried their best to achieve this harmony by any means even if it was to punish the rebel Hindu *rājās*[220].

On the lower level, the life was very difficult. There are details about the *zamindārī* (land distribution), and other revenue collection systems that the *Mughals* established under the rule of Akbar. The women were still relegated to the back position, while Muslim women were better off then Hindu women. Although religious seminaries and *maktābs* (schools) were established, the economic conditions of the farmers and agriculturalists stayed the same. Despite the fact that they made the backbone for the collection of revenue that the *Mughals* used for the upkeep of the huge army.[221] In other

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[217] Islamic tax on the non-Muslims that the Islamic government of the time levies to ensure security to their life and property.
[218] Sharma, *The Religious Policy of the Mughal Emperors*, 137-45.
[219] Ibid., 88.
[220] The ruler of a small state in India used to be called raja in Hindu which means the one who is the custodian of his people.
[221] Jayapalan, *Social and Cultural History of India Since 1556*, 2-15. Kaushik Roy, *Military Manpower, Armies and Warfare in South Asia*, no. 8 (New York: Routledge, 2013), 65-66.

words, the rural people stayed backward throughout the *Mughal* period except some occasional reforms which hardly brought any noticeable change.

This social fabric demonstrates that *Mughal* kings only needed harmony in their courts, or in the major cities and not in the rural areas where tying up the masses to the bread was easier than that of the cities, or at least this is what seems from these comments of the historians.

3.2. Socio-Cultural Environment: *Mughal* Characters, Courts and Their Impact

Laws and dictates cannot foster in voids. Rather they need a socio-cultural environment where society grows and public prospers.[222] The *Mughal* court had been a symbol of grandeur, splendidness and dignity which perhaps provided enough legitimacy to the *Mughal Farmāns* that they laid the foundation of a new civilization in India which had been marked with tolerance, art and architecture, poetry and literature and above all was humane in various aspects.[223] S. M. Ikram says that the *Mughal* dynasty was a civilization in itself which blessed the later generations with harmonious, dignified and stable culture.[224] About the impacts of the *Mughal* emperors and their personal characters, Ikram is of the view that except Humāyūn who was a bit coward and pathetic general, all other emperors were men of letters, highly intelligent and shrewd in political sense. He quotes Abū 'l-Faẓl who says that for a *Mughal* sovereign, it was a must to be educated enough to understand the educated nobility of the court.[225] It was, therefore, but natural that whatever the fashion and tone the *Mughal* court set for the society, the whole

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[222] Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (New York: Cambridge University Press, 2013), xii-xiii.
[223] Ealry, *Domesticity and Power in the Early Mughal World*, 128-29.
[224] Ikram, *A History of Muslim Civilization in India and Pakistan*, 620.
[225] Ibid., 621.

society followed that. The spirituality and mysticism spread during Akbar and Shāh Jahān, while orthodox Islam dominated the court during Aurangzēb and a bit later period. The emphasis on mysticism also brought philosophical attitude in literature as well as art. According to Ikram, the *Mughal* culture received influences from Persian, Arabic and Turkish cultures and infused them into art and crafts in a way that the general public copied it.[226] Walter A. and Fairservis Jr. say that the association with Persian culture might have some impact on the *Mughal* grandeur, for Humāyūn's defeat and subsequent visits must have some links.[227] Iqitdar Ālam Khān has also shed some light on the same Iranian impact but has enumerated major factors impacting the courtly etiquettes and culture which he says are immigrants, diplomatic relations with Persia at that time and early emperors' penchant for Persian courtly niceties.[228]

This grandeur of the Persian court perhaps imbibed in the *Mughals* a sense of old Persian empires, their ways of consolidating powers and keeping titles to send a message of awe and splendor among the masses to make their messages become acceptable. Perhaps in this backdrop, almost all the *Mughal* emperors saw that their *Farmāns* would win widespread acceptance in case. Their courts were splendid and they would win recognition in the eyes of the foreign kings and queens if their grandeur was narrated in the same way as they displayed in their courts.[229]

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[226] Ibid., 623.
[227] Walter A. and Fairservics Jr., The *Roots of Ancient India* (Chicago: University of Chicago Press, 1975), 380.
[228] Khān, The *Mughal* Empire and the Iranian Diaspora, 100-101. Also see, Jamīl *Mālik*, *Islam in South Asia: A Short History* (Boston: Brill, 2008), 171-72.
[229] Ibid., 101.

3.3. Mongolian and Persian Heritage: Impact on Administration

It is very strange and surprising to mention that *Mughals*, though, never bragged of their Mongolian heritage due to the fear of reprisals from the Muslim public, had inherited some strange customs from Mongolian background as well as borrowed some from the Persian heritage. These customs played an important role in their customs of succession as well as administration. For example, it is said that Bābur took the illness of his beloved son, Humāyūn, by circling around him and praying that he should die instead of his son, and resultantly he died of becoming ill, while surprising his son recovered from the same illness, as relates Sri Ram Sharma in his paper, "The Story of Bābur's Death," which seems like a fairytale, but he confirms it by relating to various other eminent historians such as Leyden, Erskine, Lane Poole and Elphinstone, about whom he says that they "have not only repeated the story but told it in a way to carry conviction to the minds of readers."[230] Further, he states that Abū 'l-Faẓl has narrated the same story in *Akbar Nāmah* which *Iqbāl Nāmah Jahāngīr*[231] has confirmed in letter and spirit.[232] No other such tradition of succession or transfer of power has been found in the *Mughal* dynasty, but this turn of events confirms that they might have inherited some other administrative and legal measures or used them to suit to the circumstances prevalent in India at that time.

The other thing that Akbar used in his administration was the system of *manṣābdāri*. A great British historian W. H. Moreland has traced it to Timur, a Mongol

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[230] Sri Ram Sharma, "The Story of Bābur's Death." *Journal of the Royal Asiatic Society of Great Britain and Ireland*, no. 2 (1926): 295, http://www.jstor.org/stable/25220952.
[231] It is second half of *Tuzuk*-i Jahāngīr written by Mu'tamad Khān and Muḥammad Hadi to whom Jahāngīr entrusted the work to continue after his death and finish it. For Details, see Jahāngīr, The *Tuzuk*-i-Jahāngīr, trans. Rogers, ed. Beveridge, 9-19.
[232] Ibid., 296.

to whom Bābur is said to have blood lineage. Moreland says that "Under Timur, two *tūmāns* would have been 20,000 men, but in Bābur's time effective strength was one-tenth" by which he means that it is the rank of the same that Bābur renamed as *mansab* and modified it to suit the Indian situation for collection of revenue and command of soldiers.[233] Although these two inherited and subsequently modified succession and administrative traditions have slight hints how the *Mughal*s borrowed from different social systems to organize their own administration, their Persian imitation of the courtly traditions and social customs are matchless. John F. Richards has claimed that they were perhaps more under awe of the Persian Empire as he says that, "The *Mughal* suffered from the long-standing Persian claim of cultural superiority."[234]

Regarding this heritage in his paper, "The Patrimonial-Bureaucratic Empire of the *Mughals*," Stephen P. Blake[235] has argued that *Mughal*s borrowed not only from their own lineage, the Mongols, but also from Turks and other Islamic countries. He opines that due to the nature of the empire, it was but difficult to separate household from the stage and Akbar borrowed heavily from all other empires of that time with which he had good and cordial relations. He cites examples of the Mongols who gave titles such as "household, army, and empire" which he states that Abū 'l-Faẓl has also mentioned in his *Ā'īn*. He further states that he borrowed most of the household traditions and cultural patterns from the Persians and "synthesized these elements into the coherent, rational

[233] W. H. Moreland, "Rank (Manṣab) in the Mogul State Service." *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, no. 4 (1936): 649-50. http://www.jstor.org/stable/25201403.
[234] Richards, *The Mughal Empire*, 111.
[235] Stephen Blake is a working professor of St. Olaf College, Northfield, Minnesota. He has specialization on *Mughal* Period in India. He has written extensively on Shāh Jahān which include his book ShāhJahānabad: The Sovereign City in *Mughal* India.

system of government" and gave his empire "the most systematic, fully developed, and clearly articulated form."[236]

However, another surprising argument of Stephen P. Blake is that household and state under the *Mughal*s were considered the same thing. In other words, he means that *Mughal* household had its impact on the *Mughal* art of statecraft. Perhaps, he means that powerful queens and women impacted the decision-making process. Blake attributes it to Abū 'l-Faẓl who has discussed first branch of government as *harem* (women living place, kitchen, halls, and perfumery), which was purely household including the animals used by the household individuals of the emperor and that they were part of the government structure.[237] However, Blake has only given a hint about the influences and impacts of the other nations and countries and not cited exactly how these were borrowed from other cultures.[238] Festivals and celebrations were also part of the statecraft as emperor used to appear in such celebrations. Those days and occasions also demonstrated foreign impacts.

3.4. Some Borrowed Festivals and Administrative Impacts

As festivals and celebrations are part of the cultural heritage, *Mughal*s borrowed these festivals and cultural celebrations heavily from other cultures. The reason is that festivals and celebrations used to attract people, as they attract the public now. These were the old marketing methods and administrative ploys where people were delivered the royal dictates or *Farmāns* as they gathered at a place. Even royal families used to participate to set examples for the public and show how the royalty is to be treated with awe, respect and honor and how their *Farmāns* are to be obeyed.

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[236] Stephen P. Blake, "The Patrimonial-Bureaucratic Empire of the *Mughals*." *The Journal of Asian Studies* 39, no. 1 (1979): 81-82. doi:10.2307/2053505.
[237] Ibid., 84.
[238] Ibid., 84-85.

In his phenomenal book, *Müntākhab Al-Lubāb,* Khāfī Khān[239] writes that the festival of *Norāuz*, or the New Year's celebration was borrowed from Persia where it was celebrated with the arrival of the New Year. However, its nomenclature was modified to give it a local color such as *Naūroz-ī-Jalālī or Naūroz-e-Sulṭāni.*[240] According to Khāfī Khān, the royal emissary and the king himself used to address the ceremonies.[241] Even women of the *Mughal* household used to take part to please the Persian nobles in the court. K. S. Lal[242] has also stated that the *Mughals* borrowed it from the Persian culture but modified it to suit the local culture and used to celebrate it for 18 or more days.[243] Another tradition that the *Mughals* inherited from the Persian was *Sajdah* (or prostration). In other words, it was the action of bowing before the emperor. J. N. Sarkār says that it was first equal to Persian *'taslīm'* or Cornish but later on changed to *Sajdah* which was equal to bowing in the prayers. [244]Sarkār says that it was made compulsory during the reign of Balban[245] too, long before the arrival of the *Mughals*. However, they set an example of paying homage to Syeḍs and exempted them from these rituals.[246] Gavin Hambly[247] points out that it was Akbar who made it compulsory for the courtiers to act in prostration for him so that he should have an indication of how the people obey him.

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[239] Khāfī Khān was the name of Muḥammad Hashim or Hashim Ali Khān who was made *divan* in Farrukh Siyar's period. He wrote many accounts of that period. See also E. Sreedharan, *A Textbook of Historiography, 500 B. C. to A. D. 2000* (New Delhi: Orient Longman, 2004), 372.
[240] Khāfī Khān, *Khafi Khan's History of 'Ālamgīr: being an English translation of the relevant portions of Muntākhab al-Lubāb, with notes and an introduction* (Karachi: Pakistan Historical Society, 1975), 84.
[241] Ibid., 84.
[242] Kishori Saran Lal (1920-2002) has been Indian historian who has specialization on the Muslim Period in India. He wrote many books such as *Twilight of the Sultanate and The Mughal Harem.*
[243] Kishori Saran Lal, *The Mughal Harem* (New Delhi: Aditya Prakashan, 1988), 136.
[244] Sarkār, *Mughal Polity*, 42.
[245] Here Balban means Ghiyas ud Dīn Balban who as the night king of the Mamluk Dynasty ruling India. He reigned during the thirteenth century around 20 to 21 years.
[246] Ibid., 42.
[247] Gavin Hambly has been a professor of History in the University of Dallas, School of Arts and Humanities. He wrote several books on Central Asia as well as *Mughal* Period.

Hambly notes that this act was not liked at all, and people considered it an act of blasphemy to which Shāh Jahān later succumbed and abolished it.[248]

Both, the festival of *Noroz* and the ritual of prostration were intended to bring consolidation of power. The consolidation of power actually means stability and effective governance in which dictates are not only easy to issue but also easy to implement, as people become habitual of obeying every order coming out from the court. This means that such festivals and traditions used to provide legitimacy.

However, it is quite mindboggling that Aurangzēb succumbed to the pressure of the *Sunnī* clerics and other *Sunnī* courtiers and changed the Nauruz to *Nīshāt Āfroz Jāṣḥn* (a pleasant celebration), to be held in *Ramaḍān*, the sacred month of Muslims in which they fast. In his *Tuzuk* (memoir), Jahāngīr has mentioned *Āb-Pāshān* or *Gulāb Pāshān* (throwing water or throwing rose petals), or scattering of rose water or only water on the people. Aurangzēb also used to participate in this festival, as Edith Tomory highlights this fact of the patronage of the emperor. Badā'ūnī has shed some light on the festival of *khūshroz* or fancy bazar that arranged by women. It was ordered by Akbar that the women of the royal court should also have an enjoyment, but it was borrowed from Persia.[249] Kishori Lal is of the view that it was Akbar who transformed this simple enjoyment to a complete institution, as it was established in the fort of Fatehpur Sikri[250]. He has quoted Abū 'l-Faẓl, a vital source in such festivities who extolled Akbar's

[248] Gavin Hambly, "Towns and Cities: *Mughal* India", in *The Cambridge Economic History of India, Vol. 1: c.1200-c.1750,* ed. Tapan Raychaudhuri and Irfan Habib (Hyderabad: Orient Longman, 1984), 113.

[249] Badā'ūnī, *Muntakhab-al-Tawārīkh,* 339.

[250] It is a town now located in Utter Pardesh in India. Akbar laid the foundation of this city in 1569 and made it a center of his military expeditions in Chittor and Ranthambore.

interests in it.[251] He opines that perhaps Badā'ūnī did not like such festivities, as he was a strictly religious person and thought such innovations in religion insidious, for various marriages were contracted on such occasions.[252]

As this was a mixed gathering, some religious clerics might have objected but such borrowed festivals became part and parcel of the *Mughal* court. This courtly custom spread far and wide in the empire becoming a source of revenue as well as facilitating administration. It is because there was no political theory to back up the consolidation of power through other means which played an important role that the *Mughal* rule neither developed into a caliphate, nor into a democracy at the when democratic roots were finding fertile ground in the western countries.[253] The situation of politics remained confined within the palaces where palatial intrigues and conspiracies emerged to produce another emperor who was usually the son of his predecessor.

4. Political Condition and its Impact

Despite internal intrigues and external threats, the *Mughals* were either ignorant of the theoretical political developments or entirely ignored the political polemics due to exigencies of time. No political theory was developed during the entire *Mughal* period, the reason that ultimately no stable institution was developed except army and local administrative system. Perhaps it was done due to two reasons; external influence and threats and internal threats. A noted historian Arthur Llewellyn Basham[254] states that the only theory was "royal king and loyal subject," while rest of the politics revolved around

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[251] Kishori, *Mughal Harem*, 165.
[252] Ibid., 165. Also see Lane-Pole, *History of India*, 49-47.
[253] Mukhia, *The Mughals of India*, 14-15. Also see Chandra, *Medieval India*, 86-87.
[254] Arthur Llewellyn Basham (1914-1986) was an Indian history specialist having taught in the School of Oriental and African Studies, London during the decade of 60s and wrote books on Medieval India.

external relations with Safavids of Persia, Ottoman Caliphate and Uzbeks from where overtures of either joining the *Sunnī* faction or *Shī'ah* heretics used to emerge. Therefore, being immigrants from the Central Asia, the *Mughals* always vied to attack and annex it again, though none dared to go beyond thinking.[255] The second factor was the ever-simmering situation of Qandahar where Abdullah Khān, the ruler of Qandahar,[256] rose and asked Akbar to join hands with him against Persia, while the Persians tried to win Akbar against Uzbeks and in this wrangling Akbar could not pay attention to the development of his political base.[257] The fact is that Akbar's inborn intelligence did not let him create enmity against the Persians who were far superior in fighting battles. Akbar, however, warned Abdullah of his insulting behavior to the progeny of the Prophet (PBUH) as Safavids were Syeds, writes S. M. Edwards.[258] This is just an instance of how rulers from all these countries adjacent to India used to play hide and seek with the *Mughals*, and how *Mughals* kept a fine balance in relations with all of them. However, internal and external threats also were the reasons behind not developing a sound political theory. In this connection, Kaushik Roy[259] has done a great work by comparing different historians and presenting the gist that there was a formidable *Mughal* force, but some argue that this was just a show, while some others put forward a logic that it was to make enemies to "co-opt them:."[260] This was pure politics from the *Mughals* to save the empire that the *Mughals* played on their own turf. However, the impacts of this politics played in

[255] Arthur Llewellyn Basham, *The Illustrated Cultural History of India* (Oxford: Oxford University Press, 1975), 238.
[256] Qandahar or Kandahar is the largest city of Afghanistan and in the south west of Pakistan. It has been a root of invaders coming from the central Asia to India.
[257] S. M. Jaffar, *Some Cultural Aspects of Muslim Rule in India*, (Peshawar: S. Muḥammad Sadiq Khān Publishers, 1950), 167.
[258] S. M. Edwards, *Babur Diarist & Despot* (Lahore: Tārīq Publications, 1987), 101.
[259] Kaushik Roy is working as Reader at Jadavpur University in India. He has also been a global fellow of Peace Research Institute Oslo, Norway and writes books on Indian history.
[260] Kaushik Roy, *Warfare in Pre-British India-1500BCE to 1740BCE* (London: Routledge, 2015), 113-14.

relations with foreign powers and with show of force only consolidated their own power at home without developing a political theory. Or in other words, it did not provide any theoretical base to their rule.

Commenting on the *Mughal* administration from political angle, J. N. Sarkār is of the view that the *Mughal* Empire extended over the entire Indian Subcontinent. The *Mughal* rule gave Indian states and all the 24 provinces a sense of oneness, unity and harmony in various ways. There was a single lingua franca, single currency and almost the single administrative system and judicial system. He says that even the monetary standards and denomination of the currency was also the same.[261] Despite all this homogeneity, he argues the people never felt the *Mughal* rule as their own rule. Instead, they were merely subjects under a rule.[262] And this situation continued during the entire *Mughal* period.

If the entire *Mughal* period is reviewed from Bābur to Aurangzēb, it is fair to say that there has never been any single political theory at work. During the period of Bābur, most of his attention was on the balance between *Sunnī* and *Shī'ah* sects of Islam and winning hearts of the Hindu nobility, as has been discussed in the social circumstances. Qureshi terms Bābur as "liberal and catholic" in his religious and political views, adding he was keen on taking Samarkand.[263] P. R. Tripathi[264] also seconds him but points out that Akbar has always been in political relationship with the Persians, but with a view to invade more areas. [265] S. M. Ikram is of the view that it was his power to gather *begs*

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[261] Sarkār, *Mughal Administration*, 161.
[262] Sarkār, J.N., Ibid., 161-62.
[263] I. H. Qureshi, *Akbar the Architect of Mughal Empire* (Karachi: Ma'aref Printers, 1978), 21.
[264] He is an Indian academician, has taught in many universities including *Allāh*abad and wrote more than 10 books on Indian medieval and *Mughal* period.
[265] R. P. Tripathi, *Rise and Fall of the Mughal Empire* (*Allāh*abad: Central Book Depot, 1963), 16.

(Turkish nobles) or nobles at one stage that he succeeded in overpowering the whole Subcontinent, defeating all other political forces against him.[266] Bābur's political machinations were the result of his advisors who were almost all Indians and Afghans. They were 34 in total and rest were Turanis and Persians. This situation explains his political acumen of gathering high minds in his court.[267] Perhaps he thought that most of the foreign advisors would help him transmit his own culture in India, but it could be a political ploy to pacify foreign invaders who used to invade India every other year.

Although Humāyūn's account is interesting with reference to his flight from India to Persia and then back to the throne, there is little evidence that he paid attention to build any political theory or political institution. Sukkum Roy only highlights his relationships with Persians which became the bedrock for the consolidation of his own rule.[268] Badā'ūnī relates an incident in which Shāh of Iran inquired from Humāyūn the reason of his defeat which he attributed to his own brothers which hardly point out whether he had some political thinking in mind but it was a sort of hint that the palatial intrigues were part of the political process which stayed confined to the palaces and forts only and did not grow further.[269] However, what is interesting politically here is that he developed very cordial relations with the Persians. When Sher Shāh Sūrī conquered the entire Indian Subcontinent, he became politically very powerful and sent an emissary to Tahmasp, the then Persian ruler, whose protection Humāyūn was enjoying. Sūrī demanded his expulsion. However, it was the political success of Humāyūn that Shāh became enraged and got the emissary maimed by cutting his nose and ears. Sher Shāh, a revengeful

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[266] Ikram, *History of Muslim Civilization in India and Pakistan*, 397.
[267] Muḥammad Ziauddin, Role of Persians at the *Mughal* Court: A Historical Study During 1525- 1707 A. D. *PhD Thesis Submitted in Area Study Center Baluchistan University* (2005): 61-62.
[268] Sukumar Ray, *Humayun in Persia* (Calcutta: The Royal Asiatic Society of Bengal, 1948), 25.
[269] Badā'ūnī, *Muntakhab-al-Tawārīkh*, 569.

Pakhtun, paid him back in the same coin, but Humāyūn stayed there,[270] writes Aziz Ahmed.[271] Although Humāyūn did little to pay back to Shāh of Persia, he did very good political overtures to show he was aligned with the Shāh. He gifted the famous *Kohinoor*[272] to Shāh for his hospitality.[273] Badā'ūnī then gives full detail of the help of the Shāh of Iran he extended to Humāyūn to invade India. [274] This incident that saved Humāyūn's lost rule and empire is not just a symbol of international relation and political overtures but a great political move in alliance with a foreign power that a *Mughal* emperor forged. This lasted for several years to come to reinforce the concept that the Persians were loyal friends of the *Mughals*.

Regarding nobility and its presence in the court, Humāyūn again retained the same Turani aristocracy which left him to join his brother Kamran during his flight from India. When Humāyūn returned, the same nobility re-joined him to enjoy courtly atmosphere, says Afzal Hussain, a noted historian, adding almost all the nobles who stayed loyal to Humāyūn, returned again.[275] Therefore, it was but natural that their political influence stayed in his court when he returned. However, Humāyūn soon realized the importance of local ruling class and showed guts to let the locals join his court. Afzal Hussain argues that Bābur and Humāyūn sensed the political atmosphere of India fertile to political machinations of foreign and local elite class to let them wrangle

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[270] Aziz Ahmad, *Studies in* Islamic *Culture in India* (Aberdeen: Oxford University Press, 1964), 39.
[271] Aziz Aḥmad (November 11, 1914 to December 16, 1978) was a poet, novelist, translator as well as historian and scholar. He has been a specialist of Islamic history.
[272] Kohinoor is one of the oldest and most famous diamonds which dates back to 5,000 years, having history of going through different regal hands to different empires.
[273] Rumer Godden, *Gulbadān: Portrait of a Rose Princess at the Mughal Court*,(New York: The Viking Press, 1981), 94.
[274] Badā'ūnī, *Muntakhab-al-Tawārīkh*, 572.
[275] Afzal Hussain, *The Nobility under Akbar and Jahangir* (New Delhi: Manohar Publishers & Distributers, 1999), 5-6.

within the court premises to bring a sort of harmony in the court.[276] It could be that both felt it heartening to retain Turani, Persian and balanced them with the local elements, it was a ploy to create a political stability and balance of their political clout, for each one of them represented a huge chunk of soldiers in the *Mughal* army.[277]

Akbar, however, was politically a bit different from his predecessors. Apart from Persian and Mongolian impacts, Akbar's ingenuity had been at work with religious innovations and liberal outlook. Abū 'l-Faẓl, a very astute advisor, has rather put his emperor apart from other kings and emperors when discussing his rule in his *Ā'īn-i-Akbarī*. He says that myopic rulers are often selfish who pay attention to the daily routines instead of the state matters. He says that "Security, health, chastity, justice, polite manners, faithfulness, truth, and increase of sincerity etc., are the results of the character of the emperor."[278] Discussing the political attitude of an emperor, Abū 'l-Faẓl has also stressed upon the four constituents of a political body, types of state servants and corresponding human characters.[279] Perhaps, Abū 'l-Faẓl had been aware that without the gradual development of political institutions and bodies, no law, dictates or *Farmān* could win obedience from the masses.

4.1. Abū 'l Faẓl's Political Body and Constituents

Abū 'l-Faẓl, being an astute thinker in the statecraft, put the state officials into four categories; soldiers, artificers and merchants, philosophers or learned men and manual workers.[280] He has enumerated the qualities of each and their benefits for the

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[276] Ibid., 9.
[277] Ibid., 6-10.
[278] Abū 'l-Faẓl, *Ā'īn*, 2-3.
[279] Ibid., 3.
[280] Abū 'l-Faẓl, *Ā'īn*, Vol.I, 4-6.

organization of the state, quotes Ugendra Nath Day.[281] This, Abū 'l-Faẓl says, is necessary to keep a monarch balanced. He remarks, "it is obligatory for a king to put each of these in its proper place, and by uniting personal ability with due respect for others, that cause the world to flourish."[282] He further comments that all these four constituents keep the political body or entity balanced and strong. The strength of the state lies in the balance made by these elements. Abū 'l-Faẓl has beautifully equated soldiers or warriors to fire which is used to save the state, artificers and merchants as collectors and givers of revenue, while the job of philosophers and educators or learned men is to pacify the soldiers and fiery spirits in the court through their wisdom, while the manual laborers are employed as workers in the court and other places, as Ugendra Nath Day has given a detailed picture of each and his respective duties in his book, *The Mughal Government, A. D. 1556-1707.*[283]

Referring to Abū 'l-Faẓl, U. N. Day has stated that the philosophers and learned men spread virtue throughout the empire through their knowledge. They advise the king on different matters after long deliberation and guide him about the affairs of the state.[284] However, Abū 'l-Faẓl, as Day argues, has also suggested a proper character for a king or emperor to head such a body of men. U. N. Day quotes Abū 'l-Faẓl ad verbum to show his reverence for Akbar and his logic of declaring the emperor as superior to all the other constituents of the political body he proposed. Day further argues that Abū 'l-Faẓl poses his emperor a despot by using such comments and attributes, but it was the demand of the

[281] U. N. Day is an Indian professor who has taught history and *Mughal* period in different colleges in India and wrote books on the *Mughal* period.
[282] Ugendra Nath Day, *The Mughal Government AD 1556-1707* (New Delhi: Munshiram Manoharlal, 1994), 11.
[283] Ibid., 6.
[284] Ibid., 8.

time and the nature of the political environment of that time.[285] It seems that U. N. Day has been swayed by the same argument of Abū 'l-Faẓl which he borrowed from the English history that the king is the shadow of God on earth and that he should rule, but it is not stated that if he is to rule according to the Grecian writer Sophocles' words, he should rule justly[286].

4.2. Persian Impacts on Politics

Persian had been a formidable force at the time when *Mughals* ruled India. As Persian language was capable enough to be used as an official language of state craft, it was but natural that the role of Persian language and Persian nobles along with the Safavid Dynasty in the *Mughal* courts and *Mughal* statecraft increased manifolds. However, as the Persians were mostly *Shī'ah*, it means that the *Mughal* Dynasty was to face the *Sunnī* majority at court which was inimical to *Shī'ah* clout in the court. This conflict led the *Mughals* to find a new way of dealing with the sects which emerged in the shape of *Dīn-i-Ilāhī*. Although *Dīn-i-Ilāhī* was not vigorously followed by other emperors of the *Mughal* Dynasty, yet it had its impacts on the future of the *Mughal* Empire, as it grew more tolerant and more liberal after this innovation by Akbar. Muzaffar Ālam and Sanjay SubRahmānyam[287] has noted that Persian language became lingua franca of the official world in that it was used in "imperial orders *(Farmāns)* to bonds and acceptance letter."[288] They have enumerated a number of Persian noblemen, merchants and scholars present in the *Mughal* court throughout their rule. Persian social

[285] Ibid., 9.
[286] Sophocles, *Oedipus Rex* (New York: Courier Corporation, n.d), 22.
[287] Both are noted scholars and academicians. Muzaffar Ālam is teaching in Jawaharlal University, New Delhi as a professor of history, while Sanjay SubRahmānyam is working in a social science institute in Paris, France.
[288] Muzaffar Ālam, and Sanjay SubRahmānyam, *Writing the Mughal World: Studies on Cultures and Politics* (New York: Columbia University Press, 2012), 317.

and cultural impact had been so huge that it was visible in everyday life.[289] Throughout the discussion of the religious and cultural conditions, it has been dilated upon that the Persians and Persia have been a dominant factor in the *Mughal* court, hence, their impacts on the *Mughal* politics. Therefore, it was natural for the *Mughal* to borrow not only the linguistic terminology but also names, court, celebrations and religious rituals so much so that the later emperors had hard time facing the *Sunnī* religious clerics that Akbar curbed and silenced with hard work and political acumen.[290] However, the impact of this political penetration has been that the religious fanaticism and extremism of the *Sunnī* ideology was tackled and confronted with the opposite *Shī'ah* ideology, as it had become a norm to debate faith in the court of Jahāngīr where every religious scholar was free to speak.[291] This continued even during Aurangzēb's period who favored *Sunnī*s, aligned with *Shī'ah*s and alienated Hindus and Sikhs. Rīazūl Islam has pointed it out quoting Muḥammad Kāẓīm's *'Ālamgīr Nāmah* which highlights the political intrigues going on during Aurangzēb's period. He also points out how his diplomatic overtures with the Persians failed and his embassy in Persia was ransacked in 1663 A. D.[292]

5. Legal Conditions during *Mughal* Period

India, being a *Mughal* empire, had only one king, who was all-in-all; a legislature, administrator, court of appeal and dictator. There were no separate institutions with power distribution between different branches. Although there were advisors, ministers and administrators, all were appointed by the emperor himself. P. R. Khosla has stated

[289] Ibid., 271-72.
[290] Ibid., 272-73.
[291] Ibid., 273-275.
[292] Rīazūl *Islam, Indo-Persian Relations: A Study of The Political and Diplomatic Relations Between the Mughal Empire and Iran* (Lahore: Iranian Culture of Foundation, 1970), 134, 446.

that even *Fatāwā-i-'Ālamgīrī*[293] (Religious Edicts of the Period of Aurangzēb) was the handiwork of the monarch himself, for he was also the head of religious authorities after *Ṣadr*.[294] Abū 'l-Faẓl's *Ā'īn-i-Akbarī* seems to support his contention that Akbar was his own chief minister and prime minister. Abū 'l-Faẓl seems to have attributed this to Akbar that he used to say that if there was any capable person, he would hand over "the affairs of the government to him."[295] May be it was his pride in his abilities or self-centered approach, but the fact is that emperor was a legislative authority, the reason that *Farmāns* have the legal background in the shape of an emperor, his power, his own socio-cultural background and his politico-diplomatic overtures based on those existing circumstances. In fact, even the pursuit of being a legislative authority does not mean that he was sovereign as the discussion given above demonstrates. The king was tied through different threats to the central authority of governance and not of ruling oppressively.

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[293] ***Fatāwā-i 'Ālamgīrī***, Awrangzeb 'Ālamgīr got compiled a vast and reliable book in order to decide the cases and other disputes in the light of the Islamic *Sharī'ah* during the early period of his rule. This became popular in India as *Fatāwā*-i 'Ālamgīrī. He appointed a group of Islamic scholars to work on this book and appointed Shaykh Niẓām as the head. The work was started through a *Farmān* in the fourth year of his rule in 1073 *Hijra* [1663] and completed after eight years in 1081 *Hijrah* [1670]. Following Hidāyah, this book is considered the most trusted and reliable source in *Fiqh Ḥanāfī*. This book has been compiled scientifically with a great care. It has also been published from Cairo and is popular with the name of *Fatāwā-i Hindī* in the Middle East. The original Arabic book of this *Fatāwās* comprises of six huge volumes. See for details: Muḥammad Sāqī Ma'asir Ālamgīr, Tran. Muḥammad Fida Ali Talib, 424. Shaykh Niẓām, *Fatāwā-i 'Ālamgīrī. Muqaddimah Vol.1* Trans. Syeḍ Ameer Ali (Lakhnaw: Matbāh Nolūkhshwer, 1932)208. Muḥammad Akram Shaikh, *Rood-i-Kauthar* (Lahore: Feroze Sons, 1958), 440-41. Mīan Muḥammad Ṣaeed. *'Ulamā-ye-Hind Kā Shāndār Māḍī* (Lahore: *Kutub Khānā Rashīdiā*, 1942), 556. Muḥammad Kāẓīm, *'Ālamgīr Nāmah Vol. 2* (Bengal: calcuttas Asiatic Societic, 1868), 1086-1087. Mujeeb-ul-āllāh Nadvī, *Fatāwā 'Ālamgīrī Ke Mokhalifeen* (Lahore: Markāz Diy'āhl Sīngh Trust Library, n.d), 22-23, 28-136. Muḥammad Ishāq Bhattī, *Bar-e-Sāgīr Pāk-wā-Hīnd Maīn Ilm-e-Fiqh* (Lahore: Idāra Saqāfat-e-Islāmiā, 1973), 261. Al-Basūr, "Ālamgīr Number" (Chinyut: *Islāmia* College, May, 1962), Vol. 4, no. 1, 129-30.

[294] Khosla, *Administrative Structure*, 17-18.

[295] Abū 'l-Faẓl, *Ā'īn*,Vol.1, 387.

5.1. Emperor as Supreme Legislative Authority and Legislation Efforts during Aurangzēb's Period

Laws have a firm legal cover behind them which provides them legitimacy and power on which they fully hinge to have an impact in the eyes of the public.[296] A legal system is not a product of a single person, as it hinges on public support, cultural values, norms, traditions, creeds, faiths and even tribal support. The *Mughal* period has no uniqueness in this connection except that a *Mughal* king or emperor was all-in-all. A noted Hindu scholar V. D. Mahajan says that Bābur and Humāyūn sought the backing of Islam to give legitimacy to their rule and fiats. However, Akbar avoided it, thinking the clerics might win power more than him. That is the very reason that though clerics had the power to remove the king through *Fatāwā*, (religious edicts), they had no more guts to remove him as their *Fatāwā* did not have any power of enforcement.[297] His views have the support of Abū 'l-Faẓl who declared king as the light of God, while Akbar declared himself the voice of God. Both have the same meaning.[298] However, Akbar attempted to combine both religious as well as secular forces to create a new creed that could suit his rule, though Shāh Jahān and Aurangzēb both looked towards Islam and religious scholars.[299] All these attempts by the emperors were to provide legitimacy to their orders or *Farmāns* to make them into legal orders.

Similarly, even succession did not have any law. Whosoever is powerful or is installed by the emperor himself is accepted by the public as well as the nobles. Or else,

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[296] Anne Quema, *Power and Legitimacy: Law, Culture and Literature* (Toronto: University of Toronto Press, 2015), 63-64.
[297] Mahajan, *The Muslim Rule in India*, 199.
[298] Abū 'l-Faẓl, *Ā'īn*,Vol.1, 200.
[299] Mahajan, *The Muslim Rule in India*, 199-200.

the fratricide continued until the winner is the king.[300] V. D. Mahajan and Savitri Mahajan have both traced the deaths and successions of the *Mughal* emperors saying that during Akbar's illness, his grandson tried to remove his own father from the throne. Even the appointee of Jahāngīr was ousted by his younger brother Shāh Jahān.[301] Sri Ram Sharma praises *Mughal*s for setting up conventions and traditions, stopping short of saying them law-givers.[302] He further states that their administration was very strong having several ranks such as *wāẓīr* (minister), *Dīwān* (advisor) and so on.[303] The problem was that everything was in the hands of the king himself, the reason that despite ruling India for so long, they did not develop any proper and well-developed legal system.[304] All orders were issued in the name of the king and with his seal. In other words, there was the theory of absolutism at work which means that the king or emperor was absolute monarch and each of his word was a law in itself.[305]

However, this system had a great loophole that each official used to hide himself behind the orders of the king. The king was responsible for everything, P. R. Khosla argues, saying that there were no checks and balances. [306] He further points out that there were no institutions except *Panchāyat* in villages which were just facilitation centers for revenue collection and communicating the authority of the king and nothing else.[307] However, the emperor was not as absolute as it seemed. That is the very reason that the emperors used to vacillate between *Sunnī* and *Shī'ah* sects, for a king's order or *Farmān*

[300] Richards, *The Mughal Emprire*, 112, 115, 155.
[301] Mahajan and Savitri, *The Muslim Rule*, 200.
[302] Sharma, *Mughal Empire*, 18
[303] Khosla, *The Mughal Administration*, 16
[304] Ibid., 16-17.
[305] Ibid., 17.
[306] Ibid., 16.
[307] Ibid., 26.

could not override the Qur'ānic law or traditions of the Prophet (PBUH), Khosla highlights. It is another thing that the kings used to exploit religion by playing one sect against another and facilitating their own administrative exigencies, Khosla notes, saying that Bairam Khān's revolt against Akbar is a case in point where the king was the sole judge and Arabiter.[308] In other words, as the emperor used to be the chief commander of the army, he was considered the sole judge too. A person disloyal to the king was considered a traitor and condemned to death by the king himself. Mohammad Hashim Kamali[309] says that a serious attempt to legislate or give a proper legal cover to the king's order was made when the colonialism was knocking at the doors of the *Mughal* rule. Aurangzēb, he says, tried to introduce the Islamic judicial system which was much developed until then.[310] He states that Aurangzēb made a serious attempt by introducing Islamic judicial system. He adds, "The state was responsible for military, fiscal matters and crimes in general, while the jurists dealt with matters of personal law, waqfs, commerce and the *Ḥudūd* penalties."[311] It was a sort of first attempt of an emperor to separate powers. That is why a noted historian and scholar D. R. Javata argues that Aurangzēb was the first *Mughal* who gave Islamic legal cover to his *Farmāns* by transforming them into Islamic penalties, or *Ta'zīrs*[312] as they were called in Arabic. He appointed a *niẓām* (administrator) and documented *Fatāwā-i 'Ālamgīrī*.[313] This document is widely quoted in the *Sunnī* circles as a comprehensive book on Islamic laws

[308] Ibid., 28.
[309] Hashim Kamālī is a professor of law teaching in Islamic International University Malaysia. He has also taught in the United Kingdom, the United States and Canada.
[310] Mohammad Hashim Kamali, *The Oxford History of Islam*, Ed. by John L. Esposito, (London: Oxford University Press, 1999), 112.
[311] Ibid., 112-13.
[312] *Ta'zīr* means the punishment that *Qāḍī* awards to a person on the basis of his discretion or the state ruler.
[313] D. R. Jatava, *Religions in Modern Society: The Puzzling Issues* (New Delhi: National Publishing House, 2000), 124.

in the Indian context. This was also perhaps the first attempt to legalize common royal orders as dictates or laws, providing them religious legitimacy that was a sort of public legitimacy, too. This move, however, has no direct public backing as Islam enjoyed during its romantic caliphate system.

5.2. Colonization, Existing Legal System and Dichotomy

Advent of the British in India started replacing the old laws with newly codified western legal system leaving aside personal laws. Oussama Arabi in his book, *Studies in Modern* Islamic *Law and Jurisprudence,* writes that personal laws were based on *Sharī'ah* with their application on the personal matters such as marriage, heritage and religious issues.[314] However, this first attempt, made perhaps at the end of the 18th century, could not be called a serious development in legislation, for it was already in practice privately. Shahzado Shaikh, a legal mind, throws some light on the end of the *Mughal* rule saying that an Islamic judge, *Qāḍī*, used to administer law and the East India Company adopted the same *Mughal* structure during its initial period but later on withdrew to replace it with the English Common Law and other codified laws.[315] He states that this English law was synced by the British officials with various other local laws, statutes, religious laws and personal laws. Shaikh enumerates several English policies adopted from 1753 to 1772 which the East India Company was instrumental, but he claims that the company left family personal laws of different religions entirely intact.[316] According to Shaikh the company kept on expanding its grip from Bombay,

[314] Oussama Arabi, *Studies in Modern* Islamic *Law and Jurisprudence* (Kluwar: Law International, 2001), 54.
[315] Shahzado Shaikh, *Political History of Muslim Law in Indo-Pak Sub-Continent, Mission unto Light International* (Karachi: Sindhica Academy, 2012), 9-11.
[316] Ibid., 9-11.

Calcutta and Madras to other areas until 1857 when the entire India fell into the lap of the British, leading to the total collapse of the last emblem of the *Mughal* rule.[317] It is interesting to note that the company did not implement its own laws until the local legal system provided it an easy way to mould them. When it sensed that local legal system is inadequate, it used the British system and promulgated it with full force. That is what happened in 1857 when the British found themselves in a quandary to implement a system that has no foundations at all.[318] That is why they implemented the English legal code but modified it to include the personal religious laws including some of the Islamic laws derived from *Fatāwā-i 'Ālamgīrī* and other such compilations.

It is correct to claim that the *Mughal* rule brought an entirely new culture; rather, it laid down the foundations of a new civilization in India with its own unique culture, unique set of values, unique conventions, customs and traditions. However, this entire civilization rests upon the *Mughal*'s unique administration. At the same time, it is fair to state that this unique administration was not the product of a mind of a single person. It has the back of Islamic caliphate and teachings, flexibility of political expediency, unique Mongolian heritage, freedom of borrowing different traditions and conventions and above all the liberty to modify Islamic sectarian divide to achieve end results.[319]

Although the *Mughal*s acted too early in bringing reconciliation between two antagonistic sects of *Islam*, *Sunnī* and *Shī'ah*, Akbar has to revert to *Dīn-i-Ilāhī* to give a legal cover to his dictates. It is because the two great Muslim sects were being supported by two great empires of that time; Safavids and Ottomans. Apart from tinkering with

[317] Ibid., 12.
[318] Lion M. G. Agrawal, "Revolt of 1857," In *Freedom Fighters of India.* ed. Lion M. G. Agarwal (Delhi: Isha Books, 2008), 26-30.
[319] Richards, *The Mughal Empire*, 6-10.

religious issues, the *Mughals* also thought it better to keep a balance between the two great communities of the Subcontinent; Muslims and Hindus. They kept equal number of Muslims and Hindu nobles in their court but at the same time prefered the Muslim community to induct in the army to keep power in their own hands. They were aware that power brought legitimacy more than the public support, as public support was won with the muzzle of guns. Apart from that, they also used divisions to keep the communities at conflict to not let any faction become stronger than the *Mughal* army. [320]

Moreover, the *Mughals* from Bābur to Aurangzēb, kept close relations with all the foreign powers, playing with their social and cultural traditions and exchanging relationships with wealth and public delegations, borrowing their administrative strategies and implementing them with a bit of modifications. Two most important impacts on their style of governance and of administration have been of their familial heritage of the Mongols and second of the Persians. It is because Bābur had always admīred strict Mongolian administrative structure which was highly effective as well as smooth. Moreover, they borrowed various cultural festivals from Persians to use them for some cultural integration of their system.[321]

It is also that though socially the *Mughals* have done much, politically they have not paid any attention to the development of a political theory. There could be several reasons for their failure to do so, but as it is not the subject to be discussed, it is pertinent to say that they paid much attention to provide legitimacy to their *'Farmāns'* through their own courtly traditions, social set, political machinations, diplomatic and international

[320] Ramesh Chandra Varma, *Foreign Policy of the Great Mughals, 1526-1727 A. D.* (New Delhi: Shiva Lal Agarwal, 1967), 216-217.
[321] Ibid., 217.

relations and they had been very successful in this, for their rule saw more than two centuries before it ended with the arrival of the British.

Chapter No. 2

Farmān-i-Shāhī: Statuts, Purpose, Procedure, Sources and Legal Status

Chapter No. 2:

Farmān-i-Shāhī: Statuts, Purpose, Procedure, Sources and Legal Status

1. Introduction to *Farmān-i-Shāhī*, Status and Writing Style

Before going into details of legislative, legal and legitimate status of *Farmān*, it is fair to discuss its etymology, connotative and denotative meanings and its evolution through historical use. The word *Farmān* in English is used as *Farmān* as well as *'Firmān'*; both mean the same thing. *Oxford Concise Dictionary* states that both have a bit different pronunciation where the second vowel in *'Farmān'* is short, while in *'Farmān'* it is a bit long. However, in meanings, both are the same. It states that *Farmān* used as a noun means "an oriental sovereign's edict" or "a grant or permit."Etymologically, it has not been discussed much except that it is *'Farmān'* in Persian and *'prāmanā'* in Sansakrit, which means "standard or right measure."[322] On the other hand, *Urdu Encyclopedia of* Islam published from the University of Punjab, Lahore, is of the view that it has various meansings including but not limited to command or edict as stated in the *Oxford Dictionary*, a source considered more authentic than encyclopedias. *Urdu Encyclopedia of* Islam states that *Farmān* has been derived from the Persian language, a reference that is correct according to Oxford Concise Dictionary.[323] However, it is Francis Joseph Steingass[324], who has gone into further details of this word in his *Comprehensive*

[322] *Oxford Concise Dictionary*, s.v. "*Farmān*". 8th ed, (New York: Oxford University Press Inc, 2006), 535.
[323] *Urdu Encyclopedia of Islam*, s. v. "*Farmān*." (Lahore: The University of the Punjab, 1975), 312.
[324] Born in 1825 and died in 1903, Francis Joseph Steingass had been a great English linguist and orientalist. He hailed from German Jewish descent. He earned his PhD from Germany and later taught in

Persian-English Dictionary in which he states that it means "a mandate, command, order, or royal patent," adding that its various types and each type having relevant meanings.[325] The most authentic source of *Urdu* words, *Farhang-i Āṣfiyyah* [326] has also defined the term in the same way, as done by Francis Joseph Steingass, calling it a command or royal order but has cited a popular verse from the poet of that time when it was compiled by Maulvi Syeḍ Ahmed Delhvī.[327] The dictionary was written around a century earlier when there was some importance of such *Farmāns* issued by the surviving *rājās* and elite class to their servants and personal staff members. In his reknowned *Encycolopedia of Islam*, Bernard Lewis, Ch. Pellat and J. Schacht[328] state that there are several *Farmāns* available even at this time in big tomes. These *Farmāns* have survived the most turbulent *Mughal* periods. They are mostly found in princely records of some states, or with the record kept by the heirs of some *rājās* and *nawābs* (Indian nobles) or from the records of regional communities which swore allegiance to the *Mughals*.[329] Whatever the meanings are, it is clear that the *Mughal*s borrowed *Farmān* as a cultural sign from the Persian regal culture and integrated it into their own governmental and official administrative structure. They popularized it to make it known how their empire is going to be governed and how their word is going to become a legal entity to survive other familial or social wranglings and controversies.

Birmingham as Professor of Modern Languages and Arabic literature. Also see Francis Joseph Steingass, *Comprehensive Perian-English Dictionary* (New Delhi: Asian Educational Services, 2005), Blurb.

[325] Francis Joseph Steingass, *Comprehensive Persian - English Dictionary* (Lahore: Sāng-e-Meel Publications, 1969), 921-22.

[326] Written by Maulvi Aḥmad of Delhi, known as Maulvī Syeḍ Aḥmad Delhvī, this book is the first of its kind in Urdu literature having made a name as a uniue dictionary. Also see, Maulvī Syeḍ Aḥmad Delhvī, *Farhang-i Āṣfiyyah* (Lahore: Sāng-e-Meel, 2011), Blurb.

[327] Delhvī, *Farhang-i Āṣfiyyah*, 330.

[328] Authors of the Encyclopedia of *Islam* written by them and published by Brill, Netherlands, in 12 volumes. Also visit for details http://www.brill.com/encyclopaedia-*Islam*-volume-ii-c-g.

[329] Bernard Lewis, Ch. Pellat and J. Schacht, *The Encyclopedia of Islam, Vol. 2* (Netherlands: E.J. Brill, Leiden, 1965), 806.

The real status of *Farmān,* however, is still not crystal clear, for it sometimes, according to Urdu *Encyclopedia of Islam*, denotes a recipient of a favor from the *Mughal* king in the shape of the seal of the emperor and his own signature with it. The *Encyclopedia* cites the example of Shāh Jahān that once he wrote an entire *Farmān* by himself, as it is found in the records.[330] It only shows its significance, while its legal significance is much more forceful than the public significance. In fact, a *Farmān* is a common order but a *Farmān-i-Shāhī* is a specific regal order or command that has the very foundation of law. Though a *Farmān-i-Shāhī,* during the *Mughal* period, used to be issued with the sources in mind such as the *Qur'ān, Sunnah* and Islamic jurisprudence, leaving aside Hindu personal laws and other tribal traditions.[331] The *Mughals* used to treat these *Farmāns* constitutional and judicial orders which had the state power of implementation. In fact, *Farmān* had been a valid foundation or basic law working to legitimize the government orders of the *Mughal* period. However, it is not as simple, for only issuing of a *Farmān* carried little sigificance until it was verified by an imperial seal. It is further claimed that no document during the *Mughal* period could have any legitimacy without that imperial seal. Wherever was this seal placed or put, it was called *Farmān* without addition of one or two more words to specify the purpose.[332] He further goes on to say that the status of a *Farmān* with such a seal could be evaluated from the fact that the king himself used to take great care in safeguarding this seal. The emperor kept the seal in his own possession, or handed to the trustworthy person, he argues, adding that Aurangzēb used to hand over to his daughter, Raushan Ara Begūm.[333] It

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[330] Lewis, Pellat and Schacht, *The Encyclopedia of Islam*, 806.
[331] Anwarullah, *The Criminal Law of Islam* (Islamabad: *Sharī'ah* Academy, IIUI, 2005), viii.
[332] Ibid., viii-ix.
[333] Ibid., viii.

shows the importance of the seal in legalizing the sayings of the kings and queens during the Mugahl period. Francis Bernier[334] highlights the importance of the *Farmān* in that even the emperor Aurangzēb did not trust his daughter, as he says that the emperor kept the signet with his arm tied fast to "satisfy himself that the Princess had not made use of this instrument to promote any evil design."[335] Another important point that has not been raised about oral orders is discussed in various history books. Mohammad Kasim Farishta[336], as John Briggs writes about him, asserts that even emperor's word was a law in itself. That is why it, too, was a type of *Farmān*. Briggs says that even oral orders of the king or the emperor used to bear the importance of the written *Farmān*. They carried the same force, power and awe as the written *Farmāns* had. Briggs is of the opinion that these oral and written orders or *Farmāns* were instruments using which the *Mughal* emperors kept their control over all of their departments in their empire.[337] However, Briggs, when translating Farishta, has not given any hint of any such oral order which has been used to run the entire department, but of course, he was talking about in terms of importance and status of a *Farmān*, which could be oral as well as a written one. A written *Farmān*, however, carried far more weight, as it is clear that an oral command loses its worth in the absence of the emperor.

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[334] Francis Bernier (September 25, 1620 to September 22, 1688) was a famous French traveler and herbalist. He visited the *Mughal* Empire and stayed with Awrangzīb for more than 12 years to record his governance. Also see Nicholas Dew, *Orientalism in Louis XIV France* (Oxford: Oxford University Press, 2009), 1-10.

[335] Francis Bernier, *Travels in the Mughal Empire*, Tran. by Archibald Constable (Oxford University Press, 1916), 125.

[336] Mohammad Kasim Farishta or Qasim Farishta has also been popular with the name of Hindu Shāh, who was a Persian historian and has written about the *Mughals*. Also see, Henry Miers Elliot, *The History of India, as told by Its Own Historians* (Cambridge: Cambridge Univeristy press, 2013). 1-12.

[337] John Briggs, *History of the Rise of the Mahomedan Power, Original Persian of Mahomed Kasim Ferishta, Vol. 2* (Calcutta: Oriential Booksellers and Publishers, 1908), 198.

1.1. *Farmān's* Writing Style

Exactly like the current legal jargons, the *Mughals* were very much cognizant of the fact that the language of their *Farmāns* should be distinct, unique and significant, or else it might be copied by all and sundry. Perhaps that is the very reason that they chose Persian as a language of *Farmāns,* which was not Indian lingua franca. However, Muzaffar Ālam[338] expresses surprise that the *Mughals* were Chūghtaī Turk and most of the Turks or even rulers swearing allegiance to Ottomanian Caliphate[339] did not like Persian language much due to its links with *Shī'ah* Iran at that time.[340] He relates examples of Bābur and Humāyūn who used to speak Turkish language and recite Turkish poetry. In fact, he argues, Persian language established itself as an official language long before the arrival of the *Mughals*, the reason that they could not shed off this legacy of the *Sultanate*.[341] Although the nobility of that time also set to learn Persian to immite royal lifestyle, they were strictly prohibited from imitating the style of letter writing like that of *Farmāns,* lest they might use it to write fake *Farmāns.* Nobody ever dared copy this type of language in their own letters or small documents.[342] When a noble, Ghazi-ud-Dīn Khān[343], started writing his letters by writing a phrase that looked similar to the phrase used by Aurangzēb in his *Farmāns*, he was immediately barred from it with words of scorn thrown on him by the emperor himself that this was an imitation of "royal

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[338] He is a Pakistani researcher famous for writing on *Mughal* politics as his paper in footnote 2 gives a bit of introduction.

[339] The Ottoman Caliphate was a Muslim caliphate established in 1362 with the conquent of Constantinople. Also see, Huseyin Yilmaz, *Caliphate Redefined: The Mystical Turn in Ottoman Political Thought* (New York: Princeton University Press, 2018), 34-35.

[340] Muzaffar Ālam, "The Pursuit of Persian: Language in *Mughal* Politics." *Modern Asian Stutides*, vol. 32 no, 2. (May, 1998): 318-319. http://www.jstor.org/stable/313001.

[341] Ibid., 318.

[342] Ibid., 319.

[343] Mir Shāhâb ud-Dīn Siddiqi was Ghazi ud-din Khān Siddiqi and given the title of Bayafandi Bahādūr, Feroze Jung I. He was the son of Kilich Khān, a commnader of Awrangzīb, was promoted to the rank of an Amir after the demise of his father. See Ālam, "The Purusit of Persian" 318-319.

phraseology" and that such a person holding only seven thousand soldiers cannot imitate to have the power to bring Miracles.[344] At another place, it has been stated that Muḥammad *Sulṭān*, the son of Aurangzēb also used to imitate that epistolary style, but when the emperor came to know about this, he strongly reprimanded his son, saying that he should not immitate imperial style.[345] In other words, it was the linguistic niceties, not used in everyday written or oral language, which gave a dinstinct status and unique prestige to the royal *Farmāns*.

2. Purpose and Procedure of Issuing and Writing of *Farmāns*

2.1. Purpose of *Farmāns*

Exactly like legal injunctions, the major purposes of the issuing of *Farmāns* were to keep law and order situation under the control of the emperor, collect revenues, maintain diplomatic relations, run the administration of the country and keep the government or regime's writ over the areas conquered by the armies of the emperors. The *Mughals* might have borrowed it from the earlier kings of India, or taken from the religious injunctions. Ram Parsad Khosla states that earlier the most authoritative advocates of issuing laws were the clerics, for they ruled the land single handedly due to the injunctions of the Holy Qur'ān about the Holy Law.[346] He argues that king as a "defender of Islam and guardian of the true faith...was pre-eminently a political functionary whose business was of a secular nature though his authority was by divine appointment."[347] The problems arose when the clerics or Muslim *Ulamā* (religious

[344] Ḥamid-ūd-dīn Khān Bahādūr, *Aḥkām-e-Ālamgīrī*, 35.
[345] Ibid., 3.
[346] Ram Prasad Khosla, *Mughal Kingship and Nobility* (*Allāh*abad: The Indian Press, Ltd,1934), 162.
[347] Ibid., 162.

scholars) tried to intervene in the staff affairs and made governance difficult for the state machinery and emperor to satisfy the people. Therefore, Ram Parsad is of the view that the *Mughal*s were allergic of this authority of the clerics over the legal injunctions, the reason that they used to issue *Farmāns*. He states that Akbar and Jahāngīr quickly found out this authority of the clerics and followed the strategy of the former kings such as Khilji and Tughlak. [348] Its purpose was to hoodwink the clerics to make their own rule strong enough to withstand tremors of clerical resentment. In other words, he states, their Islamic religion and divine political theory were both manipulated by the *Mughal*s to their own ends when issuing *Farmāns* with the objective of laying the foundations of stability. He opines that perhaps this was the very reason that *Ulamā* were not given homage, as they used to win in other courts under caliphate in other parts of the world at that time.[349] It is also that the objective of political stability was too complex for the religious clerics to understand its complexities. Therefeore, the *Mughal*s mostly used to issue *Farmāns* when there were poblems of political nature, but refrained from interfering in the affairs of faith and religion.

As the objective was clearly stability within the state, or areas conquered by the armies, *Mughal*s immediately sensed that their predecessors had done better by keeping clergy at bay. In this conection Ziyā al-Dīn Barānī's[350] words, he attributed to Allauddin Khilji[351], have been guiding lights for the *Mughal*s. These words are;

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[348] Ibid., 164.
[349] Ibid., 164.
[350] Ziauddin Barani was born in 1285 and died in 1357. He was a political thinker during Muḥammad bin Tughlaq. He also composed *Tārīkh*-i-Firuz *Shāhī*. Also see, V. D. Mahajan, *History of Medieval India*, Part I (New Delhi: S. Chand and Company,2011), 174-175
[351] 'Alā' ud-Dīn Khaljī was born in 1296 and died in 1316. He was the second ruler of the Khalji dynasty that ruled India. He was also son in law of his predecessor, Jalaluddin. Khaliq Aḥmad Niẓāmi, *A Comprehensive Hisotry of India* (New Delhi: People's Publishing House, 2009), 182-183.

"Organizations and governmet is one thing, and the rules and orders of law are another. Royal commands belong to the king, legal orders rest upon the judgement of *Qāḍīs* and *Muftīs*."[352]

The *Mughals* kept these words very close to their hearts, yet they never publically opposed the Holy Law or the clerics, who were still considered custodians of this law. Rather, they depended on the judgements and opinions of various Islamic scholars and judges in issuing *Farmāns*. Even sometimes emperor went too far in arresting someone for transgressing the Islamic lines, as Bābur did in the case of for calling Bābur supreme over other sacred personalities at which Bābur went furious and immediately issued the *Farmān* of arresting Shaykh Mubārak as well as Lahori scholars involved in supporting Shaykh.[353] This is just an example that Bābur, perhaps, saw something very insidious in the comparison that Shaykh had made to elevauate the status of the king over and above the Islamic concepts. The emperor immediately got alerted over this insidious act which might have landed him in trouble with other religious clerics.[354] This allergic relation of the *Mughals* with the clerics continued throughout the *Mughal* history until Aurangzēb.

It is not clear whether the *Mughals* were behind this ancient Islamic interpretation of the Qur'ānic injunction that the people should obey who are in charge of affairs, it is, however, clear that some clerics were in cohort with the *Mughals* or where their confederates in that Shaykh Mubārak, along with his sons, arranged a religious polemic to establish their authority over religion by supporting the ones who are in power through

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[352] Ziyā al-Dīn Barani, *Tārīkh-i-FerozShāhī.* Trans. by Sir Henry Mieres Elliot and John Dowso, (Lahore: Sāng-e-Meel Publications, 2006), 183

[353] Zahir'd-din Muḥammad Bābur, *Memoirs of* Bābur, Trans. by Annettee Susannah Beveridge. Vol. 3 (London: Luzac, 1922), 687-88.

[354] Som Prakash Vermba, *The Illustrated* Bābur *Nāmah* (New York: Routledge, 2016), 31-32.

the Quranic interpretations of some verses. In this connection, W. Foster[355] has beautifully presented the same incident to show how *Farmāns* were issued solely for the purpose of winning consent from the public and the clerics to bring solidarity in the empire.[356] That is why, he argues, that Shaykh Mubārak and his sons became cynosures of the eyes of the emperor after calling the emperor a *Mujtahīd* (Islamic jurist). The reason, Foster interprets, are that there could be conflicts between the regal *Farmāns* and the religious injunctions where the king or emperor might have pitted himself against the clerics.[357] Being a sensitive matter, the king or emperor would have to face retreat in the overwhelming public support the clerics enjoyed at that time. That is why, he states, they placed the king above others with the argument to support that the king saw benefit of the nation and interests of the entire Islam instead of just one tribe or family. Hence, his *Farmāns* have a greater significance and prerogative.[358] According to Foster, a traveler Terry remarks when he did not find any written laws a la some other European countries;

"The governors in cities and provinces proceed in like form of justice. I could never hear of laws written amongst them; the King and his substitutes will is law."[359]

These comments by Foster, and what Foster has stated about Terry, clearly show that the *Mughal* emperors, sometimes, ruled by the word of mouth *Farmāns* or oral orders, but mostly they used to issue *Farmāns* for different purposes. The single holistic purpose was to keep law and order or peace in the entire empire. However, the other

[355] Sir William Foster was an English knight who happened to live during 1863 to 1951. He worked as a Registrar and Superintendent of Records during the British raj in India. Please see blurb of his book.
[356] Sir William Foster, *Early Travelers in India*, 1583-1619 (London: Oxford University Press, 1921), 326.
[357] Ibid., 326.
[358] Ibid., 326-27.
[359] Ibid., 326.

purpose could be to consolidate their power, keep their administration effective and their progenies in power in the future.

2.2. Procedure of Writing and Executing *Farmāns*

As there were various types of *Farmāns*, from oral to written, from message to a specifically composed linen and even golden words, the procedure adopted for the implementation of a *Farmān* was relevant to the *Farmān* itself, its nature, its significance and the environment in which it was to be received. The details given in *Ā'īn-i-Akbarī* by Abū 'l-Faẓl is highly complex and intricate. The detail states that the *Mughal*s used to take every precautionary measure to safeguard their own authority before issuing any *Farmān.*[360] The precautions were so meticulous that a separate staff was arranged to record the orders, movements and oral orders and commands of the emperor during his stay in the court and then write down major points to extract commands. Abū 'l-Faẓl highlights almost 14 types of writers who were called Waqā'i- Navīs (event writers). They used to record every kingly movement besides writing special orders and *Farmāns*. *Ā'īn* shows that they used to record even when the king rose up in the morning, or who met the king, or what did the king or emperor ate, and what he did during his free time in the court.[361] This recording is a clear indication that the *Mughal*s were very well aware of what a written word entails and how their *Farmāns* are to be effective in bringing peace and stability in their empire if their every movement is recorded. In fact, it ensured one thing that no saying of the emperor was left out, the reason that there is hardly any oral *Farmān* in oral words, for oral *Farmāns* used to lose their worth when the emperor was

[360] Abū 'l-Faẓl, *Ā'īn*, Vol.I,249.
[361] Ibid.

not present. Abū 'l-Faẓl has highlighted four major types of writings which have been termed as *Farmāns* in one or the other way[362].

2.3. Distinctions In Different *Farmāns*

The proverbial modern day saying of 'different rules and different laws for different people' was perhaps better displayed by the *Farmāns* the *Mughals* used to issue. Abdūl Bāqī Nahāwandī, an expert of *Mughal* era, has made a neat distinction between the *Farmāns* written to different people. He states that the *Farmāns* written to the royal family members, princes, commanders, and feudal lords were not only different in language and content, but also in seals placed on them. Adapted from other *Sulṭāns* (rulers), the traditions were set according to the ranks and addressee, as to what type of style was to be adopted. Nahāwandī states that the first distinction was made by putting signature before the officiali seal, the second was by adding one or two lines in emperor's own handwriting, and the third was the placing of the royal hand on the *Farmān* with the official seal at its fixed place. He cites an example of Akbar's *Farmān* to Khān Khānan[363] calling him his son as "*farzand bedanad*" (very loving cited such a *Farmān* that he sent to Muqarrab Khān[364], the appointee governor of Behār, and addressed him as his son at the suggestion of favourite Prince Khurram.[365] He has stated at another place that he used to write a couplet in the honor of the Shāh of Persia when sending him a serveant every other day.[366] Abdūl Ḥamīd Lāhaurī, a reknowned historian, confirms it in his book, *Pādshāh Nāmah,* saying Jahāngīr used to write specific *Farmāns* himself to make a

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[362] Abū 'l-Faẓl, *Ā'īn.*, Vol.1.245.
[363] Khānzada Mirzā Khān Abdul Rahim Khān-e-Khāna lived during the reign of Akbar in 1556 to 1627 and played an important role in consolidating his kindgodm. Also see, Jahāngīr, *Tuzuk*, 244-250.
[364] He was a commander during the rule of Akbar but was later appointed as a governor. See for more details, Jahāngīr, *Tuzuk*, 244.
[365] Jahāngīr, *Tuzuk*, 244.
[366] Ibid., 284.

distinction or give more respect to the person he used to write for. He says that when Jahāngīr overpowered Rāna, he wrote a very loving letter to his son, Prince Khurrum.[367] He wrote another one to Prince Khurrum during his rebellion and to several other officials with his own handwriting.[368] Jahānir mentioned one such a letter written to Prince Parvez during seventeenth year of his rule when he asked him to immediately come to Delhi to assist the King. There is still another example written to Prince Khurrum again and the king addressed him in affectionate terms.[369] There are various examples of Shāh Jahān, too. Lāhaurī has stated that Shāh Jahān wrote very loving *Farmāns* to Asaf Khān during his last period and one to Mahabat Khān. He has recounted another example of such a *Farmān* written to Mahabat Khān.[370] British Museum Manuscript of 16859 has also given a reference of such a distinction made by Shāh Jahān when writing *Farmāns* such as one was written to Muzaffar Khān.[371] Jahāngīr himself has described this distinction made by issuing *Farmān*. Its translator Alexander Rogers says that seal was never put on the royal *Farmān* written to any servant. He argues that there could be more precedents before Shāh Jahān and Jahāngīr, but during Akbar's period, the mark of his hand could be found on a marble plate as well as on a tree in Sheikhupura, a city in Punjab.[372] This is only to show that Akbar made the first attempt to make distinction in writing *Farmāns* to different people with difference in importance of their status and rank.

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[367] Lāhaurī, *Pādshāh Nāmah*, 142, also See Radhey Shayam Chaurasia. *History of Medieval India: From 1000 AD to 1707AD* (New Delhi: Atlantic Publishers, 2002), 230-41.
[368] Ibid., 142.
[369] Jahāngīr, *Tuzuk*, 352.
[370] Lāhaurī, *Pādshāh Nāmah*, 142-516.
[371] Brahmān, *Letters written by Shaikh Jalal Hisari and Balkrishan*, 97.
[372] Jahāngīr, *Tuzuk*, 178-360.

Sometimes, it occurred even in issuing *Farmāns* that discrimination was abolished or announced to abolish where it proved harmful for the stability of the country. Aurangzēb, perhaps, sensed this for the first time that he was favouring Muslims more than Hindus and that his actions against Hindus were causing discontentment and resentment. Therefore, he issued around five specific *Farmāns* to defend himself against such allegations.[373] Sarkār has further highlighted that Aurangzēb was painted in bad light due to some of his actions; otherwise, his *Farmāns* have proved that he was equally patronizing to Hindus.[374] In his *Mughal Polity*, he says that Aurangzēb issued personal *Farmāns* to give rewards and lands to Hindus, and gave them tax concessions in various instances. Even in the case of Hindu priests, temples and other worship places, Sarkār says, Aurangzēb granted lands.[375] Sarkār has also highlighted other documents which entirely differ from the traditional accounts that Aurangzēb indeed persecuted Hindus. These documents show his *Farmāns* issued for grants to Hindus as well as Muslims.[376] In other words, the distinction and discrimination maintained during the early *Mughal* period was almost abolished during the last period when evolution of the legal framework under *Fatāwā-i 'Ālamgīrī* had become a reality.

2.4. Types of *Farmāns*: *Roznāmchah (Diary), Yāddāsht, Ta'līqah, Suyūrghāl, Thabtī Farmān, Al-Tamghah and farmān-i bayaẓī*

Roznāmchah[377]: (Diary) was overseen by a high *amīr* (chief), who had various writers under his command. They used to write every move and action of the king including his sayings of the day from morning till evening. It was then presented for

[373] Sarkār, *Mughal Polity*, 420.
[374] Ibid., 420.
[375] Ibid., 420.
[376] Sarkār, *Mughal Polity*, 420.
[377] *Roznāmchah*: It is also a Persian word used for a dairy, Dehlvi, Farhang-e-Asfia, 4: 383. Also see ARY, Hence Diarist xix, See *The Concise Oxford Dictionary of English Etymology* Edited by T. B. Sykes (Oxford University Press, 1985), 265.

king's approval of what should be included or what should be excluded, Abū 'l-Faẓl states giving examples of various diaries of Akbar.[378] When the king approved it, it was made into different copies and signed by officials such as *parvānchī*, *mīr 'ārż* and *amīr*[379] separately.[380] The original copy was kept safe, and given to the incharge officer who kept it in his custody after having a receipt. The full report was called *Yāddāsht*[381] or memorandum. As is clear, it used to keep the record of every action including the commands or *Farmāns* that the emperor used to issue. Hameedah Khātoon Naqvī, in her phenomenal work on the *Mughal* administration, states that the besides *Yāddāsht,* the court administration used to get every order written in a specific style, so that it should have no ambiguities. After full preparation, it was handed over to the staff of event writers, *risālahdār* and *dāroghah* to keep in their custody. This document was called *Ta 'līqah,* or a basic certificate that a bearer could have as a permission, she argues.[382] Although every other document required the seal of the king without which it used to lose its official worth, it is stated in *Ā 'īn* that *ta ' līqah* did not require this seal, as it was just a certificate of permission within the court. [383] However, seal was required for all types of other *Farmāns,* which did not have any importance before the seal was put on them. The *Farmāns,* which required seal, were appointment orders related to positions and lands,

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[378] Abū 'l-Faẓl, *Ā 'īn*, Vol.1,246.

[379] In some cases, these office bearers were renamed or reappointed on other posts according to the system. These offices were not permament and could change from one emperor to another emperor. See Sarkār, *Mughal Polity*, 420.

[380] Ibid., 102.

[381] *Yāddāsht*: It is a Persian word which means (i): to remember or mark to remember(ii): memories, dairy or something on which to write something to recall later, or notebook (iii): memory (iv): to write to remind something or a reminder, Dehlvi, Farhang-e-Asfia, 4: 774.
It is something in which daily report is written or it could be a notebook where daily data is placed. It could be daily report dairy.

[382] Hameedā Khātoon Naqvī, *History of Mughal Government and Administration* (New Delhi: Kanishka Publishing House, 1990), 81-82.

[383] Abū 'l-Faẓl, *Ā 'īn*, Vol.1,246.

salaries, or daily subsistence. Abū 'l-Faẓl has stated these in his *Ā'īn*, saying that appointments such as ministerial responsibilities, governorship, chief of the chiefs, teacher of a prince, or any other position having direct relevance to the emperor or the court of the emperor, were required to have a sealed *Farmān*. These were traditional *Farmāns,* as Bābur used to issue them, too.[384] Bābur's most of the *Farmāns* have the same bearings, as Abū 'l-Faẓl has given in his *Ā'īn-i-Akbarī* . He has stated another type of *Farmān* related to religious issues such as the *Suyūrghāl* type of *Farmāns.*[385] These *Farmāns* were differnet from other *Farmāns* which were fully executed or acted upon in auditing and military accounts, or civilian accounts branch. However, these types of *Farmāns* were sent to the *Ṣadr*, the main religious figure, appointed by the king as has been pointed out in the previous chapter. Abū 'l-Faẓl mentions still another type of *Farmāns* which do not need any imperial seal and were executed in some different way.[386] They were calld *thabtī* [387] *Farmāns*, as they were related to the stipends, grants and salaries given to the members of the imperial family.[388]

Another category of the *farmān-i shāhī* was called *farmān-i bayāżī*. Due to its importance it was written on a specific paper, knotted with the same paper form edge to edge so that the bearer could not read the text, and was placed in a golden cover. Only *Manṣabdārs* or *Aḥadīs* were allowed to carry this *farmān* to the required person but they had no access to the contents. [389]

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[384] Abū 'l-Faẓl,Vol.1, 246.
[385] Bābur, *Memoirs*, 260-261.
[386] Abū 'l-Faẓl, *Ā'īn*, Vol.1,246-47
[387] *Thabtī*: It has been derived from a Persian word sounding *sabt* which literally means to sign, scribble or note down, Dehlvi, Farhang-e-Asfia, 27 Also see Lughat Nama, Edited by Dr. Mohammad Moeen Akhtar and Dr. Syed Jaffar Shaheedi, Vol.5, 7267.
[388] Abū 'l-Faẓl, *Ā'īn*,Vol.1, 246-47
[389] Ibid.,Vol.1, 249.

2.5. Composition and Execution of *Farmāns*

According to Abū 'l-Faẓl, simple orders of appointments or *Farmān-i taqarrari*, were issued by the emperor himself written by the event writers, while these orders were passed on to *Dīwān* (caretaker), *bakhshī* (messenger) and *ṣāhib-i-taujīh* (military accountant). They were duly sealed by the writers with a proper seal of the emperor, which he himself placed on it according to the criticality of the *Farmān*[390]. These orders were of both types; appointment orders as well as grants.[391]

However, the issue with *Ta'līqah*[392] was a bit different. It was a simple order until it was handed over with the guarantee to the *Dīwān-i-jāgīr* (caretaker of the land), as stated by Momin Mohiuddin, who adds that it did not require a royal seal until it reached the person pointed out in it when the *Farmān* was actually drafted.[393] According to Abū 'l-Faẓl, it was dispatched to *bakhshī* to be checked in case it was related to military service and grant. The *bakhshī*, from his side, used to inspect it and complete necessary

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[390] Ibid., Vol.1, 246-47.

[391] Ibid., Vol.1, 247.

[392] ***Ta'līqah***: It is a plural of *Ta'līqah*, an Arabic word. It is also used in Persian in the same meanings. It means (1) to hang something like upside down (2) or law that is to be put into abeyance. (Syed Aḥmad Dehlvī, Farhang-e-Āṣfiyyah, Vol.2 (Lahore: Pakistan. Alim Press, 1908),613), *Ta'līqah* also means (i): a written document. (ii): (Civil) a certificate of *madrak*, order.(Dr. Hassan Anwari, Chief Edit. *Farhang-e-Fishardat-e-Sukhan, 1: No. 1223*, 428-429 (Tehran: Intisharat-e-Ilmi Khayaban-e-Inqilab ,Muqabil Danishgah, 1382 Hijrah). It also means confiscation of all bag and baggage or confiscation of a shop (2) a confiscated property or such a list that is called a page *Ta'līqah*.(Dehlvī, Farhang-e- Āṣfiyyah,Vol.2,613), The mutual communication or written communication between the kings in India is called Namah while the letters written to the administrators of the areas are called Farmans which are received by the officials coming out of their place of posting and received with great respect and honor.(Ibid, 631), *Ta'līq*: INF, ii of (*'Alq*) Persian hand writing or character; -----*Ta'līqah*, pl. *Ta'līqah*, marginal note, gloss; (m.) burning tinder; necklace, F. Stein Gass, Persian English Dictionary (London: Routledge and Kegan Paul, 1957), 309. See further details in Tareekh Muslimanan-e-Pakistan-o-Bhaharat, 1953), 1: 150. Also See *Urdu Lughat*, (on historical principal)Vol.12 (Karachi: Urdu Lughat Board, 1983), 309.

[393] Momin Mohiuddin, *The Chancellery and Persian Epistolography Under the Mughals from Babur to Shah Jahan, 1526-1658, a study on Inshā', Dār al-Inshā', and Munshīs based on original document* (Tehran: TehranIran Society, 1971), 57-58.

formalities and issue a certificate of *sarkhat* (certificate). The lower staff of the *bakhshī*, deputy and assistant deputies kept a record of such certificates in their offices, but it was duly sealed by the *bakhshī* himself.[394] However, before that it was handed to the *Dīwān* who ordered the clerks to execute the orders of granting salaries, rewards or lands. According to Abū 'l-Faẓl, it was put on the order as "majestic grant" and placed with other orders with the *Dīwān*. This was completed after the *Dīwān* signed after which it was called *Ta'līqah-i-tān* or order of salary.[395]

However, the procedure of its execution does not end here. It was then sent to the next office-bearer the *ṣāḥib-ī-taujīh* (account of the military expenditures), who kept all such orders with him and wrote fresh *Farmāns* to seal and sign himself to issue grants. A special auditor called the *mustaufī* then used to review it and put his signature and seal on it. Following this procedure, it was sent to the *nāẓir* (revision officer) and *bakhshīs* and *Dīwān* for verification and approached the *wakeel* (minister or prime minister) for his seal and signatures.[396] This is how a *Farmān* was executed after passing it through first, second, third and fourth stage. The entire procedure used to take a lot of time but it was necessary to complete this procedure to avoid fake and fraud grants issued at that time. It was also thought necessary to hold various officials accountable if there was any mismanagement or fraud.

Certain other *Farmāns* which were related to the higher appointments such as that of the governors and commanders, or related to the heir apparent, and other significant issues were not directly sent, but were given to the emperor to reivew and see that the

[394] Abū 'l-Faẓl, *Ā'īn*, Vol.1,247.
[395] Ibid.,
[396] Ibid,Vol.1,248.

message was passed correctly. The emperor used to make modifications or alterations if he deemends necessary and asked the writer, the *munshī*, to make necessary adjustments. However, it is important to remember that the emperor, as Abū 'l-Faẓl states, never used to pass any remark or get offended over such slips or mistakes made by *munshīs*.[397] In other words, the emperor used to see the important and critical matters of issuing significant *Farmāns* by himself; such was the importance of administration in the eyes of the emperor.

The case was different for some *Farmāns*. For example, Abū 'l-Faẓl states that *Suyūrghāls*[398](religious edicts) or commands related to some religious aspects of the public were first signed by *mustaufī*. They were then handed over to the department of the *Ṣadr*, the main religious authority appointed by the king himself, and where the *Dīwān-i-sa'ādat* used to review it. [399] The *Ṣadr* and *Dīwān-i-kul* used to sign it at the end for its final execution.[400] This clearly shows that the *Mughals* were fully cognizant of the departmental division and used to act upon it even when they used to issue *Farmāns*. This could be called a division of power, but it, in no way, used to interfer in the absolute authority of the emperor.

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[397] Abū 'l-Faẓl, *Ā'īn*,Vol.I 478.

[398] ***Suyūrghāl***: A word from Turkish language, *Suyūrghāl* means; **(i). Land:** a piece of land given as a reward; a reward or a prize or some financial assistance, or wages for working such as a village to be given as a *Suyūrghāl* in Thath,Vol.4(Maulvi Zakauiia, Tareekh-e-Hindustan, 1897), 38), A village for collecting 900 rupees revenge got as a soyurghal reward. (Ibid,. 134. Also see Muhammad Aslam Bin Muhammad Hafeez, *Farahat ul- Nazrin*, (Karachi: Pakistan: 1972), 134.), **(ii). Military:** An institution for the welfare of the army, or military land. (Persian English Dictionary by F. Stein Gass, 712). *Suyūrghāl* I are also issued for the welfare of the people for a long timeVol.5 (Maulvi Zakauiia, Tareekh-e-Hindustan, 1877), 704, also see (i) Dr. Ahsan Anwar, Chief Editor, *Farhang-e-Fisharuh-e-Sukhan*, reference from Ta'līqah, No. 1224,Vol 1: 1371. (ii) *Farhang-i Āṣfiyyah.,Vol.1*,586).

[399] Abū 'l-Faẓl, *Ā'īn*, Vol.I,248.

[400] Hare Krishna Menon, *Bureaucracy under the Mughals, 1556AD to 1707AD* (New Delhi: Amar Prakashan, 1989), 118-119.

In similar way, Abū 'l-Faẓl has stated the whole process of financial orders or *Farmāns* for cash payments, which was different like *Suyūrghāl*. He states that it was issued like an ordinary *Farmān* but was signed by a *nāẓir* (presenter), from where it passed on to *Dīwān-ī-buyūtāt* (caretaker of the treasure) and from there it went to the *bakhshīs* and main *Dīwān* to be signed by *khān-i sāmān* (caretaker of the cash treasure). After passing through various *buyutat,* the *Farmān* went to *wakeel* who issued then signed and sealed it for final approval for the payment.[401] This shows that the *Mughals* were very picky and careful in the cash payment. They understood the importance of financial regulations and issue of payments which could corrupt officials if given in single hands.[402] Therefore, separate *Farmāns* were issued in this connection.

The procedure for *Thabtī-Farmāns* was a bit different in that they did not need the seal of the emperor. These *Farmāns* were not presented to the emperor. According to Abū 'l-Faẓl, these were related to the specific salaries and monthly grants to royal family and families of the progeny of the Prophet (PBUH) or royal workers, or *bīrgīrāl* horses (which do not require maintaining a horse). This type of *Farmāns* was sent to the *Dīwān-ī-sa'ādat* for approval.[403] The big difference between this type of *Farmāns* and other Farmans was that in that all other *Farmāns* needed fresh approvals each time they were re-isssued, but *Thabtī-Farmāns* were sealed only once. They did not need to be demanded every year to be sealed. However, Abū 'l-Faẓl says that they were sealed once by ministers, and then sent to the *mustaufi* who received them and got special sanction from the *Dīwān* to let them pass. The rest of the procedure of their execution was the

[401] Abū 'l-Faẓl, *Ā'īn*, Vol.1,248.
[402] Srivastava, *Mughal Farmāns: 1540AD to 1706AD*, 27, 78.
[403] Abū 'l-Faẓl, *Ā'īn*, Vol.1,248.

same that they were to be approved by the *nāẓir-e-buyūtāt*, then by the *Dīwān-i-kul*, followed by the *khān-i sāmān* as well as *mushrif* of the *Dīwān*.[404] This type of *Farmāns* were different only in that every body took great care, as they were specially issued *Farmāns* and could have invited regal wrath in case of any mismanagement.[405]

Besides these *Farmāns*, Abū 'l-Faẓl has also mentioned other *Farmāns* which do not require imperial seals. They are *Sarkhāts*, sale-purchase receipt type of *Farmāns*, price lists or price related *Farmāns*, *'Arżnāmahs* (judicial statement sent to the collector), *qarārnāmahs* (confessional statements) and *muqāsā* (statement taken by *taḥṣīldārs* from *mustaufī*).[406]

Cursory glance of the procedure shows that the execution of a *Farmān* other than the *Thabtī-Farmāns* is very long and protracted. As stated earlier, the long procedure was adopted to avoid corruption and mismanagement. Although it could be tormenting for a common person, people aware of the administrative and management procedures felt it very easy to execute. It is because, as Abū 'l-Faẓl has pointed out , every department was responsible for any other delay in the procedure of the *Farmān*. The officers were also responsible to check and review the execuation of *Farmāns* at any stage.[407]He cites another advantage that is that all the civilian and administrative departments felt it quite easy to have separate *Farmāns* to be executed but there was no timeframe though the oral order was that they should be executed as soon as possible. However, what he stresses upon is that the procedure created a very smooth combination of civilian and military

[404] Ibid.
[405] Abū 'l-Faẓl, *Ā'īn*, Vol.1,248.
[406] Ibid.
[407] Ibid.

departments to stay in contact with and create check and balance system automatically.[408] In other words, there was little room for fraud or mismanagement through maladministration, sometimes, happened in every department. It is in no way, a claim that it was an ideal system but at least it paved the way for modern management system that the *Mughal*s derived from their ancient systems.

There was another tradition that was to keep the seal office separate from other departments and ministeries. It was because the seal of *Farmāns* was mostly kept in the royal family and sometimes in the custody of people having no links to any other officials within or out of the palace. This created a sort of cover against frauds and fake seals. Abū 'l-Faẓl has justified it by saying;

"His Majesty's object is that every duty be properly performed; that there be no unnecessary increase or decrease in any department, that fraudulent people be removed and trustworthy people be held in honour; and that active servants may work without fear, and negligent and forgetful men be held in check."[409]

This is a clear indication of how the *Mughal*s and their administrative minds used to create check and balance system during those times when it was considered herculean task. Modern management and administrative gurus are amazed at the system that the *Mughal*s created with the help of the local intellectuals, but it proved its effectiveness during those turbulent times. A travelling clergy has also pointed out the *Farmān* execution stating the seal was fixd on it within eight days after the receipt of the *Farmān* during which every document was subjected to rigorous inspection and evaluation. Even

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[408] Ibid.,Vol.I.246.
[409] Abū 'l-Faẓl, *Ā'īn*, Vol.I.247.

sometimes a confidential advisor, he highlights, brought final report to the king to remove any iota of error if there was any, or if there was any fraud. This was specially, he argues, done in the case of presents and rewards given to the foreign travelers and diplomats.[410]

2.6. Types, Possession and Uses of Royal Seals for Executing *Farmāns*

As there were different kinds of *Farmāns*, there were differents types of seals to prevent errors and to identify the type of royal commands. Abū 'l-Faẓl has stated that there were five types of seals, and they were all used for various types of *Farmāns;*

1. Chughtā'ī Seal
2. Large Royal Seal
3. Square Seal
4. Miḥrābī Seal
5. Female Department Seal

Abū 'l-Faẓl states that *Chughtā'ī* Seal was also named as *uzuk*. It was specifically used for only royal *Farmāns* or *Thabtī Farmāns* when the emperor confers some royal or high dignitary from the royal family with some title, makes an appointment or confers a piece of land or sanctions a huge sum as a reward. However, the larger royal seal was used for common *Farmāns* issued from time to time. This sign shows the lineage with names of all of his predecessors inscribed on it. It was specifically used for diplomatic letters to the kings. The other *Farmāns* issued from time to time for running the administration of the government in the capital and other cities for which there was a

[410] Father Antonio Monserrate, *The Commentary of Father Monserrat, S. J., on His Journey to the Court of the Akbar, trl. John S. Hoyland,* anno. by S. N. Bannerjee (London: Oxford Univeristy Press, 1922), 209.

square seal. Opposed to all these, as stated by Abū 'l-Faẓl, the judicial seal was specifically used for judicial proceedings. It was *miḥrābī* or twisted in shape with king's name as in a verse which signifies the justice of the king that it is done to please God. Besides these seals, another seal was there to be used for females.[411] Different seals were, perhaps, used to signify that the *Mughal*s were very picky in the matters of legal proceedings. They wanted to create some system that could be hard to evade and avoid.

Among all the royal seals, the *uzuk* was of critical importance, as it seems from the types of *Farmāns* for which it was used to verify drafts of various *Farmāns* of critical importance. This seal was given in the charge of a very trusted person. There was, however, no tradition or a rule that it should be given to a specific person.[412] It, however, is very significant that Abū 'l-Faẓl has nowhere stated the significance of these seals in explicit or implicit terms. Perhaps, he has completely ignored the official importance and significance of these oryal seals. He has casually referred to these seals when acknowldging service of Khavājah Jahān.[413] It was used to appoint him at some important position during the 11th year of Akbar's rule, the great. It was given in the charge of him, when Bairam Khān lost his worth in the court, he states.[414] Father Monserrate, on the other hand, states that the seal was kept in the custody of a queen,[415] he does not name who she was. However, he states that it was a royal signet kept with a minister who used to sign a *Farmān* after eight days when it was issued. Father Monserrate observed this during Akbar's Kabūl expedition in the year 1581 when he was

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[411] For details see Abū 'l-Faẓl, *Ā'īn*, Vol.1,88-89,248-49,251-55.
[412] Ibid., Vol.1,88.
[413] It was title that the *Mughal*s used to confer later though earlier he was an Amir of 5000, "who died in the time of Jahāngīr in 1919" in Lahore." See also Thomas William Beale, *The Oriential Bibliography Dictionary* (Calcutta: Baptist Mission Press, 1881), 158.
[414] Abū 'l-Faẓl, *Ā'īn*, Vol.1,249.
[415] Monserrate, *The Commentary*, 209.

also accompanying him to that expedition. The word he has used here is *muhr-i-muqaddas-i-kalāh*, and it was handed over to the queen.[416] During the end of the rule of Akbar, the seal was handed over to Mirzā Azīz Koka[417] who was given the title of the great *khān* by the emperor during his 14th year of reign on India.[418] He remained custodian of the royal seal until the death of Akbar. After that it was handed over to the new heir apparent. It means that the seal was kept in the custody of the most trusted person or whoever was trusted by the emperor. It could be a queen or a princess or a person out of the royal family like Mirzā Azīz Koka.

There is another account of the custody of the royal seal during Jahāngīr's era. It has been found from his memories translated by Alexander Rogers who says in the words of Jahāngīr;

"When I was prince I had entrusted, in consequence of my extreme confidence in him, my own *Uzuk* seal to the *Amīr al-Umārā'* (Sharīf), but when he was sent off to the province of Behār, I made it over to Parvez. Now that Parvez went off against the Rana, I made it over, according to the former arrangement, to *Amīr al-Umarā'*."[419]

This again clarifies two important aspects of *Farmāns* and executation of *Farmāns*. The first thing is that it is very important that a *Farmān* should be sealed properly with the seal. The second is that not every *Farmān* should be sealed, which means that not a common command should be sealed. This shows that a person who had

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[416] Ibid., 209.
[417] Mirzā Aziz Koka was also named as Khān-e Azam. He was also called Kotaltash. He was a foster brother of Akbar and lived with him for the rest of his life and was made governor of Gujarat, which was a province at that time. Also see Mukhia, *The Mughals of India*, 55.
[418] Abū 'l-Faẓl, *Ā'īn, Vol. I*, 86.
[419] Jahāngīr, *Tuzuk-i-Jahāngīrī*, 18.

a seal must be confidant of the emperor and be trustworthy. This was an extreme caution to prevent fraudsters from using the emperor's seal for their own vested interests.

In his book, *Pādshāh Nāmah*, Abdul Ḥamīd Lāhaurī narrates another incident during the reign of Shāh Jahān in his own words. According to him, the *uzuk* seal was given to Mumtaz Mahal after which it was handed over to Asaf Khān, who was recommended by the queen. However, he handed it over back to the queen when leaving for Deccan expedition and got it back when returned. After his death during the second Deccan campaign, Begam Sahib kept it, and duty of putting the seal on the *Farmāns* was assigned to her until her death.[420] Following this, it is said that it stayed in the *ḥaram* (women living place) with one or other queen until Aurangzēb got it back and used it himself. It becomes clear that the *Mughals* were very particular in issuing and executing *Farmāns* and they ensured that their words were not lost in the air. They knew it very well that if their *Farmāns* were not paid attention, they would not rule for another day. Their survival lied in making strong words and then ensuring implementation of those strong words, and this seal worked wonders in this connection.

3. Sources of *Farmān-i-Shāhī*

Although most of the laws were based on the wishes and whims of the emperor, for an emperor was an absolute ruler, yet it does not mean that he was completely absolute. An emperor must keep all the traditions, social conventions, customs, religions, faiths and tribal issues in mind when issuing a *Farmān*. About the sources of *Mughal Farmāns*, perhaps the strong influence or source has been the Islamic *Sharī'ah*. It has been a prevalent law during the previous Muslim rulers in India. In his book, *The Central*

[420] Lāhaurī, *Pādshāh Nāmah*, 406.

Structure of Mughal Empire. Ibn Ḥasan states that all the disputes whether they were civil or criminal in legal terms, were decided according to the rules and regulations derived from the *Holy* Qur'ān and *Sunnah* (the ways of the Holy Prophet (PBUH)). The *Sunnah* not only means the ways the Prophet (PBUH) used to act, say and behave, it also means the meanings of the *Holy* Qur'ān and their contextualisation.[421] Although the *Sharī'ah* ruled the roost over every other law, the *Mughal*s also used to issue common *Farmāns* and *dasātīr-ul-'amal* (rules of business) to run the government. Ibn Ḥasan says that such rules of business issued from time to time were called *Qānūn-i-Shāhī* (royal decree or royal law). Ibn Ḥasan has quoted all the books comprising these royal decress such as Abū 'l-Faẓl's *Ā'īn* and *Fatāwā-i 'Ālamgīrī*, adding that they are still in conjunction with the Islamic jurisprudence, mostly which is close to the *Sunnī* sect instead of *Shī'ah,* who were more influential during the previous *Mughal* rulers before Aurangzēb.[422]Dilating upon the *Mughal* judicial system, Basheer Ahmed has also expressed similar view as Ibn Ḥasan has argued in his book. He is of the view that as the Qur'ān and *Sunnah* were considered supreme, the *Mughal*s could not but adopt the same which their previous kings adopted in India.[423]H. S. Bhattia agrees with both Ahmed and Ibn Ḥasan about the foundations of the laws of the *Mughal* empire.[424] On the other hand, Basheer Ahmad, though agrees, but differs in saying that the *Mughal*s cared very much about *Islam*, but they cared much about other faiths as well, as Hindus were in a large majority in India and without pacifying them about laws, it was not possible to

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[421] Brannon M. Wheeler, *Applying the Cannon in Islam: The Authorization and Maintenance of Interpretative Reasoning in Hanafi Scholarship* (US: State University of New York Press, 1996), 56.
[422] Ibn Ḥasan, *The Central Structure of Mughal Empire.* (Karachi: Oxford University Press, 1967), 93.
[423] Aḥmad M. B., *Judicial System of Mughal Empire*, 51.
[424] Harbans Singh Bhatia, *Political, Legal & Military History of India* (New Delhi: Deep & Deep Publications, 1984), 156-57.

implement what was anathema to them.[425] However, there were certain laws and commands which did not originate from these Islamic sources. These were due to the impacts of, Bhatia says, local customs, tribal conventions and social traditions. These were called, he says, the *Qānūn-i -'Urf* (common laws).[426] Jādūnāth Sarkār has beautifully summed up the whole case of the laws saying that courts also contributed to developing good precedents, for they were autonomous when giving decisions. Muslim clerics and scholars used to collect these decisions to assist the Muslim judicial officers, *Qāḍīs*, in deciding different cases in the light of the precedents set by the courts. The *Qāḍī* was also fully autonomous to use examples and precedents but he was not restricted to the precendents. He was permitted to make his own interpretations.[427] In this connection, this was similar English law where courts are free to interpret laws keeping in view the precedents set by the superior or earlier courts. This was above and besides the laws made in viewing the social customs and conventions. It means there were four major sources of the *Farmāns* in the light of this discussion.

1. The Qur'ān and *Sunnah*
2. Social Customs and Conventions
3. Court Precedents
4. *Qāḍīs'* Interpretations

Even Islamic law or laws made in accordance with *Sharī'ah* that is the Qur'ān and *Sunnah* were dual in nature. The first types of these laws were civil laws which were tried

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[425] Muhammad Basheer Ahmad, *The Administration of Justice in Medieval India* (Aligarh: The Aligarh Historical Research Institue, 1941), 71-72.
[426] Bhatia, *Political, Legal and Military History of India*, 157.
[427] Jādūnāth Sarkār, *Mughal Adminstration* (Calcutta: Orient Longman Ltd. 1952), 37.

in the civil courts and second were *Fatāwā* which were just edicts of the Muslim clergies, but sometimes were not binding as argued by Bhatia.[428]

3.1. Civil Laws

Here civil laws mean both civil as well as criminal laws. According to Basheer Ahmed, the judicial system applies and considers both types of laws as the same. Sources for both of them were four as given above, though Basheer Ahmad has not differentiated each of them but he has discussed as if all of the sources were within the jurisdiction of the court or the judge.[429] Bhattia cites the same thing which means he agrees with Ahmed but has given custom as a separate source which Ahmed has not highlighted.[430] It means that laws were even derived from the original sources, and only these four sources were used besides the *Farmān* of the emperor which was also used to be derived from the same source and requirements of the time after valid interpretations of different Islamic sanctions.

3.2. *Fatāwā*

A *Fatwā* is a religious edict that, though, becomes compulsory when issued by a seasoned and well-known jurists and expert of religious affairs. it, by no way, replaces an already promulgated law, or new legislation, as it is subject to different interpretations. Norman Cadler[431] has called it *iftā* that is perhaps a plural of *Fatwā* in Arabic saying that the managnement of law in Islam depepends on three persons; the jurist, the *Muftī* and the *Qāḍī*. The first one derives the legal injunction, the second one interprets and the third

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[428] Bhatia, *Political, Legal and Military History of India*, 157.
[429] Ahmad, *Judicial System of Mughal Empire*, 51.
[430] Bhatia, *Political, Legal and Military History of India*, 157.
[431] Norman Calder was born in 1950 and died in February 13, 1998. He was a British historian and a scholar of Islamic history also, see Cadler, Islamic *Jurisprudence in the Classical Era*.

one implements as well as interprets it further.[432] However, at the same time he is of the view that a *Fatwā* is not a legal injunction in the strict legal sense. He says that "a judicial decision is binding and a *Fatwā* is not" adding at the same time that "This however is not a real difference and does not imply any contradiction between the *Fatwā* and the judicial decision in respect of a particular event."[433] It means a *Fatwā* is the same as a law derived from anything else, or a decision made thereof, but the only difference is that law has the power of the state for promulgation but a *Fatwā* is only a religious injunction, having only the power of belief. It becomes law when the power of the state backs it.

In the case of *Mughals* in India, the power adopted Islamic sources as the derivatives of law but at the same time, the power (state) also refrained from entirely taking up Islamic laws as the state law. The *Mughals* never declared themselves caliphs, or viceroys, or deputies of the caliphs, so that they could implement Islamic laws. However, whenever the situation arose that they needed to find out some exigency, they immediately reverted to Islam and Islamic *Sharī'ah*. Therefore, they found refuge in *Fatāwā*, whenever there was an onslaught of the criticism from the Muslim clerics. Aurangzēb gave much attention to the compilation of *Fatāwā*. 'Abd al-Ḥayy al-Ḥasanī, a Pakistani scholar of the *Mughal* period, argues that such *Fatāwā* books were becoming a norm in the court. They were often consulted for ruling injunctions by almost all the *Mughal* emperors down to Akbar. He says that *Fatāwā-i 'Ālamgīrī* compiled during the period of Aurangzēb was considered a trustworthy source of Islamic law in India. A team of Islamic clerics toiled day and night to compile it. Even still, he adds, Pakistani courts consult it due to dominance of the *Sunnī Islam*. Arguing his case further, 'Abdul Ḥayy al-

[432] Cadler, Islamic *Jurisprudence*, 117.
[433] Ibid., 127.

Ḥasanī names another collection that is *Fatāwā-i-Ḥammādiyyah*, which he calls a "rich collection" written by Rukn-ud-Dīn and his son Maulānā Baud in the ninth century on the order of *Qāḍī-ul-Qūḍāt* of Naharwal (great judge of Naharwal). The book, he says, was originally written in Arabic but was later translated into Persian and Urdu too. 'Abdul Ḥayy al-Ḥasanī yet names another collection that is *Fatāwā-i Tātārkhāniyyah* written to help of Amīr Tātār Khān in his governance and administration.[434] This clearly shows that the Muslim rulers of India, specifically, the *Mughal*s paid a great attention to Islamic sources of laws and often wrote and composed their *Farmāns* in the light of the Islamic teachings to appease the Muslim population and strengthen their base of the martial race. Commenting on the importance of different *Fatāwā* collections and their practical utility in the field of law, Chibli Mallat[435] has made very important comments saying "As a practical indicator of legal change, it is argued, *Fatāwā* have affected law in practice, though not perhaps *Fiqh* treatises."[436] This claim clearly leads to concept that *Fatāwā* were written on a grand style and were collected to help jurists and legal minds to find ways out through Islamic ways of life. Abū 'l-Ṭāhir Al-Fārisī recounts another example of such a collection named as *Fatāwā-i Qarakhanī* written by Maulana Imām Humām. Later Qabool Qara Khān compiled it to present to *Sulṭān* 'Alā-ud-Dīn. It was written in Persian language.[437] Ismā'īl Pāshā mentions another great collection titled as *Al-Fatāwā al-Ghayāthiyyah* which was written by Dā'ūd Bin Yūsuf during the period of Bulbon in

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[434]Abd al Ḥayy al-Ibn Ḥasani Bin Fakhr al- Dīn, *Nūzẖar-al-Khawātīr wa Bahjat al Masmāi'wa* al – Nawazir,Vol.2 (Beirut:Dar Ibn Hazm, 1999), 148.

[435] Chibli Mallat was born on 10 May, 1960. He is an international lawyer as well as a law professor. Also see www.mallat.com.

[436] Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford Univcersity Press, 2007), 91.

[437] Abū 'l-Tahir Al Farisi, *Makhtūtāt-i-Farisiyyah* (Lahore: Punjab Public Library, 1957-1958), 77-78.

1266 or 1267 A. D.[438] Muhammad Basheer Ahmed has mentioned it, too, adding that even during Feroz Shah Tughlaq[439]'s period, *Fiqh* was arranged as *Fiqh-i-Feroz Shahī*, which was translated from Arabic to Persian at the same time. He comments on its legal value saying that it relates to both criminal as well as civil law and adds that it helped 'Ālamgīr better than other *Mughal*s to lay the foundations of his judicial system.[440] It shows that *Fatāwā* helped *Mughal*s in two ways. First, they used *Fatāwā* to formulate laws, legislate and promote their judicial system. Secondly, they used collection of *Fatāwā* to bring stability. However, another utility of *Fatāwā* had been that they consulted the collections when issuing a *Farmān* to save themselves from the religious wrath of the public and clergy alike.

The cursory view of these these collections also makes it clear that the *Mughal*s did not cut off their legal system from the past rulers of India. They rather borrowed heavily from them, using all the *Fatāwā* collections and adding new ones to the existing to run their system according to the Islamic laws as much as possible. It could be that they had a great penchant for Islam and Islamic laws, but it is clear that they loved stability and strengthening of their personal rules more than the religion itself. The discussion of *Ā'īn-i-Akbarī* in the previous chapter regarding the Divine Faith is a case in point that Akbar tried his best to devise his own faith to reconcile two contradictory and opposite poles of Hinduism and *Islam*. However, it is another matter that he could not

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[438] Iṣmāeel Pāshā, *Edāh al-Maknūm, Vol.2*(Al-Makkāh al-Mukārramāh: al-Maktabāh al-Faisalīah, 2001),157.

[439] *Sulṭān* Firuz Shāh Tughlaq was born in 1309 and died in 1388. He was a Turkic Muslim ruler belonging to Tughlaq Dynasty. He reinged India from 1351 to 1388. Also see, Manāẓir Aḥmad, *Sulṭān Fīroz Shāh Tughlāq, 1351-1388 A.D.* (Delhi: Chūgh Pulibcations, 1978), 1-4.

[440] Ahmad, *Judical System of Mughal Empire*, 20.

succeed, but it is a proven fact that he used previous *Fatāwā* collections to further his own end of stability and legitimacy for his *Farmāns*.

4. Legal Status of *Farmān-i-Shāhī*

From the given types of *Farmāns* and their implementation, it seems there was no legislation process during the *Mughal* period. However, Jagadish Narayan Sarkār states that "there was nothing like legislation in the modern sense of the term. But that does not mean that written laws were absent" adding that there were well-codified Quranic laws having strong backing of the public along with institutions modified from Mongols and Chengēz Khān.[441] By written laws Sarkār means the laws were legislated by the emperor himself in the shape of differents types of *Farmāns* and each type of *Farmān* had its own legal status and value in which it was promulgated with the full force of the state. Although several authors and legal minds also state that the *Mughal* Empire collapsed because of the legal loopholes that the public found in the *Mughal* laws after the advent of the British, but S. R. Sharma has categorically stated that this was not the case. There was "social legislation of the *Mughals*" but the fact is that "the Empire collaposed with the deterioration of its military strength" and not due to the legal issues or that it did not have the complete legal system.[442] Raj Kumar has shed detailed light on the legislation process during the *Mughal* period in his essay "Judicial System in Medieval India,"saying that the arrival of the Muslim "marks of a new beginning in the legal history of India," adding that Islam itself was a political theory which gave its Holy book the Qur'ān and ways of the Prophet (PBUH) (*Sunnah*) as new ways to legislate and made laws though

[441] Sarkār, *Mughal Polity*, 173.
[442] Sharma, *Mughal Empire in India: A Systematic Study Including Source Material, Vol. 3, 882.*

some were already codified in the Holy book.[443] It means that *Farmāns* were also part of the legislation which was made from time to time to run the government, made administration run smoothly and govern the entire polity. This was a type of legislation. However, it is another matter that each *Farmān* has its own legal status if viewed from the prism of the modern legal and constitutional mentality. Whatever the conjective about the *Farmāns* and their status is, it has been found out that no *Mughal* emperor made any effort to prepare a codified set of laws like Roman laws. Perhaps, it was too difficult for them, or that they found an easy way out in the Islamic texts and history. Whatever the reason is, one thing is laudable that finally Aurangzēb felt the need to prepare a good code of laws. He realized it very much that there is dearth of collection M. A. Khān states in is book, Islamic *Jihād: A Legacy of Forced Conversion, Imperialism, and Slavery*, adding that it was Aurangzēb who "patronized the composition of the *Fatawa-i 'Ālamgīrī*, a great compendium of *Ḥanāfī* laws" to which he calls a task neglected so long even in the Arab world.[444] Commenting on his efforts, Firas Alkhateeb says that leaving beside what Aurangzēb is called "bigoted" and "intolerant," his efforts to bring "hundreds of scholars of Islamic law to work out a solution" resulted in the shape of this book of *Fatāwā* which is a great "collection of religious decrees based on the *Ḥanāfī* School of Islamic law."[445]In fact, it was the effort of Aurangzēb to bring his own *Farmāns* or imperial decrees within the ambit of religious legal cover, though earlier *Farmāns* were never given such a legitimized legal cover as Aurangzēb did, and it could have been his political compulsions, for he realized that the *Mughal* empire was facing

[443] Raj Kumar, *Essays on Legal System in India*, 43.
[444] M. A. Khān, Islamic *Jihād: A Legacy of Forced Conversion, Imperialism, and Slavery* (1 Universe, 2009), 153.
[445] Firas Alkhateeb, *Lost* Islamic *History: Reclaiming Muslim Civilisation from the Past* (Oxford: Oxford University Press, 2014), 170.

instability from the inimical Hindus. In the midst of this codification and rewriting of laws, the legal status of *Farmān-i-Shāhī* is sometimes of a civil legal injunction, sometimes of criminal legal injuction, sometimes of a constitutional legal injunction and even sometimes of a quasi-religious legal injuction. *Farmāns* were written and composed according to the nature of the situation but as the legal field was not as evolved as it is now, there was no process of democratic legislation but it could be equalled to the same if an emperor consulted his elite class and got composed a *Farmān* to run his government. Some of the *Farmāns* given below have been reviewed from legal point of view to determine how the *Mughals* acted to win public legitimacy.

4.1. *Fatāwā-i 'Ālamgīrī*: Legal Status and Relevance to *Farmāns*

Fatwā, a religious term signifies religio-legal opinions or decisions given by religious jurists or *Muftīs* (religious scholars) on any religious point by forming a consenus to create a precedent as a law. *Fatāwā-i 'Ālamgīrī* is a collection of these legal opinions written according to the *Ḥanafī* sect, or *Ḥanafī* school of thought which was in dominant majority during the period of Aurangzēb. Muhammad Taqi Usmani, a well-known *Muftī*, is of the opinion that this collection is based on the past clerics, *Muftīs* and well-known jurists to make work of the future *Qāḍīs* and scholars easy.[446] This opinion of an existing veteran jurist validates its legal status in religious interpretations and their validity in the existing period. This collection has been widely hailed as the first attempt after which various other collections saw the light of the day. Although during legal period, no more such polemics and efforts to collect the results of the quasi-religio-legal polemics were made with the same enthusiasm as during the period of Aurangzēb.

[446] Muḥammad Taqi Usmani, *Taqlid Ki Shari Haythiyyat* (Karachi: Maktaba Darul Ulum, 1396 H), 14.

Discussing its legal status, Sabah Bin Muhammad of Hamdard University, New Delhi says that though *Fatāwā* reflects the *Ḥanafī* law, it "also relates to the views of the jurists from other schools."[447] It is such a valuable document, he asserts, adding that it is still referred in the Indian courts regarding Muslim family laws.[448] Its importance has not lost to the foreign minds, too. Even Sir Roland Kinyvet Wilson, who is known for having an authority on the influence of Islam and its legal conventions on the English law, says that *Fatāwā* contains "judicial opinions of the *Mujtahīd*s of the best period."[449] Discussing further, Wilson has also compared the qualities of two *Mughal* emperors, Akbar and Aurangzēb, saying that Akbar found religion and law incompatible, hence are his efforts to intorduce the Divine Faith, but Aurangzēb found justice in "the law of *Islam*."[450] Although he berates that does not conform to the onslaught of modernity, his earlier praise for the emperor for his efforts to document *Fatāwā* and his penchant for Islamic justice stands a testimony that *Fatāwā*, indeed, had been a very authentic legal document of the *Mughal* period on which the Muslim family laws of the present era hinge.[451] Even Sir George Claus Rankin is all praise for *Fatāwā* when commenting on the analysis of Harington regarding the application of *Fatāwā* in Bengal Regulations. He is of the opinion that had there been conquerors other than the British, they would have abolished it completely, thinking that it reflects the "arms, religion and policy of Mohammad" but he takes price in saying that the principles of their well-known philosopher, Edmund

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[447] Sabah Bin Muḥammad, "Judicature of Islamic Law in Medieval India (Kuala Lumpur: ICASIC2016, Malysia), 10.
[448] Ibid., 10.
[449] Sir Roland Knyvet Wilson, *Introductoin to the Study of Anglo-Muhammadan Law* (London: W. Thacker, 1894), 85.
[450] Ibid., 86.
[451] Ibid., 86.

Burke, have been preserved in keeping it intact and implement it with modifications.[452] Writing about decline of the *Mughal* Empire and increase in legal scholarship on the basis of *Fatāwā*, Iza R. Hussain writes that though militarility the *Mughal* Empire seemed to have declined but it "stimulated a moral and cultural competition among successive powers that fueled an increase in Islamic legal scholarship."[453] He is referring to *Fatāwā-i 'Ālamgīrī*, so pervasive and effective was its impact that even the occupying powers and their scholars could not stop short of praising this legal document and its impact on the masses and the time to come regarding legal and legislative evolution where Islam was a dominant force.

The question, however, arises, what *Fatāwā* has to do with *Farmān-i-Shāhī*. The answer is provided by the discussion given above that the emperors were very much aware that their fiats or dictates must need legitimacy that should be legal, valid and acceptable to the public. Religoin has worked very much, specifically *Islam*, and if all the *Fatāwā* are documented, the emperor and his staff would find it easy to extract any *Fatāwā* that suited their circustances. In fact, *Fatāwā* came to light very late during the *Mughal* period when evolution in the social life had been reasonable enough to give oral orders a written shape. Although most of the *Mughal Farmāns* were in written, the documentation of the religious edicts on the line of some collections gave a good way to the late *Mughal*s, like Aurangzēb, to build their administrative structure on the basis of law and order situation that must be restored through any ways. Hence, *Fatāwā* helped

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[452] Sir George Clause Rankin, *Background to Indian Law* (Cambridge: Cambridge University Press, 2016), 168.

[453] Iza, R. Hussain, *The Politics of* Islamic *Law: Local, Elites, Colonial Authority, and the Making of the Muslim State* (Chicago: Chicago Press University, 2016), 173.

the late *Mughals* to restore peace, bring normalcy and use their *Farmāns* according to the legitimacy provided by this religious-cum-legal collection.

4.2. Significant *Farmāns* and Their Legal Review

Confidential *Farmāns* relate to those royal *Farmāns* of critical nature that could not be placed in the hands of the minor officials. These *Farmāns* were called *Farmān-i-Bayażī*. Jahāngīr has specifically mentioned these *Farmāns* in his *Tuzuk*. He states that they were so much important that they were written on specific paper, knotted with the same paper form edge to edge that the bearer could not read, and were placed in golden cover. Only *Manṣabdārs* were able to carry these *Farmāns* to the required persons without reading them. He further states that such *Farmāns* were issued only when it was required, or according to the criticality of the situation.[454] The incident of the background of this *Farmān* is related by Jahāngīr as such that Prince Khurram requested Jahāngīr to issue a *Farmān* to 'Ādil Khān. Jahāngīr issued that *Farmān* in the same way as requested by Prince Khurram. The *Farmān* was sent to 'Ādil Khān with a copy to Prince Khurram after it was sealed. Similarly, he requested two other *Farmāns* to be sent to Sir Thomas Roe, relates Jahāngīr and they were also duly issued.[455] This *Farmān* clearly showed that in terms of administration, the *Mughals* were never lenient and hesitant in issuing any *Farmān* that is of significant importance, and the criticality of the situation demands it to be issued at once. The same is the case with this *Farmān* that no delay was made, as it would have cost Prince Khurram dearly in terms of life and money. Therefore, Jahāngīr himself treated such *Farmāns* very seriously, and issued it at once. This is an emergency case in which legislation, whatever it could be called at that time, was immediately

[454] Jahāngīr, *Tuzuk*, 94.
[455] Ibid., 97.

necessary. The status of such critically significant *Farmāns* in legal terms is very important and binding.

i. *Farmān* of Akbar to *Fawjdārs*

In the same way, Abū 'l-Faẓl, as translated by Balochman relates a *Farmān* issued by Akbar to judges or *Qāḍīs* regarding the people who commit disobedience to his *Farmāns*. It states that the *Fawjdār* (judges) is a cultivator or collector of the revenue of the land of the crown or the empror. Therefore, any person who rebels against *Fawjdār*, he should be treated as a rebel and should be reprimanded in the first instance but if he did not accept this, he should be tried and chastised to be camped with the rebels in the neighbourhood.[456] From modern standard, this *Farmān* is a command to punish the rebels or person who commits high treason that is treachery against the state. It is akin to the modern-day high treason case that is written in various constitutions and amount to capital punishment.

ii. *Farmān* of Akbar to *Qāḍīs* for Murder Cases

Abū 'l-Faẓl relates in his *Ā'īn* that the sentences of blinding or chopping off a nose or ear was stopped for smaller crimes such as theft and burglaries. It is because, he states, there was a legal punishment of chopping off the hand (Islamic punishment) and capital punishment for a killer unless he was spared by the relatives for blood, money or otherwise. However, no officer other than a proper judicial officer called *Qāḍī* or Cannon Law Judge to inflict these punishments. He goes on to say that as the Qur'ānic law, the major source of the *Mughal Farmāns*, did not allow to inflict such punishments on the

[456] Abū 'l-Faẓl Allāmi, *Ā'īn-i-Akbarī*, Trans. by H. Balochman,Vol.I (Lahore: Sang-e-Meel Publications, 2004), 572.

offenders, these punishments were not valid and hence null and void. Hence, these punishments were not judicial acts and were not sanctioned by the royal authority. This was issued to the judicial and other civilian officials to refrain from awarding such punishments.[457] This *Farmān* is clearly an example of the initial attempt of formulating criminal procedural code and streamlining the punishments to win public legitimacy in the eyes of the Muslim public that, indeed, the emperor is not inflicting these punishments but these are from God and has a moral foundation.

iii. *Farmān* of Akbar to Subordinates to Perform the *Sajdah*

However, it is very strange that Akbar, as stated by Abū 'l-Faẓl further, issued some other *Farmāns* which rather created ripples among the Muslim clergy. The nature of these *Farmāns* show that they were intended to win respect or honor or instill fear and awe of the emperor in the public, so that nobody could think of rebelling against the empire. Faẓl states that besides *kūrnīsh* and *taslīm* (special greetings by bowing, Akbar's courtiers were asked to perform *Sajdah* (perform bows as in prayer) to the emperor. Even more strange is that Abū 'l-Faẓl has justified it in his book saying that "They look upon a prostration before his Majesty as a prostration before God; for royalty is an emblem of the power of God."[458] This would surely have enraged the Muslim clerics who must have rise to rebellion but it could be that the force of the state was much stronger and forceful at that time than the later period when this was declared null and void. Earlier, some of the people succumbed to it and others resented. Sir Jadunath Sarkār has confirmed that it proved intensely a red rag to bull for the Muslims in general and clergy in particular yet even later emperors Jahāngīr and Shāh Jahān continued until public opinion turned

[457] Abū 'l-Faẓl, *Ā'īn, Vol.2, 733.*
[458] Ibid., Vol.1, 156.

entirely against this *Farmān*. The courtiers pressed upon Shāh Jahān, states Sarkār adding, that he abolished it shortly after he came into power.[459] Now such type of *Farmān* could be like the protocols that the modern-day rulers win from the public through their selected parliaments yet the public resents such protocols in varous countries. This means that could it have been a constitutional type of *Farmān* which was abolished as soon as the publich resentment againt it grew.

iv. *Farmān* of Akbar Regarding Slaves

This was the time in India when slavery was rife in the world, specifically in the present-day America. However, Islam strongly opposed slavery and stressed upon the Muslims to end it. There are even rules and laws to treat slaves. Hence, there were *Farmāns* for slaves, too. During Akbar's period, Abū 'l-Faẓls states that the salves of the palace were declared as emperor's disciples through his *Farmān*. It was due to religion, Abū 'l-Faẓl argues, that Akbar did not like calling them *bandah* (man), or slave which means that the caller or the emperor is their master. Abū 'l-Faẓl adds that Akbar thought that there is only one master that is God. All others are his slaves. Therefore, he adds, many of his slaves became his disciples and chose that "road to happiness."[460] This *Farmān* relates to a simple rule that is akin to the modern-day rules of business type of *Farmāns*.

v. *Farmān* of Akbar Regarding Singing

As stated in the previous chapter that religion was almost anathema to Akbar, as it did not let him rule absolutely. Sometimes he used to issue *Farmāns* which were entirely

[459] Sarkār, *Mughal Administration*, 103.
[460] Abū 'l-Faẓl, *Ā'īn*,Vol.1, 253.

against the religious codes. *Islam*, even at this time, at least in certain interpretations, bans music and dance. At one place, Abū 'l-Faẓl says that the emperor issued a *Farmān* that the singers, both male and female, should be on standby near private apartments, should the emperor require them to sing at any time.[461] He has stated it at aother place that there were court musicians having seven groups, who used to sing or play music each day of the week. In his own words, whenever the emperor ordered, "they let the wine of harmony flow."[462] That is, perhaps, the very reason that most of the western writers have declared Akbar, a first secular ruler of India. For example, Domenic Marbaniang calls his policies and methods "contained the secular seeds of state-sanctioned religious freedom and dignity."[463] It is the result of such and various other such types of *Farmāns* that he is claimed to have laid the foundations of modern day secular India during his period. Later, claims Jādūnāth Sarkār, the practice of keeping musicians to bow before the emperor and play music in the court was abolished on such a *Farmān* issued by Aurangzēb Ālamgīr during his reign when certain clerics pointed out that it is against *Islam*.[464]

vi. *Farmān* of Aurangzēb to Judge for Blood Money

Although it is rare that an emperor step into the matters of judiciary, the *Mughals*, as absolute monarchs, used to issue *Farmāns* to the judicial officers to act in a certain way. However, a very significant case was brought to Aurangzēb which was related to his brother Murād Bakhsh. As a governor of Gujarat, he murdered an officer, the sons of whom demanded *Qiṣāṣ* (revenge) from the judge after the prince was arrested. Hussaini gives this *Farmān* ad verbatim to show that the *Qāḍī* offered bloodwit, or blood money to

[461] Abū 'l-Faẓl, *Ā'īn*.,Vol.I, 154.
[462] Ibid.,Vol.I,154.
[463] Domenic Marbaniang, *Secularism in India: A Historical Analysis* (Banglore: AAHE, 2011), 39.
[464] Sarkār, *Mughal Administration*, 93.

be paid, but Aurangzēb issued a *Farmān* rejecting this blood money. The prince was awarded punishment as per the law of the land, which is akin to a mercy petition.[465] This is clearly a way how a mercy petition is sent to the head of the state. Then the law department advises him to reject, or accept it on the basis of the merit. It could be that Aurangzēb had consulted religion and *Farmān* advisors in this connection, too.

vii. *Farmān* of Aurangzib Regarding Criminal Law for Minorities

Although *Farmāns* similar to the exising criminal penal code also existed during the *Mughal* period, they were as not simple as the other *Farmāns*, though their importance is not refuted. Even in the matters of minorities, such *Farmāns* were issued separately. Sri Ram Sharma relates an example of such a *Farmān* issued by Aurangzēb during his 46th year of rule. Hussaini has quoted it from Sri Ram Sharma as the case of "Widow of Mani vs. Sundar" in which the widow filed a suit against Sundar who though could have got his punishment exonerated, had the suiter been a Muslim, but he was kept on the issue that Hindus do not have blood money or retaliation in their personal laws.[466] 'Alī Muḥammad Khān has also quoted it exactly in the same words in his *Mir'āt-e-Aḥmadī: a Persian History of Gujarat*.[467] Another example of the case of "Sons of Chatta vs. Pir Muhammad and others" in which Chattas were complainant against Pir Muhammd and others, saying that they had killed their father at which a trial was held. His plaintiff presented evidences at which *Qāḍī* charged Pir Muhammad and others. However, Chattas exonerated them, saying that they should be expelled from the fort to which the court

[465] S. A. Q. Hussaini, *Administration Under the Mughuls* (Dacca: The Paradise Library, 1952), 5-6.
[466] Ibid., 197.
[467] Ibid., 197.

complied.[468] This is a clear example where *Farmāns* were promulgated in the court letter and spirit and despite having upper hand of the complaining party, the justice was upheld without the intervention of the royal seat. This demonstrates the nature of the *Farmāns,* which were implemented in criminal cases.

viii. *Farmān* of Aurangzēb to *Dīwān* of Gujarat as *Ta'zīr* for Theft

As these *Farmāns* were applied in the cases of grave nature, even in the common cases such as theft and burglarly, *Ta'zīrs* (Islamic punishments) were used to derive *Farmāns,* which were promulgated by the court of law with equal force. Aurangzēb is said to have issued such a *Farmān* apart from his *Fatāwās* on June 16th, 1672 laying the rules that local officers should not delay deciding cases about theft and burglaries. The *Farmān* specifically stresses upon the imposition of *Ḥadd* (sanction) upon the culprit if he confesses his crime, or it is proved that he had committed the crime during the trial. The punishment should be given immediately and without any delay, the *Farmān* says as given ad verbatism by 'Alī Muḥammad Khān in his book, *Mir'āt-e-Aḥmadī.* The *Farmān*, however, warns the judicial and legal authorities that no thief should be given punishment for the first time as it could be his first offense. The *Farmān* clearly states three instances as; first of chastisement, second of imprisonment until repentence by the thief and third of execution and recovery of the stolen objects given to the rightful owner, or given in the custody of the *Bait-ul-Māl* (Islamic treasure).[469] The words of this *Farmān*, its issuing situation and circumstances clearly show the emperor and his legal advisors used to take care of every situation that fell under the ambit of law, so that no innocent should get punishment, and that no sinner should be spared. This *Farmān* is of

[468] Ibid., 197.
[469] Ibid., 278-279.

criminal penal code type which lays down the foundation of criminal procedure in India and other states in the times to come. Despite being issued by an absolute monarch; its legal status is hard to refute.

The above given *Farmāns* provide a glimpse of how *Farmān-i-Shāhī* used to win legitimacy from every type of source available to the emperor of that time be it religion, power, army, custom, conventions, ingenuity, manipulation or public approval. These *Farmāns* were used to provide a legal basis be it a civil issue, a criminal issue or a constitutional requirement. However, if to say that all these *Farmāns* make up a complete constitution and provide a codified set of laws like Romans and other laws, it means to put the cart before the horse. In fact, these were the first attempts of those times when ruling was very difficult and the ruling elite was not aware of the legislative process that it would evolve into such complicated government systems. Whatever the case is, these *Farmāns* are enough to show how *Mughals* ruled India through complete or quasi type of legitimized *Farmāns*, which have legal value at that time.

5. A Critical Review of *Farmān-i-Shāhī* In The Light Of Criminal Law under Islamic Jurisprudence (Islamic *Fiqh*)

Crime is a simple act in criminal law, which invites the puinshemnt from a superior force in simpler terms, but in criminal law, a crime is an act of transgression and not as, we see, an omission as stated by J. C. Smith and Brian Hogan.[470] However, David Ormerod and Karl Laird shed further light on it, saying that dictionaries do not provide simple and complete definition of the word crime. However, they come to the conclusion that it is impossible to define crime, for some acts are declared crime later when it is

[470] John Cyril Smith and Brian Hogan, *Smith and Hogan's Criminal Law* (London: Butterworths, 1983), 17.

impossible to say that they are crimes. It is because an act invites the label of being called a crime when "its morality or immorality and the consequences" do not change but its legal nature does" and it invites punishment.[471] In other words, it is simply a transgression in which others might face difficulties, or come to a harm. The law is thus promulgated to keep others safe from their own acts of omission, or commission that could cause harm. In Islamic jurisprudence, 'Abd al-*Qādir* 'Awdah, a reknown scholar, says that crime in Islam is a transgression of prohibition for which there is already a suggested punishment.[472] However, Farhat J. Ziadeh in her article "Criminal Law" says that these are types of wrongs which are considered crimes in Islamic law as ordained by God, which comprises two types of punishments, limits and chastisement (*Ḥadd* and *Ta'zīr*).[473] She has not stated like Hogan and Smith that it is a complicated term; rather has very simply divided into two types of wrongs, which are categorized according to the type of punishments as stipulated by God in the *Qur'ān*. Mark Cammack of Southwestern Law School agrees with Farhat that such punishments did not exist in "the classical Islamic legal tradition," adding that even the terms that are used in criminal law were not "understood as comprising a unified area of law in the pre-modern era."[474] However, at the same time, he agrees with her saying that some terms of Islamic Criminal Law such as *Ḥadd*, *Qiṣāṣ* and *Ta'zīr* existed in the classical legal literature, and that their

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[471] David C. Ormerod, Karl Laird, John Cyril Smith and Brian Hogan, *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 2011), 3-4.

[472] Abd al-Qādir Awdah, *Criminal Law of Islam*, Trans. by S. Zaikr Aijaz,Vol.1 (New Delhi: Kitab Bhavan, 1999), 71-72.

[473] Farhat J. Ziadeh, "Criminal Law." *Oxford Encyclopedia of the* Islamic *World* (n. d). http://www.oxfordIslamicstudies.com/article/opr/t236/e0170

[474] Mark Cammack, "Islamic Law and Crime in Contemporary Courts." *Berkeley Journal of Middle Eastern & Islamic Law*, Vol, 4. No. 5. (2011): 1-2. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1021&context=jmeil

importance was duly recognized by the legal minds as well as the courts.[475] Even during the classical period, these terms were duly recognized and justice was administered within the ambit of the legal system existed at that time, as has been recorded by Abdus Salām Nadvī in his book, *Qaḍā' fī 'l-Islām*, a well known book on Islamic jurisprudence. He says that courts used to conduct a proper trial and the *Qāḍī* used to administer justice, making distinction about the type of crime and after categorizing it award sentence. There were proper rules and regulations to conduct a trial and charge sheet of a criminal. The evidences were recorded according to the proceedings. Even cross-examination was allowed in various circumstances. This method of determining, a crime of a person was developed as back as during the period of fourth caliphs, while a proper judicial system was developed during the period of second caliph.[476] Almost the same system, with some omission and commission, was adopted by the *Mughal*s. According to *Fatāwā*, this whole process was called *maḥḍar* (trial) and the record of it was kept separately which was called *sijil*. To establish a crime, *Fatāwā* says, the *sijil* must conform to *maḥḍar* to charge sheet a person and award sentence likewise.[477] However, it does not mean that all the *Mughal*s used to issue *Farmāns* within the light of *Fatāwā* and that the *Qāḍīs* used to conduct trials according to the given *Fatwā*. The stories of the justice of *Mughal*s within the ambit of *Islam*, or *their Farmāns* as Islamic and the trials of that time exactly conforming the Islamic legal codes are merely myths. There is not even iota of truth in these myths weaved by pseudo nationalists.

Whereas *Farmāns* are concerned, most of them were based on *Fatāwā* and Islamic *Ḥudūd*, *Ta'zīr* and *Qiṣāṣ*. For example, Aurangzēb, the staunch supporter of the

[475] Ibid., 2.
[476] Abdūṣ Salām Nadvī, *Qazā Fil Islām* (New Delhi: Digital Library of India, 1929), 66.
[477] Shaykh Niẓām, *Fatāwā-i 'Ālamgīrī, Vol. 6* (Beirut: Dār Ihyā' al-Turāth al-'Arabī, 1980), 247.

Islamic government, issued a *Farmān* rejecting blood money for a murder and the prince, his own brother Murad Bakhsh had to pay for his life for committing a crime whose punishment in Islam was clearly capital punishment or death sentence.[478] It has happened during the times of other *Mughal* emperors too. In other words, in the case of criminal laws, *Fatāwā* and legal injunctions of Islam and Islamic jurisprudence were upheld even at the very higher level. However, it is very interesting that when it comes to system of government in the centeral government, neither *Fatāwā*, nor any other Islamic injunction bars the *Mughal*s from ruling absolutely or ruling as a monarch. Therefore, this is no surprise that sometimes *Mughal*s entirely rejected an accepted Islamic injunction or *Fatwā* only because it did not suit their *Farmān*, or that it would have weakened their power or their government. In the same way, there were instances where entirely contradictory *Farmāns* were issued as *Fatāwā* which were duly accepted by the public without the consultation of the recognized clerics and scholars. It could be that the emperors used to exploit religion as stated earlier for their own ends. For example, Akbar used to use imperial seal having Islamic slogan of "*Allāh* Akbar" inscribed on it. Although nobody objected to this idea at that time, as it was an imperial *Farmān* having backing of the religion, a notable, Ḥājī Ibrāhīm, objected to it and he barely escaped the wrath of the emperor for infringing upon his rigths to issue a *Farmān*.[479] On the one hand, it shows the issue of *Farmāns* and on the other hand, it also shows how the emperors used religions to their own ends. It also sheds light on the issue that sometimes *Farmāns* issued in terms of personal and individual crimes were entirely against the rules and regulations of *Islam*. They were contradictory to what is now called Islamic

[478] Hussaini, *Administration under the Mughuls*. 5-6.
[479] Badā'ūnī, *Muntakhab-al-Tawārīkh*. Vol. 2, 213.

jurisprudence or Islamic criminal law and punishments, as prescribed in Islamic Holy documents. It could be reasoned that the emperors witnessed their own interests in perils when they turned to unIslamic things or *Farmāns*.

However, it is no way stated that the *Mughal* emperors were absolute. It is becuase if it is said tht they were enitrley absolute rulers and emperors, it means that even criminal cases and trials were subject to their wishes and whims which was not the case. Farrukh B. Hakeem, M. R. Haberfeld and Arvind Verba have highlighted this fact in their book, *Policing Muslim Communities: Comparative International Context*, in which they have reviewed the king's absolute power, saying that "With respect to criminal justice administration the *Sharī'ah* gave wide discretion to the sovereign, but at the same time, they have rejected the presumption of the foreign travelers that the will of the king was absolute.[480]They argue that, in fact, those foreign travelers were entirely oblivious of the Islamic criminal legal system, for it "served as a check on emperor's capriciousness," adding that even the king "could not go against the *Sharī'ah* without being challenged by the orthodox clergy."[481] Writing in *Oxford* Islamic *Studies* online, Mouez Khalfaoui has highlighted three periods according to the law in *Mughal* Empire based on the systematic implementation of *Sharī'ah* and the *Sunnah*. He argues that the first period was based on the best guidacne from Islamic jurisprudence and precdents of the *Sūltanāte* period. The second period was based on thirving tradition of legal literature including *Fatāwā* and other collections of its ilk, and the third period was dependent on two sources: clergies who became supreme reference for the criminal laws and *Fatāwā* collections such as

[480] Farrukh B. Hakeem, M. R. Haberfeld and Arvid Verba, *Policing Muslim Communities: Comparative International Context* (New York: Springer Science & Business Media, 2012), 62-63.
[481] Ibid., 63.

Fatāwā-i 'Ālamgīrī.[482]This clearly shows that the early absolutism in legal authority of the *Farmāns* gradually gave way to the *Fatāwā* of *Ḥanafī* school of thought which not only flourished but developed into a complete criminal legal code. That is why Farrukh Hakeem and his colleagues assert that the king was not absolutely capricious in issuing *Farmān* violating Islamic legal system in the final period of the *Mughal* Empire and Aurangzēb had to issue various *Farmāns,* confirming the authority of the Islamic criminal law.

Apart from the discussions and debates of the sources, derivations and legal position of the *Farmān-i-Shāhī* of the *Mughal* period, one thing is crystal clear that *Farmāns* were a legal instrument not only to bring peace, stability and normalcy, but also to keep law and order situation under control and run the administration and government. In fact, *Farmāns* were those directives, which were issued from time to time for legal and governance requirement. Although literally, it means to say something, connotatively, a royal *Farmān* is a royal decree, which has the legitimacy and backing of the force of the state. Its text and linguistic niceties also demonstrate that a *Farmān* has a legal value.

Moreover, for different purposes, different *Farmāns* were issued such as for finance, administration of justice, civil laws and constitutional and administrative *Farmāns*. The *Mughal*s were very meticulous about writing of *Farmāns*. They arranged a full department having staff writers to write *Farmāns*. In the same way, different *Farmāns* were written in different ways and were executed in more different ways. The seals for specific *Farmāns* and their submission details suggest how the *Mughal*s used to go through details of making their administration work through effective handling of

[482] Mouez Khalfaoui, "*Mughal* Empire and Law." *Oxford* Islamic *Studies Online*, http://www.oxfordIslamicstudies.com/article/opr/t349/e0066.

Farmāns. The governance and administration also demonstrated how different *Farmāns* were written in a style that their linguistic impact used to smooth working of the administration.

As far as the sources *of Farmān-i-Shāhī* are concerned, the critics and historians mostly pointed out Islam which has two major sources; the Holy Qur'ān and *Sunnah.* Obviously, these two sources were there, but the *Mughal*s also had the support of sources of Islamic jurisprudence, presence of the clerics and scholars and the social circumstances. Although in some cases, the presence of Islamic scholars proved rather a burden on the government and the court, for they objected to what the emperor used to think otherwise. The example of Shaykh Aḥmad Sarhindī during the period of Akbar is a case in point, as discussed in the previous chapter. Apart from these not-so-serious obstacles in the rule, *Farmāns* were derived from past *Fatāwā* and civilian customs and conventions, too.

As far as the legal status of *Farmāns* is concerned, there is no doubt that they used to work as legal instruments. However, there was a distinction that some *Farmāns* were categorized as criminal penal code type of laws, while some others were just advisory notes, and others were constitutional type of laws related to the structure of the government. Several *Farmāns* were categorized into administrative laws. These *Farmāns* were found in different records, but a serious attempt to compile them was made during the period of Aurangzēb who ordered compilation of the *Fatāwā* in the shape of *Fatāwā-i 'Ālamgīrī*, which comprises of the religious edicts outlining later legal penal codes of *Islam.* A legal review of the several *Farmāns* show their true issuing circumstances, objectives and their further impacts on the administration of the empire. However, a clear

review of these *Farmāns* in the light of the Islamic criminal law shows that they were mostly based on the Islamic concept of criminal justice of *Ḥudūd, Ta'zīr* and *Qiṣāṣ*. Most of the *Farmāns* related to judicial matters fall in one or the other categories, but a careful review of several *Farmāns* show that some *Farmāns* even transgress these Islamic restrictions, while some violates them clearly but it happened only during certain periods and certain circumstances and not always. The *Mughal*s were very shrewd rulers, as they knew that the Islamic classical legal system was not evolved enough to rule such an empire as India effectively and competently without devising new ways and innovative machinations but it is true that most of the *Farmāns*, if reviewed from the lens of the Islamic jurisprudence, come up to the standard of the Islamic criminal laws. It is because their ultimate aim was to bring law and order under control, which is also the ultimate aim of *Islam*, the reason that these limits, punishments and chastisements have been suggested in the Holy Qur'ān and are said to have been ordained by God. Their suggestive nature through *Farmāns* provided a good legal backing to the *Mughal*s and they made the most of it in ruling ruthlessly and effectively.

Chapter No. 3

Implementation of Farāmīn-i-Shāhī In Islamic Criminal Law during *Mughal* Period in the Subcontinent

Chapter No. 3:

Implementation of Farāmīn-i-Shāhī in Islamic Criminal Law during *Mughal* Period in the Subcontinent

No social structure has completely defined crime in terms of criminal procedural code or jurisprudence due to the fleeting nature of the world as well as the defining terms. This chapter dilates upon the details of Islamic criminal law, its classification of crimes, types, punishments, *Ḥadd, Ta'zīr, Siyāsah* and concepts of *Qiṣāṣ* and *Diyah*. Moreover, the chapter also highlights the use of *Farmān-i-Shāhī* in the implementation of the Islamic criminal jurisprudence, modification and amendments. It has been reviewed in terms of modifications in all of these types and further discusses the impact of these *Farmāns* on the criminal laws following *Mughals*. It takes into account evolution of both criminal as well as procedural code during the *Mughal* period and British period.

1. An Introduction to Islamic Criminal Law

1.1. Introduction and Evolution of Islamic Criminal Law

As discussed in the earlier chapter, the concept of crime and its Connotations are very difficult to unravel in the light of criminal law. Noted scholars of criminal law such as Smith and Hogan have expressed the same views in their phenomenal work, Criminal Law.[483] A great scholar of criminal law, Jean-Paul Brodeur has also expressed frustration over ambiguity revolving around the word, crime, saying that the various theoretical authors of criminal law such as Taylor, Young and Walton have expressed inability to

[483] Smith and Hogan, *Criminal Law*, 17.

given a brief definition of a crime, for they are of the view that an innocent action sometimes become a crime when it harms others. However, Jean Paul Brodeau and Genevieve Ouellet have stated that in the perspective of both factual as well as normative theories, calling a type of conduct which involves violence and harm to others.[484] In this secular definitional debate, Joycelyn M. Pollock has also added something referring to William Blackstone, a noted English jurist, who says that it, in a broad sense, is simply "violation of public law" or violence against the others, or in other words, it means "a commission or omission of an act which the law forbids or commands" to do.[485] Even still, the real sense of crime is shrouded in ambiguities, for nobody knows what could be "commission" and what could be "omission" until it is clearly and definitely not stipulated in the law books. It, then, gets cleared that only a literate person could be able to understand the law of the land and the crime as defined in it, for somewhere cutting for a tree, for example, is a necessary, while at some other place, it is a crime.

As far as Islamic law and Islamic criminal laws are concerned, both are intertwined with each other. Although various Muslim jurists have labelled crime as a public wrong, some have gone in more details instead of offering a short and brief definition of crime. In this connection, Imran Ahsan Khan Nyazee, a text-book writer of Pakistan, has followed the same pattern that though in *Islam*, it is a public wrong, but it is actually the act of affecting rights of other through an act. Mr. Nyazee has divided them into different categories to be discussed later.[486] Perhaps Mr. Nyazee has derived it from a noted Islamic scholar Al-Sarakhsī who has defined crime in the Islamic jurisprudence

[484]Jean-Paul Brodeu and Genevieve Quellet, "What is a Crime? A Secular Answer," ed. by Law Commission of Canada, *What is Crime? Defining Criminal Conduct in Contemporary Society* (Toronto: UBC Press, 2005), 2-4.
[485] Joycelyn M. Pollock, *Criminal Law* (The United States: Routledge, 2015), 2-4.
[486] Imran Ahsan Khan Nyazee, *General Principles of Criminal: Islamic and Western*, (Lulu.com, 2010), 18.

in the same way saying that there are two types of rights: rights of *Allāh* (God) and rights of people.[487] Christie S. Warren has done a commendable job by giving very brief categories of how Islam defines a crime and how a crime is categorized into three broad terms as *Ḥudūd, Qiṣāṣ* and *Diyah.*[488] In this connection, Al-Sarakhsī has made all the necessary distinctions, when he states the same thing but says that *Ḥudūd* belongs to *Allāh*, while *Ta'zīr* and *Siyāsah* belong to the people as their rights or violation of their rights. He further states, clarifying his categorization that *Ḥanafī* jurists take *Ta'zīr* as offense or crime against the public or an action of the violation of the public rights. However, by *Siyāsah*, he and other jurists of his ilk means some act against the rights of *Imām* (leader) or state which is again considered a public right, he says. However, in the modern criminology and Islamic Criminal Jurisprudence, this fine distinction between the public rights and rights of *Imām* has been overlooked. Whatever the case is, he is of the opinion that right of implementation and promulgation rests upon the state. He has clearly stated that "term *Jināyah* is used for an act that is forbidden by the law irrespective of its being directed at property or life, but in the jargon of the *Fuqahā'* the term *'Jināyah'* is applied to an act directed against life. They designated the act against property by the term *Ghaṣb* when the general usage is different from it." [489] This clearly shows that crime in Islamic Criminal Law is entirely different from the ambiguous term used in the modern-secular meanings.

The Arabic word used for crime is *Al-Jurm* (الجرم), *Al-Jarīmah* (الجريمة) and *Al-Jināyah* (الجناية). Literally, it is derived from *'Jurm'* that means to cut off. The word is

[487] Abū Bakr Muḥammad ibn Aḥmad Al-Sarakhsī, *Al-Mabsūṭ*, Vol. 27 (Karachi: Idarat al-Qur'ān Wa-'l-"Ulūm al-Islāmiyyah, n.d.), 84.
[488] Christie S. Warren, Islamic *Criminal Law: Oxford Bibliographies Online Research Guide* (Oxford:Oxfoed University Press, 2010), 05.
[489] Al-Sarakhsī, *Al-Mabsūṭ*, Vol. 27, 84.

used differently such as "جرمه" , (جرم صوف الشاة) that means (he cut it off) or that (he shears or cut off the wool of the sheep). The Qur'ān states;

وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا۟

"And let not a nation's hatred by any means occasion you or incite you to wrong and depart from justice."[490]

In other words, it means a sin or a crime or a fault or any offense that amounts to disobedience. It is also a transgression, intentional or inadvertent, or commission or omission of any sort.[491] Hence, in *Sharī'ah*, *'Jurm'* means an act that *Sharī'ah* has prohibited from committing and that *Sharī'ah* has prescribed a *Ḥadd* or *Ta'zīr* for the commission or omission of that act.[492] However, some other jurists have also specified a separate term that is *Al-Jināyah* for crimes[493], while William Lane has defined it as an act;

- That means to gather, pluck or steal fruit of a garden or tree
- That means to do some evil deed
- That means to do some forbidden act
- That means to use in the last meanings

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[490] Ibn Manẓūr, Jamal al-Dīn Muḥammad Ibn Mukarram al-Anṣārī Afrīqī, *Lisān al-'Arab*, Vol. 10 (Beirut: Dār al-Turāth al-'Arabī, n.d), 375-380.

[491] Edwar William Lane, *Arabic English Lexicon*, Madd al-Qamus (London: Willams & Norgate. n. d.), Bk.1, pt.2, 368.

[492] Muḥammad Abū Zohrah, *Al-Jarīmah Wa al-'uqūbah* (Cairo: Dār-al-Kutub al-'Arabī, 1975), 23-24.

[493] Ibn Nujaym, Zayn al-'Ābidīn Bin Ibrāhīm, *Al-Baḥr-ur-Rā'iq Sharḥ Kanz al-Daqā'iq Vol. 5III* (Beirut: Dār al-Mā'rifah, n.d.), 286. Zayla'ī, Uthmān Ibn 'Alī, Tabyin-al-Ḥaqā'iq, *Sharḥ Kanz al Daqā'iq, Vol. 5II* (Cairo: Al Matba'ah al kubrā al-Amīriyyah), 97. Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 233.

However, generally, it specifies a crime, an offense or a harmful act that invites punishment.[494] Another jurist Abdul *Qādir* has defined it as; " هی فعل اوترك نصت الشریعة علی تحریمہ والعقاب علیہ" that means it is "the commission or omission of an act which is forbidden by the *Sharī'ah* and punishment is recommended for it."[495]

In the light of the definitions given above, it is easy to state that the definition has three most important elements;

1. This is an action of commission or omission.
2. Violation of a specific law that has fallen in any category as specified by *Sharī'ah*.
3. There is a punishment for that crime in *Sharī'ah*.

In other words, crime means a violation of any law that has been codified by the *Fuqahā'* in the light of the Holy *Qur'ān*, the *Sunnah* or the *Ijmā'-i-Qat'ī*.

The Definition of Crime (*Al-Jurm* (الجرم), *Al-Jarīmah* (الجریمة) and *Al-Jināyah* (الجنایة)) is that the crime is something that is illegal. The Muslim jurists define it as;

الجرائم محظورات شرعیة زجرالله عنها بحدٍ او تعزیر الجریمة الجنایة that means " Unlawful acts for which punishments have been provided (directly or indirectly) by God, either fixed or discretionary."[496]

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[494] Lane, Edward William, op. cit, Bk1, pt.2, 472.
[495] Abdul *Qādī*r Awdah, *Al-Tashri-ul-Jana'i, Vol. 1*, 66. Būk Badawī, *Al-Aḥkām Al-Amāt-fī-Al-Qānūn Al-Janā'ī, Vol-1*, 39. Abdūl Mālīk Jundī, *Al-Mauso'aht, Al-Jina'ht, Vol. 3* (Beirut: Dār Iḥyā' Al-Turāth Al-'Arabī, n.d), 6. *Tabsirat-al-Ḥukkām, Vol. 2*, 210.
[496] Abū al-Ibn Ḥasan Ali Ibn Muḥammad Ibn Habib, Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah Wa Vilayat al-Dīniyyah* (Beirut: Dar al-*Kutub* al-'Ilmiyyah, n.d) 29.

This illegal or unlawful act that has been declared a crime can be;

a. Commission of any prohibitory act.

b. Omission of any obligatory act.

In other words, it has two clear aspects; the first is (إتيان فعل منهى عنه) that the act is prohibited and second is that (ترك فعل مامور به) something obligatory has been left.

In other words, it is an act of commission or omission that violates a part, or full or other provisions of law already codified to stop or permit it by *Sharī'ah*. However, in *Sharī'ah* there is some difference in that an offense is not committed until a divine provision is violated or infringed upon.[497]

It is beautifully stated that all three words *Jurm*, *Jarīmah*, *Jināyah* are used interchangeably in Islamic jurisprudence for offences committed against the public. However, the literal meanings of a *Jurm*, he states, are 'to cut off.' [498] The debate of crime has truly initiated by the Holy Qur'ān which states;

إِنَّ الَّذِينَ أَجْرَمُوا كَانُوا مِنَ الَّذِينَ آمَنُوا يَضْحَكُونَ

"Verily! (During the worldly life) those who committed crimes used to laugh at those who believed." [499]

Although in translation, the translators have used the word 'crime' that is equivalent to *Jurm* but *Jurm* has been translated with various other Connotations such as

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[497] Muḥammad Tahir Al-Qadri, Islamic *Concept of Crime*, (Lahore: Markazi Idara *Minhāj* ul Qur'an, nd), 1-2.

[498] Muḥammad Shabbir, *Outlines of Criminal Law and Justice in Islam* (Lahore: International Law Book Services, n. d.), 7-8.

[499] Qur'an, 83:29, Trans. Dr. Muḥammad Taqi-ud-Din Al-Hilali, Ph.D. & Dr. Muḥammad Muhsin Khān, http://noble*Qur'ān*.com/translation/index.html.

a sin, a fault, an offense, an act of disobedience, rebellion, treachery and so on.[500] The use of this word in the Qur'ān is about unfair act. This word is also used for unfair action and for unfair dealings and earnings. All actions of human beings which are not in accordance with the true path are considered a sin and hence a *Jurm* or a crime. Before further unravelling the entanglements of crime in Islamic Jurisprudence, it is imperative to discuss Islamic criminal law or criminal law in *Fiqh*.

The literal meaning of *Fiqh* is (العلم بالشیی و الفهم لہ) comprehension or knowledge of a thing.[501] In this case, *Fiqh* and the other word *fahm* have the same meanings.[502] Arabic idiom is: فلان لا ینفقہ ولا ینقہ ("So-and-so neither understands nor comprehends"[503]). The *Arab* used the word *Fiqh* for a person expert in camel domestication and taming specifically in terms of female camel having a distinction from other female camels. The term common among them about this was فحل فقیہ.[504]

Etymologically, *Fiqh* is an Arabic word used as a noun and literally means 'understanding.'[505] In terms of definitions, this word is used in the sense of law. It means معرفۃ النفس ما لها وما علیها "A person's knowledge of his rights and duties."[506]

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[500] Edward William Lane, *Arabic-English Lexicon* , 47.
[501] Ibn Manẓūr, *Lisan al-'Arab*, Vol. 10III, 253.
[502] See Al-Rāzī, Muḥammad Bin Abi Bakar Bin Abdul *Qādīr*, *Mukhtar Al-Sihah*, (Riyādh: *al-Mumlakah al-Arabiyyah al-Saudyyah*, 1079), 509. Rāghīb Iṣfahānī Abū Al Qāsīm Hussaīn Bīn Muḥammad Bin Fādl, *Al Mufrīdhāt Fī Gharīb al-Qur'ān* (Lahore: Islamic Accademy, n.d), 384.
[503] See Ismahil Bin Hammad Al-Jawhari, *Al-Sihah Taj Al Lughat wa Sihah Al Arabia* (Beirut: Dar ul Ilm Lil Madayin, nd).
[504] See for details Ibn Manẓūr, *Lisan al-'Arab*, vol. 10III, 253. Al-Ghazali Abū Hamid Muḥammad Bin Muḥammad, *Ihya' ullum al-Dīn* (Cairo: Matba'ah Muṣṭafā, 1939), Vol. 1, 38-39. Ibn Sā,ad, Abū Abdūllāh Muḥammad, *Al-Tābaqāt al-Kūbrā*, Vol. 2 (Beirut: Dār Sadār), 363. Ibn-Hīshām, Abī Muḥammad Abdūl Mālīk Bin Ayūb al-Humāirī, *Al-Sīrah al-Nabaviyyah*, Vol. 2 (Cairo: Dār al-Kitāb al-'Arabī, 1329 A.H), 32.
[505] *Oxford Concise Dictionary*, 8th ed, (New York: Oxford University Press Inc, 2006), 534.
[506] See *Ṣadr al-Sharī'ah*, 'Abdullāh Bin Mas'ūd, (d. 747 A.H./ 1346 C.E.), *Al-Tawḍīḥ fi Ḥall Jawamid al-Tanqīḥ* (Karachi, 1979), 22.

In this sense, the word *Fiqh* means the same what it seems today *al-fiqh al-aṣghar*. The *Shāfi'ī* jurists have defined the word in a very narrow sense as the chief of this school of thought has said[507]; [508]" العلم بالاحكام الشرعية العلمية المكتسبة من أدلتها التفصيلية and knowledge about the rules of Islam which are related to the code of conduct drawn from different specific issues."[509] This definition has varied meanings according to the use of the word. In order to understand it correctly, it needs comprehensive analysis.[510] The meanings of *Shāfi'ī* school of thought stresses more on *dalīl tafṣīlī*[511] (detailed argument) that means an argument accompanied with an evidence. Another well-known jurist has defined it in another way such as Al-Ghazālī, " عبارة عن العلم بالاحكام الشرعية الثابتة لأفعال المكلفين خاصة "it is knowledge about legal rules related to human behavior.[512] The religious interpreter *Imām* Al-Rāzī is of the view that " العلم بالاحكام الشرعية، العلمية، المعتدل على أعيانها، بحيث لا يعلم كونها من الدين ضرورة.[513]" It means knowledge about laws regarding behavior is pertained to sources which are not got through necessity.[514] Moreover, it is important to mention that *Fuqahā'* of *Mālikī* school of thought have also defined the term *Fiqh* in the same way.[515] However, a widely accepted definition is as given below;

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[507] See Wahbah al-Zuḥayhlī, *al-Fiqh al-Islāmī Wa Adillatuhu*, Vol.1 (Damascus: Dar al-*Fik*r, 1997, A.D), 19.

[508] Badr al-Dīn al-Zarkashī, *al-Baḥr al-Muḥīṭ fi Uṣūl al-Fiqh*, *Vol. 1* (Kuwait: Dar al-Safwah, 1992), 21. Nasir al-Dīn al-Baydawi, *Minhāj al-W'Uṣūl ila Ilm al-Uṣūl* (Cairo: Matba'at Kurdistan al-Ilmiyyah, n.d.)

[509] See *Ṣādr al-Sharī'ah*, *al-Tawdith*, Vol. 1, 26 for a somewhat altered form of the definition. He does not use the word *al-muktasabah*, but reproduces the rest of the definition. Ibid., 21.

[510] Nyazee, Islamic Jurisprudence, 20.

[511] The term *Adillah tafṣīliyyah* has been intentionally translated here to mean specific evidences rather than the usual translation "detailed proofs", which is likely to confuse the reader. It is the specific evidences that are referred to in the definition, as distinguished from the general evidences or the *Adillah Ijmāliyyah*. Nyazee, Islamic Jurisprudence, 20.

[512] Al-Rāzī, Fakhr al-Dīn Ibin Muḥammad, *Uṣūl al-Fiqh.Vol.1* (Riyādh: *al-Mumlakah al-'Arabiyyah al-Sa'ūdiyyah*, 1079), 78.

[513] Ibid.,\.

[514] Ibid.

[515] See for details Al Sherazi Abū Ishaq Ibrahim Bin Ali, *al-Luma'-Fī Uṣūl al-Fiqh* (Egypt: 1957), 20. Al-Haskafi, Ala-ud-Dīn Muḥammad Bin Ali Bin Muḥammad, *Al-Durr Al-Mukhtār*, (Cairo: Maṭba 'al-

"*Fiqh* is the knowledge of the *Shar'ī Aḥkām* derived directly from the specific evidences in the texts or extended through reasoning from general prepositions of the *Sharī'ah* in the light of its *maqāṣid*."[516]

Oxford Concise Dictionary further defines it as "philosophy of Islamic law, based on the teachings of the Koran and traditions of the Prophet (PBUH)." In this sense, it is a source of Islamic jurisprudence which is further defined and interpreted in the light of both of these sources. Balil Abd Al-Karim in his book, *Qur'anic Terminology: A Linguistic and Semantic Analysis*, gives the roots of *Fiqh*, saying it is an action of comprehending it and is associated with the world of having 'all knowledge' for which the word used is verb *faqaha yafqahu*. He has stated that *Fiqh* is a verbal noun. He argues that it is associated with the proper understanding of "permitted and prohibited, truth and false." He further differentiates it from *'ilm*, which is also knowledge and *tafaqqah* which is used as a noun for "pursuit of knowledge."[517] It just shows that *Fiqh* means understanding of something which is here the rule or principle set to differentiate between right and wrong. However, Dr. Sanī Ṣāliḥ Muṣṭafā, a veteran scholar, sheds a detailed light on the use of the word *Fiqh* in the Islamic thoughts. He is of the opinion that it is "understanding of the fundamental principles of" religion which is faith as well as *Islam*.[518] Discussing its relation with the previous religions and ways of understanding right and wrong through the Bible and other religious texts, he reaches the conclusion

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Amīrīyah, n.d.), Vol-11, 28. Al-Amidi, Abū Al-Hussain Saifud Dīn Ali Bin Muḥammad, *Al-Ihkam Fi Uṣūl-il-Aḥkām Vol. 1* (Qahira: Dar Al-Muharif 1914), 4. Al-Shalbi-Muḥammad Muṣṭafā, Al-Mudkhal, *Fi Al-Tahrif Bil Fiqh Al-Islāmī*, (Beirut: Dar Al-Nehzat Al-Arabiat 1949), 32.

[516] Nyazee, Islamic *Jurisprudence*, 31.

[517] Balil Abd Al-Karim, *Qur'anic Terminology: A Linguistic and Semantic Analysis*, Trans. by Nancy Roberts (Washington: The International Institute of Islamic Thought, 2017), 87-88.

[518] Sanī Sālīh Muṣṭafā, *Uṣūl- Al-Fiqh -Al-Islāmī: A Gateway to understanding Islamic Jurisprudence* (Cairo: Lighting Source, 2016), 57-58.

that *Fiqh* is now used for Islamic jurisprudence "made up of the rulings of Islamic jurists."[519] In this sense, it means *Fiqh* or Islamic jurisprudence is about formulation, derivation, interpretation and re-interpretations of the laws in the light of the Islamic sources and the existing circumstances.

Although there exist various controversies according to different schools of thoughts, the gist of all the schools is almost the same regarding *Ḥudūd, Ta'zīr* and *Siyāsah* as defined in the previous chapter. According to a great legal jurist of the early Muslim period Al-Māwardī, as quoted by Amedrozm, criminal law is applicable for "mutual justice and restraining litigants from repudiating claim by inspiring fear and awe in them."[520] This amply explains the reason being the streamlining of the Islamic jurisprudence or criminal law as a separate branch to bring law and order among the people to make it stronger to be accepted and restrain from bringing cruelties upon the poor. In other words, it means to save the poor or the weak from the strong ones. According to Farrukh B. Hakeem, M. R. Haberfeld and Arvind Verma, Mawardi has stated *Ḥudūd* or *Ḥadd* as a punishment that means to deter the culprits from committing the same offence again. They delineated on the main features of *Ḥadd,* referring to Mawardi again, saying that its major purpose is the public interest, it is un-adjustable and that it is unpardonable by anyone except a judge.[521] However, they have not given many details except equalizing it to a western sociologist Durkheim who has also spoken about the lessons of such deterrent punishments which, he says, must be similar to *Ḥudūd.*[522]

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[519] Ibid., 154.
[520] H. F. Amedroz, "The *Mazālīm* Jurisdiction in the *Aḥkām Sulṭāniyah* of Al-Māwardī." *Journal of the Royal Asiatic Society of Great Britain and Ireland,* 1911, 635-636. http://www.jstor.org.delgado.idm.oclc.org/stable/25189909.
[521] Hakeem, *Policing Muslim Communities: Comparative International Context,* 12-13.
[522] Ibid., 13.

They have classified *Ḥadd* according to the thoughts of Mawardi into six major *Ḥudūd*.[523] This makes it clear that criminal law itself is a branch in *Fiqh* which is a vast and copious social system, comprising all teachings, commands and fiats of God and instructions, traditions and sayings of his Prophet Muḥammad (PBUH). Luqman Zakariyah[524] is of the view that the Islamic jurisprudence is the term used for rules which have been deduced or deducted from the major concepts of *Fiqh*, for *Fiqh* is not just comprised of legal injunctions, it comprises of issues concerning several other fields and branches of knowledge as well. He has dwelt upon the issues of *Ijmā'* (collective thinking) and *ijtihād* (reinterpretation), saying Islamic jurisprudence or Islamic criminal law is a derivate term from *Fiqh* but it is not equal to it.[525] Therefore, the place of Islamic criminal law is that of a binding legal code, with no legal or remedial leniency for any person whosoever he is, with the purpose to check crimes in the larger public interest.

However, there is a slight difference between different schools of thought. There are four major schools of thought in the *Sunnī* schools of thought and one major section having its own separate *Fiqh* and different Islamic jurisprudence is *Shī'ah*. Abd Al-Rahmān Al-Jazīrī has summed up the four *Sunnī* schools and their concept of Islamic jurisprudence in his book, Islamic *Jurisprudence According to the Four Sunnī Schools*. According to Frank E. Vogel[526], who wrote a note on the translation in its foreword, Al-Jazīrī has summarized, recorded and juxtaposed all the "authoritative views of all *Sunnī*

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[523] Ibid., 14.

[524] Luqman Zakariyah, is a reknowned scholar, teaching in the University of Wales, Lampeter. He is working as an Assistant Professor in *Fiqh* and Usul al-*Fiqh* in Malaysia. He is also a former Research Fellow of ILSP, Harvard Law School between 2012 to 2013. See also Luqman Zakariya, *Legal Maxims in* Islamic *Criminal Law: Theory and Applications* (Boston: Brill Nijhoff, 2015), Blurb.

[525] Luqman Zakariya, *Legal Maxims in* Islamic *Criminal Law: Theory and Applications* (Boston: Brill Nijhoff, 2015), 15.

[526] Frank E. Vogel, is a scholar and legal expert in the Muslim world. He has dealt with cases pertaining to Islamic law in UK, US and Cayman Island. Also see his website for further details http://frankevogel.net/

schools" namely *Ḥanafī, Mālikī, Shāfi'ī* and *Ḥanbalī*.[527] However, it is pertinent to mention here that there is a slight difference here and there in the ways of their prayers but in terms of major *Ḥudūd, Ta'zīr* and *Siyāsah*, there are no major differences. The differences are from the fifth major school of thought, *Shī'ah Fiqh,* in that *Shī'ah* sect has a separate *Fiqh* and separate jurisprudence though there are great similarities due to the reason that derivatives of all schools of thought are the same; the Holy Qur'ān and *Sunnah*. Despite these differences and similarities, Bāqir Al-Ṣadr[528], a prominent *Shī'ah* jurist, has extolled the greatness and comprehensives of the *Shī'ah Fiqh,* saying that even the problems now facing the modern *Sunnī* societies have solutions in the *Shī'ah* jurisprudence as their leaders (*Imāms*) presented solutions hundreds of years ago.[529] It, however, is a matter of no importance for Al-Jazīrī has extolled *Ḥanbalī Fiqh* much more than this one. It is actually a matter of purpose, for how it is valid in the existing context of the *Farmān-i-Shāhī* of the *Mughal* period that it finds its trace in the most of the despotic laws of the times.

As far as the importance is concerned, the above polemic is enough to show that the modern criminal law or Islamic jurisprudence is at the heart of the principles of Islamic jurisprudence, or at greater level the core of *Fiqh* to bring normalcy and peace in the society. Hence, the importance of Islamic criminal system within *Fiqh* and within the governmental system established later during the Muslim period has far reaching consequences on the dictators and fiats issued by the administrative machinery at the

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[527] Abd Al-Rahmān al-Jaziri, Islamic *Jurisprudence According to the Four Sunnī Schools*, Trans. by Nancy Roberts, Vol. 1 (Toronto: Fons Vitae, 2009), xvvi.

[528] Muḥammad *Baqir al-Ṣadr* was born on March 1, 1935 and died on April 9, 1980 in Iraq. He was a *Shī'ah* scholar, cleric, religious ideologue and founder of Dawa Party. His father and father in law were also scholars of great note. Also see John Calvert, *Islamism* (London: Green Wood Press, 2008), 92-93.

[529] Muḥammad Baqir al-*Ṣadr*, *Principles of* Islamic *Jurisprudence (Translated): According to Shī'ah Law*, Trans. by Arif Abdul Hussain (London: ICSAS Press, 2003), 9-10.

behest of the caliphs, kings and emperors. However, it is very much facilitating to look deeply into the categories in the Islamic jurisprudence to facilitate critical look at the *Farmāns* and their evaluation within the light of the Islamic jurisprudence.

1.2. Classification and Punishments of Crimes in Islamic *Fiqh*

As the major purpose of a legal injunction or a law is to save a human being from other human beings, who are hellbent on harming that person. This means, as already discussed, the law comes to the rescue of the weaker. Islam has rather stressed upon the sanctity of human life, human dignity, human rights and above all sanctity of human relations. Therefore, all human relations and interactions are governed in the light of the Qur'ān and *Sunnah*, the reason that Islamic criminal law has a vast categorization of punishments based on fully detailed circumstantial and evidential support. Muhammad Shabbir has rightly stated that Islam has rather saved the mankind through its fair and just legal system.[530] The evidences of his claim are clearly found in the Holy *Qur'ān*, as it directs all believers to act in a certain way in various issues. For example, in its chapter *al-Ma'idah*, it says:

مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا

"...if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people."[531]

Although this verse is addressed to the children of Israel, it applies to the Muslims and followers of the other religions equally well. This points out the spirit that the Holy

[530] Shabbir, *Outlines of Criminal Law*, 6.
[531] The Qur'an, 5:32, Trans. by A. Yūsuf Ali, http://www.*Islam*101.com/*Qur'ān*/YūsufAli/*QUR'ĀN*/5.htm

Qur'ān infuses into its followers regarding sanctity and safety of the life of human beings. This is just a divine advice followed by a thrust of law. It has been stated in *Banī Isrā'īl* chapter that nobody should kill any other person except through legal trial.[532] The stress here is on what is called in the modern legal terminology 'due process of law' or a 'fair trial.' It means that the foundations of the fair trial in Islamic criminal system are laid down by the very sacred text. The Qur'ān does not spare any killer. It means if a person has committed the crime of killing a person deliberately and intentionally, he must have to pay the price. Although the Qur'ān has suggested this as hell, it seems quite lenient from the point of view of the heirs of the victims and more from the point of view of the heir of the killer. The Qur'ān says:

وَمَن يَقْتُلْ مُؤْمِنًا مُّتَعَمِّدًا فَجَزَآؤُهُ جَهَنَّمُ

"If a man kills a believer intentionally, his recompense is Hell."[533]

However, it does not mean that God has revealed all the crimes and categorized their punishments accordingly in the *Qur'ān*. In fact, the Qur'ān was revealed not in a single day, but within the timeframe of almost more than two decades during which it was arranged in an order guided by the Prophet (PBUH). It was left to jurists to define, interpret and re-interpret within the light of the *Sunnah* certain verses which are considered *Ḥudūd.* and *Ta'zīr* and *Siyāsah.* All these are three types of crimes. Farhad Malekian[534] has also stated the same categorization with a bit of change as *Ḥudūd, Qiṣāṣ*

[532] See The Qur'an, 17:33.

وَلاَ تَقْتُلُواْ النَّفْسَ الَّتِي حَرَّمَ اللهُ إِلاَّ بِالْحَقِّ وَمَن قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلاَ يُسْرِف فِّي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا

[533] The Qur'an, 4:93.

[534] Farhad Malekian is a distinguished professor of Islamic law. He is also a founder and director of the Institute of International Criminal Law, located in Sweden. He has authored many books including the one

and *Ta'zīr; Ḥudūd* against God, *Qiṣāṣ* against human beings and *Ta'zīr* for the ruler or *wali* of the time.[535] This categorization according to Luqman Zakariya is almost the same in every other school of thought. However, what they differ, he says, is in the circumstances and abstract concepts of divinity and rights of divinity.[536] It means that these three categories of crimes are almost the same in all schools of thoughts in *Islam*. Hence, the punishments are given according to the circumstances after the crime is committed. According to 'Abd al-Qādir 'Awdah, the Islamic criminal law has the same commission and omission of legal value regarding crime and punishment which the common English law has. It is because in both the cases, 'Awdah says both systems do not punish a person or award punishment to a person who has not committed the crime but intends to commit it.[537] Muhammad Ibn Ibrahim Iba Jubair has beautifully summed up this categorization of crimes as well as punishments in criminal law as benchmark that underlines the philosophy of Islamic criminal legal system. [538] This shows that the Muslim jurists have done this classification of the crimes according to rights which are violated with the same degree. Even there is an issue of predominance of right, as there are rights of God and then rights of human beings. In case, there is predominance of God's right, then it is declared correct, but in case there is indecisiveness, even then God's right takes precedence, which is an accepted fact.[539] Tahir Wasti has supported 'Awdah

studied for this research. See blurb of Farhad Malekian, *Principals of* Islamic *International Criminal Law: A Comparative Search* (Leiden: IDC Publishers, 2011).

[535] Farhad Malekian, *Principals of* Islamic *International Criminal Law: A Comparative Search*, 344-345.

[536] Luqman, *Legal Maxims in* Islamic *Criminal Law*, 15.

[537] Abdūl Qādīr 'Awdah, *Criminal Law of Islam, Vol. 1* (Karachi: Shāheed Publishers, 1987), 72-89.

[538] Mohammad Ibn Ibrahim Iba Jubair, Criminal Law in *Islam*: Basic Sources and General Principles, Criminal Law in *Islam* and the Muslim world,1st ed by T. Mahmood, (New Delhi:1996), 52-55.

[539] 'Awdah, *Criminal Law*, 89.

in his classification that there are some key factors in classification such as pardon[540], mitigation and burden of evidences, adding that 'Awdah has termed this classification as "far superior to the modern law."[541] As this study by Tahir Wasti is specific to the Pakistani context, he has compared it with Egyptian Penal Code too, of sources for both are the same.[542]

1.3. Classification of Crimes on the Basis of Rights during the *Mughal* Period

As the *Mughal*s followed the Islamic jurisprudence in its partial form at times when they needed it the most, they also used to classify crimes in the light of Islamic criminal law, or jurisprudence on the lines of *Ḥudūd*, *Ta'zīr*, *Qiṣāṣ* or *Diyah*. The classification was on the same lines as given in Islamic *Fiqh* by the popular jurists of that time and the past. Although various Islamic jurists were followed at that time in interpretations and implementation of criminal law, the most trusted classification was that of Al-Sarakhsī, a famous Iranian jurist, having lived during 1009. He has placed hundreds of penalties as rights of God and even *Ḥadd* of *Qadhf*. He placed *Qiṣāṣ* of both as right of God and of individual, while *Ta'zīr* and *Diyah* were mostly placed as rights of individuals.[543] In the case of most of *Ta'zīr* and *Diyah*, the *Mughal*s followed *Ḥanafī* jurists but sometimes they resorted to *Shī'ah* jurists too in case there was a difference.

1. God's Right: Most of the *Ḥudūd* offences were included in the rights for God except *Ḥadd*-e *Qadhf*.

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[540] Pardon is only permissible in cases where the aggrieved party agrees on its own. No *Qāḍī*, ruler or caliph can pardon a murder until he is pardoned by the heir of the victim.
[541] Tahir Wasti, *The Application of* Islamic *Criminal Law in Pakistan: Sharī'ah in Practice*, (Boston: Brill, 2009), 45.
[542] Wasti, *The Application of* Islamic *Criminal Law*, 45.
[543] Al-Sarakhsī, *Kitāb al-Mabsūṭ*, Vol. 10, 75.

2. Mixed Rights: The *Ḥadd* of *Qadhf* was included as the right of God as well as an individual. However, the right of God was predominant over that of the right of an individual.

3. Mixed Rights: Murder punishable by *Qiṣāṣ* was considered the right of both God as well as an individual but the right of individual was considered predominant.

4. Individuals' Rights: *Diyah* and *Ta'zīr* were considered rights of individual.

5. State's Right: All other offences interpreted with *ijtihād* were to be adjudicated by the state as rights of the state.[544]

Although a review of some of the *Farmāns* clearly shows that this classification in the Islamic criminal laws was followed by the *Mughals* in the administrative justice, yet there are evidences where they all were not followed in letter and spirit. However, it was considered proper to consult the Qur'ānic text and interpret it according to the situations required where the concept of *ijtihād* was applied. God has clearly put limits on these interpretations as God, in the Holy *Qur'ān*, says;

تِلْكَ حُدُودُ اللهِ فَلاَ تَعْتَدُوهَا وَمَن يَتَعَدَّ حُدُودَ اللهِ فَأُوْلَئِكَ هُمُ الظَّالِمُونَ

"These are the limits imposed by *Allāh*. Transgress them not. For whose transgresseth *Allāh*'s limits: such are the wrongdoers".[545]

1.4. *Ḥudūd, Ta'zīr, Siyāsah* and Penalties

This is first time a crime is committed and then relevant punishments were awarded for transgressing these limits. Limits mean *Ḥudūd*. *Ḥadd* used to be very much

[544] Ibid.,Vol.10, 75-76.
[545] Qur'an, 2: 229.

in vogue in the Arabic culture of legalization even before the advent of *Islam*.[546] Literally, it means that الحد: الفصل بين شيئين لئلا يختلط احد بما اولئلا يتعد احد بما على الآخر [547] or what is called as border or some limitation or limit or even restriction in one sense. A person who imposes limits such as a watchman called as *Ḥadd* in Arabic due to his duty of limiting a space for the public. In the terminology of Islamic jurisprudence, it means something that invites punishment in accordance with the injunctions of the Holy *Qur'ān*, or the *Sunnah* due to the act being considered a crime. The punishments already prescribed through a divine revelation are called *Ḥudūd*. Therefore, limitation or restrictions is associated with the crime or the punishment that it invites such as *Ḥadd*.

The association of *Ḥadd* with divine injunction means that it is God's right and that is mandatory and must be performed at every cost. None from the victim to the legislation has any authority to amend, pardon, decrease, increase or do anything with the execution of the punishment. According to 'Awdah *Ḥadd* means الحد لغة: هو المنع واصطلاحاً: هو العقوبة المقدرة حقا لله تعالىٰ [548] which means a crime for that the Qur'ān or *Sunnah* of the Prophet (PBUH) has already fixed a punishment that is unalterable in every situation.

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[546] Abū Al-Ibn Ḥasan Ali Bin Abi Bakr, *al-Marghīnānī. Hidāyah Vol. 5*, 25.

[547] Ibn Manẓūr, *Lisān al-'Arab Vol. 3*, 14. See Aḥmad Alquzrvini Ibn Fāris, *Mu'jam al-Maqāyis-al-Lughāt, Vol. 2* (Najafi: Dār al-Kutāb al Ilmīyā Iṣmāhīlīyan, n.d) 3. Muḥammad Bin Abī Bākr Abdul *Qādīr* Al Rāzī, *Mukhtar-al-Sihah* (Beirut: Dar Ahya-ul-Tarasul Arabi), 111.

[548] Abdul *Qādīr* Awdah, *Al-Tashri-ul-Jana'i, Vo.II*, 343. See Alla' al-Dīn Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, Vol. 5II, (Beirut: Dar Ahya al-Turath al-Arabi, n.d), 33. Ibn al-Humām, Al- Siwāsī al-Iskandarī Kamāl al- Dīn Muḥammad al-Dīn 'Abd al-Waḥīd ibn 'Abd al-Ḥamīd, *Sharḥ Fatḥ al-Qādīr 'alā al-Hidāyah. Vol .V*, ed. Mahbūb al-Halabī (Cairo: Maktabāt Mustāfā al-Bābī al-Halabī, 1970), 212. Aḥmad Bin Ghanūm (Ghaneem) Bin Sālam Ibn Mohinna Shāhab ud Dīn Al Nafravi Al-Azhari, *Al-fawāqeh Al Dawānī ālā Risālat Ibn Abī Zaīd Al-Qairwānī. Vol. 2* (Beirut: Dar Al-*Fikr*, n.d) 193. Ibn Qudāmah Al-Maqdisī, Muwaffaq al Dīn Abū Muḥammad Abdullah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī Vol.12* (Riyādh: Dār 'Ālam al-Kutub, n. d.)12, 307. Al Muqaddisi, Abdūr Reḥmān Bin Ibrahim, Abū āl Farāj, *Al Shar'h-al-Kābīr alā Matān, Al-Muqannāh Vol. 10.VI* (Beirut: Dār al-Kitāb āl Arabī līl Nāshīr līl Tawzīh, n. d.) 167. Ibn al Qāyyīm al Jawziyah Muḥammad Bin Abī Bākr, *Al Hūdūd wā'al Ta'zīrāt* (Beirut: Dār Asīma līl Nāshūr wā al-Turāth), 23.

In this light, the punishments awarded for *Qiṣāṣ* are not counted as *Ḥadd,* for they are the rights of the individuals and not of God. Hence, they are pardonable and alterable.[549]

Some other *fuqahā'* have defined *Ḥadd* as الحد هو العقوبة المقدرة شرعا which has varied meanings encompassing everything including *Diyat* and *qiṣāṣ*.[550]

These forms of crimes and their punishments are prescribed by a cannon law. Therefore, a human agency cannot reduce, modify or alternate the punishments awarded for *Ḥudūd.* Although various Islamic jurists have defined *Ḥudūd*, Dr. Etim E. Okon has summarized all the definitions of *Ḥudūd* in his paper, saying the capital offenses are termed *Ḥudūd.* which means prohibition or restraint. He is of the view that instead of the violation of God's rights, this is a type of criminal behaviour against God by which he means that even punishment is already established, but he is of the view that the court is "divested of discretionary power."[551] Other Islamic jurists, however, have favored *ijtihād* in some respects but not most of the time when punishment is already suggested. However, all of them are vocal in respect of its applicability to Muslims and non-Muslims. Mathew Lippman, too, has defined *Ḥudūd* in the light of the most Islamic jurists and followed Etim Okon, avoiding thrusting self-defined principles on it.

[549] See for details Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5II*, 33. Ibn al-Humām, *Fatḥ-al-Qadīr*, *Vol. 5*, 212. Al-Dasūqī, *Hāshiyat-al-Dasūqī, Vol. 4*, 484. Al-Māwardī, *Al-Hawī-al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī Vol. 10III* (Beirut: Dar al-*Kutub* Al-Ālamiya, n.d) 84. Abī Zakariyyā Muḥyī al-Dīn Yaḥyā Bin Sharaf, *Al-Nawawī, Rawḍat-al-Ṭālibīn Wa 'Umdat al-Muftīn, Vol. 4* (Beirut: Al-Maktab al-Islāmī, n.d) 279.

[550] Ibn al-Humām, *Fatḥ al-Qadīr, Vol. 5*, 212. Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, 221.

[551] Dr. Etim E. Okon, "*Hūdūd* Punishments in Islamic Criminal Law" *European Scientific Journal*, 10. no. 14 (May 2014): 228, Accessed July 09, 2017, http.ujournal.org/index.php/esj/article/download/3405/3169

However, he adds the action against these crimes is initiated by the agency of God that is the state.[552]

As stated earlier, *Ta'zīr* is a discretionary punishment and depends on the discretion of the court. The crimes not classified under *Ḥadd* or not falling within *Ḥadd* jurisdiction are classified as *Ta'zīr*. These are just common crimes such as petty thefts, brawls, quarrels, gambling etc.[553]

Literally, the word *Ta'zīr* means prevention, to prevent or stop something. It is also used in the sense of avoiding, moderating, honoring, correcting and helping. In usage, it could be stated thus; (Somebody has disciplined, or chastised) which means to prevent the criminals from repeating the same crime. In other words, this means a sort of punishment that is meant to stop a crime or criminal from committing the same crime.[554]

In Islamic jurisprudence, the word *Ta'zīr* means having different meanings such as (forbidden), اشد الضرب (beaten), اللوم والعتاب (punishment), التاديب, الاعانة والنصرة (to help).[555] It means a sort of punishment not duly defined or explained by the religious texts or the *Sunnah* and is left to be decided by the legislator or legislature in existing circumstances in which the crime is committed.[556] The Holy Qur'ān has also stated that "Whoever works evil, will be requited accordingly."[557]

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[552] Matthew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law, 12 *B.C.* Int'l & C omp. L. Rev. 29 (1989), Accessed July 10, 2017, http://lawdigitalcommons.bc.edu/iclr/vol12/iss1/3

[553] Al-Sarakhsī. *Mabsūṭ*. 75.

[554] Lane, *Madd al-Qamus*. Bk.I. Pt.2, 2034.

[555] See for details Ibn Manẓūr, *Lisan al-'Arab*, 325. Al-Rāzī, *Mukhtar Al-Sihah* (Riyādh: *al-Mumlakah al-Arabiyyah al-Saudyyah*, 1079), 699. Aḥmad Alquzrvini Ibn Fāris, *Mohjām al-Maqāyees-al-Lughāt Vol. IV* (Najafi: Dār al-Kutāb al Ilmīyā Iṣmāhīlīyan, n.d), 311. Abdul *Qādīr* Awadh, *Al-Tashri-ul-Jana'i, Vo.I*, 80.

[556] Anwarullah, *The criminal law of Islam*, 213.

[557] The *Qur'ān*, 4: 123.

Different *Fuqahā'* have defined *Ta'zīr* in a different way which is collectively having different meanings depending on the circumstances and situation of the crime, criminal and the state itself such as والتعزير هي: تأديب استصلاح وزجر على ذنوب لم يشرع فيها حدود ولا كفارات[558]. For example, a reknowned Islamic scholar Al-Māwardī has explained *Ta'zīr* saying that it means punishments for which Islamic *Sharī'ah* has not given any specifically prescribed punishment. The rules are framed on the basis of situations and circumstances of the criminal or the accused.[559] Other jurists have stated that *Ta'zīr* also means the crime for that the divine sources have not specified any punishment.[560] Moreover, *Al-Ta'zīrāt Al-Badaniyyah wa Mūjibātihā* has defined *Ta'zīr* in another way saying that عقوبة شرعية غير مقدرة لجرائم غير محدودة which means an offense for which the punishment is alterable and not fixed one.[561]

However, as a crime, *Ta'zīr* is proved in the same way as having a witness, some other evidences, and circumstantial evidences, opinions of the legal jurists and then the final order of court to decide the issue.[562]

However, the third type of crimes called *Siyāsah* has not been derived from the Qur'ānic texts in such a way that different sects and different jurists defined these terms entirely differently. The term *Siyāsah* means the policy of the *Sharī'ah*. The policy is just

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[558] Anwarullah, *The criminal law of Islam*, 213.
[559] Al-Māwardī, *al-Aḥkām al-Sulṭāniyahh*, 236-37.
[560] Abū Zohrāh, *al-Jārīmāh Wā al-ūqubāh* , 4. See for details Abdūllāh Bin Sālīh Bin Sulemān, *Al-Ḥadīth al-Ta'zīrāt-ul-Badaniyah wa Moojibatiha fil Fiqh al Islāmī* (Riyādh: Maktabāt-ul-Haramaīn, n.d), 28. Ibn Nujāym, Zayn al-ābīdīn Bin Ibrāhīm, *Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq Vol. IV* (Beirut: Dār al-Mā'rifāh, n.d.), 44-251. Abdūl Bāqī Bin Yousaf Bin Aḥmad Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil Vol. 5III* (Birut: Dar al *Kutub* al-Illmiyah, n.d), 8, 115-116. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib Vol. IV*, 161-192. Al-Hijavi, *Al Iqnah*, Vol. IV, 269-272. Ibn Farhaun, *Tabsirat-ul-Hukkam Vol. 2*, 264-280. Ibn 'Ābidīn, *Hashiya Rudd-ul-Muhtar Ala Addar al-Mukhtar*, Vol. IV, 247-248. Shams-ud-Dīn Muḥammad Bin Muḥammad Bin Abdul Reḥmān al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil Vol. 3 and Vo.VI* (Cairo: Matbahat al-Sahadat, n.d), 357, 219.
[561] Sulemān, *Al-Ḥadīth al-Ta'zīrāt-ul-Badaniyah wa Moojibatiha fil Fiqh al Islāmī*, 28.
[562] Ibn Qudāmah, *Al-Mughni, Vol. 3* 189.

as long as the government upholds the *Sharī'ah*. If it does not uphold it, the policy becomes unjust or *zalimah*. The policy of the *Sharī'ah* is of two types: the first deals with the "preservation" aspect of the five principles listed above, while the second deals with the "protection" aspect of these five principles. *Siyāsah* also awarded the titles of social policy and legal policy. [563] It is related to political and governance matters which is stated to be in accordance with the principles derived from *Sharī'ah*. There is no such categorical derivative of either executive, or administrative structures but one thing which has been confirmed is that it should be in accordance with the principles of *Sharī'ah* which has made it a sort of theocracy. Mohamad Hashim Kamālī has left it to the discretion of the ruler to determine its structure but has gone into much detail of *ūlu āl āmr,* or people having the power to issue a command, a Qur'ānic concept.[564] Joseph Schacht has also reviewed mostly the *Siyāsah* in his, *An Introduction to* Islamic *Law*, saying that it became rigid and harsh but he mostly viewed it in the light of the Abbāsids and not other derivatives.[565] In short, *Siyāsah* needs another research from the point of *Mughal*s how they adopted it, as it is not subject of this research.

However, where *Siyāsah* is related to punishments, it falls under the jurisdiction of Islamic criminal system, for criminal offences related to *Siyāsah* often carried severe punishments, including capital punishment. The excuse used for *Siyāsah* punishments was used from the Qur'ānic interpretations of *shar,* which means evil.[566] Nayazee has

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[563] See for details Tarablusi, *Mu'in al-Hukkam*, 207. Imran Ahsan Khan, Nyazee, Islamic *Legal Maxims* (Islamabad: Advanced Legal Studies Institute), 74-75. Muḥammad Mushtaq Ahmad, PhD thesis "*The Doctrine of Siyāsah in the Ḥanafī Criminal Law and its Implications for Islamization of Laws in Pakistan*" (Islamabad: IIUI, 2015), 23-43.

[564] Muḥammad Hashim Kamālī, *Siyāsāh Shar'īyāh* or The Policies of the Islamic Government, The American Journal of Islamic Social Sciences 6. no. 1. (1989): 59-60,

[565] Joseph Schacht, *An Introduction to* Islamic *Law* (Oxford: Oxford University Press, 1965), 75-76.

[566] See the Qur'an, 16:90.

stated that several punishments for *Siyāsah* crimes awarded during the medieval Muslim period and Turks were not strictly in the *Sharī'ah* law. They were Arabitrarily contrived by the rulers to punish their opponents.[567] In other words, *Siyāsah* punishments were awarded to the rebels and opponents in the name of the *Sharī'ah* while in *Sharī'ah* their purpose and way of execution depends on the nature of the crime and conduct of the ruler, too.

It is, however, fair to differentiate between *Ta'zīr* and *Siyāsah* before dilating upon them further. Mr. Imrān Aḥsan Khān Nyazee[568] has stated that *Ta'zīr* belongs to a single person, while *Siyāsah* belongs to the state. He means that *Ta'zīr* is a private injury to an individual while *Siyāsah* could be against the people.[569] It means that the Muslim rulers were cognizant of the fact that *Siyāsahs* were not easy to implement, while *Ta'zīrs* were very easy to administer.

1.5. *Qiṣāṣ* and *Diyah*

Literally, *Qiṣāṣ* means replacing something but dictionaries have defined it as;

كلمة القصاص مشتقة من مادة ''قص'' والقاف والصاد أصل صحيح يدل على تتبع الشيء، ومنه قولهم: اقتصت الأثر اذا تتبعته، ومن الباب القصة والقصص، كل ذلك يتتبع فيذكر، ومنه قصصت الشعر، وذلك أنك اذا قصصته، فقد سويت بين كل شعرة وأختها، فصارت الواحدة كأنها تابعة للأخرى مساوية لها فى طريقها، ومن الباب

إِنَّ اللهَ يَأْمُرُ بِالْعَدْلِ وَالإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاءِ وَالْمُنكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ

[567] Imran Ahsan Khan Nayazee, *Outlines of* Islamic *Jurisprudence*, (Islamabad: International Institute of Islamic Thought & Islamic Research Institute, 1994), 450.

[568] Imran Ahsan Khan Nyazee is a Pakistani legal scholar, teaching in International Islamic University Islamabad (IIUI). He is expert in Islamic law and has penned down many books. Also see blurb of Imran Ahsan Khan Nyazee, *Theories of* Islamic *Law: Methodology of Ijtihād* (Islamabad: International Institute of Islamic Thought & Islamic Research Institute, 1994)

[569] Imran Ahsan Khan Nayzee, *General Principles of Criminal Law:* Islamic *and Western*, (Islamabad: Advanced Legal Studies Institute, 2010), 64.

أيضاً اشتقاق القصاص فى الجراح وذلك أن يفعل بالجانى مثل فعله بالمجنى عليه، فكأنه اقتص أثره.[٥٧٠] though

القصاص: ''أن يفعل بالفاعل مثل ما different *Fuqahā'* have defined it still in another way such as فعل'' and [٥٧١] ، أى: أن يفعل بالجانى مثل فعله بالمجنى عليه.[٥٧٢]

However, another jurist 'Awdah states that it is القصاص: هو العقوبة الأصلية للجناية على مادون النفس عمدا[573]

In principle, *Qiṣāṣ* means revenge taken in the same way. It is applied to a willful murder and various other crimes, which are committed against other human beings in an unfair way and in an unfair situation. According to Luqman Zakriya, *Qiṣāṣ* crimes are also *Ḥudūd* and their penalties have already been stipulated in the Holy Qur'ān and the *Sunnah* of the Prophet (PBUH).[574] Under *Qiṣāṣ*, relations of the person could either approve punishment or forgive the person. However, when money is paid instead of blood of injury, this is called *Diyah* as Zakirya says.[575] *Diyah* literally means what is given for something such as ودى يدى دية or what is given to replace life such as المال الذى

[570] Al-Rāzī, *Mukhtār Al-Ṣiḥāḥ*, 864. Ibn Fāris, Mu'jam al-Maqāyīs-al-Lughah, Vol.5,11. Al-Sāhīb Ismāh'īl Bin Hibād, *Al-Muhīt fil Lughāt* (Riyādh: Ālam-ul-*Kutub*, 1994), vol. 5. 186. Abū al Qasim Mahmood bin Umar bin Aḥmad, Al-Zafhashri. Asas-ul-Balagha (Beirut: Dar-al-*Kutub* Al-Illmiya, n.d), Vol. 2, 250. Muḥammad Mūrtadā Zubaīdī, Taj-al-Uroos, (Beirut: Dār Sādīr, n.d), Vol. 4, 131.

[571] Al Syeḍ Sharīf Ali Bin Muḥammad Al Jurjani, Kitab Al Tarifat (Iran: Inti*Sharah*t Nasir Khusru, n.d), 176.

[572] Al-Jaṣṣāṣ, *Aḥkām Al-Qur'ān*, vol. 1, 187. Shams Al Dīn Muḥammad Bin Aḥmad Al Khatib Al *Sharbīnī*, Mughni Al Muhtaj Ila Mahri'fat Mahani Ilfaz-ul-*Minhāj*, (Beirut: Dar-al-*Kutub* Al Illmiya, n.d), vol. 4, 53. Ibn al Qāyyīm, Muḥammad Bin Abī Bākr. Al Jawziyyah, *Ehlām Al Moqhīeen*. Vol.1 (Beirut: Dār Al Kutub Al Ilmīyā, n.d), 280.

[573] Awdah, Abdul *Qādīr*, At-Tashri-ul-Jana'i, vol. 2, 212. See Shams-ud-Dīn Muḥammad Bin Muḥammad Bin Abdul Reḥmān al-Raheeni al-Hattab, Mawahib al-Jalul *Sharah*h Mukhtasir Khalil (Matbahat al-Sahadat, n.d), vol. 6, 245-256. Muḥammad Bin Aḥmad Al Dasūqī Al *Mālikī*, Al *Sharah*h Al Kabīr Lil Shaykh Al Dardīr wa Hashiya Al Dasūqī, (Beirut: Al Matbah Ameeriya, n.d), vol. 4, 224. Vol. 6, 326. Vol. 9, 428, 348. Al-Kāsānī, Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i', Vol. 7, 310. Vol. 9, 298-309. *Imām Shāfi'ī*, *Al-Umm*, vol. 6, 6. Abi Isḥāq, Al-Shīrāzī, Al Muhadhdhab (Egypt: Matbahat-ul-Babi al-Halbi, n.d), Vol. 2, 190-193.

[574] Luqman, *Legal Maxims in* Islamic *Criminal Law*, 99.

[575] Ibid., 99.

يعطى للمجنى عليه أو لوليه بدل الجناية الواقعة عليه[576]. Different Islamic jurists have defined this term differently that means المال الذى هو بدل النفس or the money that is paid in compensation of life.[577]

In other words, it means that it is compensation that is given to the family of the murdered person in case the murder is done by mistake or even intentional. The Holy Qur'ān clearly says; "He who killed a believer by mistake must set free a believing slave and pay *diyyat* (compensation) to the deceased's family unless they remit it freely."[578]

Al-Sarakhsī opines on *Qiṣāṣ*, saying that it is the severity of the crime that it is not upheld as expiation for the killing. In fact, he argues the sin is very grave as it is against what has been ordered by God in the *Qur'ān*.[579]Al-Sarakhsī has cited a very long background, quoting the Qur'ān at different places such as when God asks the sons of Israel to desist from committing such a crime[580], then God talks about retaliation of:

وَالْعَيْنَ بِالْعَيْنِ وَالأَنفَ بِالأَنفِ وَالأُذُنَ بِالأُذُنِ وَالسِّنَّ بِالسِّنِّ

"Eye for eye, nose for nose, ear for ear, and tooth for tooth".[581]

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[576] Zubaīdī, *Tāj-al-Uroos*, vol. 10, 386. See Al-Rāzī, *Mukhtar Al-Sihah*, 630. Aḥmad Bin Ali, *Al Hamavi Al Misbah al Munir fi Gharib Al Sharahh al Kabir* (Beirut: Al Maktabat-ul-Illmiya, n.d), 250. Abī Bākr Muhammād Bīn āl Ibn Hāssān Ibn Duraīd Al-Azdī, *Jamarāt āl Lughāt Vo.I* (Beirut: Dār āl Kutāb āl Illmīyā: n.d), 174.

[577] Al Jurjani, K*itab Al Tarifat*, 106.

[578] The *Qur'ān*, 4: 92.

[579] Al-Sarakhsī, *Al-Mabsūt*, vol. 27, 84.

[580] See the Qur'an 5: 32.
مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَلِكَ فِي الأَرْضِ لَمُسْرِفُونَ

[581] Qur'an 5: 45.

The concept of *Qiṣāṣ* is here clearly defined as well as established as a principle for awarding punishment. Even the Qur'ān has upheld equality in the prescription of the law, as it says that:

كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالأُنثَى بِالأُنثَى

"In case of murder: the free for the free, the slave for the slave, the woman for the woman" and no other person.[582] These verses have not likened the idea of crossing the limits to punishment somebody more than he deserves.

Regarding further classification, Nyazee has depended on Doi, Al-Māwardī and al-Shawkānī to state that there are further seven types of crimes, which fall under the concept of *Ḥudūd* which are murder, theft, injury, adultery, defamation, apostasy[583], inebriation, and highway robberies.[584] In the same way, *Ta'zīr* crimes are also not the same. They vary from society to society and nation to nation. The reason is, Shahid M. Shahidullah, says they are not prescribed in the Holy book or *Sunnah*. The jurists and judges interpret them corresponding to the situation they are placed in. He cites some

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[582] Qur'an 2: 178.

[583] Apostasy menas that a person convers to a religion other than *Islam* and voluntarily leaves *Islam*. It means the acts and words that are against the fundamental teachings of *Islam*. Also, it means that person is against Islamic rituals and other practices such as belief in the next life, prayers, fasting and any other injunctions stipulated by *Islam*. This encompasses even the explanation and interpretation of the *Sharī'ah* and its other commands. As the *Qur'ān* has stated;

الردة: الردة لغة هى الرجوع، فالراجع مرتد ومن ذلك قوله تعالى: (ولا ترتدوا على أدباركم فتنقلبوا خاسرين) وتعرف الردة شرعاً بأنها الرجوع عن الاسلام أوقطع الاسلام وكلا التعبيرين بمعنى واحد.

(Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5II*, 136. See for details Ibn 'Ābidīn, *Hashiya Rudd-ul-Muhtar Ala Addar al-Mukhtar*, *Vol. 3*, 391. al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil*, *Vol. 5I*, 279. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib*, *Vol. 4*, ١١٦. Ibn Hāẓm, *Ali ibn Ahmad, Al-Muḥāllā*, *Vol. 9* (Cairo: Al-Maktabāh al-Jamhurīyyāh al-Arabīyyāh, 1968 A.D), 192. Muḥammad Ali al-Shawkānī, *Nayl al-Awtar min Asrar Muntaqi-ul-Akhbar*, *Vol. 5II* (Cairo: Matbah al-Bolaq, n.d.), 218-219. Awdah, *Al-Tashri-ul-Jana'i*, *Vol. 2*, 706-730.)

المرتد: هو المسلم الذى غير دينه فلا يعتبر غير المسلم مرتداً اذا غير دينه، ويعتبر المرتد مبدر الدم فى الشريعة

(al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil*, *Vol. 5I*, 288. Awdah, *Al-Tashri-ul-Jana'i*, *Vol. 2*, 18. Sharf-ud-Dīn Musa al-Hijavi, *Al Iqnah* Vol. IV (Egypt: Matbah al Misriya, n.d), 293. Al Sherazi, *Al Muhazzib*, *Vol. 2*, 236.)

[584] Luqman, *Legal Maxims in* Islamic *Criminal Law*, 99.

examples such as possession of weapons, sedition, drug addiction and smuggling, robbery, organized crimes, cyber-crimes and crimes which are in yet to be defined status.[585] If they are compared with *Ḥadd* and its types, it becomes clear that even sometimes a murder is declared a type of *Ta'zīr*, while the other classification depends on the social circumstances.

2. Evaluation of Islamic Criminal Law in India during the *Mughal* Period

As in these modern times, it is state's duty to implement laws, the same is the case in *Islam*. The crimes falling under *Ḥadd* are implemented by the state and crimes committed in this connection are punishable through state's prosecution. *Mir'at-e-Aḥmadī* mentions that the proceedings are initiated by the police.[586] In this connection the case of Mir Murtada vs. Kashmiri as given by 'Alī, Muḥammad Khān is a good example.[587] Another case of such a nature has been mentioned by Khāfī Khān as Muhammad Ami Khan vs. Manucci.[588] This classification has been the same as given in the Islamic criminal system which shows that the *Mughals* were very much aware of the *Ḥudūd* type of crimes and the way how to proceed against a person when the police department used to get information.

The second type of crimes such as *Ta'zīr* was also placed in the same category. The punishment for these cases was not as awarded in the cases of *Ḥadd* or *Ḥudūd*.

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[585] Shahid M. Shahidullah, *Comparative Criminal Justice System* (Burlington: Jones and Bartlet Learning, 2014), 372.
[586] 'Alī, Muḥammad Khān, Mir'āt-e-Aḥmadī, *Vol. I* (Bombay: Fāth-ul-Karīm, 1307, A.D), 282-283.
[587] Khāfī Khān, *Khafi Khan's History of 'Ālamgīr: being an English translation of the relevant portions of Muntakhab al-Lubāb, with notes and an introduction*, 565.
[588] Niccolao Manucci, *Storia Do Mogor, Vol. 2*. Trans. by William Irvine (Calcutta: Editions Indian, 1965), 197.

Niccolo Manucci has mentioned referring to Nihaya to have applied this punishment but not in the cases involving *Ḥudūd*. The reason is that *Ta'zīr* is just a prohibition, as 'Alī, Muḥammad Khān has mentioned it in his *Mir'āt*.[589] This shows that the *Mughal*s also differentiated in terms of crimes as stipulated in the Islamic jurisprudence. The *Mughal*s knew that the punishments given under *Ḥudūd* were not alterable. In case of a *Ta'zīr*, it was the discretion of the court or the judge to award sentence or pardon the person. Even new punishments were coined to be awarded if some other punishment seemed severe.[590] Ali Ahmed Khān has distinctly referred to new types of acts which fall under *Ta'zīr* such as hurting others, gambling and cases of fake currencies.[591] The administration of *Ta'zīr* was the responsibility of the ruler or the *Qāḍī*. However, it is pertinent to mention here that there was not a set standard for such punishments.[592] Ali Ahmed has mentioned some cases during Aurangzēb period when the emperor ordered his governors and *Qāḍīs* to visit prisons and pardon criminals for minor crimes.[593] Aurangzēb also dismissed the court orders for imposing undue fines on offenders though *Diyah* or amount paid for blood money was allowed.[594] These are just a few examples of how *Ḥudūd*, *Ta'zīr* and *syasah* were categorized as separate crimes and separate punishments were administered despite the fact that no king or ruler ever allowed to change *Ḥudūd*.

The same was case of homicide where *Qiṣāṣ* was allowed as blood money. It has been mentioned in *Tuzuk-i Jahāngīrī* too. In State versus Empress Nūr Jahān[595] the

[589] Khān, Mir'at-e-Aḥmadī, 177-182
[590] It may be interesting to notice that the title given to the Hindustani translation of the India Penal Code is *Ta'zīrāt-i-Hind*.
[591] Khān, Mir'at-e-Aḥmadi,182.
[592] Ibn Ḥasan, *The Central Structure of Mughal Empire*, 336.
[593] Khān, Mir'at-e-Aḥmadi, 277-282.
[594] Ibid., 293.
[595] Jahāngīr, *Tuzuk-i-Jahāngīrī*, 30.

complainant readily got agreed to accept compensation but in the case of State versus Prince of Gujarat[596], the emperor rejected this and upheld the capital punishment. This clearly shows that the emperors sometimes categorized crimes according to their own wishes and whims where they saw stability of the state. They did not shirk from making alternation in *Ḥudūd* cases, but when the public interest depend, the king realized the public mood and did not interfere to prove himself a devotee of *Islam*. However, in such cases, it could be stated that sometimes the discretion of the court was allowed to work in tandem with the social and political expediencies. In the case of State vs. Khawajah Ahmed, the state, for example, "the Appellate Court (*Sulṭān*) directed the Lower Court not to accept 'blood fine.'[597] The crime was categorized by the king himself by interference. In fact, murder and homicidal cases were considered private and the state interfered only when the complainant agreed. In short, the legal criminal system during the *Mughal* period was highly organized which paved the way for the British to bring it at part with the modern world and promulgate it in India later on, as Vikas Gandhi has concluded in his book, *Judicial Approach in Criminal Justice System: An Experience of India.*[598]Although this system in terms of categorization of crimes was far from perfect as U. B. Singh alleges, he has praised the administration of justice through Islamic jurisprudence on the foundations that *Qāḍīs'* jurisdiction prevailed on the entire empire including the emperor.[599]

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[596] Khān, Mir'at-e-Aḥmadi,49.
[597] Ahmad, *The Administration of Justice*, 508.
[598] Vikas H. Gandhi, *Judicial Approach in Criminal Justice System: An Experience of India*, (New Delhi: DK, 2010), x-xi.
[599] U. B. Singh, *Administrative System in India* (New Delhi: APH Publishing Corporation, 1998), 124.

3. Implementation of *Farmān-i-Shāhī* in *Mughal* India

It is very interesting to note that even the implementation of the *Farmāns* was backed up by one or the other type of the classified Islamic crimes and punishments were awarded likewise. However, it is pertinent to mention here that these were related to criminal laws and not the overall administration or military matters of the statecraft. They, however, are also not credited with documenting Islamic criminal law, for they followed the *Fatāwā* handed down to them through the previous *Sulṭāns*. The most important Islamic legal documents pursued, consulted and widely attributed to two major sources; one was *Fiqh-i Fīrūz Shāhī* and *Fatāwā-i 'Ālamgīrī*. The most trusted *Mughal* source researcher Basheer Ahmed has stated that regarding criminal laws, these two codes were considered final according to the *Ḥanafī* or *Sunnī* sect. The courts, he argues, used to give support to interpretations and reinterpretations of their different codes. According to him, such Islamic criminal law documented so far was used to categorize violations or crimes under these major headings;

i. Crimes against God

ii. Crimes against King

iii. Crimes against people or private individuals[600]

Basheer has further highlighted the initiation of the *Sharī'ah* law or Islamic criminal law's major elements during the period of Quṭb al-Dīn Aybak, a slave king. The law was not completely codified at that time and this continued to be administrated through courts. The first attempt for codification was made during the period of Fīrūz

[600] Ahmad, M. B., *The Administration of Justice in Medieval India*, 40-41.

Shāh Tughlaq, says Basheer Ahmed adding that this attempt resulted into *Fiqh-i Fīrūz Shāhī*. Basheer mentions another book 'Civil Procedure Code' translated by Fīrūz Shāh himself. It was widely used in the courts during the *Mughal* period after which it was replaced by another codification, *Fatāwā* as mentioned earlier.[601] His conclusion is that almost all the Muslim kings and emperors of India made efforts for the supremacy of *Sharī'ah* which in other words means the supremacy of Islamic criminal law. Praising daily justice of the Indian emperors, he argues that the Indian kings and *Mughals* never deviated from the right path of the dispensation of justice. That is the very reason, he adds, the Islamic criminal type of system continued in India even when the East Indian Company took over the entire system from the last *Mughals*.[602] Perhaps the reason behind this sticking to *Sharī'ah* has been stated by Ibn Ḥasan referring to Al-Māwardī. He argues that it was that the Islamic jurists of the past stressed upon the need that the ruler is bound to protect his kingdom or *Ummah* (nation) as well as *Sharī'ah*. He is to be expected to display the merits of a true Muslim and uphold law as propounded by the jurists. [603] He further states that the safety of *Sharī'ah* means Islamic laws in force in a state. The ruler only exists to implement the law. If he does justice and stands up for it in his society, he quotes Ibn Khaldūn, saying then he is a fair ruler and the Muslim subjects are bound to be obedient to him.[604] However, it is fair to mention here that the Muslims and non-Muslims are considered equal in Islam only in theory but in practice both are separated from each other through a tax system. This separation through *jizyah* continued even during the period of *Mughals* though discontinued for a brief period during Akbar

[601] Ibid., 41-42.
[602] Ibid., 42.
[603] Ibn Ḥasan, *Central Structure of the Mughal Empire*, 256.
[604] Ibid., 256.

and Shāh Jahān's eras. Quoting another scholar *Sulūk-al-Mulūk*, Ibn Ḥasan says that it is the Islamic law which has divided the subjects into Muslims and non-Muslims categories. Hence, it becomes the duty of the rulers to see believers lead their lives according to the tenets of Islam and that non-Muslims pay their tax for which the state guarantees them security to life and property. [605] In the light of this argument, it is important to remember that a Muslim ruler has two important responsibilities; the first is to perform his duty of ruling and second is to rule in the light of the Islamic laws.

In the case of *Mughal*s, however, it has proved highly different. It is because they were placed in a situation like their predecessors where more than half of the population comprises of non-believers. Quoting an Urdu source *Ādāb-i-Sulṭanat*, or Ways of Ruling, Ibn Ḥasan argues that Islamic legal system guarantees safety of life and property on an unbiased and unprejudiced manner to everybody living within the state. The jurists of the past have also stressed upon this aspect of the Islamic system. He says that in the eyes of the *Mughal* rulers "Justice and compassion must be exercised alike for all subjects. The king is the shadow of God and the gift of divine mercy is common to both believers and non-believers."[606] His claim could be even verified from *Akbar Nāmah*, which is considered a reliable source to study the *Mughal*s. Abū 'l-Faẓl argues that king should stop himself from committing atrocities against his own subjects quoting the Holy Prophet (PBUH). He adds that the Prophet (PBUH) has stopped the Muslims from injustice against the victims even if they are infidels.[607] Although the reference of Ibn Ḥasan is purely *Mughal* that a king is a shadow of God and not Islamic, the reference to the sayings of the Holy Prophet (PBUH) is significant which points to their loyalty to the

[605] Ibid., 306.
[606] *Ādāb-i-Sulṭanat* as quoted by Ibn Ḥasan, p. 308.
[607] Abū 'l-Faẓl Ibn Mubarak, *Akbar Nāmah*, Calcutta: The Asiatic Society, 1907, Vol. 3, 257.

Islamic system.Therefore, it was but imperative for the *Mughals* to continue administration of justice using Islamic criminal law in whatever shape it was at that time.[608] There have been cases where Akbar set aside some provisions related to *Ḥadd*, *Ta'zīr* and even in *Siyāsah* issues, but these occurrences were not much as compared to their predecessors as Basheer Ahmed has pointed out.[609] One thing is to be noted that not all civil laws were applied to the non-Muslims who were Hindus at that time, as pointed out by Vincent Smith but he states that criminal laws of Islamic jurisprudence were set in abeyance in the cases of non-believers. He further argues that it is very interesting to note that the *Mughals* did not disturb the rural corporate life run through old institutional setup. Referring to *Ā'īn*, he states that Akbar honestly tried his best to administer justice.[610]

The theory that the king was the shadow of God on the earth and thus was exempted from all legal proceedings was just a myth and a concept. Practically, it was never implied, as it was never acknowledged that the king was beyond law. However, it is pertinent to mention here that every *Mughal* emperor considered himself viceroy of God on the earth. According to M. J. Akbar, that was the very reason that the due submission was demanded from the public on account of this status of the king. Theoretically, the king was obliged to abide by the sacred law he was declared patron of. Therefore, the king was supposed to be the source of law himself, the reason that there were no or fewer codified legal documents during the *Mughal* period. The few documents existed were prepared by the interest of the kings such as The Twelve Ordinances during

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[608] M. J. Akbar, *The Administration of Justice by the Mughals* (Lahore: Muḥammad Ashraf Publisher, 1948), 2-3.
[609] Ahmad, M. B., *The Administration of Justice in Medieval India*, 42.
[610] Smith, *Akbar the Great Mughal, 1542-1605*, 34.

Jahāngīr and *Fatāwā* during the period of Aurangzēb. Although the sacred or Holy law states that the justice is to be dispensed by the human beings, it does not recognize any idea of the power of legislation of the king. However, it was necessary to deduce through *ijtihād* as propounded by the clerics at that time and Aurangzēb made efforts to remove this fault through the compilation of *Fatāwā*.[611] A British diplomat Thomas Roe, who visited the Indian Subcontinent during the seventh century noted different aspects of the administrative justice and wrote a commentary on the major points. About the emperor, he stated that he was the ultimate authority with justice sprouting from him. He argued further that despite this, Shāh Jahān and Aurangzēb made decisions according to the classical law practiced at that time.[612] This dispensation of justice as quoted by the British diplomat shows it clearly that the *Mughal*s were very keen in legitimizing their rule even when issuing *Farmāns* regarding justice. R. C. Majumdar has also noted the same point and supported opinion of Thomas Roe that the *Mughal*s did not use to consider themselves above the law and that they used to practice orthodox Islamic injunctions in their empire.[613] Another noted writer Surendar Nath Sen has also stated referring to Giovanni Careri, a noted traveler to whom he transcribed that there was no written law in the *Mughal* Empire and that the final decision in all judicial verdicts used to stay with the emperor himself.[614] Edward Terry and another traveler Father Antonio too noted this, who according to H. K. Kaul had done extensive work in observing the

[611] Akbar, M.J., *The Administration of Justice by the Mughals*, 5-6.
[612] Sir Thomas Roe, *The Embassy of Sir Thomas Roe to India, 1615-19: As Narrated in His Journal and Correspondence*, Ed. by William Foster (New Delhi: Munshiram Manoharlal Publishers, 1926), 89-104.
[613] R. C. Majumdar, *The Mughal Empire* (Bombay: Bharatiya Vidya Bhavan, 1974), 537-554
[614] Surendra Nath Sen, *Indian travels of Thevenot and Careri; being the third part of the travels of M. de Thevenot into the Levant and the third part of a voyage round the world by Dr. John Francis Gemelli Careri* (New Delhi: National Archives of India, 1949), 240.

dispenstation of justice during the *Mughal* period and noted down its salient features in their diaries and travelogues.[615]

Whereas the dispensation of justice was concerned, there were regular courts, judges and codified laws applicable at that time. There were central courts, provincial courts, district courts and *pargānāh* courts. This system, according to Sabah Bin Muhammad in his conference paper "Judicature of Islamic Law in Medieval India," goes to the bottom at village level where petty crimes and smaller judicial issues are decided by a local *Qāḍī*.[616]He, however, has stated a very important point that it does not mean that before the *Mughal*s there were no codified laws. There were at least four copies of different *Fatāwā* of Islamic laws applicable at that time. An important collection that he mentions is of *Fatāwā-i* Bāburī[617] which several historians have missed.[618] Another Italian traveler has shed detailed light on the justice system of the *Mughal*s mentioning bell of justice used by Jahāngīr that every common man can ring outside of his palace to file his complaint and get it resolved directly with the intervention of the emperor. This

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[615] H. K. Kaul, *Travelers India: An Anthology* (Calcutta: Oxford University Press, 1980), 211.

[616] Sabah Bin Muḥammad, "Judicature of Islamic Law in Medieval India" *3rd International Conference on Arabic Studies and* Islamic *Civilization*, 04-05. (14-15 March 2016), Malaysia. https://worldconferences.net.

[617] ***Fatāwā-i*** Bāburī, This great book of *Fiqh Hanafī* written during the great soldier and founder of the *Mughal* kingdom, Zahir ud din Bābur has no mention in the reliable books of Persian literature. Its different handwritten pieces are lying in different libraries in India. Even the biography of the writer of this book, Shaykh Nurūḍḍin Khawānī are not found in any other book. However, he has some information about him in Nafaisul Maasir. (Catelog Makhtutāt Fārisī (India: Patna Library) vol. 14, 86).
In the foreword of the book, Shaykh Nurūḍḍin Khawānī has written that in order to fulfill his wish of associating himself with the regal court through that book by written his pedantry in the shape of the book and present it to the king. He set out from his homeland in 525 *Hijra* and reached "Mamalak Mahroosa" after covering much "distances". He was in a conflict how to present that book that the kingly fiat arrived that the book should dilate upon the issues of *Sharī'ah* in Persian language. After this order, the author sets to write the issues of *Sharī'ah* from the certified traditions and books and got help from *Hidāyah, Kafi, Sharahh Qaya, Sharahh Mukhtasar Waqāyah, Khaza, Fatāwā Qāḍī Khan* and its summahry. Shaykh Farīd Sāhīb Būrhān Purī "*Fatāwā Bāburī*". Mah'rīf Azam Gārh No. 1, vol. no. 66, 52-53.

[618] Sabah Bin Muḥammad, "Judicature of Islamic Law in Medieval India". 08

practice, Nicolo Manucci says, continued up to the period of Shāh Jahān. [619] This is enough to tell that a complete judicial system comprising civil and criminal judicial procedures existed during the period of the *Mughal*s. It evolved from simple criminal procedure to highly complex *Fatāwā* with the amalgamation of the religious injunctions and political exigencies of that time. It clearly shows that even if it was in its raw form, it followed the classical Islamic system which further evolved keeping in view the majority section of *Sunnī Ḥanafī*.

Regarding procedure, Manucci states that emperor used to dispense governmental affairs to provide full justice. Even the armies were used against the robbers to establish peace and tranquility within the empire. The public safety was ensured through every measure. The governors, *Amīrs*, chiefs and other officers were duly held accountable for negligence in checking crimes. In his phenomenal work, *The Constitution and Criminal Justice Administration*, Dalbir Bharti has shed a detailed light on the full system. He not only discusses the evolution of the criminal law up to the period of *Mughal* but also in the post-*Mughal* period. He is of the view that there was a complete justice and justice administration system with king at the top, the final authority followed by a complete code of criminal laws, which were applicable at that time in courts, lower courts and *praganahs* established during Sher Shāh Sūrī's period. He goes on to say that it was a full police system for prosecution and a complete prison system to back up the whole judicial procedure.[620] Quoting various primary sources, Dalbir Bharti has concluded that the full criminal procedure categorization of the crimes was the same as was given in the Islamic criminal law regarding crimes against God, crimes against the state and the crimes

[619] Nicolo Manucci, *Storia do Mogor, Vol. I*, ed. By William Irvine (London: John Murray, 1907), 260.
[620] Dalbir Bharti, *The Constitution and Criminal Justice Administration* (New Delhi: APH Publishing Corporation, 2002), 24-25.

against the people. However, what Dalbir has differentiated from the rest is that he has taken a detailed view saying, crimes against God and state, both were treated crimes against the public and morality and were treated as such. There was a complete legal procedure with a *Muḥtasib*, a prosecutor attached with the criminal to bring the crime case to its logical end for punishment or release of the criminal.[621] Elaborating the procedure further, he says that during the criminal process, the victims and the accusers were directly involved in the case with judgement from the court. Regarding collaboration, testimony and admission, he states that the *Ḥanafī* law was followed in its entirety due to the majority of the *Sunnīs* in the empire. The salient features of this laws that the capital punishment on non-believer's complaint could not be awarded to a believer, non-believers and women were not considered equal to a single believer, while women as evidence were non-admissible in *Ḥudūd* and *Qiṣāṣ* cases.[622] He further states that there was a complete system of lawyers representing the criminals in the court and fight the legal battle.[623] The legal coding during this entire period continued to evolve into a complete codified *Fatāwā* that Aurangzēb helped compile into a single collection. Bharti has commented on this evolution, stating that this was used by the colonialism with some mixture of the English law to apply just administration in India. The praise that the English administrators showered on this system is enough to show how it evolved into a complete criminal system based on the classic Islamic *Fiqh*. Luke Scrafton has termed it a complete system with various components that no government could claim to have in such a good shape. He claims that none ever objected it as an oppressive system

[621] Ibid, 27.
[622] Ibid., 28.
[623] Ibid., 29.

that "The manufacturers, commerce, and agriculture flourished accordingly."[624] Another historian Sidney J. Owen in his book, *The Fall of the Mughal Empire*, states that whatever the system was in force in India, it was one of the best systems available at that time. What he praised the most was the early justice instead of "tedious delays as were observed in the English system at that time.[625]

3.1. *Farmān-i-Shāhī* and Amendments in the Administration of Justice

A simple glance over the entire *Mughal* rule with strategic thinking can make a scholar aware of the anomalies existed in the *Mughal* political as well as legal and judicial system but it is not a surprising thing, for the *Mughal* empire was not a modern democracy and public had nothing to do with the governance at that time starkly different from the public of today. Therefore, political, social, national, racial and even transactional exigencies existed during those times to force the *Mughal*s to bring twist, reinterpret, amend, modify or even refrain a *Fatwā* or *Farmān* despite the fact that it, sometimes, modified the very law existing since classical Islamic period. However, in some cases they proved highly just rulers. For example, Jahāngīr loved justice and used to treat all others with the same eyes. This has been recorded by several other analysts too. Once, a noble's nephew committed a murder. The crime was put to trial and it was proved. However, the officials were dilly dallying on the issue, Jahāngīr intervened saying "God forbids that in such affairs, I should consider princes and far less that I should consider *amīrs*" and ordered execution of the nephew of Khān 'Ālam, a prominent

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[624] Luke Scrafton, *Reflections on the government of Indostan, with a short sketch of the history of Bengal, from MDCCXXXVIIII to MDCCLVI: and an account of the English affairs to 1758* (London: Strahan Ivn. 1770), 18-20.
[625] Owen, *The Fall of the Mughal Empire*, 1–4.

noble of his court.[626] There are hundreds of examples where they used *Farmāns* to bring the criminals to justice using Islamic criminal law established long ago, but they also held discretionary powers to bring changes and modifications in the same system which was held in high esteem. There could be various reasons for these changes, for the *Mughals* were ruling Hindu majority India with the Muslim minority and that they were to pacify this huge chunk of population which if rose to rebellion, would have ended their rule sooner rather than later. Some of the modifications they made in several *Ḥudūd* and *Qiṣāṣ* laws are given below so that it could be understood how the *Mughals* used Islamic criminal law through their *Farmāns* to establish their own concept of the rule of law.

3.2. Some Modifications in *Ḥudūd*

3.2.1. Modification in *Ḥadd-e-Qadhf*

Qadhf means to put an accusation on somebody for having done the act of *Zinā*[627]. The person must be adult on whom this accusation is being levelled and that the

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[626] Jahāngīr, *Tuzuk*, Vol. 2, 211.

[627] Some jurists have defined *Zinā* as يعرف الزنا عند المالكيين بأنه وطء مكلف فرج آدمي لا ملك له فيه باتفاق تعمداً. (Abdūl Bāqī Bin Yousaf Bin Aḥmad Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil Vol. 5III* (Birut: Dar al *Kutub* al-Illmiyah, n.d), 74-75. Shams-ud-Dīn Muḥammad Bin Muḥammad Bin Abdul Reḥmān al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil Vol. 5I* (Cairo: Matbahat al-Sahadat, n.d), 290. Al-Dasūqī, Muḥammad, *Ḥāshiyat-al-Dasūqī Vol. 4*, 484. Al-Māwardī, *Al-Ḥāwī-al-Kabīr fi Fiqh Madhhab al-Imām Al-Shāfi'ī Vol. 4*, 313. It means it is a consensual sexual act in which a man and woman are involved in sexual intercourse without legal marriage contract between them. (See for details Awdah, 'Abdul *Qādir*, *Al-Tashrī' al-Janā'ī Vol. 1*, 390-392. Abū Zohrāh, *Al-Jārīmāh Wā al-ūqubāh*, 101-102. See Al-Zuhayhli, *Uṣūl al-Fiqh al-Islāmī, Wa Ādillatuhu Vol. 5I*, 33.)
Ḥanafī Sunnī Fuqahā' have defined it as;
أنه وطء الرجل المرأة فى القبل غير الملك وشبهة الملك
(Ibn-al-Humām, *Fatḥ-al-Qadīr Vol. 4*, 138. Zayla'i, Uthman Ibn Ali, *Tabyin-al-Haqa'iq. Sharī'āh Kānz al Daqā'iq. Vol. 3*, 163. Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 233. Ibn Nujāym, *Al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, vol. 5, 3. Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i' Vol. 5II*, 33.
Some of the *Shāfi'ī Sunnī Fuqahā'* have defined the term as;
ايلاج الذكر بفرج محرم لعينه خال من الشبهة مشتهى طبعاً
Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib Vol. 4*, 125. Abi Ishaq, *Al Sherazi. Al Muhazzib Vol. 2*, 83. Al-Ramli, *Niyat al Muhtaj. Ila Be Sharha. al-Minhāj*. Vol. 7, 402.
There are still other *Fuqahā'* from *Ḥanbalī* school of thought who says;
أنه فعل الفاحشة فى قبل أودبر
Al-Hijavi, *Al Iqnah*, vol. 4. 250. Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī Vol. 10*, 151.

person is innocent, and he has not performed the act of *Zinā*. However, it is un-compoundable crime as the accuser is not tried until he brings the case and does not prove it. Once he brings it in the court, he has to probe it as in case of failure, he is liable to be punished. In both the case, the accuser is punished if it is proved otherwise. The Holy Prophet (PBUH) himself has once stated, "Forgive among yourselves offences that deserve the punishment, but when a case is brought before me, the punishment will become obligatory."[628] It happens that when the accuser is unable to produce any witness to substantiate his accusation, he is liable to be punished under this *Ḥadd* and if that person is able to produce witnesses, then the accused is punished if it is proved.[629]

According to the jurists of the *Ḥanafī* school of thought it is;

من قذف حياتم مات، لا يقام عليه حد القذف. [٦٣٠]

However, it is interesting that it is not used against the person when the accused is dead but when the accused is alive as من قذف ميتا، يلزمه الحد [631]

الزنا فعل يختلف باختلاف المحل والمكان والزمان؛ ومالم يجتمع الشهود الأربعة على فعل واحد، لا يثبت ذلك عقد الامام.
Al-Sarakhsī, *al-Mabsūṭ Vol. 9*, 69.
However, it is pertinent to mention here that it varies from person to person and place to place and even timing. That is why the act of taking four witnesses has put a question mark on the punishment awarded for it. Therefore, it is not easy to prove as it is stated that الزنا ليس الا وطء متعر عن العقد والملك وشبههما
Al-Sarakhsī, *al-Mabsūṭ Vol. 9*, 62. See Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i' Vol. 5II*, 33-39. Abū Al-Ibn Ḥasan Ali Bin Abi Bakr, *Al-Marghīnānī, Hidāyah Vol. 2*, 487-489. *Imām Mālīk* Bin Anās, *Al-Mudawwanah Al-Kubrā Vol. 10VII* (Cairo: Qāhirah, 1323) 16, 35-59. *Imām Shāfi'ī, Al-Umm Vol. 5I* ,119-121. Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī, Vol. 5III*, 156-214.)
It is also that it is committed when marriage contract is not signed or that that the girl is not a slave that is the question of the ownership of girl.
[628] Al-Zuhayli, *Al-Fiqh al-Islāmī, Vol. 2*, 77-79.
[629] Awdah, *al-Tashri al Jina'I al-Islāmī. Vol. 2*, 470.
[630] Al-Sarakhsī, *al-Mabsūṭ, Vol. 9*, 55.
[631] Ibid. See for details Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i', Vol. 5II*, 40-46. Al-Marghīnānī, *Hidāyah, Vol. 2*, 509-550. *Imām Mālīk, Al-Mudawwanah Al-Kubrā. Vol. 10VI*, 2-33. Ibn Qudāmah Al-Maqdisī, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī,Vol. 5III*, 215-236. Al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil, Vol. 5I*, 213-300. Ibn-al-Humām, *Fatḥ-al-Qadīr, Vol. 4*, 204.

Even the Holy Qur'ān has not minced words about this *Ḥadd* saying;

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاء فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُوْلَئِكَ هُمُ الْفَاسِقُونَ adding further that إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللهَ غَفُورٌ رَّحِيمٌ[٦٣٢]

"And those who accuse chaste woman (of *Zinā*) and produce not four witnesses (in support of their allegation), flog them with eighty stripes; and reject their evidence ever after; for such persons are wicked transgressors; unless they repent thereafter and mend (their conduct); for *Allāh* is oft-forgiving most merciful."

The Qur'ān has further stated that;

إِنَّ الَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ الْغَافِلَاتِ الْمُؤْمِنَاتِ لُعِنُوا فِي الدُّنْيَا وَالْآخِرَةِ وَلَهُمْ عَذَابٌ عَظِيمٌ[٦٣٣]

"Those who slander chaste women, indiscreet but believing, are cursed in this life and in hereafter. For them is a grievous penalty."

There is a good example of change in *Ḥadd-e-Qadhf* during the period of Shāh Jahān when he issued a *Farmān-i-Shāhī* to award a punishment against the *Ḥadd*. It happened that a young man filed a complaint against a woman for having broken her promise of marrying her though he spent his entire belongings on her. He cited evidences as having seen some marks on her body to prove their love. However, the woman flatly refused to entertain his complaint saying that person was a fake suiter. Nicolo Manucci relates this incident saying that the *Qāḍī* decided in the favor of young man, ordering the woman to marry him within a few months. However, the woman brought the same young

[632] The *Qur'ān*, 24: 4-5
[633] The *Qur'ān*, 24: 23

man for theft after a month. The young man then refused to recognize the woman thereupon which the woman related the previous decision and appealed for his annulment. The case went to the king and he inquired into the matter, overturned its original decision and punished the young man and his informer who informed him about the marks on the body of the woman to be burried in the ground up to their wastes and shot dead with a volley of arrows.[634]This was the case of *Ḥadd-e-Qadhf* but the emperor modified according to the changing nature of the crime and awarded punishment on the basis of his own discretion. The same happened before Shāh Jahān, too.

3.2.2. Modifications in *Ḥadd-i-Sariqah*

Literally theft means to steal the property of someone else. In Arabic, the word used for theft is (سرقہ) according to which this is also theft if the person does not know about his property as being taken or if it is taken without his consent. Al-Kāsānī states that "The ingredient of theft is to take away the property of someone surreptitiously" where the word surreptitiously has been stressed upon. The Holy Qur'ān also states: "But any that gains a hearing by stealth."[635] This verse is very clear about the issue of theft. Some other Islamic jurists have also stressed upon it saying;

انها أخذ مال الغير خفية ومعنى الأخذ خفية هو أن يؤخذ الشيء دون علم المجنى عليه ودون رضاء [٦٣٦]

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[634] Manucci, *Storia, Vol. I*. 199.

[635] Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5II*, 65.

[636] Al-Marghīnānī, *Hidāyah, Vol. 2*, 517. Al-Sarakhsī, *al-Mabsūṭ, Vol. 10*, 132. See for details Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī, Vol. 10*, 239-259. Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5II*, 65-97. Ibn-al-Humām, *Fatḥ-al-Qadīr, Vol. 4*, 219-264. Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil Vol. 5III*, 98-106. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib, Vol. 10II*, 137-147. Al-Raheeni al-Hattab, *Mawahib al-Jalil Sharahh Mukhtasir Khalil, Vol. 3*, 357. *Vol. 5I*, 305-318. Al-Ramli, Niyat al Muhtaj, *Ila Be Sharha, al-Minhāj, Vol. 5II*, 418-439. Awdah, *Al-Tashri-ul-Jana'i, Vol-2*, 514-637.

It means that to surreptitiously taking means to take one's property without his information or taken secretly without informing the real owner.

Al-Qamus al-Muhit has also stressed upon the same meanings saying;

سرق منه الشيء يسرق سرقا محركة وككتف وسرقة محركة وكفرحة وسرقا بالفتح واسترقه: جاء مستتراً الى حرز فأخذ مالا لغيره [٦٣٧]

تعريف السرقة في الاصطلاح: قال المناوى: السرقة أخذ ما ليس له أخذه في خفاء وصار ذلك في الشرع لتناول الشيء من موضع مخصوص وقدر مخصوص على وجه مخصوص على وجه مخصوص. [٦٣٨]

Another incident mentioned by Abū 'l-Faẓl in his *Akbar Nāmah* regarding a crime pertaining to *Ḥadd-i-Sariqah* which was altered from the original punishment into chopping off the feet. It happened that a leopard-keeper appropriated a pair of shoes of a person by force. The owner of the pair of shoes, somehow, reached the emperor and lodged a complaint. The emperor heard the case as suo moto and ordered to chop off the feet of the leopard-keeper.[639] Thus as the *Ta'zīr* was turned into a *Ḥadd* and that was then transformed and modified into *Ḥadd-i-Sariqah* where original punishment in Islamic jurisprudence is chopping off the hands. However, the emperor, viewing the crime, modified the *Ḥadd* to suit the occasion and the circumstances of the crime.[640]

Again, this had been modified during the period of Akbar as is stated by Abū 'l-Faẓl in Akbar Name. It is about change in *Ḥadd-i-Sariqah.* A royal gardener registered a complaint against two servants for stealing some plants from the royal garden. The trial

[637] Muḥammad Bin Yāqūb, *Fīrūz* Abadi, *Al Qamus-ul-Muhīt* (Beirut: Dār al-Jeel, 1952), vol. 1, 1153.
[638] Al Jurjani, *Kitāb Al Tarifat Vol. 1*, 403. *Imām* Abi Nasar Aḥmad Bin Muḥammad, *Al Samar Qandi. Anees-ul-Fuqha Fi Tahrifat al-Alfaz Almutadavlllāhī Bain-ul-Fuqha Vol. 1* (Lubnan: Dar-al-*Kutub* al-Almiayah, n.d.), 176.
[639] Abū 'l-Faẓl, *Akbar Nāmah, Vol. 2*, 733.
[640] Ibid.,Vol.2, 733.

held afterwards awarded punishment to the culprits for stealing plants with chopping off their hands.[641] The original punishment in the classical Islamic jurisprudence was the same but the circumstances were different. However, the emperor applied his discretionary power and implemented the punishment even for a minor crime. These are just a couple of examples from the period of the great Akbar. The same continued during the rest of the *Mughal* period.[642]

For example, during the period of Shāh Jahān, a factory of the Dutch people was plundered in Surat. Nicolo Manucci states that Shāh Jahān was not averse to awarding capital punishment for minor thefts which was contrary to the original principles of the implementation of the *Ḥudūd* as related by the famous jurists. He is stated to have banished some thieves to the other side of the Indus River, which was considered a strict punishment at that time.[643] The punishments were so strict that even the officers in charge of the prisons were to face the same punishments in case the original culprits succeeded in fleeing from the prisons or police stations.[644]Manucci relates the incident of Surat, saying that Shāh Jahān commanded his governor to compensate the Dutch factory for the plunder that he could not stop or arrest the culprits.[645] This was again against the canons of *Ḥudūd* as stipulated by the Islamic jurists. In this connection, the discretionary power of the emperor was considered a final verdict san any appellate court next to him.

This modification and alteration in awarding punishments continued even after Shāh Jahān until Aurangzēb, the most Islamist *Mughal* emperor. He followed the strict

[641] Ibid., Vol.2,735.
[642] Ibid.,Vol.2, 735.
[643] Manucci, *Storia*, Vol. 1., .203.
[644] Ibid., 203.
[645] Ibid., 203-204.

interpretation of *Ḥadd-i-Sariqah* as stated by Radhika Singha in her book, *A Despotism of Law: Crime & Justice in Early Colonial India.* However, she has also stated that he turned to classical Islamic punishments several times but resorted to modifications even by his subordinates as was the case of cutting off nose instead of awarding capital punishment to Ramnath who was involved in killing a boy by strangling him.[646] It clearly means that either the emperors consulted clerics for alternation or modification in *Ḥudūd* cases or themselves did it if they thought there was some ambiguity involved in criminal cases.

3.2.3. Modification in *Ḥadd-e-Ḥirābah*

الحرابة هى قطع الطريق أو هى السرقة الكبرى، واطلاق السرقة على قطع الطريق مجاز لا حقيقة [٦٤٧]

Ḥirābah (حرابہ) literally means to pick up a brawl, a fight or a quarrel. However, technically, it means to snatch someone's possession forcibly. About this some jurists have stated;

حرابه فالخروج بقصد أخذ المال اذا لم يؤد لحالة من الحالات ليس حرابة ولكنه ليس مباحاً بل هو معصية يعاقب عليها بالتعزيز [٦٤٨]

Not only it includes robberies, but also strife such as bloodshed, violence, treason and banditry. It could be committed by a person or a by a whole clique of brigands. *Imām* Abū Hanīfa argued that such brigands must have weapons including old weapons of the Stone Age such as stick or even wooden piece. However, other *Imāms* such as *Mālik* and

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[646] Radhika Singha, *A Despotism of Law: Crime & Justice in Early Colonial India* (Delhi: Oxford University Press, 1998), 54-55.
[647] Ibn-al-Humām, *Fatḥ-al-Qadīr, Vol. 4*, 268.
[648] Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i', Vol. 5II,* ٩٠. Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī, Vol. 10* 302. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib, Vol. 4*, 154. Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil,Vol. 5III*, 108.

Shāfi'ī has stated only the ability to use weapons for *Ḥirābah* which is a bit different from *Imām* Abū Hanīfa, for it includes even unarmed strife creating person.[649]

However, there is a slight difference between a theft and *Ḥirābah,* as theft does not involve the use of force which is paramount in the case of *Ḥirābah*. Some other conditions involve custody or possession of the property, the value of the property, share of the thieves or offenders and its value in the light of *Sharī'ah*. Another condition is that the offender must not have any right to steal that property or get it forcibly. It is also important to mention that *Imām* Abū Hanīfa has stated the *Ḥirābah* as *Ḥadd* if committed out of center or city. Else, it is *Ta'zīr*. However, other jurists such as *Mālik*, *Shāfi'ī* and Aḥmad have stated it *Ḥadd* disregard of the commission of the place. [650]

The term *Ḥirābah* in Islam means strife or mischief that leads to public unrest and threatens the very foundations of the state. It is considered a very serious crime as it puts the public lives and property in danger. Punishments for such crimes are also special not awarded for any other crime as Nik Rahim Nik Wajis has argued in his paper, "The Crime of *Ḥirābah* in Islamic Law" in a great detail.[651] He has referred to the chapter Al-Maidah which stipulates the punishment for this crime. It states:

إِنَّمَا جَزَاء الَّذِينَ يُحَارِبُونَ اللهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الأَرْضِ فَسَادًا أَن يُقَتَّلُواْ أَوْ يُصَلَّبُواْ أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُم مِّنْ

خِلافٍ أَوْ يُنفَوْاْ مِنَ الأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الآخِرَةِ عَذَابٌ عَظِيمٌ

[649] Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī. Vol. 10.* 262-264.
[650] Ibid., *Vol. 10, 304.* See for details Al-Ramli, *Niyat al Muhtaj. Ila Be Sharha, al-Minhāj. Vol. 5III,* 2-3. *Imām Mālīk, Al-Mudawwanah Al-Kubrā, Vol. 10VI,*98-99. Ibn Rushd, Muḥammad Bin Aḥmad Bin Muḥammad, *Bidāyat-ul-Mujtahid wa Nihāyat-ul-Muqtaṣīd.* Vol. 2 (Cairo: Matbāh al-Jamālīa, n. d), 381. Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i',* *Vol. 5II,* 65-97. Al-Sarakhsī, *al-Mabsūṭ, Vol. 9,* 133-205. Al-Marghīnānī, *Hidāyah, Vol. 2,* 517-538. Awdah, *-Tashri-ul-Jana'i, Vol. 2,* 638-670.
[651] Nik Wajis, The Crime of *Ḥirābah* in Islamic Law, (Glasgow: Glasgow Calendonian University, 1996), 60-62.

"The sentence of those who wage war against *Allāh* and His Messenger, and endeavor with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their humiliation in this world, and a heavy punishment is theirs in the hereafter."[652]

It means that there is a clear command from God that they must be punished in such a way, or in another way. All the alternatives have been suggested. However, what Radhika Singha has pointed out is that the cutting a nose for merely a murder which is a specific twist in an established *Ḥadd,* as it does not fall under the *Ḥadd-e-Ḥirābah.*[653]

It is also stated that there is a common agreement among all the Muslim jurists as stated by Al-Kāsānī in his book that this punishment is obligatory.[654] However, it continued to stay the same during the *Mughal* period though its examples have not been found. However, Lord Cornwallis suggested its annulment with some other punishment which was duly ignored at that time but was accepted again after a year and this *Ḥadd* was abolished from the Indian courts at that time in 1791.[655] It is pertinent to mention here that it was done after the *Mughal* Empire was in the hands of the company though a de facto *Mughal* king was ruling in Delhi at that time.

3.2.4. Change in *Ḥadd-e-Shurb*

A literal meaning of *Ḥadd-e-Shurb* is drinking of wine. There are differences on the drinking of wine. *Imām* Abū Hanīfa states that a drunk is a person who cannot differentiate between the earth and the sky and the male and the female. According to

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[652] The Qur'an 5:33.
[653] Singha, *A Despotism of Law,* 55.
[654] 'Alla' al-Dīn Al-Kāsānī, *Badai'a al-Sanāi'a* (Beirut: Dar Ahya al-Turath al-Arabi, 2000), 56.
Abd *Allāh* Ibn Qudamah, *Al-Mughni* (Cairo: Hijr Publication, 1992) 12:477.
[655] M. P. Jain, *Outlines of Indian Legal and Constitutional History* (Nagpur: Wadhwa & Company, 2007) 347.

Ṣāḥībayn (*Imām* Abū Yūsuf and *Imām* Muḥammad), a drunk is a person whose conversation is disconnected and he talks as if in intoxication. And there is a *Fatwā* on the saying of the *Sāhībain*. It has been stated in *Fatāwā-i 'Ālamgīrī* that a person drinks and is caught and there is a smell in his mouth or he is caught in intoxicated state and the witnesses have stated that he has drunk, the enforcement of *Ḥadd* on him is an obligation. In this way, if he himself has confessed and the smell was there, then there is the same command whether he has drink a little or more. If the drunk has confessed after the smell is gone, there is no need to try under *Ḥadd* according to *Imām* A'ẓam and *Imām* Abū Yūsuf. In the same way, if the witnesses have reported it after the smell and effects of the intoxication have gone, according to the *Imāms*, this would not be tantamount to the imposition of *Ḥadd*. However, if the witness has caught the drunk when his mouth was smelling and after that the smell is gone and he is no intoxicated no more, then there is consensual consent on *Ḥadd*. However, if the drunk who is intoxicated and he has admitted it, then there is no validity of *Ḥadd*.[656]

However, there are varied definitions according to different Islamic jurists such as Imām Mālikī, Imām al-Shāfi'ī and Imām Aḥmad Ibn Ḥanbal.

شرب المسكر سواء سمي خمراً أم لم يسم خمراً وسواء كان عصيراً للعنب أولأى مادة أخرى كالبلح والزبيب والقمح والشعير والأرز وسواء أسكر قليه أوأسكر كثيره.[٦٥٧]

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[656] Niẓām, *Fatāwā-i-Ālamgīrī*, *Vol. 3*, 238. See for details, Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5II*, 39-40. Al-Marghīnānī, *Hidāyah*, *Vol. 2*, 506-508. Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī*,*Vol. 5III*, 303-320. Ibn-al-Humām, *Fath-al-Qadīr*, *Vol. 5III*, 184. Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil*, *Vol. 5III*, 112-118. Al-Hijavi, *Al Iqnah*, Vol. 1V, 248-267. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib*, *Vol. 4*, 108-194. Awdah, *Al-Tashri-ul-Jana'i*, *Vol. 2*, 496-513.

[657] Al Zarkani, *Sharahh al-Zarkani Ala Mukhtasir Khalil*, *Vol. 5III*, 112. Zakariya Ansari, *Asni al-Matalib Sharahh Rauz-ul-Talib*, *Vol. 4*, 158. Ibn Qudāmah, *Al-Mughnī 'alā Mukhtaṣar al-Khiraqī*, *Vol. 10*, 326.

Imām Abū Ḥanīfah says;

فالشرب عنده قاصر على شرب الخمر فقط سواء كان ما شرب كثيراً أوقليلا والخمر عنده اسم [658]

As the Holy Qur'ān has also stated that drinking is prohibited.

يَا أَيُّهَا الَّذِينَ آمَنُواْ لاَ تَقْرَبُواْ الصَّلاَةَ وَأَنتُمْ سُكَارَى حَتَّىَ تَعْلَمُواْ مَا تَقُولُونَ [659]

"O, You who believe! Come not to prayers when ye are drunk until you understand what you say."

يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ لِلنَّاسِ وَإِثْمُهُمَآ أَكْبَرُ مِن نَّفْعِهِمَا [660]

"They ask you concerning wine and gambling. Answer, in both there is great sin and some uses for men, but their sinfulness is greater than their usefulness."

يَا أَيُّهَا الَّذِينَ آمَنُواْ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالأَنصَابُ وَالأَزْلاَمُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ [661]

"O, you who believe! Wine and gambling and stone pillars and divining arrows are an abomination of the work of Satan, therefore avoid them that you may prosper."

Ḥadd-e-Shurb is about drinking in the open. If a drunk is caught, his punishment according to Islam is to be lashed. However, in the case of Lashkar Khān, Akbar not only waived this punishment but also suggested a new way of punishing him. It was to insult him as well as to teach him a lesson, for he held very important positions of Mīr Bakhshī

[658] Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'*, *Vol. 5*, 112.
[659] The *Qur'ān*, 4: 43.
[660] The *Qur'ān*, 2: 219.
[661] The *Qur'ān*, 5: 90.

as well as Mīr Arż. Abū 'l-Faẓl writes that the emperor punished him by tying him to the tail of a horse and by sending him to jail for a few months.[662]

These are just few examples where the emperors who were also the appellate court in criminal cases devised new ways by modifying or altering *Ḥudūd* laws of the Islamic jurisprudence. However, in more than often, the Islamic jurists did not confirm their modifications in the punishments and rebelled against the Muslims, the fear of which made *Mughal*s to stick to *Sharī'ah* punishments.However, most of the *Mughal*s were stuck to the Islamic punishments to win hearts of the Muslims, a martial race at that time. This was vital for the stability of their rule and peaceful coexistence.

3.3. Absence of *Farmāns* and *Fatāwā* during the Last Period of *Mughal* Empire

The *Mughal* Empire stayed very strong and stable but with the passage of time, *Farmāns* started losing their worth. Even when the compilation like *Fatāwā* has seen the light of the day, it seemed that the administrative machinery started giving ways to different foreign invaders as well as local rebels. Christopher V. Hill does not mince words in saying that the minister of Muḥammad Shāh in 1722 clearly advised him to reform the administrative structure and bring reforms in his court to which he refused.[663] S. R. Sharma terms rebellion and absence of any law or *Farmān* as the major reason of the decline of the *Mughal* Empire. However, he equally blames the "rebellious spirit" of the people of India. [664] Radhey Shyam Chaurasia has also highlighted he absence of law or lawlessness but he argues that it started disintegrating long time ago during the time of Aurangzēb. His successors only hastened the disintegration of the empire; there were

[662] Abū 'l-Faẓl, *Akbar Nāmah*, *Vol. 2*, 529.
[663] Christopher V. Hill, *South Asia: An Environmental History* (Washington: ABC Clio, 2008), 75-76.
[664] Sharma, *Mughal Empire in India*, 158.

riots, lawlessness and rebellions everywhere from Deccan to the northern areas of the empire.[665] This means that there was no law. Even *Fatāwā-i 'Ālamgīrī* lost its worth, what to say about *Farmāns* to back them up. Most of the *Mughal*s entered the courts never to come out again to see what was going on with the public until the East India Company starting taking over cities after cities and culminated this spree with the War of Independence of 1857.

4. The Impact of *Farmāns* in Criminal Law of British India

4.1. Impact on British India and Reforms

As soon as the East India Company started making its grip firm on the areas where it had set its feet, it started doing legal work to strength its public base. The laws and *Farmāns* of the *Mughal*s, even in cases where they were strictly in accordance with *Islam*, were either modified, changed and amended. This, in no way, shows that they were averse to these laws, but it was a situation in which they were to be streamlined to be used in the British judicial system, as the *Mughal*s could not pay much attention beyond *Fatāwā*, while rest of the world developed a well-formed judicial system, procedure and laws. However, these *Farmāns* gave them a way forward in the British India which they ruled for the next two centuries.

4.2. Some Examples: Amendment in *Qiṣāṣ* by British

The *Mughal*s continued with their modification and change in the crimes falling under the category of *Qiṣāṣ*. Although as Al-Kāsānī has made a distinction between intentional murder and ambiguity or suspicion in the intention. According to Al-Kāsānī,

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[665] Chaurasia, *History of Modern India*, 02-03.

Abū Hanīfa opined that if a murder is committee through certain other acts instead of by sword such as by strangulation, poison or drowning or a stick and iron is not used, it means there is no *Qiṣāṣ*.[666] Although some other jurists opposed this, it continued to be a type of *Qiṣāṣ* throughout the world where *Sunnī* majority ruled and so was the case of India. M. P. Jain, however, has stated that it was abrogated in 1790 considering that an intentional murder, whatever means it is done by, should be considered as such and be awarded with capital punishment.[667]

4.3. Change in Next to Kin in *Qiṣāṣ*

In case where the *wali-al-dam* i.e. the next in kin of a deceased is either of minor age or insane, the majority of the *Fuqahā'* are of the opinion that the *Qiṣāṣ* shall be delayed till the *wali-al-dam* attains the age of majority or his insanity cures. Where it is not possible, the guardian of the *walī-al-dam* shall execute the *Qiṣāṣ* on his behalf. According to few of the *Ḥanafī Fuqahā'* the court has the authority to execute the punishment on behalf of *walī-al-dam* that is of minor age or is insane.[668] M. P. Jain relates another instance in which the British government modified Islamic concept of *Qiṣāṣ* in 1793 under Regulation IX that if the heir to the deceased has not attained maturity, the trial would take place nonetheless and the state would replace him.[669] Although this does not impact the concept of *Qiṣāṣ*, it was a sort of departure from an accepted rule. The fact is that concept of *Qiṣāṣ* which provided guiding light to the *Mughal*s again proved useful for the colonial administrators.

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[666] 'Alla' al-Dīn Al-Kāsānī, *Badai'a al-Sanai'a* (Beirut: Dar Ahya al-Turath al-Arabi, 200), 343.
[667] Jain, *Outlines of Indian Legal and Constitutional History*, 343.
[668] Muḥammad Tahirulqadri, Islamic *Penal System and Philosophy* (Lahore: *Minhāj*ul *Qur'ān* Publications, 1995), 408.
[669] Jain, *Outlines of Indian Legal and Constitutional History*, 349.

Jain relates another instant of revision of *Qiṣāṣ* law for having right of *Wali al-Dām* in which the guardian is permitted to execute punishment on the killer himself instead of leaving it to the state officials. The Regulation IV of the British government in Subcontinent as related by Jain replaced this form of *Qiṣāṣ*. It was modified that the killer would be given punishment without any reference to the heirs of the victim. [670] In the same way, the death or capital punishment given for killing a son or grandson whereupon Al-Tīrmizī, has quoted a *Ḥadīth* that a father is not punished for killing by his son or grandson. The *Ḥadīth* goes thus: "The father shall not be killed for his son." [671] Although all the four schools of thought agree on this punishment as stated by Al-Kāsānī.[672] It however, does not seem appropriate to the British when they reviewed some other laws. Some Islamic jurists have also expressed doubts about it. Therefore, this type of *non-qisas* was abolished with regulation VIII in 1802 which stated that the criminal was to be punished by death like all other criminals or accused of murders.[673]

4.4. Major Flaws in Application of Islamic Criminal Laws during *Mughal* Period

A student of law and comparative legal studies immediately captures various major flaws in that Islamic criminal law and administration of justice during the *Mughal* period. Perhaps, that is the very reason that the *Mughal* Empire collapsed sooner rather than later. The colonizers though spurned it openly, yet incorporated several of its major features in the Indian acts they later promulgated in the administration of justice. Muhammad Munir, in his paper, "The Judicial System of the East India Company: Precursor to the Present Pakistan Legal System" has highlighted several major points that

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[670] Ibid., 345.
[671] Mohammad bin Essa al-Tirmizi, *al-Jama'l al-Sahi* (Riyādh: Dar al-Sālam, 1999), 339.
[672] Ala' al-Dīn Al-Kāsānī, *Badai'a al-Sanai'a* (Beirut: Dar Ahya al-Turath al-Arabi, 2000), 284.
[673] Jain, *Outlines of Indian Legal and Constitutional History*, 351.

the colonizers incorporated ad verbatim, or with some modification and amendments for the administration of justice in Calcutta. Even some of the nomenclatures the company adopted for the administration of justice were Islamic such as "*mufaṣṣal*" and "'*adālat system*" etc.[674] As is always the case with legal systems that they evolve into the present shape over a time after alternations, revisions and modifications, the same happened with the Islamic criminal cases applied during the *Mughal* periods through their *Farmān-i-Shāhī* and culminated in the shape of a collection of *Fatāwā-i 'Ālamgīrī*. It means its major flaws were removed or the entire laws were abolished.

In this connection, Wahed Hussain has beautifully pointed out some major flaws in the *Mughal* justice administration in his tome, *Administration of Justice During the Muslim Rule in India with a History of The Origin of the* Islamic *Legal Institutions*. Citing the case of Warren Hastings, he states that he always used to look at the laws having any Islamic touch as brutal ways of torturing people and not legal codes. Wahed Hussain has pointed out the first major defect of the *Mughal* administration of justice as separate from legislation and judiciary. He goes on to say that uncertainty and absence of uniformity in the legal codes, non-division of civil, criminal and public laws, irrational punishments in the name of God, illogical compensations, illogical discretionary powers regarding *Ta'zīr*, deficiency of the law of evidence, discriminatory punishments to non-Muslims and self-concocted interpretative punishments.[675] Despite these flaws, the *Mughal*s have left their footprints in the shape of the legal codes which have been modified and re-modified to suit the situations. Studying deeply the current Indian

[674] Muḥammad Munir, "The Judicial System of the East India Company: Precursor to the Present Pakistani Legal System", *IIU*, Islamabad. n. d., 58-59.
Available from http://irigs.iiu.edu.pk:64447/gsdl/collect/hWalīyya/index/assoc/HASH01e9.dir/doc.pdf
[675] Wahed Hussain, *Administration of Justice during the Muslim rule in India with a History of the origin of the* Islamic *Legal Institutions* (Delhi: Idarahi-i-*Ādāb*iyat-i-Delhi, 1977) 103-106.

judicial system. Wahed Hussain has pointed out that the Indian judicial system has strong footprints of the *Mughal* rule. Quoting Sarkār, he argues that there was time in India when this system was being witnessed in every nook and corner.[676] His opinion coupled with that of the scholarly comments of J. N. Sarkār lends credence to this fact that the *Mughals*, indeed, established a proper judicial system which set a precedent for the British to establish a well-organized system.

Despite these defects, Wahed Hussain has pointed out several features which have become guiding lights for the legal minds and legislatures in the future to organize institutions. He says that the first good feature of the *Mughal* administration was to ensure that there is a stable government and extensive machinery accountable to only one central authority. The second point that he emphasizes the most and terms it elixir for a good judicial system was the renaissance of the art and literature.[677] Perhaps, he means that a good linguistic capability of the officials lead to good codification of laws, for he himself was a legal mind. He further claims that diversity in the Indian Subcontinent found *Mughals* at the helm of the affairs who used it dexterously to contribute to reconciliation and formulation of laws.[678] It is another matter that several historians rather strongly differ with him though his points seem to be valid for the legal minds as evolution takes years in the making and then legal codes do not take a day to be written and implemented.

Although several legal gurus and historians have castigated the *Mughals*, declaring them outright despots, dictators and brutal rulers who used religion to further

[676] Ibid., 106.
[677] Ibid., 30.
[678] Ibid., 30.

and prolong their own rule. There is no denying the fact that the rule of might is right was applied where none other works and they had vested interests.Yet.they made a contribution to the legal codes in the shape of their *Farmāns* amalgamated with the Islamic criminal laws.

Perhaps the necessity of sticking to the Islamic *Fiqh* arose from the fact that the ruler required to transform the state into an Islamic state in accordance with the Qur'ānic teachings and *Sharī'ah* laws. Ibn Ḥasan has argued this case stating that the exigency of the king and the Qur'ānic injunctions to transform the social structure into two sections of believers and non-believers and declare the latter *dhimmīs* forced the *Mughals* to see their stability in the Islamic criminal procedure of that time. It is, however, to be ensured that their life as well as their property of the non-Muslims subjects is guaranteed under the Islamic rule, which the *Mughals* ensured properly.[679] It clearly shows that the *Mughals* not only performed their own duties but also abided by the religious injunctions, overseeing the upper hand of the state rather than only the religion. Hence, they used Islamic criminal procedure and sometimes ignored it when the situation demanded. Ibn Ḥasan further states that they were to uphold the Islamic reflection of the state through its laws.[680] Whereas the stability was concerned, it was to come with justice and hence the guarantee of their life as well as property of the non-Muslim, as ensured in the Islamic law, became a necessity, rather than an exigency. [681] That is why it became imperative for the *Mughals* to treat both the major sections of the society on equal footing. Referring to Abū 'l-Faẓl, Dr. Munir has highlighted that the king must exercise his justice and

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[679] Ibn Ḥasan, *The Central Structure of the Mughal Empire and Its Practical Working Up to the Year 1657* (New Delhi: Munshiram Manoharlal, 1970), 306.
[680] Ibid., 306.
[681] Ibid., 307.

beneficence on all the subjects in a similar way, adding that even Hindu subjects were the greatest beneficiaries. He further states that being a shadow of God on earth, the mercy of the king must be showered on both sections in equal manner. [682] U. N. Day has perhaps interpreted the same views saying that an emperor is obligated to administer justice, view that law is in accordance with the *Fiqh* and that it must keep in mind the actual community of Muslims.[683] Perhaps these major reasons of the kings to shy away from giving the laws a proper codification makes the law to look defective. It could also be that when Aurangzēb meddled with impunity and ordered the compilation of the laws as *Fatāwā* in the shape of *Fatāwā-i 'Ālamgīrī*, he was severely castigated by the non-Muslim historians and secular legal pundits alike while revered by the staunch Muslim enthusiasts for sticking to the Islamic injunctions.

4.5. Impacts on Future Evolution of Legal Codes in the Subcontinent

These *Farmāns* issued from time to time became the basis for legal evolution for the British as well as the three newly formed states of India, Pakistan and Bangladesh. The *Mughal* rule and its administration of justice via Islamic criminal law have far reaching consequences for the Indian Subcontinent during this age. Muslim scholars hail them for their unique approach to civilization, amalgamation of Islamic jurisprudence with their own secular and national blend; while Hindu scholars berate them for bringing alienism in India. Radhey Shyam Chaurasia has beautifully summed up this observation saying that the *Mughal*s failed in mixing Hindus with Muslims, with the result that the *Mughal*s grew weaker day by day and finally gave up the power to the East India

[682] Munir Ahmad, "*The Administration of Justice* and The Reign of Akbar and Awrangzib: An Overview", *IIU*, Islamabad, [Online], (August 2012 [cited 10 July 2017]: Available on https://works.bepress.com/Muḥammad_munir/18/.
[683] Day, *The Mughal Government*, 203.

Company. He argues that this made impacts on people, specifically the Muslims that they were inspired from Arabia as the "civil and criminal laws had to be borrowed from Baghdād and Cairo."[684] This historian is perhaps not aware of the fact that the entire Indian legal system is borrowed from the English codified laws and the historical Indian legal codes more than often codified by the Muslims. Raja Kumar and Raj Pruthi both have lauded the *Mughal*, on the other hand, saying they brought with them new ways of establishing the rule of law "which was in many ways more humane than that administered in contemporary Europe" which is a tribute to the *Mughal* justice administration system. These authors quote Lord Macaulay for his praise for Muhammadan law in India.[685] Regarding impacts on the Indian criminal law and subsequent penal codes, Mahima Gherani has taken a good review of the British legal experts in removing defects from the Muhammadan laws codified profusely during the *Mughal* period. She is of the opinion that the "English administrators introduced reforms from time to time to mould, refrain and amend the Muslim Law" which is a tribute to the *Mughal Farmān* issuing with respect to the criminal laws despite spitting venom on the Muhammadan law as a whole.[686] In other words, though there were defects in the ruling dispensation and hence resultanate defects in the criminal law with respect to *Farmāns* issued from time to time, it has been by no way an entirely defective system. Had it been so, the British would not have been all praise for this.

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[684] Radhey Shyam Chaurasia, *History of Modern India, 1707 A. D. To. 2000 A. D* (New Delhi: Atlantic Publishers and Distributers, 2002), 09.

[685] Raj Kumar and Raj Pruthi,The Cultural Influence of *Islam*, Ed. by Raj Kumar Raj Pruthi, *Essays on Indian Culture*. (Discovery Publishing, 2003), 52-53.

[686] Mahema Gherani, "Growth of Criminal Law in India" *The Lex Warrier*, [Online], (05 June 2015 [cited 10 July 2017]: available from http://lex-warrier.in/2015/06/growth-of-criminal-law-in-india/.

This entire discussion demonstrates that the impacts of the *Mughal Farmān* on the Islamic criminal procedure, its application through *Farmān-i-Shāhī*, its interpretation and reinterpretation have been far reaching. Not only they handed over fine institutions for rendering justice but also they provided a good path leading to proper codification of Islamic jurisprudence but also codification of criminal laws. Donald Davis has beautifully stated it in his essay that the Muslim kings and *Sulṭāns* of the regional *Sultanate* created various "administrative legal terms, offices and institutions that for the first time forged a close link between state and law in India." He has beautifully stated that though the introduction and evolution of Hindu law in India is of late coming, the actual foundation of the Islamic *Fiqh* and laws was laid down by the *Mughal* emperors who streamlined its various laws.[687] David Levinson has also praised the *Mughal* administrative justice, underlying the fact that even the Hindu system benefitted from it when codifying laws.[688] Indian Bar Council, too, pays tributes to the *Mughals* on equal footing with the Mauryans that existing secular court system owes much to the *Mughal* Empire in the matters of criminal laws.[689]The case of Pakistan and Bangladesh is not different. Even Pakistani legal code owes much to the *Mughals* in that its orientation is purely Islamic and that too according to the *Ḥanafī* school of thought.

In case of Pakistan, most of the jurists are all praise of *Mughal* for bringing improvement in the ambiguous classical Islamic jurisprudence. Specifically, in case of Aurangzēb, various myths have been circulated to prove his piety and his great work of

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[687] Donald R. Davis, A Historical Overview of Hindu Law, in *Hinduism and Law: An Introduction*, Ed. by Timothy Lubin, Donald R. Davis and Jayanth Krishnan, (Cambridge University Press, 2010), 22.
[688] David Levinson, *Encyclopedia of Crime and Punishment*, V. 2 (New Delhi: Sage Publications, 2002), 830-885.
[689] "Brief History of Law in India," *Bar Council of India*, n. d. http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/

Fatāwā-i 'Ālamgīrī. Quoting Traver extensively while presenting the case of Pakistan and its legal experience, Osama Siddique has stated that the *Mughals* have stayed an important factor in all Indian countries including Bangladesh. He even states Hastings, who was against the *Mughals*, as supportive of resuscitating the constitution which "flourished under the great *Mughals*."[690] A notable legal expert, Herbert Liebesny has argued that though the British did not accept the *Mughal* administrative justice system, they accepted Islamic criminal injunctions where Muslims were involved and also accepting *Fatāwā-i 'Ālamgīrī* as the credible authority on *Ḥanafī* school of law.[691] This leads to the idea that Pakistan, too, has adopted several of its modifications after amendments to suit the specific modern situations. Tahir Wasti has made an excellent comment about the *Mughal* impacts saying that a famous Christian judge of the Pakistani Supreme Court Justice Carnelius is stated to have said that the current Pakistani criminal procedure and penal codes have everything to do with *Fatāwā-i 'Ālamgīrī* and that it is not what the clerics call an English law.[692] Perhaps, he has commented about the Homicide Act regarding the English law and Pakistani laws.

The story of Bangladesh is not different. Muhammad Mahbubur Rahman has taken a cognizant of this impact of the *Mughal* period in its criminal procedure. In fact, it has been a part of Pakistan, the reason that it still has its impacts on its legal code. Rahmān is of the view that *Fatāwā* has considerable imprints on the Bangladeshi criminal procedure because of its religious dividing lines during partition as well as its

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[690] Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice*, (Cambridge University Press, 2013), 64, 61.

[691] Herbert Liebesny, "English Common Law and Islamic Law in the Middle East and South Asia: Religious Influences and Secularization", *34 Clev. St. L. Rev. 19* [Online] (1985-1986[cited 10 July 2017]: Available on http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1954&context=clevstlrev

[692] Wasti, *The Application of* Islamic *Criminal Law in Pakistan: Sharī'ah in Practice*, 156.

seminary system where *Fatāwā* is still being taught as a research document. Most of sentencing is done viewing this collection of the *Mughal* period, he argues. Although he has discussed the British amendment of the *Fatāwā* in detail, what he has found unique is that they have not abolished *Fatāwā* and other simple administrative rules of the *Mughal* period. Rather, they built a new foundation on it which led to the Bangladeshi criminal code existing now.[693] This entire discussion about the criminal legality and awarding of punishments, whether it is religious as is the case of Pakistan and Bangladesh, or secular, as is the case of India, has footprints of the *Mughal* period and final compilation of *Fatāwā-e 'Ālamgīr*. Therefore, to say that *Farmān* has been critical in the applicability and implementation of *Fatāwā* and hence in the stability of the state, is to say that *Farmāns* have been law unto them.

In short, the edict or *Farmān* of the *Mughal* emperors played an important role in the formulation of Islamic *Fatāwā* and making the foundations of the Islamic criminal laws very strong. It, in no way, means that Islam did not establish its system, in fact, Islam as stated earlier has a complete code of criminal laws and corresponding punishments. Islam rather has given a clear definition of punishments, clearer than the modern legal minds.

Moreover, criminal law as a legal code has a specific place in Islamic jurisprudence. The reason is that *Islam*'s major objective of forming a society is to bring peace and stability. That is the very reason that peace and stability are not possible without the categorization of the crimes into *Ḥudūd, Ta'zīr* and *Siyāsah*. Furthermore, Islam has categorized the crimes on the basis of the violation of the rights. However, it

[693] Muḥammad Mahbubur Rahmān, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity* (Washington: Skrill, 2017), 81, 194.

does not mean that it is categorical, from time to time, different jurists have made different interpretations and even those jurists differ with each other a lot. That is why there are four major schools of thought requiring *Fiqh* with slight difference in the notion of awarding punishments.

The role of *Mughal Farmān* has been crucial in the implementation of the Islamic system. Although it could be surmised that the *Mughal*s found various political and state exigencies such as appeasing the Muslims and so on, there is no doubt that they found Islamic criminal systems as a ready-made system to be implanted with their own *Farmāns*. However, it also does not mean that the *Mughal*s always preferred Islam and that they loved Islam very much. In fact, they were living in medieval period where might was right. They preferred to interpret these laws instead of going blindly for implementation.

It is also that the *Mughal*s formed an empire at time when there were already two great Muslim empires; One Persia, a *Shī'ah* empire and other the Ottoman empire of the *Sunnī* Turks. Therefore, they were very well aware of the delicate balance that they were to keep and they kept it successfully for two centuries. In the midst of this fine balance, they kept playing hide and seek with religious clergies and Islamic criminal laws to bring stability in their state and provide legitimacy to their rule.

Although the *Mughal*s followed the same Islamic categorization, sometimes they resorted to the interpretation where it was necessary that a *Hadd* or *Ta'zīr* should be interpreted in the light of the new facts. It could mean an entirely new interpretation. This led to various modifications, alternation and amendments which continued even after the *Mughal*s. In fact, the *Mughal*s evolved the Islamic criminal law through their *Farmāns* in

such a way that they reached the point where *Fatāwā-i 'Ālamgīrī* became a reality. Its compilation stabilized the empire but not the emperors. The modern emperors soon started giving ways to more organized East India Company and other rebel elements until the *Mughal* period came to an end with the exile of Bahādūr Shāh Zafar in 1857. However, the story of *Fatāwā* does not end here. It rather continued mesmerizing the British who continued fidgeting with it by amending and abolishing or adding in it to create new rules until the independence of India. Even then the *Mughal*s have not lost their impacts. All the countries formed from India have some impacts of the *Mughal Farmān* and *Fatāwā-i 'Ālamgīrī*. It is also that the *Mughal* Empire collapsed only because of the absence of law or in other words it could be said that the *Farmāns* of the *Mughal*s lost their validity and implementing force. As soon as the state power weakened, it collapsed like a house of cards but the work done in the field of legal codification such as *Fatāwā* and *Farmāns* are still lying in the books. In fact, *Fatāwā* and *Farmāns* have provided guiding lights to the predecessors of the *Mughal*s in codifying and arranging laws.

Chapter No. 4

Compilation of Criminal Law during The *Mughal* Period in the Light of *Farmān-i-Shāhī*

Chapter No. 4:

Compilation of Criminal Law during the *Mughal* Period

In the Light of *Farmān-i-Shāhī*

This chapter higlights the issue of compilication and codification of the criminal law during the period of *Mughal*s in the light of their official *Farmāns*. The *Mughal*s inherited some religious *Fatāwā* collections that they used during the implementation of laws in criminal as well as civil cases and used them to compile and codify new laws. However, most of these collections were belonging to *Ḥanafī Fiqh* and hence this school of thought prevailed in the future compilation and codification. Later on, the judicial officials, *Qāḍīs* and other officials also confirmed to the dominant role of the *Sunnī Ḥanafī Fiqh* in the compilation until the completion of *Fatāwā-i 'Ālamgīrī*.

1. Compilation of Criminal Procedure of Law during the *Mughal* Period

1.1. Legacy of Compiled and Codified Criminal Laws of Pre-*Mughal* Era

The question of whether the *Mughal*s inherited compiled and codified criminal legal system begs an extensive debate, for it ranges from the period when the Muslims set their feet in India to different *Sultanate* periods. In this connection, some researchers say that there is no proof of the codification or compiled laws. This period, according to them ranges from 10th century to the invastion of Muḥammad Ghori in the year 1206.[694] However, during the slave dynasty, they say that the existence of *Sharī'ah* and "the Court

[694] K. K. Abdul Rahiman, "History of the Evolution of Muslim Personal Law" *Journal of Dharma: Dharmaram Journal of Religoius and Philosophies* 11 (July-September 1986), 250.

of Common Law" which was used for the Muslims and imposition of religious laws on all the subjects was confirmed.[695] During the *Mughal* period, there were two types of attempts. The first was to codify a type of constitutional law on the basis of *Ā'īn-i Akbarī* and second was the compilation and codification of religious edicts of *Islam*. The first attempt, he states, was made during the period of Akbar and second during the period of Aurangzēb which came in the shape of *Fatāwā-i 'Ālamgīrī*.[696] It, somehow, shows that the *Mughal*s did not inherit anything from the slave dynasties and other *Sulṭān*s of India, which is an entirely wrong notion. However, there are some other examples, such as of Mahmud of Ghazni who is stated to have authored a book about *Ḥanafī Fiqh*.[697]It is not clear whether this book was a complete compilation and codification of the *Ḥanafī* rulings, but it is clear that this has been a royal attempt about presenting completely compiled injunctions. However, it does not mean that in Pre-*Mughal* period, there was no codified or compiled criminal law. As the *Mughal*s mostly followed the Islamic criminal laws, there were very good *Fatāwā* colletions compiled long before the *Mughal*s during the period of other dynasties. In this connection, the role of religion is of critical significance. Dr. Khalid Masud, a noted Pakistani researcher, has argued his case regarding religion saying that *Fatāwā* collections have played an important part in the administration and law and order in India. However, he differentiates between *Fatāwā* collections and other compilations of laws, saying that even during Aurangzēb's period, the emperor never strictly abided by *Fatāwā-i 'Ālamgīrī*.[698] Dr. Masud adds that Ishaq

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[695] Ibid., 251.
[696] Ibid., 251-252.
[697] Clifford Edmund Bosworth, *The Ghaznavids: Their Empire in Afghanistan and Eastern Iran, 994-1040* (Pennsylvania: Pennsylvania State University, 1963), 291.
[698] Muḥammad Khalid Masud, "Religion and State in Late *Mughal* India: The Official Status of the *Fatāwā Ālamgīrī*" 3, *LUMS Law Journal*, (n. d.): [online], Accessed on July 28, 2017,

Bhattī, a researcher, has mentioned more than 11 collections of *Fatāwā* compiled in India before and during the *Mughal* period.[699] Does it mean that before the *Mughal*s, the Islamic jurisprudence had an upperhand in the criminal matters? The answer is yes, as given by Dalbir Bharti that the sources of the Islamic laws were the same as were in other parts of the Islamic world.[700] It is also that various *Fatāwā* books which laid the foundation of the introduction of the Islamic jurisprudence for the *Mughal*s in that they inherited completely compiled *Fatāwā* but very few secular legal codes such as Hindu personal law. However, though these *Fatāwā* books, *Fiqh* pamphlets and ancedotes of the judges are a point of "departure for understanding the larger picture of Islamic law" in criminal matters, the *Mughal*s always relied heavily on those *Fatāwā* collections such as *Fatāwā-i Ghīyāthīyyā, Fatāwā-i Qarakhanī, Fatāwā-i Tatārkhanīyā* and *Fatāwā-i Bāburi*.[701] The first three *Fatāwā* collections were compiled long before the *Mughal*s, while the fourth one was compiled during the period of Bābur. Perhaps, he must have felt the need to have his name among the Islamic devotees. Or it could be the need of the hour to stabilize his own empire. However, on the approval or patroninzing of the previous *Sulṭān*s is entirely in doubt as Dr. Masud has stated in his paper that it is unclear whether the kings patronized the compilation of those collections.[702] It is because in case of *Fatāwā* collections compiled during the *Mughal* period, the name of the emperor was added in the title, but it did not happen in the case of the pre-*Mughal* period.

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https://sahsol.lums.edu.pk/law-journal/religion-and-state-late-*Mughal*-india-official-status-*Fatāwā*-Ālamgīr#_ftn45

[699] Ibid.,

[700] Bharti, *The Constitution and Criminal Justice Administration*, 30-38.

[701] Mallat, *Introduction to Middle Eastern Law*, 91-92.

[702] Masud, Religion and State in Late *Mughal* India .

In pre-*Mughal* period, there were two most important collections despite various other unknown compilations of *Fatāwā*. These were duly patronized as he says that *Fatāwā-i Ghiyāthiyyah* that he attributed to Ghiyāth al-Dīn Balban and other was *Fatāwā-i Tātārkhaniyyah* which he attributed to Fīrūz Tughlak. Both were written in the 14th century.[703] Professor Christopher Rose has said in his interview with Patrick Olivelle that law of Vedic existed during Mauryia period even long before the *Sultanate*s of Delhi which is also now called Hindu law or Hindu personal law. It was both criminal as well as civil law and even religious law, whose objective, he states, was to lead a good life.[704] Several other historians and legal minds have also talked about the existence of Hindu law which the Muslim kings permitted to be applied in case of Hindu. It was mostly called Hindu personal law due to the dominance of the *Sharī'ah* under which all other legal or judicial codes were relegated to the backburners. In other words, there were no other codified systems, as Roman laws but the criminal law was only in the form of compiled *Fatāwā* collections which were used at the will of the *Sulṭān* or king or even emperor with additional force of *Farmāns*. The *Farmāns* continued to provide precedents to the preceding *Mughal*s. However, the interesting point that Dr. Masud has noted is that almost all of these collections or compilations were related to *Fiqh Ḥanafī*, or *Sunnī Fiqh*, and were mostly borrowed from Arabic traditions, written in Arabic and translated into Persian.[705] They were the same things, underlining compulsion that Balban and Iltutmish faced when enforcing criminal laws. It means that criminal law was applied to all with

[703] Jamal *Mālik*, *Islam in South Asia: A Short History*, 193-194.

[704] Christopher Rose, interview by Patrick Olivelle, Episode 15: The "Era Between the Empires" of Ancient India, [Online] November 20, 2008. Accessed on August 03, 2017 on https://15minutehistory.org/2013/03/06/episode-15-the-era-between-the-empires-of-ancient-india/.

[705] Masud, Religion and State in Late *Mughal* India.

some lenient thinking and alteration in case of non-Muslims and Hindu laws applied only to Hindus as interpreted by *Qāḍīs*, *pundits* or judges of that time.[706]

Therefore, the tradition of this *Sunnī* specific compilation continued, but it is not clear what procedure did those scholars take or whether there was some guidance or lead from the king or the court. Hence, the *Mughal*s have already a paved road for them in the shape of *Fatāwā* to deal with the Muslim population and Hindu personal law to deal with the majority of their subjects.

1.2. *Mughal* Contributions Regarding Compilation and Codification of Criminal Laws

It seems that the *Mughal*s, specifically, Bābur sensed it very early that only a strict amalgamation of religio-secular legal enforcement could save his newly-won Indian crown from jeopardy, or else he would have to face extinction similar to his predecessors. The *Mughal*s inherited a very good judicial system, courts, appelleate courts, judges, prison system, trial system and somewhat distinct laws. Therefore, Bābur thought it unnecessary to bring a viable change to make his own *Farmān* more enforceable and powerful. It seems that there is wisdom of Bābur at work in keeping the system in place instead of wrapping it up and initiating his own.[707] The stability of the state and legitimacy of the rule lies in playing with the public in the name of the religion and even not touching religion. Bābur sensed that he needed to play on both sides of the fence and on neither side at the same time. On the one hand, there was a big Muslim population to make realize that the king was their own Muslim brother and on the other hand, there was

[706] Parth G. Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil Code* (London: Routledge, 2012), 48.
[707] Parnab Panday, Md. Awal Hossain Mollah, The Judicial System of Bangladeshi: An Overview from Historical Viewpoint, *International Journal of Law and Management* 53, no. 1. (2011): 10.

a huge Hindu majority to whom the king was to convince that he was benevolent to them despite his victory against his own Muslim brethren at Panipat.[708] Bābur was also fully aware of the *Sunnī* leanings of his Muslim army as well as population. Although he had a considerable touch with *Shī'ahs* of that time as his sucessors kept their links with *Shī'ah* Persia, he resorted to using *Ḥanafī Fiqh* in his *Farmāns* instead of other codified laws. It is stated that some *Fatāwā* collections among which *Fatāwā-i Bāburī* is mentioned as the first *Mughal* compilation were already in use.[709] It is also stated that when Bābur prevailed, he tried to put his name as the great Islamic king, replacing previous "legal codes" with his own *Fatāwā-i Bāburī*.[710] Meanwhile, his son Humāyūn succeeded him who did not make any serious effort in compiling any legal code except using Fatāwā-e *Bāburī* and other laws continuing from his father's time who inherited them from the previous *Sulṭāns*. However, another collection of *Fatāwā, Fatāwā-i Burhāniyyah* appeared during the period of Akbar, the Great. However, it is not clear whether the king patronized it or not, for at least Abū 'l-Faẓl did not mention it in his *Ā'īn*, nor any other book attributed to the emperor. However, it is sure that it appeared during Akbar's reign[711]. Therefore, it is not counted as an official compilation. Perhaps, that is the very reason that Akbar coined his own religion of *Dīn-i Ilāhī* and spurned the religious authorities so much so that he imprisoned some of those who opposed his un-Islamic practices.[712] Although *Ā'īn* of Abū 'l-Faẓl could be stated to be a compilation, for Abū 'l-Faẓl has done his best to prove that it is *Ā'īn* or constitution, it is a narrative of Akbar's

[708] B. N. Puri and M. N. Das, *A Comprehensive History of India: Comprehensive history of medieval India Vol. 2* (New Delhi: Sterling Publishers Pvt. Ltd, 2003), 106.
[709] Mallat, *Introduction to Middle Eastern Law*, 91-92.
[710] Muḥammad, Judicature of Islamic Law in Medieval India, 04.
[711] M. Reza Pirbhai, *A Histriography of* Islamic *Law in the Mughal Empir* (Oxford: Oxford University Press, 2016), 05.
[712] Ikram, *Indian Muslims and Partition of India*, 07.

period and not a legal document though Abū 'l-Faẓl has claimed that it is a "legal document" in his book.[713] It could be that the *Mughal* India was not as far ahead in legal codification as the Islamic world was, the reason that the Muslim rulers borrowed heavily in criminal procedure codificiation from the Islamic jurisprudence. Muhammad Basheer Ahmed has stated that even the kings or emperors were not immune from the Islam as criminal jurisprudence due to legitimacy and sacredness attributed to the Islamic laws. That is the very reason; he says, that *Ḥanafī Fiqh* prevailed during the entire *Mughal* period with *Fiqh-i Fīrūz Shāhī* and *Fatāwā-i Bāburi*, as the major compiled works regarding criminal law procedure. He is of the view that the basis of *Fatāwā-i 'Ālamgīrī* is the same based on crimes against God, king and the public at large which is the basis of the Islamic jurisprudence.[714] However, it does not mean that the Islamic laws were immune from the alternation and amendment from the *Mughal* emperors. The first argument deduced from the third chapter is that they used to tinker with the Islamic jurisprudence with the connivance of the religious cleric, and second that they used to modify them to suit the purpose of the situation. In this connection, Manucci has stated the alterantion in *Ḥadd* from Shāh Jahān[715] and Abū 'l-Faẓl has noted a change in *Ḥadd-i-Sariqah* by Akbar.[716] This means that compilation and condification continued unrelented but it is another matter that Akbar gave more secular touch to *Farmāns* issued regarding criminal appeals which also fall under the preview of the modern criminal condification. This little bit of use of *Farmāns* regarding criminal procedures reached the

[713] Abū 'l-Faẓl, *Ā'īn Akbarī*, Vol.1, 160.
[714] Ahmad, M. B., *The Administration of Justice in Medieval India*, 40-41.
[715] Manucci, *Storia Do Mogor*, Vol. 1,199.
[716] Abū 'l-Faẓl, *Akbar Nāmah, Vol. 2*, 733.

point where Aurangzēb felt the need for a revised condifiction of Islamic laws instead of following the same *Fiqh-i Fīrūz Shāhī* as Basheer Ahmed has referred to.[717]

The addition of *Fatāwā-i 'Ālamgīrī* in the *Mughal* criminal procedure and in Islamic criminal law compilation heralded a new era. This is a phenomenal document in that more than 500 Islamic jurists were set to work by the emperor. It comprises laws codified with examples and precedents related to all walks of life ranging from inter-religious matters to taxation and crimes. With more than 30 volumes, it became the basis of the late *Mughal* civilization.[718] For example, regarding marriage, it has given full directions for the marriage of the Muslim girl, apostacy and establishment of pateranity.[719] This is just an example that this compiliation paved the way for the evolution of the future criminal procedure in South Asian context. That is why Mr. Tahir Wasti, a reknowned Pakistani legal expert and researcher, has found relevance in Pakistani Penal Code and *Fatāwā-i 'Ālamgīrī.*[720] Its compilation is even considered a book of narrative by the jurists themselves, but they agreed that it extracts the essence of *Fiqh.*[721] In other words, only the Islamic jurisprudence has had the exact nature of criminal procedure code ready to be applied; otherwise, there was only Hindu personal law for a specific ethnic category in India. Therefore, the *Mughal*s have already an Islamic precedent of Islamic criminal law before them to implement and bring normalcy and stability in their diverse empire. That is why Basheer Ahamd, the same leading historian of legal code, states that there were copious compilations of two collections during the *Mughal* period; *Ā'īn-i Akbarī* by Abū 'l-Faẓl and *Fatāwā-i 'Ālamgīrī* during

[717] Ahmad, M. B. *The Administration of Justice in Medieval India*, 40.
[718] *Mālik, Islam in South Asia: A Short History*, 194-197.
[719] Niẓām, *Fatāwā-i 'Ālamgīrī, Vol 6*, 632-637.
[720] Wasti, *The Application of* Islamic *Criminal Law*, 52.
[721] M. Reza Pirbhai, *Reconsidering Islam in a South Asian Context* (Washington: Brill, 2009), 134.

the period of Aurangzēb. The first, he argues was the narration of the "general condition of administration," while the second was "more or less an exposition of the substantive law then prevailing."[722]

1.3. Compilation Procedure of the Criminal Law under the *Mughal* Period

It is, thus, fair to state that the *Mughal* criminal law or any other law was not compiled in any systematic way but reading of the above-mentioned historical tomes evince that this law was systematic in the way those rulers wanted it to be. The writing of criminal law, however, depeneds on the type of the law which was then executed in the shape of a *Farmān* or *Farmān-i-Shāhī*. They were, as discussed in Chapter-2, *diary*, *Yāddāsht*, *Ta'līqah*, *Suyūrghāl* and *Thabtī Farmān*.[723] Different legal *Farmāns* were written by different persons appointed for this specific purpose. The style of each *Farmān* was also in specific legal jargons.[724] Even in composition, all *Farmāns* were not the same. In fact, as these *Farmāns* were all having a legal formality, the linguistic style must conform to the style that the specific writer wrote at that time and none other was permitted to copy that style.[725] When the *Farmān* was written, it was properly sealed in a specific way, and then copied and sent to the concerned authorities to be kept in record.[726] However, as far as compilation is concerned, it was done in the same way as was done earlier in the shape of *Fatāwā*. A cursory glance at any volume of *Fatāwā* is enough to demonstrate that they have been compiled exactly like all other *Fatāwā* done in the Arabic world from which it was originally derived. There were various past

[722] Ahmad, M. B., *The Administration of Justice in Medieval India*, 29.
[723] Sarkār, *Mughal Polity*, 420.
[724] Naqvī, *History of Mughal Government and Administration*, 80.
[725] Mohiuddin, *The Chancellery and Persian Epistolography*, 57-58.
[726] Abū 'l-Faẓl, *Ā'īn*, Vol.1,248..

precedents existed during the compilation of *Fatāwā* collections. Therefore, it was natural to follow the *Sunnī* school of thought and *Sunnī Ḥanafī Fiqh* as was done during the Ottoman rule over the *Arab* world. Even the original work was done in Arabic but later on translated into different languages including Persian, which was the language of the court.[727] Although Bhatia has clearly outlined the sources of *Farmān-i-Shāhī*, he has not given the detail of the sources of other criminal laws though it is obvious that they are the *Qur'ān, Sunnah*, court precedents and interpretations and decisions of *Qāḍīs*.[728]Regarding compilation and division of criminal law, he is almost silent. However, the writing and compilation of *Fatāwā-i 'Ālamgīrī*, which is not only given in detail in commentaries of different historians but also in translation of the tome itself, it is clear that it has the backing of the Islamic jurisprudence. The compilation of the several volumes of tome is in the arragenment as other *Fatāwā* collections of the classical period of books of *Ḥadīths*. Most of the religious edicts have been collected under certain categories given with complete interpretations. These categories include marriage and death rituals, different types of omissions and commissions, *Ḥudūd, Ta'zīr, Qiṣāṣ* and their types, *Siyāsah* and religious ritauls.[729] A cursory glance at the compilation pattern of *Fatāwā-i 'Ālamgīrī* shows that this 30 volumes tome translated into Urdu in ten volumes has two major categories; personal and criminal laws and others about taxation. In the personal and criminal laws, it has divided as the *Digest* suggests into different subsections about Islamic ways of categorizing the crimes and prescribing punishments and taxation about perhaps non-Muslims except in cases where they are involved in

[727] Sarkār, *Mughal Polity*, 421.
[728] Bhatia, *Political, Legal and Military History of India*, 157.
[729] Neil Benjamin Edmonstone Baillie, *Digest of Muhammadan Law Part First* (London: Smith, Elder, & Co. 1875), vii-ix.

criminal matters with the Muslims, as argued by Catherine B. Asher and Cynthia Talbot in their book, *India Before Europe*. They are of the view that though it is stated to be a compendium of religious codes, in fact, it is a "compilation of legal decisions consistent with *Sunnī Ḥanafī* School of law."[730]

The compilation procedure of this legal code of the *Mughal* polity follows more or less the same Islamic tradition. This pattern spans over different crimes, the crimes against God, state and people, subsequent punishments, their interpretations, past precedents, religious rituals, interpretations, examples from history and opinions of prominent jurists, past decisions and above all the new interpretations.[731] *Fatāwā-i 'Ālamgīrī* has almost the same pattern except some taxation and dealing with the non-Muslims specifically Hindus in India. In this connection, it stands apart from all others written before it. The impacts of this legal code were tremendous and profound on the Anglo-Indian and Anglo-Muhammadan law on the Subcontinent during the colonial period and subsequently on the polities established in the shape of Pakistan, India and Bangladesh.

2. Role of *Qāḍīs* and *Muftīs* in Compiling Criminal Law during *Mughal* Period

In the hierarchy of the judicial authorities during the *Mughal* period, the role of *Qāḍīs* and *Muftīs* is very important. Although the overall impression of *Qāḍīs* in the western or eastern world was not good in terms of administration of justice, as a French Francis Bernier has stated during his travel that they were entirely at the mercy of the

[730] Catherine B. Asher and Cynthia Talbot, *India Before Europe* (Cambridge: Cambridge University Press, 2006), 230-213.
[731] Ibid., 231.

landlords who were corrupt and were incapable of delivering justice to all and sundry.[732] Disregard of his personal observation which could be based on some specific oriental prejudice, it is correct that some were corrupt and dispensed justice according to the criminal procedure laid down in the books of *Fiqh* and *Fatāwā*. It is, however, very interesting to discuss the word *Qāḍī* and different shades of meanings given to this word and the post.

2.1. *Qāḍī:* Derivation, Meanings, and Role During the *Mughal* Period

The word *Qāḍī* or *Qāzī* has been derived from another Arabic word that is "qaza" which according to Rekhta, is noun of "*qezi*" where vowel after 'q' is short and unlike "*Qāḍī,*" is not long. It gives its meanings as "to decree" or "to appoint." Other than these, it has also listed various other meanings but the meanings which are close to criminal matters or justice are "decree, order, judgement, judication or judicature" and even "sentence."[733] In the same way, in Arabic Enlgish Lexicon, William Lane has defined *'Qazā'* or *'Qaḍā'* as something to be finished in its entirety. In other words, it means to end something judicially. However, it falls under *'qedi'* which has three different meanings.[734] A great Islamic jurist, Muḥammad Sallām Madhkūr has interpreted it further saying that it means to pay some debt or perform some action on some command or fulfill a desire. He is of the view that *Qāḍī, too, is* a type of ruler, for he stops a lawbreaker from crossing the boundaries in taking unjust action.[735] On the other hand, the Holy Qur'ān has used the word 'qaza' in various nuances. For example, in Taha Chapter,

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[732] Francois Bernier , *Travels in the Mogul Empire, 1656-1668* (London: Oxford university Press, 1916), 200-238.

[733] *Rekhta Online Lughat.* s. v. "Qaza." [Online]. Accessed August 8, 2017 https://rekhta.org/urdudictionary?keyword=qazaa.

[734] Lane, *Arabic-English Lexicon*, 2537.

[735] Muḥammad Sallām Madkūr, *Madkhal al-Fiqh al-Islāmī. Vol. 1* (Beirut: al-Dār al-Qawmīyah lil-Ṭibā'ah wa-al-Nāshīr, 1964), 333.

it asks the Prophet (PBUH) not to make haste before revelation is "completed" which is also "perfected" as used by other translators.[736] However, at another place, the Qur'ān has used it for settling an issue as Yousuf Ali has used word "settled" for *Qazā*. Therefore, the derivation of *Qāḍī* from *Qazā* is in the meanings of one who settles issues.[737]

However, some other jurists have defined *Qazā* in some other way but still it relates to decision making or issuing a decree to decide something which is binding on all. In this connection, the word *Ḥukm* has been used for it which is a sort of decree, as stated by Ibn Al-Humām in his book, *Fatḥ al-Qadīr*.[738] According to *Fatāwā-i 'Ālamgīrī*, it is compulsory order for the public, while Ibn Farhūn al-Mālikī is of the view that it is a directive of *Sharī'ah*, adding that it is an act of intermediary for creature and their God to execute His orders.[739]

Hence, settled on the issue of semantics regarding *Qāḍī*, it is better to review some conditions required for appointing a suitable person for this post in Islam and the way of appointment. Some of the prominent jurists have declared appointing a *Qāḍī* as an obligation of the Islamic ruler. A reknowned jurist Al-Kāsānī has termed it as an important requisite for a leader or *Imām*[740], while Al-Māwardī has declared it a duty of

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[736] See Qur'an, 20: 114, Trans. by A. Yūsuf Ali, http://www.*Islam*101.com/*Qur'ān*/YūsufAli/*QUR'ĀN*/5.htm
فَتَعَالَى اللَّهُ الْمَلِكُ الْحَقُّ وَلَا تَعْجَلْ بِالْقُرْآنِ مِن قَبْلِ أَن يُقْضَى إِلَيْكَ وَحْيُهُ وَقُل رَّبِّ زِدْنِي عِلْمًا

[737] See Qur'an, 06: 08.
وَقَالُوا لَوْلَا أُنزِلَ عَلَيْهِ مَلَكٌ وَلَوْ أَنزَلْنَا مَلَكًا لَّقُضِيَ الْأَمْرُ ثُمَّ لَا يُنظَرُونَ

[738] Ibn Al-Humām, *Fatḥ al-Qadīr, Vol. 1*, 453.

[739] Ibn Farhūn al-*Mālikī*, *Tabṣirāh al-Ḥukkām fī Uṣūl al-Aqḍiyah wa Manāhij al-Aḥkām, Vol. 1* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1995), 12.

[740] 'Alā al-Dīn Abū Bakr bin Mas'ūd al-Kāsānī, *Badā'i' al-Sanā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1986), 27.

the ruler whether he is caliph or *Imām* to appoint a judge.[741] Even *Shī'ah* jurists have stressed upon the same thing though they have replaced the name of caliph with *Imāma*[742]. Both consider it the duty of *Imāma* to appoint a just judge. Even acceptance of this post is very interesting in that the jurists have recommended the eligible persons to accept the post and endorse it for the sake of justice. Leaving aside any other terms and conditions for this post, the immediate area of concern here is with reference to the *Mughal* period. U. N. Day has listed some qualifications about the appointment of *Qāḍīs* such as a male of *Ḥanafī Fiqh* School, even if that is a woman, intelligent, sound, free Muslim, must have knowledge of the Islamic jurisprudence.[743] As there were some other Islamic virtues that Day has listed, it makes it imperative that his status and authority should not be belittled by the king or the other landlords. Theoretically, Day has claimed, it was considered that even the King has no right to interfere in the matters of justice. The *Qāḍī* was not bound to accept any evidence or order from the emperor. However, it was only in theory, for a *Qāḍī* was appointed by the emperor himself. Therefore, he was bound to have an impact on him as Day has argued citing that 'Abdul Wahhāb was appointed as *Qāḍī-ul-Quḍāt* by the late *Mughal* emperor, Aurangzēb, for he was the only *Qāḍī* and a great figure who sided Aurangzēb's occupation of the throne in accordance with *Sharī'ah*.[744]

From this entire discussion, it is easily deducing what the word *Qāḍī* means and how different and great Connotations are associated with this word. However, as far as his role is concerned, it was of great importance in the judicial matters as well as criminal

[741] Abū al-Ibn Ḥasan Ali Ibn Muḥammad Ibn Habib Al-Māwardī, *Ādāb al-Qāḍī, Vol. I* (Baghdād: Dtrasat Dtwan al-Awqaf, 1972), 137.
[742] Aḥmad Bin Fahad Al-Hilli, *Sharahi al-Islām,* Vol. I (Tehran: Ansariyan, 1981), 314.
[743] Day, *The Mughal Government*, 213-214.
[744] Ibid., 214.

law and its compilation. *Qāḍī* was the second in compilation of legal codes in that he set precedents through his judicial duties, through his decisions and overall proceedings in the court exactly like modern judges who speak through their decisions and set examples for the jurists to follow. However, that precedents did not become binding,[745]which means that the *Mughal Qāḍīs* also were not compelled to follow the set precedents, but those precedents helped compilers later in compiling *Fatāwā*, which is the major example of compiled legal code.

As far as judicial duties are concnered, the duties of a *Qāḍī* appointed by the *Mughal*s were very detailed. In the Batala Collection of *Mughal* Documents, it is said that a *Qāḍī* must hold a court in the mosque and not at any other place though during the *Mughal* periods there were various court buildings. However, his office used to perform functions of judiciary as;

i. Making decisions

ii. Giving judgements

iii. Appointment of guardians in property cases

iv. Supervising *waqf* property

v. Executing wills

vi. Implementation of Muslim personal law according to *Sharī'ah*

vii. Supervision of decisions and punishments

viii. Supervision of law officers and subordinate law officers[746]

[745] Neil Duxbury, *The Nature and Authority of Precedent* (New York: Cambridge University Press, 2008), 111.

[746] M. Z. A. Shakeb, *A Descriptive Catalogue of the Batala Collection of Mughal Documents, 1527-1757 AD* (London: British Library, 1991), 60-61.

As there were several types of *Qāḍīs* in the lower courts, there is a *Farmān* which shows duties of a *Qāḍī* appointed in a *pargana* in Batala city. These duties show that a *Qāḍī* is responsiblie for adjudicating disputes, enforcement of law, and awarding punishments, leading Friday prayers, taking care of personal law, overseeing property related issues and establishing equity issues.[747] *Qāḍī* was also responsible for appointing his deputies and even writing of the judgements.[748] Chief *Qāḍīs* were responsible for prisons and conditions in prisons and prinsoners along with other judicial duties.[749] These lists are quite sweeping powers that a *Qāḍī* enjoys during the *Mughal* period. Therefore, the decisions were bound to become precedents. As the decisions were put in black and white, they were followed by the subordinates everywhere they were distributed. However, the compilation only happened quite late during the last period. Although some documents such as the collection of Batala exist which shows very credible traces of the legal codes, and their collections, they are not complete compilations.

2.2. Role of *Qāḍīs*

In fact, here compilation does not mean full collection into codified shape. It means to leave examples. For example, Safa Muḥammad has stated, "During the period of Islamic history in India, Islamic courts and *Qāḍīs*' bold judgements have left such a bright tradition and instances of the supremacy of the *Sharī'ah* code that the modern secular courts cannot even think of it."[750] This clearly shows that *Qāḍīs* have left their precedents which became legal examples for their sucessors to follow. This is a direct

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[747] Ibid., 61.
[748] Rafat Mashood Bilgrami, *Religious and Qausi-Religious Departments of the Mughal Period, 1556-1707* (Aligarh: Munshiram Manoharlal for Centre of Advanced Study, Dept. of History, Aligarh Muslim University, 1984), 123.
[749] Majumdar, R.C., *The History and Culture of the Indian People: The Mughal Empire*, (Bombay: Bharatiya Vidya Bhavan, 1974), 547-548.
[750] Muhammed, Judicature of Islamic Law in Medieval India, 07.

example of leaving precedents. In other words, it is a type of judicial legislation regarding criminal laws and their codification. It is also said that judges or *Qāḍīs* were often legal teachers. Therefore, it was but natural for them to give sound judgements based on legal aspects of the cases.[751] It is further stated that the legal codes followed during *Mughal* period were *Fiqh-i Fīrūz Shāhī* and *Fatāwā-i 'Ālamgīrī*[752]. Therefore, everything was ready for the *Qāḍīs*. However, their indirect legislation or role in compilation occured whenever they were called by the emperor or they worked as laywers from the state.

As has been discussed that the *Qāḍīs* left precedents to be followed in the shape of their judgements. This was their direct role in compilation as it has been demonstrated during the compilation of *Fatāwā-i 'Ālamgīrī*. Shaykh Niẓām of Lahore, who presided over more than 500 writers to write *Fatāwā* was also a laywer who was to be made *Qāḍī* but was called to work on the compilation of *Fatāwā*.[753] The researchers also said very much about the direct role of *Qāḍīs* in interpretations in that though they were appointed from the topic, the *Qāḍīs* "had not only the option to choose from different lines of interpretation offered by different *Mādhāhab* but also the right to interpret *Sharī'ah*."[754] He is obviously referring to the case of *Fatāwā* in which various *Qāḍīs* and clerics took part in compiling and collecting interpretations from different schools of thought. However, he argues, *Fatāwā* was not considered authoritative by *Qāḍīs*, for *Qāḍīs* were authorized to go beyond its interpretations and set their own interpretations of *Sharī'ah*.[755] Another direct influence was that they were authorized to award sentence

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[751] Kumar, *Essays*, 50.
[752] Ibid., 51-52.
[753] Ali Akram Khān Sherwani, *Impacts of* Islamic *Penal Laws on The Traditional Arab Society* (New Delhi: M.D. Publications, 1993), 88.
[754] Rahmān, *Criminal Sentencing in Bangladesh*, 88.
[755] Ibid., 95.

and even sometimes appeleate court was not authorized to change that sentence. Therefore, the decisions made by *Qāḍīs* were upheld until they were implemented and became parts of collections and later on were used in *Fatāwā* collection.[756]

In other words, although *Qāḍīs* were not directly employed by the emperor for the compilation of *Fatāwā-i 'Ālamgīrī*, they were helpful through their decisions, interpretations and application of the Islamic criminal jurisprudence in the making of this huge compilation. Another class, which took part in the compilation of this huge tome and others before it, comprised of Isalmic clerics who were also called *Muftīs*.

2.3. Role of *Muftīs*

A *Muftī* is a very important figure in an Islamic society. According to Oxford Dictionary, a *Muftī* "is a legal expert who is empowered to give rulings on religious matters."[757] Al-Ma'ānī, an online Arabic dictionary defines *Muftī* as "someone who officialy explains law."[758] Both of these short definitions amply show the place of *Muftī* in the legal fraternity and in criminal law procedure. Not only does *Muftī* provide a clear guideline but also provides details of the due process of law and the law to be applied.

Exactly like their role in the implementation of *Fiqh* or Islamic jurisprudence, *Muftīs* or *'Ulamā'* as they were called played an important role. According to Munir, *Muftīs* have been part of the judicial systems during the *Sultanate* times.[759] Munir highlights their role during the period of Aurangzēb when they were set to work for the compilation of the judicial records called "*Maẓharnāmahs*" as stated by Ahmed. It is

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[756] Ibid., 92-94.
[757] *Oxford Concise Dictionary*, 937.
[758] *Al-Ma'ānī*, s. v. "*Muftī*." [Online]. Accessed August 8, 2017. https://www.almaany.com/en/dict/ar-en/*Muftī*/
[759] Munir, *The Administration of Justice*, 6-7.

another matter, he says, that this record does not exist in toto, for only a short record is available now.[760] It, however, becomes clear that *Muftīs* played an important role in the judicial process. Munir further highlights that *Muftīs* were always present in the hall of the court. Even the emperors used to ask questions from *Muftīs* in case they were stuck in some difficult case where their opinion was absolutely necessary to set the standards.[761] It is also said that *Muftīs* were very important in the compilation of laws and making decisions, for they used to assist *Qāḍīs* in furnishing previous precedents and decisions and impacted the whole judicial processes.[762] However, Basheer Ahmed has stated that he was not a regular legal official but only a helper who was there as a relic of the canon law from the past. It is, however, correct to state that he was authority on the religious law which was held in high esteem during the *Mughal* period. [763] He further states that they used to copy decisions and present and previous judgements to the *Qāḍīs* for their guidance. However, *Muftīs* did not have authorities to impose decisions. It was only left to the discretion of the *Qāḍīs.*[764] Another researcher, Bittoo Rani has also expressed the same views about the role of *Muftīs* adding that they only used to read *Fatāwā* and did not decide the cases. However, these *Fatāwās* were almost relevant to the cases in point.[765]

On the other hand, *Muftīs* became sources of criminal laws on two major reasons. The first basis was that they were religious scholars and religion was of paramount importance in the court. Hence, their presence in the court was necessary. They were

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[760] Ibid., 11-12.
[761] Ibid., 16.
[762] Rajjak, Justice and Punishment During *Mughal* Empire, 2445.
[763] Ahmad, M. B., *The Administration of Justice in Medieval India*, 34-35.
[764] Ibid., 35.
[765] Bittoo Rani, "*Sharī'ah* Courts as Informal Jusice Institution in India" *International Journal of Humanities Social Sciences and Education (IJHSSE)*, 1, no. 9 (Sepember, 2017), 133.

important due to their being interpreter of the Islamic law,[766] while on the other hand, they also advised the judges and laid down opinions of other jurists due to which it was easy to reach the decision.[767] The second reason was that they were part and parcel of the Islamic life. Even sometimes they advised the kings about the ways how to deal with the Muslim population. Mr. Khalid Masud, a researcher of great note, has beautifully summed up the entire role of a *Muftī* in an Islamic society, shedding light on his role during the *Mughal* period. He has given a very good account of how *Muftīs* were treated during the *Mughal* period saying that even their role was determined in *Fatāwā-i 'Ālamgīrī* along with their real role in its writing.[768] Discussing further rule and authority of *Muftī*, he terms him a "servant of God" on earth. However, Khalid Masud has referred to Basheer Ahmed and Ishtiaq Hussain Qureshi to reach his conclusion that he was not a "regular official" which is correct to some extent, for he used to assist in matters of religion, but his opinion and assistance was not binding.[769]The reason that the emperor was to decide what is legitimate and what is to be done to bring peace and normalcy in the state, and not *Muftī*. However, opinions of *Muftīs* became a legal piece or precedent, the reason that they were included in *Fatāwā*.

His importance in criminal law compilation could be deduced from the fact that he was an authority in the religious matters and *Sharī'ah* and the *Mughal* period wholy depended on Islamic criminal jurisprudence.[770] There are ample examples of the presence of *Muftīs* in the *Mughal* courts. It is because every *Muftī* was given due accord as he was

[766] Ahmad, *A Comprehensive History*, 277.
[767] Muḥammad Qasim Zaman, *The Ulamā in Contemporary Islam: Custodians of Change* (Princeton: Princeton Univeristy Press, 2010), 20-21.
[768] Khalid Masud, *Ādāb Al Muftī*, from Moral Conduct and Authority: The Place of *Ādāb* in South Asian *Islam*, Ed. Barbara Daly Metcalf (California: University of California Press, 1984), 129.
[769] Ibid., 141. .
[770] Ibid., 144-145.

the source of a *Fatwā*, a religious edict, having the sacred force behind it. *Fatāwā-i Bāburī*, *Fatāwā-i 'Ālamgīrī* and all other such religious books have been written by great *Muftīs*. For example, *Fatāwā-i Alamagiri* has been written and compiled by more than 300 *Muftīs* along with other legal experts and jurists of that time under the guidance of Shaykh Niẓām and the emperor Aurangzēb[771]. As the *Mughals* were more inclined to *Ḥanafī Fiqh*, consequently all the *Fatāwā* collections are related to *Ḥanafī Fiqh* except some decisions made by Akbar regarding *Dīn-i Ilāhī*. Even the rise of Faizi and Abū 'l-Faẓl, the chief proponents of *Dīn-i Ilāhī* was due to the influence they had regarding their knowledge equal to *Muftīs* from whom Akbar got allergic, for he had multireligious court to which it was very difficult to tackle.[772] In other words, though *Muftīs* were behind compilations of legal documents, they were also behind what was considered and is still considered irreligious. Whatever it was, the impetus was from the *Muftīs*. Although it seems that *Muftīs* played a significant role more than *Qāḍīs*, it is almost true, for they had the backing of religion. Though Shaykh Mubārak and others of his ilk tried their best to bring secular form of criminal or other laws, they succeeded little, for the public support to religion led to the compilation of *Fatāwā-i 'Ālamgīrī* which left its impact in the shapes of more *Fatāwā* collections and more influence of *Muftīs* in the future compilations.

3. Authority of *Qāḍīs* in Criminal Matters

Role of *Qāḍī* like as the judiciary itself was very significant in criminal matters. Despite being used for extra judicial issues such as guardianship and supervision of the

[771] Jādūnāth Sarkār, *Studies in Mughal India* (New Delhi: Longmans, 1920), 270.
[772] MaKhānlala Roychoundury, *cc v* (Calcutta: University of Calcultta, 1941), 61-65.

other public affairs, he was to execute judicial issues related to crimes. There is long detail about them regarding their role in *Sharī'ah* courts and the office of *Qāḍī* with respect to decision making. It is said that the chief justice or *Qāḍī-ul-Quḍāt* was responsible not only of criminal matters but also of civil matters. He was the final authority for making decisions following a complete hierarcy of *Qāḍīs* in lower courts on district and then on rural level. Moreover, he had two other important functions to perform. The first was administration and second was criminal decisions. Besides being a capable person, he was also considered to be expert in Muhammadan Law or Islamic jurisprudence.[773] His authority was all pervasive as sometimes the emperor himself acted as a *Qāḍī* to administer different criminal penalties or revise a penalty due to being the appeleate authority. For example, generally a rebel is put to death, or awarded a capital punishment under the Islamic jurisprudence, but Bairam Khan approached the final authority through Jamal Khān and was forgiven. This means the emperor himself acted as the final appelleate court.[774] Other such acts of the final authority or the chief justice led to make *Qāḍīs* very powerful. U. N. Day has discussed the authority of *Qāḍī* in legal matters saying that although *Qāḍī's* authority depended on the authority delegated to them by the emperor, it was also dependent on the *Qāḍī* himself and his personality. Even in some cases where criminal trial was being heard, he could declare the interference of the king or emperor as null and void or invalid. He could not postpone the case if an order came[775]. However, it was only in theory and practically the appeleate court or the emperor could take up the case directly as has been stated in the case of Bairam Khān.

[773] Bittoo Rani, *Sharī'ah* Courts as Informal Jusice Institution in India, 133-134.
[774] Abū 'l-Faẓl, *Akbar Nāmah, Vol- II*, 178.
[775] Day, *The Mughal Government*, 213-214.

The reason for this weak theoretical fact is that all issues releated to the service of *Qāḍī* used to depend on the public office holders in the area he was working U. N. Day states that they could get him removed by the emperor through the intervention of the chief justice.[776] However, this is a factual position and a ground reality. Although there was a *Mīr 'Adl* (secular *Qāḍī*), *Qāḍī* was all powerful in a judicial bench where criminal matters were concerned with Islamic jurisprudence.[777] Although there is a contention between different historians about the role of *Mīr 'Adl* and *Qāḍī* in criminal judicial matters, where it is said that they were equal, and it is also said that *Mīr 'Adl* does not possess any judicial powers like that of his partner, *Qāḍī*.[778] It is becausae the *Qāḍīs* were superior due to their having Islamic leanings and Islamic learning and belonging to *Islam*. At least, it is what appears from the judicial system of the *Mughals*. What, however, Basheer Ahmed has insisted that a *Qāḍī* was the chief judge in case of criminal suits and that the suits were tried in the ambit of the Islamic jurisprudence.[779] It is quite another matter that a *Qāḍī* has always the assistance of a *Muftī* with him. He was, however, the authority in pronouncing the punishment on the criminal.[780] Although there were certain pronounced obligations for a *Qāḍī* to observe in order to see corruption due to the power and authority vested with the post of the *Qāḍī-ul-Quḍāt*, but they were merely formalities for the appointment of every *Qāḍī*.[781] Being very sensitive to justice, *Mughals* knew it too well that *Qāḍīs* were very important functionaries in establishing peace and stability and above all legitimacy. They used their *Farmāns* to keep check on the judiciary. For

[776] Ibid. 214.
[777] Beni Parsad, *The History of Jahangir* (New Delhi: The Indian Press Ltd, 1930), 96.
[778] Ahmad, M. B., *The Administration of Justice in Medieval India*, 41-43.
[779] Ibid., 56.
[780] Ibid., 56.
[781] Ibidi, 56-59.

example, once Akbar dismissed a very large number of *Qāḍīs* merely because they were "corrupt and greedy."[782]However, it is very significant to mention here that even Akbar, who is called a secular ruler, did not disturb most of the judicial officers related to religion. In other words, he only dismissed *Qāḍīs* but stopped short of dismissing all religious and quasi-religoius judicial officers or *Qāḍīs*.[783] In order to make system more efficient, he introduced reforms and made *Qāḍī-ul-Quḍāt* more powerful in removing *Qāḍīs*.[784] In short, the role of *Qāḍī* was very important as considered by the *Mughal*s in criminal matters. The reason as has been deduced from this discussion is too obvious that they played an important role in the judicial system and in establishing due process of law to create a sort of peace and consequential stability. The real purpose, therefore, seems that the *Mughal*s always sought stability and peace to consolidate their rule through a firm legitimate structure which only a trustworthy judiciary could establish. Hence, there was a strong *Qāḍī* to assist in establishing peace and Islamic jurisprudence to implement. Such a powerful judicial officer has not less power as it seems and some exmaples show that even when the application of *Ḥadd* or *Ta'zīr* is too obvious in terms of some crimes, the *Mughal*s desisted from entering, but where they found a room to interfere, they took *Qāḍīs* to task for being too harsh or too lenient. After all, they were appointing authorities and a large purse has always a large tune as the saying goes. For example, Abū 'l-Faẓl relates such an incident related to *Ḥadd-i-Sariqah* where Akbar thought that the *Qāḍī* was too lenient in awarding punishment, for Islamic jurisprudence listed a *Ta'zīr* regarding chopping off a hand, but Akbar altered it from the original

[782] J. L. Mehta, *Advanced Study in the History of Medieval India, Vol. 2* (New Delhi: Sterling Publishes Private Limited, 1984), 371.
[783] Ibid., 371-372.
[784] Ibid., 371.

punishment and ordered rather chopping the feet.[785] This example is enough to show how much authority a *Qāḍī* had, but it does not mean that they were powerless. Even Aurangzēb sometimes went too far in interference as stated by Radhika Singha regarding interference of Aurangzēb.[786] Even the role of *Muftīs* in the criminal matters was no less important. In fact, *Muftīs* sometimes created hitches in justice only because their opinions mattered in the interpretation of the abstract laws to put them into reality and let *Qāḍī* award punishments.

4. Authority and Role of *Muftīs* in Criminal Matters

There is a huge difference in the role and authority of the *Muftīs*. According to Basheer, *Muftīs* used to sit with the *Qāḍīs* but they did not actually pronounce the verdict or decision of the dispute. They were only involved in giving interpretations of the issues when there were some problems with the *Qāḍī*.[787] There are two major functions that he performed according to Basheer. He assisted the *Qāḍī* to sit in the court and secondly, he interpreted the *Sharī'ah* law. It is the second function where his role becomes significant.[788] This role of the *Muftīs* has been highlighted by Shaykh Musak Rajjak and he also agrees with Basheer that their importance mostly lied in interpreting the laws specifically related to *Ḥudūd* and *Sharī'ah*.[789] Radhika Singha too has highlighted the same role of *Muftīs* regarding his advice to the *Qāḍī* and his assistance in the matters of

[785] Abū 'l-Faẓl. *Akbar Nāmah*, *Vol. 2*, 733.
[786] Singha, *A Despotism of Law: Crime & Justice in Early Colonial India*, 54-55.
[787] Ahmad, M. B., *The Administration of Justice* in Medieval India, 42-45.
[788] Ibid , 45.
[789] Rajjak, Justice and Punishment During *Mughal* Empire, 2445.

the interpretations of laws.[790] The question, however, arises, whether the *Muftī* assisting the *Qāḍī* has an authority in criminal matters and awarding punishment.

In this connection, historians, legal minds and religious clerics have cited different opinions. Basheer Ahmed, a great name on *Mughal* legal period, is of the view that the role of *Muftīs* is very important in that they advised the *Qāḍī* on legal matters regarding interpretation of Islamic jurisprudence.[791] A great historican M. P. Sirvastava has also attached some legal importance to *Muftī's* post, they had pacifying impacts on the Muslim masses, playing an indirect role in subsiding the religious senitments of the Muslims.[792] On the other hand, another historian Makhanlala Roychoudhary does not seem to be second Sirivastava, as he says that *Muftīs* were legal officers, were well versed in laws, were great student of the Qur'ān and religious injunctions, but they were second fiddle in case of *Qāḍīs* who were the real judicial officers on lower and upper level.[793] Jagdaish Narain Sarkār, on the other hand, does not give very much or very less importance. He seems to support Basheer Ahmed's view about *Muftīs* saying that they were very important but not as importance as *Qāḍīs*.[794] Clarifying his role and authority further, A D. Khān says that *Muftī* did not posses his office. Although he played an important role in the *Mughal* judicial system, his expositions carried weight larger than it was considered.[795] Katherine Lemons, however, has differed with many of these historians, lauding the *Muftīs* in the *Mughal* judicial system. In her doctorate thesis, she is of the view that *Muftīs* have been very important but mostly in personal law matters. It is

[790] Radhika Singha, *A Despotism of Law*, 18-19.
[791] Ahmad, M. B., *The Administration of Justice* in Medieval India, 45.
[792] M. P. Sirvastava, *The Mughal Administration* (New Delhi: Chūgh Publications, 1995), 156.
[793] Chawdāhury, *The State and Religion in Mughal India*, 176-177.
[794] Sarkār, *Mughal Polity*, 188.
[795] A. D. Khān, *The History of the Sadarat in Medieval India: Pre-Mughal Period* (New Delhi: Idārah-I Adabiyāt-I Dellhi, 1988), 172, 252.

because in criminal law matters, their role was curtailed by the clarity of punishments in most cases related to *Ḥudūd*, *Ta'zīr* and *Qiṣāṣ* which have ample examples to compare and contrat and give opinions.[796] However, still they have some authority which they could tell "politely," says Jādūnāth Sarkār in *Mughal Administration*, adding that he could say that if he sees that the judgement is "opposed to all precedent."[797] Althogh Basheer has very carefully selected Sarkār's words, he has not interpreted them in the light of the *Mughal* judicial system[798]. Given the nature of the job of the *Muftīs*, it is clear from Sarkār's words that he used to be a learned person, well-versed in past decisions and very expert in giving practical shape to what Sarkār called "abstract laws" despite the fact that his authority was just to assist the *Qāḍī* in the court.[799] In the instructions to the *Muftīs*, it has been suggested that "he should train himself" regarding legal drafting and legal jargons, but in the case of *Qāḍī*, it was a must.[800] This difference of "must" distinguished *Qāḍīs* to have authority over the *Muftīs* despite the fact that there could have been differences among them. If the difference is about implementation, it is clear that *Qāḍī*'s opinion used to hold sway, but in case of interpretation, it was the prerogative of the *Muftīs*.

It is also that *Muftīs* mostly derived their authorities from their religious base. It was not limited to the period of Aurangzēb, for MaKhanlala Roy Chawdahury has cited examples from Akbar's period how *Sunnī Muftīs* used to hold sway in the court merely

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[796] Lemons Katherine, "At the Margins of Law: Adjudicating Muslim Families in Contemporary Delhi," *University of California*, Berkley, Accessed on August 15, 2017. 1-4.
[797] Sarkār, *Mughal Administration*, 37.
[798] Ahmad, M. B., *The Administration of Justice* in Medieval India, 42-45.
[799] Sarkār, *Mughal Administration*, 37.
[800] Ibid., 37.

due to their learning and this was "confined to *Sunnī* theology."[801] Morever, the source of this authority was clearly his religion or better to say the dominant religion. He adds that it was always interpreted by the *Sunnī Ṣadr* or the *Sunnī Muftī*, who happened to be assisting the *Qāḍī*.[802] This simply leads to the fact that he must have a great role in compilation and *Fatāwā-i 'Ālamgīrī* bears testimony to the fact that more than 300 scholars, mostly *Muftīs*, were engaged by Aurangzēb. Therefore, it is their religious base, their interpretative capabilities, their learnedness, their erudition in *Sunnī* sect, their religious upbringing and above all their own personal position that have made them an integral part of compilation process. They have always played an important role in compiling and suggesting compiled criminal trials to the *Qāḍīs*. Hence, though it could be stated that his authority could be secondary to *Qāḍīs*, but his role was very dominating. However, they used to get assistance from various other judicial officials in criminal matters.

5. The Contribution of Other Judicial Officials in Compiling Criminal Laws

5.1. The Role of Lawyers

There are several other judicial officers who helped the *Qāḍīs* in one or the other way. In the Pre-*Mughal* period, there were laywers to prosecute the alleged culprits and defense laywers to defend them in the courts. They have been mentioned in both *Fiqh-i Fīrūz Shāhī* and *Fatāwā-i 'Ālamgīrī*. Both Ibn Ḥasan and Basheer Ahmed have mentioned the existence of *wakil*s or lawyers or advocates in their works, which Pirbhai

[801] Chawdahury, *The State and Religion in Mughal India*, 55.
[802] Ibid., 59.

has quoted extensively in his historiographical research.[803] Basheer Ahmed has given much importance to lawyers stating that they were inducted in the period of Aurangzēb the *Qāḍī* as well as the accused to see legality of the punishments.[804] He has attributed the compilation of *Fatāwā* to a great Lahori laywer Shaykh Niẓām, who was assisted by more than six other great lawyers. Basheer Ahmed has enumerated their names as Muḥammad Jamīl al-Dīn, Jalāl al-Dīn Ḥusayn and Muḥammad Ḥusayn, while several other names are not traceable, he says.[805] Bhatia has also attributed to Basheer Ahmed as mentioning laywers and their presence during the period of Aurangzēb[806], while Sri Vastava has also attributed to Ibn Ḥasan.[807] Ibn Ḥasan has given a reference to the presence of lawyers in the judicial institutions in his book, *The Central Structure of the Mughal Empire.*[808] However, none of these researchers have ever mentioned that they have anything directly to do with compilation of any law. It is because their role has been restricted to the courts and their legal position. Philip B. Calkin has given very good details about the role of lawyers, but he has stated that there were no professional lawyers. [809] He further states that in most cases the plaintiffs and the defendants had to plead their cases themselves. Even if, he says, there were sometimes lawyers or *wakils* as they were called, they were not fully trained and well versed in the legal processions.[810] This entire discussion clearly shows that though lawyers were important, they were not as important as they have become in this modern age. Badā'ūnī has referred to a Hindu

[803] Pirbhai, *A Histriography of* Islamic *Law in the Mughal Empire*, 5-6.
[804] Ahmad, M. B., *The Administration of Justice in Medieval India*, 156-158.
[805] Ahmad, M.B., *Judicial System of the Mughal Empire*, 20-21.
[806] M. L. Bhatia, *Administrative History of Medieval India: A Study of Muslim Jurisprudence Under Aurangzeb* (New Delhi: Radha Publications, 1992), 166.
[807] Srivastava, *The Mughal Administration*, 118-122.
[808] Ibn Ḥasan, *The Central Structure of the Mughal Empire*, 343-344.
[809] Philip B. Calkins, "A Note on Lawyers in Muslim India." *Law & Society Review* 3, no. 2/3 (1968): 403-06. doi: 10.2307/3053009. 404-406.
[810] Ibid., 404.

lawyer Rae Arzani in his book as Khān Zaman. [811] Sir Thomas, a traveler has referred to a solicitor as having submitted and inspected his complaint in the court.[812] Manucci has referred to a laywer in his case of theft against Amin Khān.[813] This shows that laywers or *wakīls* used to exist and proved very helpful. However, it is not clear anywhere that they played any role in the compilation of either Cannon Laws, any *Fatāwā* collection or any *Maẓharnāmah* (record of judicial proceedings). It though is very much clear that their imperceptibly indirect role is too obvious, for they must have helped the *Muftīs* and *Qāḍīs* to arrive at a decision in difficult circumstances where some legal points become too complex to unravel.

5.2. The Role of Major and Other Minor Officials

5.2.1. *Qāḍī ul Quḍāt* or Chief *Qāḍī*

Sarkār has called him the supreme *Qāḍī* of the empire as appointed in every provincial capital.[814] In fact, the difference between a *Qāḍī* and chief *Qāḍī* is that a common *Qāḍī* is a general post whose role is generally determined before hand. However, a chief *Qāḍī* is a specific post with a very powerful background, having a heavy say in the codification and compilation of criminal as well as civil laws. Raj Kumar says that they were appointed by the emperor and that they also existed on provincial and central level. However, he has pointed out that they were often eminent lawyers.[815] Sarkār has given credence to the system saying that they were often very

[811] Badā'ūnī, *Muntakhab al-Tawārīkh*, Vol. 2, 76, 97.
[812] Thomas Roe, Ed. Foster, *The Embassy of Sir Thomas Roe to India, 1615-1619*, 260.
[813] Manucci, *Storia*, II, p. 198.
[814] Sarkār, *Mughal Administration*, 19.
[815] Kumar (Ed.), *Essays on Legal Systems in India*, 58.

learned men and were given very good remuneration package.[816] Raj Kumar has added that all *Qāḍīs* were selected from eminent lawyers.[817] Miss Farooqui, however, has shed a very good light on this top judicial post saying that his status was next to the emperor.[818] In fact she has pointed out that his status in defining legal boundaries was next to the emperor. This gives a clue to why a *Qāḍī-ul-Quḍāt* must have played a leading role in the compilation of cannon laws, *Maẓharnāmahs* and *Fatāwā* collections. Sarkār, however, has very beautifully summed up the impact of the religious injunctions saying that no emperor or *Qāḍī* or their decision could alter that or lay down "a legal principle, elucidate any obscurity in the *Qur'ān*, or supplement the Qur'ānic law."[819] Does this mean that even *Qāḍī-ul-Quḍāt* had very little room for interpretations and codification or compilation? Some commentaries by noted historians, however, points to this fact that he had freedom of forming rules and regulations and disciplining the local courts. They had the power to issue rules and regulations for the functioning of the courts. This also included formulation of these rules, he says adding that they were engaged in formulating rules for both civil as well as criminal laws.[820] Although Parsard has hinted absence of lawyers at the time of Akbar[821], it does not mean that this would have curtailed the power of the chief *Qāḍī*. In this connection, it is very important to note Sarkār who says that the *Qāḍīs*, even the chief *Qāḍīs*, used to have an Islamic law digest or better to say *Fatāwā* collections with them to administer laws and prescribe punishments.[822] This points to the fact that they had room for interpretations but not as much as the Islamic clerics,

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[816] Sarkār, *Mughal Administration*, 29.
[817] Kumar (Ed.), *Essays on Legal Systems in India*, 58-59.
[818] Farooqui, *A Comprehensive History*, 277.
[819] Sarkār, *Mughal Administration*, 10.
[820] Mehta, *Advanced Study in the History of Medieval India*, 371-372.
[821] Parsad, *Muslim Rule in India*, 413.
[822] Sarkār, *Mughal Administration*, 11-14.

theologians and *Muftīs* had, who were directly related to the Islamic jurisprudence and had greater say in the matters of Islamic laws specifically in criminal law issues where penalties and punishments were clear sans ambiguities. Sarkār has futher dilated upon this post and his authority regarding criminal matters saying that his authority encompasses all civil and criminal matters because there was no distinction between the two in Islamic jurisprudence.[823] The case of *Qāḍī-ul-Quḍāt* was unique in that they were inherited by the *Mughal*s from the Muslim rule in the Ottoman Empire, where they were noted theologians and *Muftīs* and compiled the criminal laws deriving their penalties and punishments from *Fiqh*.[824] This entire discussion from their past in the Muslim world to the *Mughal* administration shows that they have close association with the compilation and codification of criminal laws and were involved very deeply in criminal matters.

5.2.1. The Role of *Muḥtasib*

Muḥtasib has been derived from an Arabic word "*Ḥasabah*" which is etymologically made up of the sounds of /ḥ/, /s/ and /b/. It is used in the meanings of calculating.[825] It is used in the given meanings such as in Surah *al-Raḥmān* of the Holy Qur'ān as (الشَّمْسُ وَالْقَمَرُ بِحُسْبَانٍ) [826] that means there is a calculation or accountability for the sun and the moon. In a book, *Tājul 'Arūs*, it means to hold accountable and it also means to make arrangements or administer. It also means to do something for the pleasure of God as given in the sayings of the Holy Prophet (PBUH) such as " من صام رمضان ایمانا

[823] Sarkār, *Mughal Policy*, 199.
[824] Aniruddha Ray, *Some Aspects of Mughal Administration* (New Delhi: Kalyani Publishers, 1984), 134, 143.
[825] Ibn Manẓūr, *Lisān-ul-'Arab* (Ḥasab), vol. 1, 314. *Fīrūz* Ābādī, *Al Qāmūs-ul-Muḥīt*, vol. 1, 12, 95.
[826] The *Qur'ān*, 55: 5.

واحتسابا غفرلہ ماتقدم من ذنبیہ" which means if a person fasts during the *Ramaḍān* with the mind of fasting, all of his previous sins are forgiven.[827]

In terms of words, *Ḥisbah* means " انها الامر بالمعروف اذا ظهر ترکہ، والنهی عن المنکر اذا ظهر فعلہ[828]" which means a good deed that is given up and it is otherwise when it is publically done or committed.

Ibn Khaldūn has also defined the term in the same way saying;[829]

The word *Muḥtasib* has been derived from *Ḥisbah* that means the person who safeguards the rights of the people from those who infringe upon them.[830]

According to dictionary, the world *Muḥtasib* means the person who tries to safeguard the interest of the people.[831]

It means *Muḥtasib* is a person who performs the task of propagating goodness and stopping evil deeds. He also supervises calculation in dealings and other such issues.[832]

Though literally *Muḥtasib* means the one who holds other accountable, in *Urdu* as defined by Rekhta, it refers to an "officer who supervises observance of laws and

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[827] Muḥammad Bin Ismā'īl al-Bukhārī, *Al-Jāmi' al-Saḥīḥ, Kitāb al-Ṣawm*, vol. 1 (n. m). 255.

[828] *Al-Mawsū'ah Al-Fiqhiyyah*. (Al Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1983), vol. 17, 223.

[829] Ibn Khaldūn, Abū Zayd Abd-ul-Raḥmān Bin Muḥammad, *Muqaddimah Ibn Khaldūn* (Lahore: Al-Faisal Tājirān Wa Nāshirān-e-Kutub, n.d), Chap. 3, part 31, 150.

[830] Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, 240.

[831] Al Fazarī, Aḥmad Bin 'Alī Bin Aḥmad Al-Qalqashandī, *Ṣubḥ-ul-A'shā fī Ṣina'at-ul-Inshā'* (Beirut: Dār al-*Kutub* al-'Ilmiyyah, n.d), vol. 5, 425.

[832] Ibid., vol. 5, 425. See for details of Niẓām-e-*Ḥisbah* of the *Mughal* priod: 'Alī, Muḥammad Khān, Mir'āt-e-Aḥmadī, *Vol. 1* (Bombay: Fath-ul-Karīm, 1307, A.D), 262-263. Muḥammad Bakhtāwar Khān, *Mir'āt-al-'Ālam, Vol. 1* (Lahore: Idārah Tehqīqāt-e-Pakistan, Dānish Ghāh, Punjāb, n.d), 156. Kāẓim, *'Ālamgīr Nāmah* , 391-392. Muḥammad Sāqī, *Ma'āthir-i-'Ālamgīrī*, 21-25, Khānī Khān, *Muntakhab-ul-Lubāb, Vol. 2*, 80, 358-359.

punishes offenders."[833] Wahed Hussain argues that *Muḥtasibs* were "permanent limbs of the judicial machinery."[834] According to him, they were appointed to supervise the public and see if they are acting morally and to see "illegal traffic, and for the control of grog-shops and suppression of gambling dens."[835]Stating the duties of *Muḥtasibs*, he says that they used to work in the courts and their rank falls after *Qāḍīs* and *Muftīs*.[836] Dilating upon various other duties of *Muḥtasib*, he says that they were related to law and its implementation through court. They were censor of the public morals, prefect of the police and public morality. They were to take control of the purchase and sale of wine, or other drugs, gambling, supervise markets and civic amenties, check products and their sales and inspect for counterfeit currencies and products.[837] As the police used to work under him, it means he was directly involved in the implementation of law and saw how it impacted the people. He has listed a very good instruction given to the *Muḥtasib* by Aurangzēb regarding upkeep of the city streets.[838] Sarkār has also mentioned them as judicial officers who were used to enforce justice system in the far and wide corners of the *Mughal* Empire.[839] Although Sarkār has attributed them in the destruction of temples on the behest of the emperor, it is debateable whether it was a legally approved act under the Islamic jurisprudence or not.[840] It, however, is certain that they had no direct role in any of compilation of criminal laws though they had a significant role in the application and implementation of the criminal laws in letter and spirit. They could be stated to be

[833] Rekhta, s. v. "*Muḥtasib*." Accessed on August 16, 2017 on https://rekhta.org/urdudictionary?keyword=*Muhtasib*
[834] Hussain, *Administration of Justice During the Muslim Rule in India*, 67-68.
[835] Ibid., 65.
[836] Ibid., 65.
[837] Ibid., 65.
[838] Ibid., 65-66.
[839] Sarkār, *Mughal Administration*, 30-31.
[840] Ibid., 31.

instrumental in implementing and seeing impacts of that implementation directly. Therefore, their role is vital in giving opinions to the compilers but not in compilation itself.

As far as *Kotwāl* is concerned, he was the major component of *Mughal* civilian administration. His concern with judiciary comes under the preview of this topic when he was appointed as a magistrate having judicial authorities. About *Kotwāl* and his role, Raj Kumar says that he was like a commanding officer in cities like *Shīqāhḍār* who was appointed on the same position in the *pargānāh*, and both have administrative as well as judicial responsibilities.[841] However, *Kotwāl* is not a new post created by *Mughals*. He had been relic of the Mauryan days, but he was only entrusted with the duties of policing the society and not performing judicial functions. It has been the handiwork of Sher Shāh Sūrī that he entrusted them with judicial duties to perform to keep peace and stability.[842] Basheer Ahmed has traced the roots of this administrative-cum-judicial post in the Indian administration and judicial background saying that it has been a relic of the past but the *Mughals* gave new shape to this post where a *Kotwāl* used to invent new legal injunctions to keep his small duties perfect. If it is said that he was prefect of the socity, it is not wrong[843], but Basheer Ahmed has not given any detail whether this small administration-cum-judicial official was involved in the compilation of criminal law in any way. Divercing from the popular tradition, Upendar Nath Day has included *Kotwāl* in the list of *Fawjdārs* as an important person who establishes peace, but he also listed his judicial responsibilities under the *Mughal* administration. He is of the view that sometimes

[841] Kumar (Ed.), *Essays on Legal Systems in India*, 51-52.
[842] U. B. Singh, *Administration, System in India: Vedic Age to 1947* (New Delhi: APH Publishing, 1998), 119-120.
[843] Ahmad, M.B., *The Administration of Justice in Medieval India*, 171, 243.

Kotwāls were entrusted with full responsibilities to exercise their quasi-judicial responsibilities to bring peace and calmness in societies.[844] Bharti has expressed the same views about the institution and personality of *Kotwāl* and lamented its end in 1857 by the British.[845] Above all of these modern researchers, Abū 'l-Faẓl has dilated upon the duties of a *Kotwāl* in *Ā'īn* saying that he enjoyed magisterial powers to keep law and order in districts. Sarkār has also not hinted that the *Kotwāl* has anything to do with *Maẓharnāmahs* or other compilaton of criminal laws or matters thereof. He has given details of his duties referring to Abū 'l-Faẓl and Manucci. [846] He has given full details of his job responsibilities, too.[847] However, he has not stated that *Kotwāl* was associated with the compilation work or not. It could be surmised from such an importance given to this judicial and administrative official that he must have contributed in the shape of his suggestions or short decisions that he must have made in the nick of time or left any precedents. However, officially, it is fully confirmed that despite having a very important position in the judicial process, he does not have any role in actual composition, compilation or codification. His role was confined mostly to implementation or suggestions for compilation.

5.2.3. Role of Different Judicial Institutions

The *Mughal* period is marked due to a complete judicial system run by a judicial department headed by a chief and then lower courts and lower judicial officials. *Qāḍī ul Quḍāt* and *Ṣādr* used to head the department with provincial courts in each province

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[844] Day, *The Mugahl Government*, 234.
[845] Dalbir Bharti, *Police and People: Role and Responsibilities* (New Delhi: APH Publishing Corporation, 2002). 12-13.
[846] Sarkār, *Mughal Administration*, 96-97.
[847] Abū 'l-Faẓl, *Ā'īn-i Akbarī*. *Vol. I*, 243, 478.

called *Ṣūbah* and then headed by a *Qāḍī*. They were followed by a governor's court, a provincial chief appeal court and other minor officials such as *Muftī*, *Muḥtasib* and *dāroghah-e-adālat-e-Ṣūbah*, each having different duties to perform. The courts were further divided into district courts headed by *Qāḍī-e-Sarkār*, and *Fawjdār Adālat* headed by a *Fawjdār*. *Kotwāli* court headed by a *Kotwāl*, *Ālamguzarī kacharī* headed by *Alamgūzār*. *Prāganāh's* court headed by *Qāḍīs* and other *Panchāyats*. Basheer Ahmed has pointed out with a complete sketch of how a judicial system was headed by the *Mughal* emperors with the emperor as the final head to hear appeals or work as an appeleate court.[848] However, his entire discussion revolves around their duties, their scholarship, their erudition, their character and salaries[849] but he has not pointed it anywhere that they were involved in the compilation or codification of laws. Although it is clear that *Qāḍī ul Quḍāt* used to get direct orders from the emperor in the due process through *Farmān-i-Shāhī*[850] that could be of the codification nature or about compilation of decisions. Therefore, it is but natural to conclude that only the highest office of the judicial system, the office of *Qāḍī ul Quḍāt* was engaged in getting orders and releasing instructions about compilation and codification but even then, it is not clearly mentioned in the duties of the post.

6. Relevance of *Farmān-i-Shāhī* in Compilation of Criminal Laws

This entire discussion about the role and authority of different major and minor judicial officials of the *Mughal* era points to another question whether the actual topic of this research, *Farmān-i-Shāhī* had to do something with the compilation of the criminal

[848] Aḥmad M. B., *Judicial System of the Mughal Empire*, 208-256.
[849] Ibid., 185-186.
[850] Sarkār, *Mughal Administration*, 13.

laws and criminal jurisprudence during the *Mughal* era or not. Jādūnāth Sarkār has presented his observation that the emperor himself was very close to the judicial system through *Qāḍīt ul Quḍāt.*[851] This makes it clear that whatever *Farmān* as issued, it was directly issued to this post of the chief *Qāḍī*. This has been aptly pointed out that this post was next to the emperor in legal matters besides hearing of appeals.[852] Upendra Nath Day is of the same opinion about the place of *Qāḍīt ul Quḍāt* in the *Mughal* judicial administration.[853] However, in the case of revision or appeals, emperor was also involved which is clear that *Farmān-i-Shāhī* used to be instrumental not only in the codification or compilation of decrees but also in the case of revisions where the emperor, Day says, "could take action at his own initiative."[854] There are exapmles that *Qāḍīt ul Quḍāt* used to report directly to the emperor in case of violation of any law by any high government functionary even if he happened to be a governor.[855] It is also clear that Aurangzēb, seeing the dearth of criminal procedural code, issued a *Farmān-i-Shāhī* for the compilation of *Fatāwā-i 'Ālamgīrī*[856], for which she states, Aurangzēb arranged a syndicate of religious scholars. However, Jahāngīr himself issued Twelve Edicts[857], while before him Bābur issued a *Farmān* to arrange *Fatāwā-i Bāburi* as he ordered Shaykh Nurudin.[858] These references clearly show that *Farmān-i-Shāhī* has something to do with the compilation process and without the interest of the king, the fountain of justice, it

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[851] Ibid., 13-14.
[852] Farooqui, *A Comprehensive Hisotry*, 277.
[853] Day, *The Mughal Government, A. D. 1556-1707*, 209.
[854] Ibid., 213.
[855] V. D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, (Eastern Block Co, 2005), 27-33.
[856] Ayesha Jalal, "In the Shadows of Modernity? Theology and Sovereignty in South Asian *Islam*," from *Theology and The Soul of The Liberal State*, Ed. by Leonard V. Kaplan and Charles L. Cohen (London: Lexington Books, 2010), 274-276.
[857] Satish Chandra, *Medieval India: From Sulṭanat to the Mughals Part-II*, (Har-Anand Publications, 2005), 253-254.
[858] Afzal-ur-Rahmān, *Evolution of Knowledge* (New Delhi: Muslim Schools Trust, 1984), 753-754.

would not have been possible for the future generations to see the compilations of criminal laws. However, it is quite another matter that emperors, as being the final appeal, used to alter, modify or change sentences to suit the political circumstances.

In short, the *Mughal*s found a long tradition of very good compilation, first in the shape of Islamic jurisprudence from different Islamic jurists and second from the period of the *Sulṭān*s. Ghori, Balban and Tūghlak did a fine work and provided them with *Fiqh-i-Fīrūz-Shāhī* which led to *Fatāwā-i Bāburi* in the initial stages but later paved the way for more profound and more district work such as *Ā'īn* and *Fatāwā-i 'Ālamgīrī*. The contribution of the *Mughal*s through their *Farmān* continued from Bābur to the last one Auranzeb until various lawyers, *Muftīs* and theologians were employed for this voluminous work of *Fatāwā-ī Ālāmgīrī*. Although the works like Twelve Edicts, *Fatāwā-i Bāburi* and some other precedents were there, *Fatāwā-i 'Ālamgīrī* left its profound marks on the future of the criminal law in India. The compilation procedure adopted by the *Mughal*s was not different from the Islamic caliphs, for they used to employ clerics, law professionals and *Muftīs* separately for personal law, criminal laws and taxation laws. In this connection, the role of *Qāḍīs*, lawyers, *Muftīs*, other minor judicial officials and even the emperor himself was quite distinct and prominent. *Qāḍīs* and *Muftīs*, however, had been given the most weightage due to their learning and legal experience, while institutional role was played at the top level by the chief *Qāḍī* due to his proximity with the emperor. Both of these senior officials have a great authority in criminal matters, the reason that they were given preference in compilation process though lawyers too were given a priority as more Aurangzēb invited top *Lāhorī* lawyers to the compilation of *Fatāwā*. The long and short of the compilation of the criminal law and procedure under

the *Mughal*s is that *Farmāns* of the *Mughal* emperors had always been the prime movers of everything. They could be stated to have constitutional authority and legislative power.

Chapter No. 5

Criminal Procedure During The *Mughal* Period In The Light Of *Farmān-i-Shāhī*

Chapter No. 5:

Criminal Procedure during the *Mughal* Period In The Light of *Farmān-i-Shāhī*

1. Islamic Procedural Law

1.1. Procedural Law and Early Islamic Judicial System

Procedure, as the nomenclature goes, is a law that defines the entire procedure in the criminal matters. This procedure, according to Kristin B. Gerdy, contains three processes including assistance to court, establishing a uniform code and finally the trial itself. Gerdy is of the view that the procedural law comprises of rules of business governing the trial and due process of law and helps the administration in the courts. He enlists the case, "rules of proof, the available remedies, and the manner in while the judgement is enforced."[859] However, criminal procedural law is somewhat different from civil procedural law though some processes are almost the same such as investigation, pretrial decisions, adjudication, sentencing process, and "appeal and post-conviction."[860] In fact, the reason of giving these steps is to find out whether Islam has a complete procedural law that should be called as akin to the modern procedural law to present Islamic jurisprudence as the viable criminal law evolved through centuries.

In order to have a grasp of the Islamic procedural law, it is important to have a deep look through history. Islam has given a complete and detailed procedural law but

[859] Kristin B. Gerdy, "What is the Difference between Substantive and Procedural Law? And How Do I Research Procedure," *Perspectives: Teaching Legal Research and Writing*, vol. 9. (Fall, 2000): 2-4., https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2000-fall/2000-fall-3.pdf.
[860] James, R. Acker, and David C. Brody, *Criminal Procedure: A Contemporary Perspective* (Washington: Jones and Bartlet Learning, 2013), 1-2.

the main point of contention so far is the power of judiciary about which various jurists have given specific and separate but contentious opinions. Said Ibn Ḥasan Ibrahim, however, has argued that this depends on the type of crime committed by a person but more important is the establishment of a criminal administration system by the state. *Islam*, he says, as a code of life has made it incumbent upon the state and the government to establish a complete justice system headed by a judge. Then the question of his power arises.[861] Therefore, the first aspect of the Islamic procedural law is the establishment of a judicial system and court and then the question of the powers of the judge arises. Even before this power of the *Qāḍī* or judge in *Islam*, Lippman presents the justice of pre-Islamic period based on revenge which became the basis of the popularity of the Islamic criminal law procedure.[862] Although the exact procedures on the modern lines were not laid down immediately after the introduction of Islam by the Prophet Muḥammad (PBUH), most of his decisions paved the way for the procedures. He himself acted as a *Qāḍī* to decide matters in a way that no one objected. Syed Abū 'l-A'lā Maudūdī,[863] a reknowned Islamist scholar has stated that even the Prophet (PBUH) instructed the would-be *Qāḍī* at one moment not to decide any suit without proper hearing which, in a way, was a procedure to be laid down. The mosque was declared the public trial place while persons with impeccable characters were appointed as judges to decide suits.[864] He

[861] Ṣaeed Ibn Ḥasan Ibrahim, "Basic Principle of Criminal Procedure Under Islamic *Sharī'ah*," From *Criminal Justice in Islam: Judicial Procedure in The Sharī'ah*. Ed. by M. A. Abdel Haleem, Adel Omar Sharīf, and Kate Daniels (I. B. Tauris, 2003), 17-18.
[862] Mathew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law," *Boston College International and Comparative Law Review*, vol. 12, no. 1. (1989): 29-30.
[863] Born in united India on September 25, 1903, Madaudi has been an influential Pakistani Islamic scholar who wrote on a wide range of Islamic concepts including on Islamic State and its derivatives from legislative concepts. He died in 1979 in America. Also see blurb of Sayyid Abūl A'la Mawdudi, Islamic Civilization: *Its Foundation Beliefs and Principles* (Lahore: Kube Publishers, 2015).
[864] Syed Abūl A ālā Moūdodī, *System of Government under the* Holy *Prophet* (Lahore: Islamic Publication (PVT.), Limited, 1978), 9-10.

further states referring to Prophet (PBUH), that a true *Qāḍī* should not have any fear, prejudice or bigotry.[865] During the times of next four caliphates, this system evolved further into a complete judicial system based on the source of Holy Qur'ān and *Sunnah* of the Holy Prophet (PBUH) in a way that the precedents of the caliphs became examples of decision making in judicial processes.[866] As punishments were awarded according to a procedure, and this hearing was counted as investigation, while all the followers were given the duties to provide support of legitimacy, this could be stated as the complete procedural code as stipulated by Ṣaeed Ibn Ḥasan Ibrāhīm.[867] Therefore, there is a good reason that an Islamic procedural law could be based on these initial actions exists as Mathew Lippman has argued that Islamic criminal law evolved through a long period during the four caliphs with Umayyad and Abbāssid dynasties setting up complete police system and criminal procedures.[868] He is of the view that the "exclusive theoretical validity" of *Sharī'ah* continued until the sixteenth century with the arrival of the western criminal law and its codified shape that *Sharī'ah* started further compilation of the criminal jurisprudence.[869] In other words, the sources were already there. The further interpretations and precedents were set by the evolution of the judicial processes in different places within the Islamic empire. Commenting on the Islamic criminal procedure and its need, Sadiq Raza says that Islamic procedural code has long been there since the inception of *Islam*. He is of the view that in the presence of western procedural law, it is but a requirement that *Islam* should also have a procedural law. Dilating further

[865] Ibid., 10-11.
[866] Sadeq Reza, "Due Process in Islamic Law," *New York school, International Rev.* 1, vol. 46. (2013-14), 6-7.
[867] Ṣaeed Ibn Ḥasan Ibrahim, "Basic Principle of Criminal Procedure Under Islamic *Sharī'ah*" 18
[868] Mathew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 32-35.
[869] Ibid., 34.

upon the requirement, he says that it is because *Sharī'ah* says many things on the same matter which are not clear and are not in a proper and uniform shape despite having a complete classical jurisprudence better than the western jurisprudence. Even the ideology of human rights has been given to the west by *Islam*, he says adding *Islam* has full and detailed procedural law having complete rules and regulations spread here and there in different sources including the *Qur'ān*, the *Sunnah*, precedents, legal opinions, and *Fatāwā*.[870]

1.2. Evolution of Procedural Law in Islamic Jurisprudence

In fact, Islamic criminal procedural law exists since the day Islam started its judicial system. There was a complete code of how to try an accused and punish him accordingly through a complete process. Discussing procedural law and its application in Islam Matthew Lippman has counted all the punishment categories of *Ḥudūd*, *Ta'zīrs* and *Qiṣāṣ*, saying that Islam has provided a complete criminal procedural code though it is haphazardly spread in the Qur'ān and the *Sunnah*. It was arranged later by the jurists. Lippman has also counted all reasons where these three types of punishments are applied according to the nature of the crimes.[871] Talking about criminal procedure, Lippman says that there is no clear procedure and procedural law in *Islam*. It is rather spread here and there in the sources such as respect for individual, law of evidence, conformation of decision to *Sharī'ah*, application of law, treatment to the accused, punishment, detention, pre-trial detention, punishment, the *Qāḍī*, his qualification, his acceptance of the law of evidence and above all human rights.[872] However, his last comments are entirely against

[870] Raza, "Due Process in Islamic Criminal Law", 11-14.
[871] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 41-44.
[872] Ibid., 51-56.

his own thesis when he says that an individual human being having individual rights is "alien to Islamic religion and culture."[873] Sadeq Raza has also identified the four principles of the procedural law in Islam saying that they encompass all the modern principles of procedural law. They are investigation, prosecution, adjudication and imprisonment.[874] Regarding investigation, Sadeq Raza says that Islam has stressed upon the individual rights of a person such as honour and privacy in investigation and has laid down a complete code of arrest and pre-arrest treatment of the accused.[875] In fact, Qur'ān has laid down these rules that an individual has certain rights that must be protected at all costs such as Qur'ān says that:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْنِسُوا

The authorities or other persons should not enter the house of a person without permission whatever it may cost.[876]

Discussing the application of law, Lippman gives examples from both the Umayyad and the Abbassid period saying that during the Umayyad period, the method of appointment, qualities and responsibilities of a *Qāḍī* were determined, while during the later period most of the attention was paid to the legal theory and system even avoidance of its complete application and excuses of the clerics during these periods.[877] In other words, everything was clearly laid out and interpreted by the scholars, but political exigencies forced the rulers of these periods not to apply the procedural law in letter and spirit.

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[873] Ibidi, 61.
[874] Raza, "Due Process in Islamic Criminal Law", 16.
[875] Ibid., 17.
[876] *Qur'ān*, 24:27.
[877] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 31-33.

According to Lippman now there are certain elements of the Islamic procedural law which include;

i. Sources of law

ii. Islamic Criminal Law

iii. Categories of Crimes and Punishments

iv. Criminal Procedure

v. Pre-Trial Detention

vi. Pre-Trial Interrogation

vii. Right to Present Evidence and Assistance of a lawyer

viii. The *Qāḍī* and the Rules of Evidence

ix. The *Sharī'ah* and Human Rights[878]

Among these important components of the procedural laws, the first three have already been discussed along with the fourth one as full judicial procedure. The most important point here is the use of torture during pre-trial detention and interrogation or torture during investigation and arrest. As has been said earlier that the Qur'ān prohibits entry into house, protecting privacy of an individual[879], but it is not clear whether torture during this step is allowed or not. Sadeq Raza, after enumerating almost the same points argues that these rules and principles of procedural law "exceed western standards in limiting official powers in criminal law-enforcement,"[880] Almost refutes Lippman that they are not adequate. Regarding the criminal procedure, the most important is the rights of the accused. In this connection, Sadeq Raza has taken a detailed review of the opinions

[878] Ibid., 41-55.

[879] See *Qur'ān*, 24:27.

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْنِسُوا وَتُسَلِّمُوا عَلَى أَهْلِهَا ذَلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ تَذَكَّرُونَ

[880] Raza, "Due Process in Islamic Criminal Law", 26.

of the different schools of thought to discuss that a habitual offender may be punished for extracting important information, while stressing upon the fact that these are only jurist's opinions and not God's laws.[881] Although several other jurists have challenged this concept among whom Al-Māwardī is quite prominent. He has not endorsed this punishment or physical torture during this period but stressed upon the importance of *Muḥtasib* but with restrictions on his investigation.[882] It is because the works of investigation was started during the Umayyad and Abbasside dynasties through the office of *Muḥtasib.*[883] Abū Dāwud has also endorsed Al-Māwardī in this connection quoting the Qur'ānic verses that nobody should enter the house of an accused and violate his privacy.[884] These are just examples to show that a strict procedural law exists before the *Mughal*s and it was applied indiscriminately in every case.

In fact, Islam has set precedents about evidences, presentation of evidences and right to clarification and legal assistance during the judicial procedures. Commenting on evidence and its presentation, Nasran Bin Muḥammad argues that there are four major ways. The court knows facts through including confession, testimony, oath and circumstantial evidences.[885] They are same in almost all the judicial systems across the world. However, Nasran has mostly dilated upon the confession or admission of a crime through western prism in the Islamic context. Making a distinction between confession and testimony, he is of the view that testimony is not acceptable when no charges are

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[881] Sadeq Raza, "Torture and Islamic Law," *Chicago Journal of International Law*, vol. 8. no. 1. (January 6, 2007): 25-26. http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1253&context=cjil.

[882] Abū Al Ibn Ḥasan Ali Ibn Muḥammad Ibn Habib Al Al-Māwardī, *The Ordinances of Government*, trans. By Wafaa H. Wahba (Reading: Garnet Publishers, 1996), 260-280.

[883] Raza, "Due Process in Islamic Criminal Law", 11-19.

[884] Abū Dawud, *Kitāb Al-Hūdūd*, trans. Aḥmad Ibn Ḥasan, No, 4405, available at https://sunnah.com/Abūdawud/40.

[885] Mohd. Nasran Bin Mohamad, "Islamic Law of Evidence in Confession (Iqrar): Definitions and Conditions," *Islāmiyat* 15 (1994), 71-73. Accessed on July 20, 2017 at http://journalarticle.ukm.my/7632/1/4035-9303-1-SM.pdf.

framed but confession is acceptable at every time. He has extensively quoted Ahmed Fathi Bahansi, a great Islamic scholar to prove his point that confession has no such role as evidences and testimony has in Islamic jurisprudence.[886] This too shows that Islamic jurisprudence, when it passed through turbulent phases of Umayyad dynasty, evolved into a good procedural system where full evidences and law of evidences were promulgated by the *Qāḍī* himself. Lippman has stressed upon the right to legal assistance but more so on the rights of an individual dilating upon the fact that the Prophet (PBUH) himself made it an example by declaring that if his daughter Fatima was caught, she was to be punished accordingly, which according to him, a great way to set a procedural law in procedural matters.[887] However, he has not explained the absence of procedural laws during the great Ottomanian Turks. The Ottomanians made great efforts for codification that could be called procedural laws[888] as they set only rules and regulations and did not actually changed *Sharī'ah* for codifications. In fact, it is due to the fact that they were administrative laws and regulations and not actually criminal laws.[889] In other words, Lippman has deduced a right conclusion that they were not in black and white but it is too sweeping a statement that no efforts were made or that procedural laws were absent. On the other hand, Sadeq Raza seems correct to say that they were always there in the sources but not all[890] that is also the case with Roman Statutes and other administrative laws.

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[886] Ibid., 84-86.
[887] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 46.
[888] Stanford J. Shāhw, *History of the Ottoman Empire and Modern Turkey: Volume 1. Empire of the Gazis: The Rise and Decline of the Ottoman Empire 1280-1808* (Cambridge: Cambridge Univeristy Press, 1976), 100-103.
[889] Ibid., 102-103.
[890] Raza, "Due Process in Islamic Criminal Law", 26.

Whereas the role of *Qāḍī* and the law of evidence is concerned, both have gone through a long evolution in the Muslim legal history. Earlier, the Umayyads followed the Muhammadan method of settling justice through the caliph and his subordinates such as governors and military commanders. The post of *Qāḍī* was that of a legal consultant or secretary to the principle person who settles the dispute. Due to the nature of the work, he says, the post was separated from the administrative post and some rules were set regarding the police and administration of justice.[891] These rules were later further developed but they did not enter *Sharī'ah* like categorized offenses and relevant penalties. As several penalties were derived from interpretations and precedents, rules were also set in the same way. Calling the Umayyad as secular and the Abbāsids as religious, he goes on to say that *Qāḍīs* won independence and ceased to be just consultants and administrative officers. Separate courts were set for them. They also win religious coloring that gave them further independence and hence more rules were set by them.[892] However, he adds, during the Ottomanians, a *Qāḍī* became an independent person with several rules and regulations or what he cites as secular laws to work and administer justice.[893]

In nutshell, even during the most turbulent period in the Islamic history, there were rules and regulations under the justice was administered. There were proper *Qāḍī* courts, and sub-courts throughout the Muslim empire during every period with the caliph having vested with the final authority of appeal and reappeal and chief *Qāḍī* as the most

[891] Martin Shapiro, *Islam* and Appeal, *California Law Review* 68, no. 02(California: Berkeley Law Scholarship Repository, 1980): 361-364.
[892] Ibid., 364-367.
[893] Ibid., 372.

authentic and independent.[894] Lippman has rather discussed the role of *Qāḍīs* in setting the law of evidence in all types of offences be related to *Ḥudūd* or *Ta'zīr*.[895]

2. Procedural Law during the *Mughal* Period

The *Mughal*s, on the other hand, inherited a fully working judicial system form the *Sultanate* of Delhi. Not only they brought changes in legal framework but also left impact on the judicial system to be followed by the Company and other countries coming into existence, Wahed Hussain highlights.[896] He further refers to another *Mughal* authority, Jādūnāth Sarkār saying that they laid the foundation of a great civilization, the reason that everything done during the time of *Mughal* was arranged in an apple pie order.[897] However, in terms of procedural law, the *Mughal*s got only what the *Sulṭāns* of Delhi used to practice in the judicial system. There was compete Islamic *Qāḍī* system in place. His jurisdiction followed the same Islamic tradition, Basheer Ahmed says adding that even the procedure of summon, application submission and issuing of summons. He argued that the trial was heard in the presence of both the parties. However, it is very pertinent to mention here that the actual investigation used to begin following the hearing and not prior to hearing. In the same way, he states that a *Qāḍī* was separated from the case having links with his home districts. Also, that he was not removed from the case he himself used to have witnessed. In the same way, he was to be declared invalid in case he

[894] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 46.
[895] Ibid., 51.
[896] Hussain, *Administration of Justice during the Muslim rule in India with a History of the origin of the* Islamic *Legal Institutions*, 103-106.
[897] Ibid., 105-106.

was proved to have been bribed in some case, as Basheer Ahmed quotes *Fatāwā-i 'Ālamgīrī*.[898]

However, it is very strange that despite these nitty-gritties regarding laws and penalties, the procedural law in the *Mughal* era was as weak as in the other Muslim empires existing at that time. The procedural law was too simple regarding the organization and administration of courts, hearing of complaint, arrangement of trial and hearing, investigation process and human rights, detention and arrest, punishment and imprisonment and post-punishment period. However, one thing is sure that the impacts of Islamic system on the *Mughal* procedural and judicial laws was prominent as Wahed Hussain has pointed out that even though the impact of "Iraq, Spain, Egypt and Turkey" was deep during the Muslim rule, it was a "combination of India and extra-Indian elements" during the *Mughal* rule.[899] In other words, the *Mughal*s borrowed extensively from different Muslim sources be they local or foreign and amalgamated them into a fine blend of their own justice administration system, thus laying the foundation of the Muslim procedural law which later helped Muslim states to develop their own legal systems.[900] As far as laws and penalties are concerned, the *Mughal*s faced real dilemmas in their vast empires where various ethnicities and religions existed and followers of every religion were aplenty. Therefore, they adopted a way out by following Hindu Personal Law and *Sharī'ah* and leaving other minority religious communities on their own personal laws to be followed in criminal matters. Wahed Hussain has stated their procedural law as law of procedure adding that they used to have adjective law in its proper and initial shape through which the *Mughal*s justice system started procedure and

[898] Ahmad, M.B., *The Administration of Justice*, 177.
[899] Hussain, *Justice During Muslim Rule*, XIV.
[900] Ibid., XIV.

pleading, jurisdiction and applicability, law of evidence and witnesses and above all law of limitation.[901]

2.1. Organization of Judicial System

The whole system given by Basheer Aḥmad was a very detailed *Mughal* judicial system with courts, lower courts and sub courts at every level with specific names and major and minor judicial officials.[902] Ibn Ḥasan is of the view that it was the legacy of the previous rules. This system was laid down by the *Sulṭān*s of Delhi, he says adding that various Muslim jurists took part in various ways. [903] For example, he says that even before the *Mughal* Empire, the *Sulṭān* was the head of the judiciary and final appeal authority. He was responsible not only for appointment of the judicial officials but also of its working.[904] However, it does not mean that the *Mughal*s kept it the same. In fact, they brought sea changes from Bābur to their last emperor, Aurangzēb.

2.1.1. The Emperor as Supreme Judicial Authority

Whatever the structure was there in the *Mughal* India, the emperor was the supreme judicial authority on several courts. Despite differences among the jurists regarding his rights and authorities, Ibn Ḥasan says that the *Mughal* emperor used to interfere with the entire justice system through his dictatorial power. The emperor, he says, used to assemble great theologians of Islam from every nook and corner and seek their opinions in legal matters and appoint any one of them as a chief *Qāḍī*.[905] This shows that he was a supreme authority on account of his power of appointments made in the

[901] Ibid., 107-109.
[902] Ahmad, M.B, *The Administration of Justice*, 21-123.
[903] Ibn Ḥasan, *The Central Stucture of the Mughal Empire*, 310.
[904] Ibid., 310-311.
[905] Ibid., 311.

judicial system. However, it does not mean that he was absolute ruler. Basheer Ahmed has argued;

"The Muslim sovereigns in India even at the zenith of their power and influence seldom, if at all, attempted to tamper with the day to day administration of justice."[906]

This commentary by Basheer Aḥmad makes it clear that though they had the power to interfere but they never tried to tamper with the judicial matters, though at some times their *Farmān-i-Shāhī* went so far as to change, alter or defer and postpone some punishment given by a *Qāḍī* which made it Abūndantly clear that he was a final appellant authority. It is because as Mukhia says in his book, The *Mughal*s of India, that they tampered with "justice, paternalistic generosity and the spirit of forgiveness."[907] Ibn Ḥasan has also stated it clearly that it was admitted nowhere that the *Mughal* king was above the Holy law. They used to regard themselves, he argues, as viceroys and *khalifas* of God, the reason that *Fatāwā-i Alamgīrī* was ordered to be compiled. However, the king, as a responsible ruler of the Islamic state, used to appoint the best suitable person as the chief *Qāḍī* or *Qāḍī ul Quḍāt.* [908] Due to his, being the king, he also had the power to unseat the *Qāḍī*, and used to take opinions from the known theologians and appoint *Qāḍīs* for a certain period of time. This authority gave the emperors judicial powers that Ibn Ḥasan has stressed upon.[909] Though, it by no means, became his absolute power, it used to keep *Qāḍīs* alert and under check. Ibn Ḥasan has further stated that there was no check on the emperor, but he was expected to demonstrate his knowledge in legal

[906] Ahmad, *Administation of Justice*, 68.
[907] Harbans Mukhia, *The Mughals of India* (New Delhi: Blackwell Publishing, 2004), 54.
[908] Ibn Ḥasan, *The Central Stucture of the Mughal Empire*, 311.
[909] Ibid., 311.

matters, for the welfare of the whole state used to rest on his shoulders.[910]However, Khosla has differed with him quoting some European travelers that state as there was no written law, the king was not compelled to abide by any law and hence was the source of absolute rule. He, however, has admitted that the emperors used to comply with *Sharī'ah* laws due to the fear of the public as the dominant public in the court belonged to *Ḥanafī* school of thought of *Islam*.[911] Abū 'l-Faẓl has shed great light on the idea of justice and the role of an emperor. He has not only dilated upon when a judgement is poor, but has also stated the role of a monarch in justice.[912] It is also that the king or the *Sulṭān* was represented in each province by a governor who himself was a chief judicial officer in a way that he used to decide several cases of criminal nature, says Basheer Aḥmad.[913] In some cases, the emperor could punish a person directly. For example, Manucci relates an incident of Shāh Jahān that Shāh Jahān punished a noble directly for not paying salary to his servant and made him dead tired by asking him to run tiringly.[914] However, it is pertinent to mention here that the different *Mughal* emperors adopted different ways in dealing with the justice as well as judicial system. Their way became precedents for the succeeding emperors to adopt or discard them as the situation demanded. For example, Bābur followed the administrative style of his predecessors but sometimes he intervened and took action to administer justice. In this connection, Gulbadān Begūm[915] has stated two important examples where Bābur forcefully decided the cases as per the precedents.

[910] Ibid., 312.
[911] Khosla, *Mughal Kingship and Nobility*, 22-24.
[912] Abū 'l-Faẓl, *Ā'īn, Vol.1*, 433-450.
[913] Ahmad, M.B,*The Administration of Justice*, 103.
[914] Manucci, *Storia, I*, 201.
[915] Gulbadān Begūm was a great *Mughal* lady born in 1523 and died in 1603. She was a learned woman and great scholar. She wrote Humāyūn *Nāmah* and earned a great name in history. Also see Gulbadān Begūm, *Humāyūn Namāh*, trans. Self Translation (Delhi: Qaumī Council Baray Fārugh-e Urdū, 1981), 5.

The first example is of Bābur who fulfilled all desires of Khusro Shāh[916] who mistreated his two cousins when he was with his forces between Kandez and Badkhashan.[917] She narrates another incident where Mīrza Khān and Mīrza Muhammad both rebelled but had to seek refugee with their women; the former with his mother and second with his wife at which Bābur extended mercy to both and spared them.[918] However, it could be the force of circumstances that he pardoned during military skirmishes, though in normal circumstances he could have ordered execution of both of them. But these are just two examples of how Bābur used to intervene in administering justice. The same situation continued during the period of Humāyūn, his son, who succeeded him.

Gulbadān Begūm has narrated some cases decided by Humāyūn too. She says that Humāyūn arrested Muhammad Zaman Mīrza, a courtier for slaughtering the father of another noble, Haji Muhammad Khān. It also came to his knowledge that Zaman Mīrza was planning to rebel against him. Humāyūn got him arrested somehow and gave him in the custody of Yadgar Taghai who neglected due to which he escaped. However, the emperor got him arrested and ordered him to be blinded there and then.[919] Another incident is quite famous one which happened during Humāyūn's exile to Persia. Shāh of Persia complained him about his trusted nobles Roshan Koka and Khawaja Ghazi about their plots and misunderstanding they caused with the Persian king. On his return, Humāyūn punished both of them by throwing them in the *zīndān* (prison).[920] Another instance also happened, states Gulbadān Begūm, during his fight with Mīrza Kamran.

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[916] Khusrau Shāh or Khusro Shāh was also known as Kokultash was a military commander of the *Mughal* Army. He wrose to become an emire later and found in many battles. Also see Gulbadān Begūm, *Humāyūn Namā*, 5.
[917] Gulbadān Begūm, *Humāyūn Namā*, 5.
[918] Ibid., 8.
[919] Ibid., 26.
[920] Ibid., 68.

Humāyūn ordered some of his soldiers to murder for excesses they committed and spared the rest by imprisoning them.[921] These examples also happened during the military skirmishes though in normal circumstances it could have been different. The same administration of justice continued during the time of Akbar who witnessed relative peace and stability and established a proper court. He, according to Smith, retained the same judicial system with minor changes that suited his administration. However, Vincent Smith adds, he set up the office of lawyers, and *Dīwān-i-kul* with various other administrative offices. It is because, Smith argues, he used to give priority to justice over everything else and tried his best to leave examples of his justice according to the rules and procedures of his time.[922] Another historian Mountstuart Elphinstone mentions Akbar's instructions to the judicial officers of not resorting to mutilation of bodies during the punishment except in the case of seditions.[923] Wahed Hussain has also mentioned Elphinstone in his phenomenal book, *Administration of Justice During the Muslim Rule in India.* adding that Akbar was too lenient than other kings and ranked himself above all in administering justice himself.[924] Hussain has added that he used to take review of the whole administration of justice and send *Farmāns* in this regard to his governors to avoid capital punishments.[925] These *Farmāns* used to have full guidelines for administering justice not only for *Qāḍīs* but also for the *Muftīs*, assisting the *Qāḍīs* in their judicial work.[926] However, at the same time, Hussain has castigated Vincent Smith for saying that the judicial procedures were not as mature and sophisticated as in Europe, saying that he

[921] Ibid., 26.
[922] Smith, *Akbar the Great Mughal*, 34.
[923] Mountstuart Elphinstone, *The History of India*, vol.1 (London: John Murry, 1841), 532.
[924] Hussain, *Administration of Justice*, 33.
[925] Ibid., 33-34.
[926] Ibid., 34.

was perhaps unaware of the Islamic jurisprudence or *Fiqh* in the sense that he did not know that the Qur'ān did not stipulate all rules and procedures and that the rulers had discretion.[927] However, he supports Smith for his deep observation but again refutes him that there were various legal treaties and codes which Akbar used to administer through his *Farmāns* from time to time and that he had precedents of his predecessors that he used to revise.[928] In fact, emperors sometimes used to leave very good comments about corrective punishments which became precedents for the *Qāḍīs*. Akbar was very careful in this advice and asked for scold, threat and punishment before amputation and capital punishment.[929] He also stressed upon the *Qāḍīs* not to stay satisfied with halfhearted investigation and do full investigation including those of witnesses and oaths they took.[930] The emperors were also aware that as a single person they were not able to do all of their duties. Therefore, they needed to delegate this power to others. According to Abū 'l-Faẓl, Akbar stressed more upon arriving at truth instead of delivering mass justice to more people in less time. [931] This clearly shows that as a supreme judicial administrator, emperors set examples and precedents and also advised their judicial officials from *Qāḍīs* to *Muftīs*.

Related an incident, Elliot tells that Adham Khān was jealous of Atka Khān. Munam Khān too was jealous of his approach to the emperor. Both of them carried on feeling enraged so much so that even in Ramaḍān, relates Elliot, they came with their collaborators and fell upon Atka Khān and the emperor came to know it due to the noise they made. He ordered his nobles Farhat Khān and Sangram Hoshnak to blind them and

[927] Ibid., 36
[928] Ibid., 37.
[929] Abū 'l-Faẓl, *Ā'īn*, Vol. 2,573, trans. Tr. Jarret, 37-38. See, Also trans. Gladwin, Vol. 3, 254.
[930] Ibid.,Vol.2,573.
[931] Ibid., Vol. 2,573, Also see trans. Gladwin, Vol. 3, 300.

threw them down from the wall. However, as they did not die in the first time, the emperor ordered them to be thrown again.[932] Elliot further states that the emperor used to relax after evenings but one evening he came unusually to hear something from Deccan. The emperor found lamp lighter napping and ordered him to be punished by throwing him from the tower.[933]

There are several examples of the period of Aurangzēb who is also termed to have panchant for justice. Bernier has given examples of Aurangzēb hearing cases himself in the *'Ām-Khāṣ* (public court). He also used to hear cases of ten persons selected and give orders. He never failed to attende the public court at least once or twice in a week and issue orders.[934] Manucci has also stated the same thing as Bernier has stated that Aurangzēb used to hear cases in the *'Ām-Khāṣ*. He states that several times the emperor used to order punishments at the same time and sometimes asked for further investigations.[935] It has been given in 'Ālamgīr Nāmah that Aurangzēb used to personally consult Cannon Law and *Sharī'ah* to give his decisions on cases that the people used to bring to him. These cases and decisions became precedents for the *Qāḍīs*.[936] It is stated that the emperor used his discretion at most of the times and did not care for any other precedent. His way in *Dīwān-i-Khāṣ*, a tradition set by Akbar, used to be Wednesday and all other judicial officials also used to be present.[937] There is a very good example of setting up a procedural convention which could have become a law in the later period.

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[932] Elliot, *The History of India*, Vol. 51, 26. See Kalika Parsad Tiwari, *Foundations of Indian Culture* (Delhi: Pointer Publishers, 2007), 198. See S. M. Burke, *Akbar: The Great Mughal* (Delhi: Munshiram Manoharlal Publishers, 1989), 50, 165.
[933] Elliot, The History of India, vol. 51, 64. See Burke, *Akbar*, 165.
[934] Bernier, *Travells in the Moghal Empire*, 263.
[935] Manucci, *Storia*, Vol. 2, 462.
[936] Kāẓim, *Ālamgīr Nāmah* , 1096.
[937] Ibid., 1102.

Aḥmad Ali Khān wirtes that once Aurangzēb became aware that the *Qāḍīs* in Gujarat were enjoying three holidays during a week and used to hear cases only two days a week. He instantly wrote a letter and ordered them to follow the example of the imperial court in hearing cases. They were ordered to sit for five days a week and until sunset and only have an interval for prayers. [938] He also changed the names of courts to give impression that the empror used to support the suppressed.[939] Manucci seems to suggest that the prince was jealous due to justice of the others. [940] This shows that different emperors set different examples, precedents and established new judicial institutions that could cater to the increasing requirements of the justice in their respective eras. However, they are hardly called procedural laws. but the traditions and conventions which became permanent with the passage of time transformed into procedural laws though they were not mostly written. These are some of the actions where the emperors used to take direct action for negligence of duty, some criminal offense in the court or a convict caught during the palatial intrigues. In short, the emperor, being an absolute ruler, had a great role in the judicial system but they exercised it within a proper context and did not try to cross these boundaries in order to give legitimacy to their *Farmāns*.

2.1.2. Judicial Institutions and Procedures during the *Mughal* Period

The *Mughal* judicial institutions were based on the previous *Sultanate* periods. The courts started from the central to the provincial and district level and then down to village level. U. N. Day has stated that they were moulded on the administrative patterns of an empire comprising villages, *parganas, sarkārs, Ṣūbahash* and the capital. The

[938] Khān, Mir'at-e-Aḥmadi, 291.
[939] Sāqī Mustā'd Khān, *Mā'asir-i-Ālamgīrī*, trans. Self (Calcutta: n. p. 1871), 460.
[940] Manucci, *Storia*, Vol. 3, 262.

village was the lowest in the courts and center at the top headed by a *Qāḍī ul Quḍāt*.[941] The top was the *Shāhī* court or *Dīwān-e-ama* as held in the court of the emperor as justice was done as suo moto, writes Ishtiaq Hussain Qureshi. However, as he writes that this was the case with the *Sulṭāns*, it continued with the *Mughals* too.[942] On the other hand, Basheer Ahmad says that the *Mughals* followed the *Sulṭāns* in judicial administration too and stayed as the head of the judiciary.[943] V. D. Mahajan too has stated the *Shāhī* court as the highest judicial institution[944] followed by others as in order as given by U. N. Day.[945] Ibn Ḥasan comments that the *Mughal* emperors used to hear cases by themselves,[946]which has been stated by Akbar himself in his book.[947] This is just to state that the *Mughals* not only followed the structure but also the protocols of running the judicial institutions. Apart from these courts, there were religious courts too.

Most of the religious courts were established to hear cases in the light of the Qur'ān and the *Sunnah*. Wahed Hussain has related the post of *Qāḍī ul Quḍāt* and the *Qāḍīs* to this religious leaning of the *Mughals*.[948] V. D Mahajan has also seconded Hussain saying that as non-Muslims were treated according to their own religion, hence was the religious courts. [949] Then there were customary courts which were divided as High *Dīwān Court, Mīr 'Adl Court* and *Ṣadr-e-Jāhān* Court according to Hussain who adds that High *Dīwān* court was related to appointment and disposition of the judicial

[941] Day, *The Mughal Government*, 204.
[942] Qureshi, *The Administration of the Sultanate of Delhi*, 157.
[943] Ahmad, *The Administrating of Justice*, 133-1324.
[944] Mahajan, *History of Medieval India: Sultanate Period and Mughal Period*, 207.
[945] Day, *The Mughal Government*, 204.
[946] Ibn Ḥasan, *The Central Stucture of the Mughal Empire*, 317.
[947] Akbar, *Akbar Nāmah*, 373.
[948] Hussain, *Administration of Justice*, 27.
[949] Mahajan, *History of Medieval India*, 202.

officials along with power to hear appeals.[950] Hussain further states that *Ṣadr-e-Jahān* was more related with the civil disputes instead of criminal matters.[951] These are just the examples of the *Mughal* judicial institutions of higher level. The lower level institutions were also set up to end crime through a procedural law so that the judiciary could work in tandem according to rules and regulations.

These courts were followed by lower courts such as *pārgānā* as each *pārgānā* had its own court headed by a *Qāḍī*. He was appointed through a procedure called a royal *sānād*. He was able to exercise his jurisdiction through this *Farmān* and was assisted by a *Muftī*, a *Muḥtasib* and a *Dāroghah-i-'Adālat*.[952] These courts were followed by panchayat which were the lowest judicial bodies to decide all types of cases including civil cases. However, they were not managed by the central judicial authority as they were elected on village levels usually an assembly of five men.[953] On Sarkār level, there was a Sarkār court headed by a Sarkār *Qāḍī*.[954]He too was appointed through a specific procedure initiated by a *Farmān*[955] called the *Royal Sānād*. Basheer Aḥmad has given a full detail of his appointment and jurisdiction according to different manuscripts adding that lawyers were appointed at this stage to assist the *Qāḍī* even to give legal advice to the poor without any legal fees. The *Farmāns* giving their appointment also stated the duties of the *Qāḍīs* as to give decisions and act as legal advisors of the public properties or trusts.[956] The major role of these courts was to curb petty crimes but it is sure that there were procedural codes for their establishing, appointment of *Qāḍīs* followed by clear

[950] Hussain, *Administration of Justice*, 71.
[951] Ibid., 71.
[952] Hussain, *Administration of Justice*, 204.
[953] Ahmad,M.B, *The Administration of Justice*, 140.
[954] Khān, Mir'at-e-Aḥmadi,Vol. 2, 282-83.
[955] Ahmad, M.B., *The Administration of Justice*, 153-156.
[956] Ibid., 163-164.

instructions about their roles and duties as Basheer Aḥmad has stated.[957] Moreover, he also states that the *Mughal*s were aware of the separation of powers and checks and balances that different institutions played against each other. This means that they kept the judiciary separate from the administration and kept a sort of balance. He says that the *Qāḍīs* "had no 'Executive' duties and, as far as, was possible; the executive officers were not invested with judicial powers." [958] In other words, the *Mughal*s were fully aware that mingling institutions would not work in the long run, for one institution would become a burden on the other and it would create problems for the masses. That is why the qualification, status and role of the *Qāḍī* were kept separate from other state and administrative officials.

2.1.3. *Qāḍī:* Appointment, Status and Role in Procedural Law

Qāḍī was the third highest post in the *Mughal* judicial administration after the king and the *Qāḍīul Quḍāt*. *Qāḍī* had been a tradition from the Islamic judicial system that the *Sulṭāns* and the *Mughal*s incorporated in their system. Abū 'l-Faẓl has stated the appointment, role and power of a *Qāḍī* in detail in *Ā'īn*. He states the reason as "incapacity of a single person" to decide all types of matters. He has then gone into the detail of the qualification of a *Qāḍī*, his educational capability, his learning, his manners and even his living style. He has stated the learnings and manners as integral to the posts of *Qāḍīs* and *Mīr 'Adl*, which became essential qualifications with the passage of time.[959] *Qāḍī* was also required to do certain things and not do certain things according to Basheer Aḥmad who has given many details in writing that there were instructions for the

[957] Ibid , 209.
[958] Ahmad, M.B., *The Administration of Justice*. 281.
[959] Abū 'l-Faẓl, *Ā'īn*, Vol.2,573.

Qāḍīs to uphold the status and honor of the post.[960] The post of *Qāḍī* did not stay static during the entire *Mughal* rule. It witnessed sea changes specifically during the rule of Aurangzēb Ālamgīr. A *Qāḍī* was not only to choose the law, but also consult the *Muftī*, which has become a norm. Without the consultation, the *Qāḍī* was unable to decide cases of *Ḥudūd*.[961] It is stated that a *Qāḍī* had unlimited powers to review his orders though he was unable to decide in the light of any sacred law or *Sharī'ah* law.[962] All these rules and regulations governing the appointment, status and role of *Qāḍīs* were considered an important procedure. Hence, they were made procedural laws with the passage of time. Along with them some adjective laws, customary procedures and appealing methods also transformed into procedural laws.

2.1.4. Adjective Law, Procedure, and Jurisdiction

Adjective law, Wahed Hussain refers to laws of the early Islam related to the proceedings or court procedure to prove a crime or file a suit against somebody[963]. He argues that this has been deduced from a *Farmān* of second caliph written to Abū Mūsā, a governor of Kūfah, a city in Iraq which fell to Muslims at that time.[964] According to Wahed Hussain, these rules pertain to the administration of justice such as equality, burden of proof, compromise, time of decision, benefit of doubt and providing evidence.[965] As it was already given in *Fiqh-i-Fīrūz Shāhī*, the *Mughals* followed these Islamic adjective laws in letter and spirit. Hussain states that these rules and regulations changed with the passage of time and went through a great evolution until they

[960] Ahmad, M.B., *The Administration of Justice*, 155-156.
[961] Basheer, *Judicial System*, 196.
[962] Ibid ,102.
[963] Hussain, *Administration of Justice*, 108-109.
[964] 'Allāmah Shiblī Nomānī, *Al-Fārūq, Part-II* (Lahore: Almisbah Publsher, 1991), 49-50.
[965] Hussain, *Administration of Justice*, 108-109.

transformed into laws called adjective laws or procedural laws in some parts of the world. Abdur Rahim, who has done extensive research on these points and issues states that the major objective of these rules and regulations was to put forward a case at the appropriate forum or court, move it forward, bring evidences and witnesses and get the culprit punished.[966] Wahed Hussain has presented the whole procedure of putting a claim or complaining about any wrong doing and then how it is run in the court. There were specific Persian and Arabic terms for such things.[967] Abdur Rahim has given a full detail of the plaintiff, complainant, claimant, the case, trial and the reason for relief.[968] Wahed Hussain states that there was a complete legal procedure of the case how it was heard by the *Qāḍī* after sitting in his court at his *masnad.* The *Qāḍīs*, he states, used to follow certain written and customary protocols, while a special writer was always present in the court to record the proceedings. Some religious theologians also used to sit in the court to assist *Qāḍīs*. Even there were wakils or lawyers who used to assist or advise the parties on legal issues or matters. Then everything was left on the *Qāḍīs* to decide and then supervise the decisions or implement but all this was followed by a long-held rules and regulations.[969] However, as far as the jurisdiction is concerned, the emperor as stated was all in all when it came to hear cases and determine jurisdiction of the courts.

Although the people knew very well the jurisdiction, it was not left to the people alone. The *Qāḍī* of the Sarkār Court, pargānā or other superior court was eligible as Abū 'l-Faẓl states to hear cases if he thought that the case fell into his jurisdiction.[970] If there

[966] Abdūr Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafī, Mālikī, Shāfi'ī and Ḥanbalī Schools* (London: Luzac, 2010), 364-65.
[967] Hussain, *Administration of Justice*, 110.
[968] Rahim, *The Principles of Muhammadan Jurisprudence*, 365-370.
[969] Hussain, *Administration of Justice*, 112-117.
[970] Abū 'l-Faẓl, *Ā'īn*, Vol.2,573.

was some issue, it was sent to the proper forum including the king himself who in certain ways interfered with the courts as being the supreme judicial authority.[971] However, it does not mean that the king or the emperor used to interfere more than necessary.

2.1.5. Arrest, Investigation, Trial and Law of Evidence

As *Sharī'ah* was the main law of the *Mughal* Empire, the *Mughal*s judicial administration followed almost the same procedure in arrest and investigation as was followed in *Sharī'ah*. However, there have been serious changes in the arrest and investigation during the *Sultanate* of Delhi as Wahed Hussain has noted adding that the *Kotwāl* was the first person who was to know about the case, arrest the person and bring him in the court.[972] In this connection, several Islamic procedural laws were followed. Quoting Khāfī Khān, Basheer Aḥmad states that a police officer was made to compensate a person for a "wrongful arrest of a citizen."[973] There was proper procedure of taking a person in custody after arresting him and it was done only in the matter of cognizable cases with necessary "prima facies" evidences.[974] Ali Ahmad has given a bit of information about that saying that the *Kotwāl* of the city was responsible for arresting a person after getting a complaint. He then used to report to the *Qāḍī* to get the orders about his prosecution. He adds that even *Fawjdār* could also arrest a person but he did not use to report to the *Qāḍī* but to the governor.[975] The police, he says, was not allowed to arrest a person in certain cases but the police had the power to arrest even a *Qāḍī* if he

[971] Ibn Ḥasan, *The Central Stucture of the Mughal Empire*, 311.
[972] Hussain, *Administration of Justice*, 59.
[973] Ahmad, M.B., *The Administration of Justice*, 88,
[974] Ibid., 208.
[975] Khān, Mir'at-e-Aḥmadi,281-283.

himself got involved in a crime.[976] In other words, the citizen to be arrested was given full rights as per *Sharī'ah* if he was a Muslim and through cannon or personal laws if he belonged to some other religion.

The same was the case of investigation. Basheer Ahmed related a case of State versus Khawaja Asif saying that the police officers investigated the crime. The investigation regarding search of the house was the same as was followed in the British penal code later codified for India, he says, adding that even the *Qāḍī* was allowed to made this search but under the law after informing the accused of the offence.[977] The instructions for the inquiry were released from the court of the *Ṣadr*. If there was good reason behind the offense and crime was strong enough, the police, he says, could break into the house.[978] It means the same *Sharī'ah* procedure was followed in investigation with a bit of touch of the locality alternatives of the police.

In the case of trials, *Qāḍī* was the main official who used to conduct a trial of the accused. The prisoners under trial were given in the custody of the *Kotwāl* who kept them in accordance with the instructions of the court.[979] The trial were conducted quickly so that the accused should not suffer unjustly in jail. There were proper jails for the people in custody and prisoners.[980] During the trial, the evidences and witnesses were called but they were called within the ambit of the Islamic laws and procedures. It was the same procedure followed by the second caliph when he wrote to his governors.[981] In this connection, all these principles of presenting evidences were given in *Fiqh-i-Fīrūz Shāhī*

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[976] Ibid., 282.
[977] Ahmad, M.B., *The Administration of Justice*, 211.
[978] Ibid., 211.
[979] Ibid., 248.
[980] Ibid., 261.
[981] Nu'mānī, *Al-Fārūq*, 49-50.

as well as in *Fatāwā-i 'Ālamgīrī* as Basheer Ahmed has mentioned in detail saying that the *Mughals* used to follow the *Ḥanāfī* law which classifies evidence on the basis of corroboration, testimony of an individual or confession or admission of the crime.[982] It was the same as given in the Islamic *Fiqh* followed at that time in the entire Islamic world. There was also competency of witnesses and whether they were Muslims or non-Muslims including gender distinction, as it was clearly followed in some cases, according to Basheer Ahmad.[983] There were proper rules and regulations for direct evidence, circumstantial evidences, documentary evidences and even the way how to admit a fault or a crime and confess it before the *Qāḍī*.[984] There are various instances of these procedural laws spread here and there. Even Manucci has given an example of written documentary evidence used in his case.[985] Although there are very short evidences about some specific legal points such as estoppel and res judicata in which case a party could stop the other party from raising the same issue already advised and even method of how to record evidences, these are just few evidences.[986] As far as the number is concerned, in this connection, Basheer Ahmed says that the *Mughal* judicial administration followed the Islamic method as given in the Islamic *Fiqh* including the taking of oath as happened in some cases stated by Abū 'l-Faẓl.[987] In other words, there might have been some alternations or amendments in these procedural laws or customs and traditions set by the *Mughal* judicial administration, almost all the rules were already set by the *Sultanate* of

[982] Ahmad, M.B., *The Administration of Justice*, 211.
[983] Ibid., 212-213.
[984] Ibid., 212-218.
[985] Manucci, *Storia*, 204.
[986] Ahmad, M.B., *The Administration of Justice*, 219.
[987] Ahmad, M.B., *The Administration of Justice*, 219. Cf. Abū 'l-Faẓl, *Ā'īn*, I, 34-41.

Delhi and the Islamic caliphate of the past. Therefore, the *Mughal*s had done little to bring improvement except during the period of Akbar and Aurangzēb.

2.1.6. Law of Limitation and Working of Courts

Law of limitation does not apply to the Islamic jurisprudence and there is no limit of evidences and witnesses to be produced for a criminal case. A document pertaining to *Hidāyah* has given one-month period for calling for evidences[988], while Basheer Ahmad has also mentioned the same thing in his book.[989] However, at the same time, Basheer has quoted a British Museum document to claim that there was no time limit and it was entirely up to the court to set a limit or no limit.[990] Though in some cases, this law of limitation was applied to the holder of the office such as on the king who was "de facto" Chief Judge, as Basheer Ahmed says adding that respecting the law was for in his advantage.[991] In a way it was a limit on his limitless authority of doing everything under the sun merely by using a single *Farmān*. However, practically, the emperor would not issue a *Farmān* having unlawful consequences. In similar fashion, the qualifications of the chief *Qāḍī* and his duties and responsibilities were in some way limitations on him so that he should not act in contravention to those laws. The qualifications of *Qāḍī* as given by Al-Māwardī applied in the age of *Mughal*s too that he should be an adult male, a pious Muslim, a man learned in Islamic *Fiqh*, of good health and good power of judgement.[992] Basheer Ahmed has traced the same qualifications applied during the *Mughal* period.[993] Regarding the application of these rules and regulations, Basheer Ahmad says that the

[988] Mus. Add. 22417 f. 11.
[989] Ahmad, M.B., *The Administration of Justice*, 195.
[990] Ibid., 195.
[991] Ahmad, M.B., *The Administration of Justice*, 219.
[992] Al-Māwardī, *Aḥkām al-Sulṭāniyyah*, 123-128.
[993] Ahmad, M.B., *The Administration of Justice*, 82-85.

examples of the caliphs were followed strictly in letter and spirit and the same laws were applied to all the government or state officers sans any distinction. Citing different cases quoted in *Spirit of* Islam by Ameer Ali,[994] Basheer Ahmed states that actually the Islamic criminal law does not favour on the basis of any distinction due to colour, creed, post or responsibilities.[995]These limitations go down from the emperor to the chief *Qāḍī* to the bottom and all other officials linked with the judicial system. Khāfī Khān has stated a case State versus *Shiqahdar* where a police officer was fined to pay compensation for a wrongful arrest.[996] Khāfī Khān has also stated the caste of Mīrza Beg, the police prefect of Lahore, saying that his try to arrest a *Qāḍī* for wrong doing from his house evolved into the murder of that *Qāḍī* whose heirs tried the *Kotwāl* in the court and won the case though the *Kotwāl* later appealed it and died during the process.[997] These were limitations on almost all the officials including the king himself which kept them away from any wrong doing or issuing any unlawful *Farmān.* It could be deduced that had a *Mughal* emperor issued an unlawful *Farmān* regarding criminal jurisprudence, it would likely to have serious backlash unless it had full backing and supporting of the power and the masses at large.

On the other hand, the procedural law also included the working of the courts, as how the *Mughal* courts proceeded with the trial of the person arrested and sent to the court for having committed any criminal offence. *Hidāyah* has given a full detail of how a case used to be presented in the court before the *Qāḍī.* It states it in graphic details that when the *Qāḍī* used to enter the court, the audience present in the court paid him homage

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[994] Ameer Ali, *Spirit of Islam* (Calcutta: S.K. Lahiri & Co, 1902), 279-283.
[995] Ahmad, M.B., *The Administration of Justice*, 86-87.
[996] Khāfī Khān, *The Muntākhab al-Lubāb*, Vol. 2, Ed. Maulvi Kabir Al-Dīn Aḥmad, (Calcutta: College Press, 1869), 728.
[997] Ibid., 550.

with bow. He used to read the record of the court and then asked the petitioner or his lawyer to state the case. The other party or the convict, if present, was given the opportunity to defend himself. Then the case used to be decided in accordance with the given law. It states that there used to be points: *mazhur* that means records of the proceedings of the case and the *sijil* that means the order given by the court. The evidences and witnesses were then produced to make it easy to be decided and the court could also summon witnesses if needed.[998] In this connection, the first aspect that the *Qāḍī* used to ensure was their jurisdiction that they were never to cross in any case as stipulated in *Fiqh-i-Fīrūz Shāhī*, which were regarded in high esteem and as quoted by Basheer Ahmad. [999] Generally, there was only a single *Qāḍī* working in a court and he was able to hear any case brought to him by the *Kotwāl* of the city. However, *Qāḍī ul Quḍāt* was authorized to try any case throughout the empire.[1000] Basheer Aḥmad further argues that the system of hearing the case was the same as was followed by the *Sultanate* of Delhi. The tradition of the Islam of referring complex issues to the clerics was followed as a *Qāḍī* was always accompanied by a *Muftī* in the court.[1001] Cases were also transferred from one court to the other court on the request of the accused or the plaintiff as had been done by ShāhJahān cited by Vincent Smith.[1002] Manucci has also referred to two more examples from Akbar and one from Shāh Jahān of transferring cases.[1003] Regarding criminal trial procedure, Manucci states that it was a very simple system[1004]

[998] *The Hidāyah*, trans. Charles Hamilton, (Lahore: Premier Book House, 1963), 451.
[999] Ahmad, M.B., *The Administration of Justice*, 176.
[1000] Ibid., 175-176.
[1001] Ibid., 179.
[1002] Smith, *Akbar the Great Mogul*, 345.
[1003] Manucci, Storia III, 128.
[1004] Ibid., 246.

and followed a "uniform practice" as Basheer Ahmad called it.[1005] According to Badā'ūnī, the case was brought in the court by the *Kotwāl* or the claimant and institute by the *Muḥtasib* or the *Kotwāl* himself.[1006] He further states that the court had the power to call the accused or demand evidences and witnesses from the claimant. The sentence, he says, used to be pronounced in the open court and if the court is of complex nature, a complete record was kept,[1007] while petty cases were discarded without any note.[1008]

Although the *Mughal*s mostly followed the *Ḥanāfī* law which did not allow ex parte decision, sometimes when it gets difficult and one party does not appear, the judicial system and *Muftīs* present in the court were allowed to act on *Shāfi'ī* law according to which ex parte decision made was given.[1009] However, if the defendant or accused appeared after a time, his case, Basheer Ahmed say, could be heard again. According to Neil Benjamin Edmonstone Baillie there were complete rules and regulations on prescribed forms for decrees issued in case of punishment and for the records of the proceedings of the trial.[1010] The law of evidence was observed in its totality with corroboration in front of *Muftī* so that he should give his sound opinion in accordance with the Islamic law.[1011] This is how a punishment was announced after which the accused was declared a criminal. Usually, the *Qāḍī* used to pronounce the punishment with relevant codes and accused was handed over to the *Kotwāl*. However, the final judgement according to Ibn Ḥasan, was recorded in a book called *Kitābul*

[1005] Ahmad, M.B., *The Administration of Justice*, 182.
[1006] Badā'ūnī, *Muntakhab al-Tawārīkh* I, 102.
[1007] Ibid., 102-103.
[1008] Hussain, *Administration of Justice*, 183.
[1009] Ibid., 11.
[1010] Baillie, *The Digest of Muhammadan Law*, 763-767.
[1011] Hussain, *Administration of Justice*, 118.

Ḥakam.[1012] In case, an accused was considered dangerous, the punishment was announced in a closed court instead of the open court.[1013] Although some historians might have stated that the judgements were not recorded, Manucci as well as Baillie[1014], both have confirmed referring to *Ā'īn* that even in civil matters the punishments were duly recorded and sent to the emperor for confirmation.[1015] According to Basheer Ahmed, a full record was kept and copies were sent to different officials for certain actions. The reports of the judgements were also sent as was the case of *Maẓharnāmahs* or "records of judgement" of the higher courts to set precedents during the period of Aurangzēb.[1016] Basheer Aḥmad has even given full details of the court timings, workings, dress code and "disposal of business" in civil as well as criminal courts. However, Basheer relates that there was a bit of difference regarding trial before the king and before the *Qāḍī.*[1017] It was because the king was the final authority and after his decision, there was no appeal for the convict. However, after the decision of the *Qāḍī*, he could file an appeal in the superior court.

In other words, even working of courts was not done in a haphazard way. Some of the rules and regulations or better to say procedural laws were borrowed from the Muslim judicial system in the caliphate and others were adopted to suit the circumstances including keeping of records, stamping by the emperors and then keeping copies for different officials. All these rules and regulations were applied and implemented through

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[1012] Ibn Ḥasan, *The Central Stucture of the Mughal Empire*, 311-312.
[1013] Ahmad, M.B., *The Administration of Justice*, 185.
[1014] Baillie, *The Digest of Muhammadan Law*, 767-769.
[1015] Manucci, *Storia III*, 264.
[1016] Ahmad, M.B., *The Administration of Justice*, 186-188.
[1017] Ahmad, M.B., *The Administration of Justice*, 256.

different *Farmāns*. In other words, backing of the *Farmān* was there in case of work of the judicial institutions.

2.1.7. Post-Punishment Period, Imprisonment and Appeal System

In a criminal case decided in the court, a convict was then to be punished in accordance with the punishment as pronounced by the *Qāḍī*. According to Basheer Aḥmad, the *Kotwāl* was the highest officer responsible for the implementation[1018] of the punishment and see that the court's orders were carried out.[1019] The police used to work under him to throw the convict in the prison or execute him.[1020] In case of death or capital punishment, the executioners were also appointed or arranged by the *Kotwāl*. However, the death sentence, as Basheer Aḥmad has pointed out was confirmed by the governor or the emperor himself. He cites an example of Shāh Jahān of getting executed a person through a snake bite.[1021] This means that there was a bit of difference between the post-punishment period and imprisonment. It was handled by *Kotwāl* to place a person in the prison.

Regarding punishment, there were the same procedures. Basheer Aḥmad has quoted Terry, that executions were commuted to prison sentences during the period of Aurangzēb and that they were mostly carried out at night.[1022] As far as imprisonment was concerned, there was a proper prison system called *bandī khānahs*, as Basheer Ahmad has stated. However, there was no separate prison department like the modern

[1018] Ahmad, M.B., *The Administration of Justice*, 201.
[1019] Abū 'l-Faẓl, *Ā'īn*, Vol.2,573-74.
[1020] Khān, *Mirat I*, 283.
[1021] Khāfī Khān, *The Muntākhab al-Lubāb*, Vol. 2, 550.
[1022] Ahmad, M.B., *The Administration of Justice*, 202.

department, but it was administered by the *Qāḍī* and the *Kotwāl*.[1023] Manucci has also mentioned the existence of prisons along with its incharge.[1024] Basheer Ahmad has cited several credible sources to prove that there was a proper *jail* system with proper inspection from the *Qāḍī*.[1025] However, it does not mean that a convict was permanently placed in the prison. There was a complete appeal system so that a convict should have every opportunity to get his sentence exonerated or commuted in case he could prove his innocence.

The *Mughal*s did not leave the judicial system unattended following pronouncement of punishment. H. M. Elliot has commented on the appellate system saying that there was a proper procedure of appealing system. A decision made in the court of a *Qāḍī* could be challenged or appealed against in the court of the *Qāḍī* of *Ṣūbah* or in the court of the governor.[1026] Even if the convict was not satisfied with the decision, he could file the appeal in the chief *Dīwān* or chief *Qāḍī* and then seek mercy from the emperor.[1027] Manucci has stated that he himself had seen the emperor deciding appeals over some very interesting issues which showed that the *Mughal*s were keenly interested in setting up a proper judicial system. To prove, he relates the incident over which the emperor took notice and came to know that the girl of a Hindu abducted by a Muslim soldier collided with the soldier that the emperor came to know through the fact that she was able to prepare inks, for her father was a Hindu.[1028] However, in civil matter, Ibn Ḥasan says both the parties could take the case to the next stage whether to the *Qāḍī* of

[1023] Ahmad, M.B., *The Administration of Justice*, 248.
[1024] Mannuci, *Storia I*, 69-70.
[1025] Ahmad, M.B., *The Administration of Justice*, 247-249.
[1026] H. M. Elliot, *The Histrory of India as Told by Its Histroians*, vol. 5II (London: Turbner & Co. 1877), 170-173.
[1027] Ibid., 170-73.
[1028] Manucci, *Storia*, vol. 1 203.

Ṣūbah, the governor or the emperor against the judgement against the lower court.[1029] It happened several times during the period of different *Mughal* emperors that the emperor overturned or reversed the decision made by a lower court. Manucci relates a famous case of a cat which four merchants reared jointly but she was injured and caused fire in their shops over which one of them, who treated the cat was convicted to pay the damages to the other three. However, the appeal in the court of the emperor was reversed after hearing full witnesses and decided the case on equal footing.[1030] Basheer Ahmad argues that impartiality of decisions and fast action became so much popular during the reign of Akbar that it continued spreading far and wide. Aurangzēb then brought some reformations in the appeal system to make it more transparent and speedy.[1031] However, in order to decrease the load of the cases, Aurangzēb also issued a *Farmān* that the cases should be tried in the local *Qāḍī* courts in the first and then brought to the emperor.[1032]

Does it mean that the appellate system was the creation of the *Mughal*s themselves? Not at all, for appeal system existed in the Islamic jurisprudence itself. It has been beautifully summed up as the appeal system in Islam as it is preferred both on the judgement and facts of the judgement as well as on the law that is used to award punishment.[1033] That is why Kennedy has given a full list of the appellate courts saying that there were appellate courts in the province as well as on central level, the last that of *Qāḍī ul Quḍāt*.[1034] However, what is interesting according to Basheer Ahmad is that there was no proper name for appeals though there was a name for the court as '*Adālat-e-'Ālia*

[1029] Ibn Ḥasan, *The Central Sructure of the Mughal Empire*, 320.
[1030] Manucci, *Storia*, vol. 1, 203.
[1031] Ahmad, M.B., *The Administration of Justice*, 267.
[1032] Khān, Mir'at-e-Aḥmadi,vol. 1, 257.
[1033] Attīya Mashrīqā, *Al Qazā fil Islām* (Cairo: Al Qahira, 1966), 24. [self translation]
[1034] Pringle Kennedy, *History of the Great Mughals*, vol. 1 (New Delhi: Anmol Publications, 1987), 308.

or the high court. He says, referring to an old manuscript that sometimes appeals were called *tajwīz sānī* or second suggestion and sometimes or *murāfi'ah* which according to him was borrowed from *Fiqh-i-Fīrūz Shāhī.*[1035] It seems that it has been borrowed later from the East India Company and Basheer Ahmad seems to agree with this suggestion, adding that there was a system of redressal during the *Mughal* Period.[1036] Even appeal was urgent in case of the capital punishments where the execution of the punishment was not approved without obtaining the permission of the emperor himself. Even a second appeal was permitted to be presented before the high *Dīwān* or Mīr 'Adl or even at *Qāḍī ul Quḍāt* level. The final appeal was to be presented before emperor himself.[1037] Basheer Ahmed states that there used to be the King's Bench at provincial level which had the authority to hear appeals from the district or provincial *Qāḍīs.*[1038] In other words, there were complete appellate benches at all level in a hierarchical fashion to ensure that the justice is properly done and the emperor used to ensure that the monitoring is done properly by administering justice themselves in their courts.

There are, however, several other questions, such as the powers of the appellate court and review of cases. In this connection Manucci has related various stories in his book. He states that the appellate court used to have the authority to try witnesses and claimant both for telling lies in the court or for framing false charges or what is called perjury.[1039] He states a story of such a case where Jahāngīr ordered review and prosecution of a case of a Muslim lady against a Rajput in which case the death sentence

[1035] Ahmad, M.B., *The Administration of Justice*, 204.
[1036] Ibid., 204.
[1037] Ahmad, M.B., *Administration of Justice in Medieval India*, 201-204.
[1038] Ibid., 205.
[1039] Manucci, *Storia*, Vol. 3, 263.

was awarded in the appeal.[1040] It means that the appellate courts existed during the *Mughal* rule at all level with a little bit of difference between their powers. However, there is no way that it could be known that there existed rules for procedures. However, Basheer Ahmad has stated that there were no specific rules and regulations for filing an appeal. In fact, he says that the appellate courts seemed to have "accepted jurisdiction in every dispute," which the parties brought to it in civil matters.[1041] However, as it happened that the death sentence was awarded to the Muslim Woman versus Rajput case as stated earlier, it might have reduced the number of coming appeals, alleges Basheer Aḥmad.[1042] Manucci has also expressed the same view that this case reduced the number of cases of the false complaints which used to come aplenty.[1043] Sarkār in his *Mughal Polity*, on the other hand, says it was an open system and that even a friend could file an appeal[1044] as happened in the case of *Kotwāl* Mīrza Beg versus State and stated by Khāfī Khān.[1045] It becomes clear that there were some rules for appeals for they were not detailed and rigorous. Basheer Aḥmad also made it clear that the appeals were also copied and put in record along with sending copies to the relevant quarters.[1046] There was also a revision mechanism, Basheer Ahmad states. It comprises of either inspection or even suo moto if there is an application or even sudden inspection. However, there were rules that only a superior court could do so in its own jurisdiction,[1047] while the emperor did not have any barring from exercising his jurisdiction anywhere in the empire, it seemed. There were also examples of making a reference of the court to decide another

[1040] Manucci, *Storia*, vol. 1, 199-200.
[1041] Ahmad, M.B., *The Administration of Justice in Medieval India*, 205.
[1042] Ibid., 205.
[1043] Manucci, *Storia I*, 174-175.
[1044] Sarkār, *Mughal Polity*, 174.
[1045] Khāfī Khān, *The Muntākhab al-Lubāb, II*, 257.
[1046] Ahmad, M.B., *The Administration of Justice in Medieval India*, 207.
[1047] Ibid., 207.

court or asking a court for acceptance of the appeal. In this connection, Dr. 'Aṭiyya Mashriqa's reference that a *Qāḍī* could ask the opinion of a scholar in case there is ambiguity in the appeal is very important.[1048] Basheer Aḥmad has given references to Aurangzēb's restriction on "right of appeal" but these were in the matter of civil cases.[1049]

This leads to another issue of the review of judgement. As it was called *tājwīẓ sānī* or second suggestion, Basheer Ahmed has stated that the judgement was used as a second review only when there was some illegality and it occurred only when the ruling was against the Qur'ān and *Sunnah* or against *Sharī'ah*.[1050] It could be stated that the *Mughal*s have established a judicial procedure with complete procedural laws to ensure that no innocent is awarded punishment and no criminal is spared. However, it was ensured that the benefit of the doubt should go to the convict.

2.1.8. Unconventional Royal Judicial Institutions and Their Judicial Procedures

Unconventional judicial institutions mean that those judicial institutions did not fall under the hierarchy of regular courts and judicial institutions and that they were established and set up by different emperors during their rule for different purposes. It is where the *Farmāns* of the emperors were at work in the administration of justice to the public and became judicial precedents and reviews for the judicial officials to follow. However, sometimes those decisions were only done by the royal figure and were not followed by other judicial institutions, but all the same they were presented as examples done by the emperors. In this connection, Akbar tops the list of the emperors who used to do experiments with setting up additional judicial institutions.

[1048] 'Aṭiyya Mashriqa, *Al Qaḍā fil Islām*, 09.
[1049] Ahmad, M.B., *The Administration of Justice in Medieval India*, 207.
[1050] Ibid., 208.

2.1.8.1 Emperor's Court during Akbar

Akbar was very fond of providing justice and his penchant could be traced in Dr. Basheer and Wahed Hussain extensively. Both have widely quoted his different systems that he loved justice and that he was very keen to provide justice to the poor.[1051] In fact, Wahed Hussain has given a complete idea of his justice quoting Abū'l-Faẓl's phenomenal book *Ā'īn* extensively how Akbar loved justice.[1052] In this connection, Hussain has stated that he used to set up his own *"tribunal"* which is a type of unconventional judicial institution.[1053] Although there were regular courts in all the city centers and provincial capitals, he still used to set up an additional court even in his own palace or what they used to call *Dīwān-ī-Khās*.[1054] Akbar used to personally hear and dispose of cases during his presence in the court.[1055] Usually, every other judicial officer was present in the court or *Dīwān-e-Khas* to administer proper justice and record whenever it was necessary. Even the *Qāḍīs*, *Ādils*, *Muftīs*, clerics, jurists and even *Dāroghā-e- Adālat* used to be present along with *Kotwāl* and other police officials.[1056] In such cases, the emperor barred everyone from sitting in the court except the parties concerned and others who were extremely necessary. People used to come forward to personally report the cases and get the justice done on the spot. The emperor used to write *Farmāns* or orders and send them to the concerned officials immediately.[1057] As it used to be presided over by the emperor himself, it did not fall in the hierarchy of the judicial institutions. Also, it used to convene

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[1051] Ahmad, M.B., *The Administration of Justice* in Medieval India, 160, 180, 186, 201. See Hussain, *Administration of Justice*, 31-35.
[1052] Hussain, *Administration of Justice*, 32. See Smith, *Akbar the Great Mughal*, 344.
[1053] Ibid., 35-36.
[1054] Qaisar Hayat, *Criminal Breach of Trust: A Comparative Socio-legal Study of Indian and* Islamic *Criminal Laws* (New Delhi: Kitab Bhavan, 2002), 480.
[1055] Ibid., 480. Cf. Liaquat Ali Khān Niazi, *The Institution of Mūḥtasīb (Ombudsman)*, (Lahore: Researcher Cell, Dyal Singh Trust Library, 1994), 214-215.
[1056] Sarkār, *Studies in Mughal India*, 14, 70. See Niazi, The Institution of *Mūḥtasīb*, 214.
[1057] Sarkār, *Studies of Mughal India*, 14 ,70.

only when the emperor himself was present, and obviously there was no chance of appeal against it.

2.1.8.2 Golden Chain of Justice

Golden chain of justice was a famous justice system coined by Jahāngīr, the most famous among all the *Mughal* emperors for his keen interest in the judicial system.[1058] The fake cases were duly disposed with some punishment to the petitioner so that they should not waste time of the emperor in administering justice.[1059] The emperor used to have a full staff to hear complaints, make a complete record and then issue *Farmāns* for prompt actions against the officials or the defendants. He used to hear cases in person whenever a person was found shaking the chain.[1060] In fact, Jahāngīr was deeply involved in the justice system going far beyond his regal duties, seeing prisoner's fate and plight in prisons and visiting different prisons. It is stated that once he visited Ranthambor fort to see the plight of the prisoners and acting as the chief judicial administrator, issued *Farmāns* at the spot about them.[1061] Manucci has related many incidents of the Jahāngīr's intervention saying that the justice was administered at the spot after the golden chain was shook and that even he used to go so far to through the oppressive and cruel officials before the lions.[1062] Elliot has made a very interesting observation about Jahāngīr of how he intervened in the justice system and barred the judicial officials from administering barbaric punishments of mutilation or chopping off the body parts such as noses and ears. [1063] He issued many *Farmāns* pertaining to the

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[1058] William Finch, *Purchas His Pilgrimes.* vol. IV (Glasgow: James Maclehose & Sons, 1905), 74.
[1059] Ibid., 74-75.
[1060] Finch, *Purchas His Pilgrims*, Vol. 3, 43-44.
[1061] Ibid., 59.
[1062] Manucci, *Storia*, vol. 1, 174.
[1063] Elliot, *The Histrory of India*, vol. 51, 285.

judicial administration through his golden chain justice whenever he observed that something was to be corrected to provide justice. For example, he ordered his judicial officials not to administer the punishment of blinding a convict and also issued various rules to promulgate from time to time.[1064] These include his orders of executing prisoners not till sunset and it was issued because of an earlier order during which a courtier interceded and the situation of the case changed. However, until then the convict was hanged.[1065] Therefore, this order was given for the judicial administration to delay until sunset and see if there is any chance of saving a convict. These precedents were set during the justice administered through this golden chain system which was not included in the general hierarchy of courts.[1066] It is stated in a manuscript quoted in several books that once an ass caused that chain to ring the bell over which an inquiry was launched and the owner of the ass was warned to take care of his ass.[1067] However, it is very interesting that Elliot has mentioned the same chain and has attributed to Iltutmish,[1068] a previous *Sulṭān* of Delhi, who used it to administer justice.[1069] Disregard of its history and historical use, this fact remains that Jahāngīr introduced it and made it known throughout the history for his name associated with speedy justice. However, he did not stay contented and followed his father in running open court procedure.

[1064] Ibid., p.325.
[1065] Ibid., p.361.
[1066] Jahāngīr, *Memoirs*, vol. 1, 7.
[1067] Muni Lal, *Jahangir* (New Delhi: Vikas, 1983), 67.
[1068] His full name is Shams ud-Dīn Iltutmish (1211-1236), who beloned to Mamluk dynasty and was the third ruler of the *Sūltanāte* of Delhi.
[1069] Elliot, *The History of India*, Vol. 3, 591. See Samuel Lee, *Ibn Batuta*(Holbron: The Oriental Translation Committee, 1829), 112.

2.1.8.3. Open *Darbār* Justice: Procedure

Although it has been touted that Jahāngīr was very much concerned about justice in his empire, it is also surprising to see that he used to award punishment to be given before his very eyes. However, it was followed through the same kingly judicial procedure. Joannes De Laet,[1070] has beautifully summed up this view of open *Darbār* justice system and procedure adopted thereof. Stating the complete procedure, he states that it used to happen once in a week, usually on Tuesday that the open *Darbār* was held. What he states in harrowing terms is that "Capital chastisement is generally inflicted before his eyes and with great cruelty."[1071] He further highlights the death sentence to be inflicted through various cruel methods such as beheading, trampled by elephants or thrown to other wild animals.[1072] However, the most important thing to be mentioned here is that the procedure was followed completely. There were no lapses in the procedures. Specific days of the week were appointed to be used for justice only for the public.[1073] Jahāngīr used to use this open court or open *Darbār* system twice a week.[1074] The duration could be any; it was not fixed but generally the emperor used to take around two hours.[1075] It is pertinent to mention here that he used to hold *Darbārs* even in the most inauspicious moments when he was on some adventure or even in the military skirmish.[1076] In other words, it could be stated that it has become a judicial custom in a

[1070] He was a Flemish geographer, a naturalist and a great philologist born in 1593 at Antwerp. He was a director in Dutch East India Company working in India at that time. He died in 1649. His narratives of the courts of the *Mughals* have great bearing on the current scholarship in this connection.
[1071] Joannes De Laet, *The Empire of the Great Moghol*, trans. J. S. Hoyland and S. N. Bannerji (Bombay: Taraporevala Publishers, 1928), 93. See Abraham Early, *The Mughal World: Life in India's Last Golden Age* (New Delhi: Penguin Books, 2007), 51, 236, 241.
[1072] Ibid., 93-94.
[1073] Finch, *Purchas His Pilgrims*, Vol. 3, 43-46.
[1074] Jahāngīr, *Memoirs*, Vol. 3, 13-14.
[1075] Ibid., 14.
[1076] Ibid., 13-14.

way that the king never skipped this open justice court system that he adopted. Jahāngīr himself relates in his *Memoirs* that he heard the poor and the sorrowful of Ahmadabad in the open *Darbār* when he visited the place.[1077] Foster too has referred to Terry, a traveler, who has termed Jahāngīr a man of wild nature and even wild in administering justice.[1078] However, despite this, it seems that the administration of justice was the product of Akbar's mind, for he used to hold such courts.[1079] However, there were two more good precedents; the first was the speed with which the justice was dispensed and the other was that the culprits or convicts were given exemplary punishments.[1080] Both of these precedents continued imperceptibly with the *Mughal* justice system in the later period.

2.1.8.4. *Jharokah-i-Darshan* Justice System

Shāh Jahān was very inventive not only in architect but also in using his architectural structures for administering justice. He used his *Jharokah-i-Darshan* for administering justice for the public. The people used to bring their petitions before the king and get immediate justice. It was devised to remove obstructions of the officials.[1081] Several researchers have quoted an *Urdu* history book of Rai Bhara Mal saying that Shāh Jahān fixed Wednesday for this activity. More than twenty plaintiffs used to get their issues solved, including issues of criminal nature. The emperor ordered *dāroghā* to bring plaintiffs or face punishment so that nobody should go without getting justice.[1082] However, his account by the end suggests that the authorities used to administer justice

[1077] Ibid., 13-14.
[1078] Foster, *Early Travellers in India*, 331. Cf. Sharma, *Mughal Empire in India*, 362-363.
[1079] Smith, *Akbar: The Great Mughal*, 354. See, Edwardes & Garrett, *Mughal Rule in India*, 158-159.
[1080] Foster, *Early Travellers in India*, 331-332.
[1081] Abdūl Ḥamīd Lahori, *Pādshāh Nāmah*, vol. I (Kolkatta: Asiatic Society of Bengal, 1872), 145.
[1082] Mehta, *Advanced Study*, 461. See Elliot, *The History of India*, vol. 5II, 172-173.

without sending the plaintiffs *Jharokah* for fear of the emperor.[1083] *Pādshāh Nāmah* also relates the day of Wednesday when Shāh Jahān used to stay busy in dispensing with justice. Therefore, the public court was disbanded on that day from morning till evening while the day was reserved for *Jharokah* proceedings.[1084] Shāh Jahān set another precedent of *Mizan-i-Adl* (balance of justice) a painting on the wall that he used to see to signify that he loved justice and that he had been very keen to stay impartial when administering justice. He used to make the *Qāḍīs*, *Muftīs* and other religious clerics to sit with him to administer justice. This justice system through *Jharokah* became very famous and people used to come from every corner of India.[1085] Although it is not clear from any source whether he carried this tradition from the past, but it discontinued after him due to palatial intrigues of the princes over succession.

2.1.8.5. *Eḥtisāb* System

Aurangzēb Ālamgīr, though stricter than the previous *Mughal* emperors was keener in setting up a fool proof judicial system. Even more than that, he was keener on *Sharī'ah*. He established *Eḥtisāb* System that he perhaps articulated during his letter to Shāh Jahān in which he declared that the sovereignty is for the safety of the people and not for enjoyment.[1086] Although it was already established during the previous rules, he made it stronger by spreading the writ of the *Muḥtasib*. Emperor himself issued instructions to the *Muḥtasib* to take action against the petty crimes that were considered to be banned under *Sharī'ah*. He was also advised to impose the Qur'ānic morals and advise the leaders not to indulge in vices and in case of violation of the tribal leaders, he

[1083] Ibid., 461.
[1084] Lahuori, *Bādshāh Nāmah*, vol. 1., 150.
[1085] Ibid. 151.
[1086] Elliot, *History of India*, vol. 5II, 158.

was ordered to report to the governor.[1087] Aurangzēb's idea was to banish crimes and other such petty vices from his empire through the strict enforcement of *Sharī'ah* through ban on debauchery, brothels and wine.[1088] It is also that he issued a *Farmān* regarding punishments in accordance with the *Ḥudūd* to the *Muḥtasib*.[1089] In fact, he perhaps expected the post of *Muḥtasib* to work in accordance with the concept of Islam and stop illegal offences or practices, for he was considered a protector of the public morality. His job was to protect the morality against vices. [1090] In other words, Aurangzēb turned the *Eḥtisāb* System into a full judicial institution to stop petty crimes and enforce *Sharī'ah* in the real sense of words.

3. Penal Code of *Mughals*

It is not clear when the famous social contract came into being, it is clear that one of its objectives was to check crimes and punish the convicts to protect the interests of the public at large. [1091] However, it is quite interesting to note that the punishment awarded to the criminals has never been the same. It has always varied from crime to crime and culture to culture. [1092] These punishments range from imprisonment to capital punishment. They were categorized on the basis of torture and pain such as physical

[1087] Sarkār, *Mughal* Administration, 30-31.
[1088] Khān, Mir'at-e-Aḥmadi,vol. 1, 262-263. See also Bakhtawar Khān, *Mirat ul Alam*, vol. 1 (Lahore: Research Institute Pakistan, Danish Gah Punjab, n. d.), 156.
[1089] Khān, Mir'at-e-Aḥmadi,vol. 263.
[1090] Niẓām-ul-Mulk al-*Mālik*, *Siyāsat-Nāmah*, Trans. H. Darke, as *Book of Government or Rules for Kings* (London: Routledge and Kegan Paul, 1960), 39. Details about Islamic concept, See Al-Māwardī, *Aḥkām Sulṭāniyah*, 427-528.
[1091] Sonja Snacken, Legitimacy of the Penal Policies, from *Legitimacy and Complicance in Criminal Justice*, ed. Adam Crawford and Anthea Hucklesby (New York: Routledge, 2013), 51-52. For details discussion also see Richard Quinney, *Critique of the Legal Order: Crime Control in Capitalist Society* (London: Transaction Publishes, 2001), 18-19.
[1092] Edwin Hardin Sutherland, Donald Ray Cressey, David F. Luckenbill and David Luckenbill, Principles *of Criminology* (London: Rowman & Littlefield Publishers, Inc., 1992), 333-343.

torture, removal of some organ or even social degradation. [1093] As there were not penal codes or legal codes in written format, everything in the administration was run through a *Farmān*.[1094] Emperor was all in all and his *Farmāns* have the constitutional as well as legal backing with full legitimacy of religion as well as military. However, the *Mughals* were often shrewd and used *Sharī'ah* laws to control the public and pacify the downtrodden.[1095] It does not mean that there were no written laws at all. There were several codes written but they were not in a collected format with any specific names. Elliot has stated that it only occurred to Aurangzēb to collect all the laws and compile them into a single volume or a single book of several volumes. He, therefore, entrusted Shaykh Niẓām to prepare a collection of *Fatāwā* which was later called *Fatāwā-i 'Ālamgīrī*.[1096] Despite this huge volume of codification and compilation of the criminal laws and penalties, there was not a single copy of penal code available when the British occupied the entire India. This means there was not a penal code like a modern penal code system applied in every other country. Some sort of codified criminal laws though existed during the period of every emperor which became essential to be kept in the courts for the *Qāḍīs* to consult.

The situation of having no code existed from Bābur and continued until the time of Akbar. However, Akbar was astute enough to do something and wrote different *Farmāns* to his *Subedars* and *Fawjdārs* in which he highlighted codes for the administration of different punishments for different crimes.[1097] Sri Ram Sharma has highlighted the decree issued in 1579 about his own interpretation of laws and penal

[1093] Khosla, *Mughal Kingship and Nobility*, 22-24.
[1094] Ibid., 23-25.
[1095] Ibid., 23-25.
[1096] Elliot, *Hisotry of India*, vol. 5II, 159-160.
[1097] Akbar, M. J. *The Administration of Justice by the Mughals*, 52-53. See Sarkār, *Mughal Polity*, 182.

coding of some *Farmāns* raised eyebrows of the clerics.[1098] However, Sarkār has discussed some documents which were almost akin to penal codes such as *Farmāns*, or *Qānūn-i-Shāhī* (royal laws) and *Dastūr ul Āmāls* (administrative codes) which were some procedures and interpretations and reinterpretations of the same old laws which were almost "secular or common" in nature.[1099] Sarkār has then quoted Smith that no such penal codes existed except these sparsely lying documents which were only rules and regulations.[1100] It is, however, surprising, Sarkār claims that Hindu laws were rather codified.[1101] Wahed Hussain has pointed out that the *Muftīs* and *Qāḍīs* used to decide cases in "conformity with the Common law" that he says, comprises of "edicts, ordinances and instructions issued by the Emperor."[1102] There were a larger number of legal commentaries and penal codes were spread in them.[1103] There were "Institutes" used by Bābur and Timur as well as Akbar which have details of "the edicts, ordinances and *Farmāns* of those sovereigns.[1104] The judicial officers were instructed to make decisions about crimes in accordance with those books.[1105] In other words, what is stressed upon is that the *Farmāns* played a key role in penal code formation and conveying the same to the judicial officials.

A serious attempt, however, was made during the period of Jahāngīr. Elliot has enumerated as many as 12 codes for different penalties in his phenomenal work. Most of these penal codes are related to the taxes, *jāgīrs*, *Farmāns* for building of roads and

[1098] Sharma. *The Religious Policy of the Mughals*. 36.
[1099] Sarkār, *Mughal Polity*, 173. See for details Munir, "*The Administration of Justice*", 1-14.
[1100] Ibid., 173-174.
[1101] Ibid., 173.
[1102] Hussain, *Administration of Justice*, 33-34.
[1103] Ibid., 36.
[1104] Ibid., 36-37. See also Sarkār, *Mughal Polity*, 173.
[1105] Ibid., 37.

mosques, punishments for petty crimes, and prohibitions from different intoxicants.[1106] Emperor also made it compulsory to get permission for execution.[1107] Even up to Aurangzēb, there was no specific civil or criminal code in the modern sense. Although procedures were there, there was no proper procedural code or procedural law though rules and regulations existed almost at every level and in every field. However, Jahāngīr and Aurangzēb made personal efforts towards codification.[1108] Aurangzēb's detailed *Farmān* to the governor of Gujarat at that time could be called a serious attempt at codification of penal code. However, even this is not an official attempt.[1109] This letter contains detailed orders about different punishments and reduction or deduction in physical punishment. There are also instructions about punishments awarded by *Qāḍī* and his presence when awarding the punishment. The codes also stipulate the amount of punishment to be inflicted, the crimes, and instructions about *Ḥudūd* and *Ta'zīr*, codes about *zimmis* or no-Muslims, religious vices and social vices.[1110] However, this is not the only act of Aurangzēb to streamline judicial system and criminal procedure. In fact, he was fully cognizant of the criminal justice procedure as well as the jurists. It is said that Mohammadan Law as almost on his finger's tips.[1111] It is said that he ordered several of his officials to prepare rules and regulations as well as penal codes.[1112] Sarkār has listed total 31 codes which present somewhat a summahrized picture of what Aurangzēb thinks

[1106] Elliot, *History of India*, vol. 5II, 284-87. Also see, Hussain, *Administration of Justice*, 42-44.
[1107] Smith, *Akbar: The Great Mughal*, 344.
[1108] Hussain, *Administration of Justice*, 44-50.
[1109] Ibid., 33, See Elphinstone, *History of India*, 532-534.
[1110] Sarkār, *Mughal Administration*, 09-17. For further details, see Awrangzīb Ālamgīr, *Ruka'at-i-Ālamgīrī*, trans. Jamshid H. Bilimoria (Londo: Luzac & Co. 1867), 141-189. Also see, U. C. Sarkār, *Epocs in the Indian Legal Histroy* (New Delhi: VishveshvaRānand Vedic Research Institute, 1958), 227-234. See also Day, *Mughal Government*, 227-228.
[1111] Ibid., 230-232.
[1112] Shayam Singh Shashi, *Encyclopaedia Indica: Aurangzeb and his Administrative Measures* (New Delhi: Anmol Publications, 1999), 305-308.

about the judicial penalties. These codes can be stated to have presented a guideline in the following manners:

i. Trial and method of trial for the *Qāḍī*, when to resort to the *Qāḍī* for trial and how to hear a complaint.

ii. Punishments, name of punishments, crimes, severity of crimes and type of crimes along with type of punishments.

iii. Punishments have been referred with number of the punishment along with mention of the Islamic name for the offense and punishment thereof.

iv. There are civil codes as well as criminal codes for punishments.[1113]

The other great effort of Aurangzēb about codification is the compilation of *Fatāwā-i 'Ālamgīrī*. The *Fatāwā* could be divided into three broad categories: criminal laws, personal laws and pillage and slavery along with interpretations of Islamic *Fiqh*.[1114] However, it does not mean that it is a complete book of codification; rather it is a narrative that could be turned into codes when required and the *Qāḍīs* of that age used to do the same. However, it shows the reconciliation of different views of the jurists.[1115] *Fatāwā* has been termed as a penal code book, as well as a collection of opinions and interpretations of the well-known jurists. However, there are some other documents too which could also be termed as penal codes such as Appointments of *Muḥtasibs*, [1116]*Farmān-i Adālat*,[1117] *Farmān of Kharāj*,[1118] *Jizyah* and *Zakāt* Collection.[1119] Although Appointments of *Muḥtasibs* order or *Farmān* was not as exhaustive and

[1113] Sarkār, *Mughal Administration*, 09-118.
[1114] Pirbhai, *Reconsidering Islam*, 133-134.
[1115] Ibid., 134.
[1116] Khān, Mir`at-e-Aḥmadi,249-253.
[1117] Ibid., 277-283.
[1118] Ibid., 268-274.
[1119] Ibid., 296-300.

particular like the *Farmān* to the governor. However, *Farmān-i Adālat* is somewhat a guiding line for the courts.[1120] In short, Aurangzēb made a lot of efforts and did try to have a good compilation of penal codes, but it was just an evolution of the modern period of codification of punishments. Therefore, they could not be called penal codes similar modern penal codes. Nonetheless, they are penal codes of that time which were extensively used in the *Qāḍī* courts as well as in the upper courts to consult during the trial and hearing of cases.

4. Role of *Sharī'ah* Courts in the Procedural Law of *Mughal*s

Before discussing the role of *Sharī'ah* courts in the evolution of procedural laws during the *Mughal* period, it seems fair to take stock of things regarding Islamic philosophy about procedural laws and penal codes. Etim E. Okon[1121] argues, "The primary objective of Islamic penal system is to protect society," but at the same time the sources of Islamic law, the Qur'ān and *Sunnah* or *Ḥadīth*, do not provide clear penal codes.[1122] However, both the sources have stipulated clear guidelines for the trial and punishment though they are scattered at different places.[1123] What is called *Sharī'ah* is just a methodology and philosophy to show the path to the jurists.[1124] However, at the same time, the Qur'ān does not attribute every human action to determinism.[1125] Several western scholars too have supported the Qur'ān and Islam that it does not support pre-

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[1120] Ibid., 277-283.
[1121] *Etim E. Okon* is a professor religious studies in the University of Calabar, Nigeria.
[1122] Etim E. Okon, "*Hūdūd Punishments in Islmaic Criminal Law*," *European Scientific Journal*. 10. no. 14 (May, 2014): 226-227.
[1123] Ibid., 227.
[1124] Tārīq Ramaḍān, "*Ijtihād and Maslahā*: The Foundations of Governance," from Islamic *Democratic Discourse: Theory, Debates, and Philosophcal Perspective*, ed. M. A. Muqtedar Khān (Lanham: Lexington Books, 2006), 3-4.
[1125] Tamara Sonn, *Islam: History, Religion and Politics* (West Sussex: John Wiley & Sons, Ltd, 2016), 116.

determined view of human actions.[1126] For example, the Qur'ān has clearly stated in chapter 53, The Star, saying:

وَأَن لَّيْسَ لِلْإِنسَانِ إِلَّا مَا سَعَى

"That man can have nothing but what he strives for".[1127]

Again, the Qur'ān has praised God for creating man from the best of the mould. This points to the fact that human beings have the ability to commit good or bad deeds. It says:

لَقَدْ خَلَقْنَا الْإِنسَانَ فِي أَحْسَنِ تَقْوِيمٍ

"We have indeed created man in the best of moulds".[1128]

The Holy Prophet (PBUH) has also stated it several times that it is the intentions that matters.[1129] This is just to prove that a person having committed a sin or a crime is to be punished. This is done to keep a social structure peaceful and keep the poor and the downtrodden safe and sound. This means that the Qur'ān supports punishment to the wrong doer, and not to somebody else. Chapter six says clearly in verse 164 that:

وَلاَ تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى

"O bearer of burdens can not bear the burden of another."[1130]

[1126] Sheikh Zafar Hussain, *The Reconstruction of* Islamic *Society: A Comparative Study of Principles and Values of Islam with the Philosophy of Secularism* (Lahore: Ferozsons, 1992), 123-124.
[1127] *Qur'ān*, 53: 39.
[1128] *Qur'ān*, 95: 4.
[1129] Maulānā Jalīl Aḥsan Nadvī, *Rāh-i-Amāl* (Lahore: Manshoorāt, 1986), 9-10.
[1130] *Qur'ān*, 6:164.

It means that a person who has committed wrong cannot be spared for somebody else or that a son cannot be awarded punishment for his father. These are just guidelines for penal code and procedural laws for a judicial system. But Islamic sources also provide further guidelines to evolve penal codes further. Certainly, those were the olden times and linguistic as well as institutional capabilities were not as complex and developed as are now. Therefore, the Qur'ān provided a strong rule of non-discrimination in the application of laws. The Qur'ān has said it clearly:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالأُنثَى بِالأُنثَى

"O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman."[1131]

This clearly shows that Islam has not given privileges to any person whosever he may be. The same was the case of the Roman law as codified.[1132] This was true about the orders and sayings of the Holy Prophet (PBUH). He knew too well that there would be horrible consequences in case law is not followed in equal footing.[1133]

The question, however, arises, where the state stands in terms of establishing courts which could be in accordance with *Sharī'ah*. In this connection, the Qur'ān is very much clear about the role of courts that it is to stop vices and promote virtues. It says;

وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنكَرِ وَأُوْلَئِكَ هُمُ الْمُفْلِحُونَ

[1131] *Qur'ān*, 2:178.
[1132] Aḥmad Ibrahim, "The Position of *Islam* in the Constitution of Malaysia," from *Readings on Islam in Southeast Asia*, ed. Aḥmad Ibrahim, Sharon Siddique and Yasmin Hussain, (Singapore: Institute of Southeast Asian Studies, 1985), 216.
[1133] Muḥammad Umer Chapra,*The* Islamic *Welfare State and Its Role in the Economy* (Licester: The Islamic Foundation, 1979), 16.

"Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity."[1134]

The Holy Prophet (PBUH) followed the same path and also asked his followers to do the same. That is why the second Caliph Omar codified some laws and sent its copies to the *Qāḍīs* during the period of first caliph.[1135] God has also warned about the negligence and its consequences if the state plays the role of a negligent. It is not the concern or responsibility of a single person. It is a collective responsibility to be performed by the state through courts and they must adopt a procedure to do this.[1136]

This is the point where the role of the court regarding procedural laws enter. The Qur'ān has given guidelines about justice and *Qāḍīs* who are to perform the duties of justice saying:

يَا أَيُّهَا الَّذِينَ آمَنُواْ كُونُواْ قَوَّامِينَ بِالْقِسْطِ شُهَدَاء للهِ وَلَوْ عَلَى أَنفُسِكُمْ أَوِ الْوَالِدَيْنِ وَالأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللهُ أَوْلَى بِهِمَا

"O ye who believe! stand out firmly for justice, as witnesses to *Allāh*, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for *Allāh* can best protect both."[1137]

This is the impartiality that the Qur'ān stresses upon the persons who are engaged in dispensing justice to the public. However, it is not complete without the punishment theory of Islam which determines the offenses and also suggests punishment likewise.

[1134] *Qur'ān*, 3:104.
[1135] Ṣabāḥaddīn 'Abdur Raḥmān, "Umar Fārūq-i-A'ẓām ke ijtihādāt se ham ko kyā milā our kyā mil saktā hai," (Paper at Seminar, "*Islam* in the Modern World; Problems and Prospects". Iqbāl Institute, Kashmir University, Srīnagar in October, 1981), 11-18.
[1136] Rahim, *The Principles of Muhammadan Jurisprudence According to the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī Schools*, 358.
[1137] *Qur'ān* 4:135.

In fact, the Qur'ān has not only suggested punishments for crimes each one differently but also suggested the trial method at various places which have been collected and made into a codified shape. But the theory behind this punishment is that it has been improved from the ancient penal systems in corrective punishments.[1138] Islam does not allow retaliation, the reason that it has handed over a penal system to the state to be implemented through *Sharī'ah* courts so that the public could not go to each other's throats.[1139] That is the very reason that compensation instead of retaliation is encouraged in the penal system of *Islam*. This is just the philosophy behind the establishment of *Qāḍī* or *Sharī'ah* courts. Although there were separate procedures for non-Muslims, the rule of the courts under the *Mughal* in providing justice to the public was akin to the *Sharī'ah* courts in the Islamic caliphates of that times. Even the Persian courts were working according to the *Sharī'ah* laws. It means there were two-court legal systems, *Sharī'ah* courts as well as other personal legal system for the non-Muslims.[1140] Most of the courts, other than the common law courts, followed the Muslim penal code and hence Muslim or *Sharī'ah* based procedural laws. The punishments have been categorized to apply such as *Ḥudūd, Ta'zīr* and *Qiṣāṣ*.[1141] In fact, what has been stated as law of procedure by Hussain is entirely Islamic procedural law applied in the *Sharī'ah* courts or Cannon Law Courts or Courts of Cannon law established at that time with some major and minor amendments.[1142]

[1138] Robert Roberts, *The Social Laws of the Qur'ān* (London: Curzon Press, 1978), 87-91.
[1139] Rudolph Peters, *Crime and Punishment in* Islamic *Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. Themes in Islamic Law. Cambridge: Cambridge University Press, 2006. doi:10.1017/CBO9780511610677, 48. Also see Wasti, *The Application of* Islamic *Criminal Law in Pakistan*, 12.
[1140] Will Deming, *Understanding the Religions of the World: An Introduction* (Oxford: John Wiley & Sons, 2015), 204-205.
[1141] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law", 41-44.
[1142] Hussain, *Administreation of Justice*, 107-128.

The courts where specifically cases about crimes and offenses related to Islamic concepts of *Ḥudūd* and *Ta'zīr* were heard, there were complete trials and cross-examination and even in some cases the support of the lawyers for the parties. And interesting part is that the *Mughal* judicial system borrowed and merged these procedures and proceedings from the Islamic jurisprudence heavily.[1143] It means that they added something to the already developed procedural system that helped the future governments in India to lay the foundations of the modern procedural laws and penal codes.

5. Procedural Law for Non-Muslims

Another convention that the *Mughal* emperors inherited from the Islamic caliphate and kings was the love for justice. Earlier, the justice was administered in the name of God and Caliph or other Muslim ruler, but the emperors just supervised the administration of justice themselves, thinking themselves as the fountain head of the justice.[1144] This led to the evolution of a procedural law in courts where the emperor was regarded in high esteem regarding justice. In this connection *Sharī'ah* courts played an important role in carrying out the age-old and ancient Islamic procedures which continued from the period of *Sultanate* in the shape of different collections of *Fatāwā.*[1145] Regarding the procedural laws used in the common courts to deal with the cases of the non-Muslims, mostly the respective procedural laws were followed. In this connection, the Muslim rulers adopted their personal laws and even rules and regulations. Therefore, the monarchs and the emperors had to issue edicts and *Farmāns* from time to time to adjust the judicial administration to supplement the laws "as we find them in the legal

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[1143] Qaisar Hayat, *Criminal Breach of Trust* (India: New Delhi, 2002), 487.
[1144] Ibid., 487.
[1145] Bhagat Ram Sharma, *Judiciary on Trial: Appointment, Transfer, Accountability* (New Delhi: Deep and Deep Publications, 1989), 14-15.

treaties of the Muslim jurists" who used to sit in the *Sharī'ah* courts or codify and interpret Islamic laws.[1146] However, it is very interesting to note that the *Sharī'ah* courts rely more on ethics rather than legal means to achieve dispensation of justice.[1147] As the *Qāḍīs* had hierarchy reaching at the top to *Qāḍī ul Quḍāt*, this hierarchy provided justice according to the classical Islamic *Fiqh*. As their judgements and ways of dispensing justice was recorded in *mahirs* and *sijilat*, they were kept to be followed.[1148] This was the evolution of a procedural law to which *Sharī'ah* courts provided some guidelines for the future courts. However, it is another matter that this system was Anglicized during the rule of the British East India Company and first Penal Code was enforced in 1862 followed by amendments in evidence procedures as" the Indian Evidence Act of 1872."[1149] However, the interesting part of this is that the criminal law was the same from the Islamic jurisprudence but when it came to the non-Muslims it was then enforced by the emperor. Abdul Rahmān says;

"This kind of law was often imposed by the *Farmāns* and edicts of the emperors. Further, the secular portion of the Muslim law underwent changes and was often modified by the *Shāhī Farmāns*."[1150]

This quote from Abdul Rahiman is significant in evaluating the role of *Sharī'ah* courts in the evolution and development of procedural laws and the role of *Farmān* lying behind the force that used to legitimize the procedural laws and penal codes. Wahed Hussain seconds it saying that even *Qāḍīs* used to decide cases according to the legal

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[1146] Hussain, *Administration of Justice*, 141.
[1147] Rani, *Sharī'ah Courts as Information Justice Institutions in India*,133.
[1148] Ibid., 134.
[1149] Hayat, *Criminal Breach of India*. 481.
[1150] Rahiman, "Hisotry of the Evolution of Muslim Personal Law," 252. For more details, see Hussain, *Administration of Justice*, 125-126.

principles. However, it is also interesting that these were very well documented in the shape of books as stated by Hussain. These books include "*Durrūl-Mukhtār, Rādd-ūl-Mukhtār* and *Shārah-ī-Vaqayā*."[1151] Basheer Aḥmad has also asserted that the *Mughals* excluded the non-Muslims to be tried in accordance with the Canon Law.[1152] But none of these commentators have stated that the procedural laws adopted for the non-Muslims were the same though it could be deduced from the argument of Abdul Rahim that *Shāhī Farmāns* were used to alter, amend and change Muslim law whenever the other personal laws seemed inadequate. It is clear, however, in Basheer Aḥmad that during the late *Mughal* period as in the period of Aurangzēb, the written laws were applied in the case of non-Muslims but through different regulations issued through edits and proclamations.[1153] In other words, he means that only specifically Islamic codes were not applied in the case of non-Muslims, while the procedures and even codes which did not specify the religion were applied after certain specific amendments and alterations.[1154] It is, however, very interesting to note that the same *Qāḍīs* were used in the courts for Common as well as Canon Laws to make judicial working easy.[1155] However, another addition was made during the *Mughal* period as stated by Ameer Ali that Pandits were added to the court where the Hindus were tried according to their personal laws.[1156] However, it is not clear whether procedural laws and codes adopted in this connection were also from Hindu personal law or from the Muslim personal law.

[1151] Hussain, *Administration of Justice*, 126.
[1152] Ahmad, M.B, *The Administration of Justice*, 72.
[1153] Ibid., 77.
[1154] Ibid., 77-78.
[1155] Ibid., 78.
[1156] Syed Ameer Ali, Islamic *History and Culture* (Delhi: Amar Parkashan, 1978), 333-334.

6. Comparison of Islamic and *Mughal* Procedural Laws

6.1. Uniqueness of Islamic Procedural Laws

Regarding Islamic criminal procedural laws, it is to be noted that it has evolved over centuries despite the fact that the Qur'ān contains clear procedures of trials or awarding punishments with what to do in a case and what not to do.[1157] These are clear with penalties for each category.[1158] They are based on four basic principles of investigation, prosecution, adjudication and imprisonment or punishment. Although there are some prohibitions that Islam has stressed upon but they have been lost in the maze of the time.[1159] Regarding terminology, like the Islamic punishments, procedural and codal laws have also the same Qur'anic terminology.[1160] However, they have been translated into different languages to suit the circumstances. Islam has given a full list of the investigation and what not to include in the investigation.[1161] Another important point is that the Islamic criminal procedure was not as developed as the modern procedural law has developed now.[1162] However, still it has rules and regulations about these procedures. For example, there were complete sources to draw penal codes form and write procedural laws based on the four principles.[1163] These sources helped build a humanistic perception of the Islamic due process or criminal procedure to develop into laws.[1164] Islam has given full guarantee of the protection of the human rights from the initial stage to the last stage

[1157] Reza, "Due Process in Islamic Criminal Law," 03.
[1158] Ibid., 04.
[1159] Ibid., 16.
[1160] Lippman, "Islamic Criminal Law," 30-31.
[1161] Reza, "Due Process in Islamic Criminal Law," 03.
[1162] Adel Omar Sherif, "Generalities on Criminal Procedure Under Islamic *Sharī'ah*," In *Criminal Justice in Islam: Judicial Procedure in Sharī'ah*, ed. M. A. Abdel Haleem, Adel Omar Sherif and Kate Daniels (London: I. B. Taurus, 2003), 02-03.
[1163] Reza, Due Process in Islamic Criminal Law, 03.
[1164] Muḥammad Hashim Kamālī, Legal Maxims and Other Genres of Literature in Islamic Jurisprudence, Arab Law Quarterly, 20, (2006): 77.

to protect human rights.[1165] Although there have been analogical interpretations within the jurisprudence, yet almost all the offenses have been properly categorized to develop a strong penal code which has also set precedents for the evolution of procedural codes.[1166] However, the most important than categorization and penalties, are the procedural rules, regulations and legal points for which a ruler has the discretion but he is guided by the Qur'ānic commentaries and interpretations long with the famous jurists of their time.[1167] Despite having good rights, Islam has given egalitarian principle to protect rights of even the slavers let alone of the accused.[1168] Lippman than counts the respect of the rights of the accused that Islam protects. These procedures where rights are given preference through procedural rules turned into laws included;

a) Rights during Detention

b) Rights During Pre-Detention

c) Rights During Post-Detention

d) Rights During Interrogation

e) Rights Pre-Trial Interrogation

f) Rights to Defense and Rights to Legal Support

g) Procedures of the Trials and Evidence Presentation[1169]

The entire philosophy of the Islamic procedural codes is that even if a criminal is freed, an innocent should suffer or get punishment. Shāh Walīullāh says that Islam protects the rights of others and ensures that nobody tramples upon the rights of others. If

[1165] Cherif Bassiouni, Islamic *Criminal Justice System* (London: Oceana Publications, 1982), 33.
[1166] Lippman, "Islamic Criminal Law," 40-43.
[1167] Awad M. Awad, "The Rights of the Accused under Islamic Criminal Procedure," in *The* Islamic *Criminal Justice System*, ed. M. Cherif Bassiouni, (London: Oceana Publications, 1982), 91-92.
[1168] Lippman, "Islamic Criminal Law," 46-47.
[1169] Ibid., 41-55.

there is no punishment, then prohibitions and restrictions even if they are in Islam are useless, he says adding that the objective of prohibition is to enforce punishment.[1170] However, it is said that the four principles are very important and critical. The history of Muslims, however, shows that they hardly ever followed all of them though in some eras they were followed in letter and spirit.[1171] It is also a fact that sometimes the implementation of the rules and regulations even proved stronger than the western standards. It happened in the earlier history of *Islam*.[1172] This clearly means that Islam laid down detailed procedural laws that transferred from generation to generation and country to country. It is also a fact that sometimes as it is stated that Islamic criminal procedure is defective, it is because of the failure of the implementation of these procedural rules.[1173] For example, Islam has stressed upon rights so much so that it has called it unislamic if these rights are trampled upon and the judicial and government decision are not done in accordance with *Sharī'ah*.[1174]Lippman further adds, "A governmental decision must be consistent with the *Sharī'ah*; otherwise it is a nullity" which means that it is not in consonance with *Sharī'ah* laws or Islamic criminal procedure and hence it is not valid.[1175] A Muslim can refuse to accept, if it is not in accordance with the *Sharī'ah*, a reason that Islam has attached the same importance to the procedural laws as it has attached to the categories of offenses and punishments with discretion.

[1170] 'Abd al-Raḥīm Shāh Walīullāh, *Ḥujjat Allāh-al Bālighah, vol. 1* (Lahore: Maṭbū'āt-e-Ilmiyyah, 1975), 468.
[1171] *Minhāj* et Ṭālibīn Nawawī, *A Manual of Muhammad Law According to the School of Shāfi'ī*, trans. E. C. Howard, (London: W. Thacker & Com. 1914), 503-504.
[1172] Reza, "Due Process in Islamic Criminal Law," 26-27.
[1173] Ibid., 26.
[1174] Lippman, "Islamic Criminal Law," 46.
[1175] Ibid., 46.

6.2. Additions of *Mughal*s in Evolving Islamic Procedural Laws

Although Islamic procedural laws were not perfect when they reached the *Mughal* empire through the *Sulṭān*s of Delhi, yet it was fair enough to be applied in a good judicial system of that time. There were written *Fatāwā*s, *Fiqh* books and written rules and regulations along with *Farmāns* of the *Sulṭān*s to help dispense with justice.[1176] The *Sulṭān*s not only preferred *Sharī'ah*, but also applied Cannon Law along with the civil laws and personal laws of the followers of the other religions. These include *The Qānūn-i-Shāhī* which means edicts, ordinances and *Farmāns* regarding officers and officials including *Dastūr ul 'Amal*.[1177] As *Mughal* emperors were very much fond of dispensing justice themselves, there was no question that any other legislation could be proved fruitful in furthering their cause of justice. J. N. Sarkār rather asserts that they loved to be considered "fountain head of justice."[1178] The reason of this love for justice was that more and more litigations were brought before *Qāḍīs* and *Sarḍārs* with a load of cases on them. The emperors used to do their best to provide justice to all the aggrieved parties.[1179] Therefore, the laws and procedures used to change according to the circumstances despite the fact that the criminal justice was dispensed with the Islamic criminal procedure.[1180] In these circumstances, the emperors faced various exigencies as well as compulsions in which they were placed. Basheer Ahmad says commenting on this state of affairs that there were various kinds of laws. He says;

[1176] Ahmad, M.B., *The Administration of Justice*, 15-16.
[1177] Ibid., 15-16.
[1178] Sarkār, *Mughal Administration*, 9.
[1179] Tripathi, *Rise and Fall of Mughal Empire*, 368.
[1180] Ibid., 368-369.

"It is clear that the body of laws which controlled the social life and regulated the legal relations of the Indians (including Indian Muslims) consisted at least of three kinds of laws -- the Indian Law, the Muslim Law and the *Ler Loci* or the municipal laws of the country which did not properly come within the scope of the Hindu or Muhammadan Law, but many of them consisted of various local taxes and duties and customs."[1181]

Here Basheer Ahmad has counted all types of laws including criminal laws adding that if rules or laws do not exist where they were needed the most, they were imposed through a royal decree or *Farmān-i-Shāhī*. Therefore, it can be easily concluded that *Farmāns* of the *Mughal*s were instrumental in the evolution of criminal procedure in general terms and Islamic criminal procedure in specific terms. Although they inherited something in criminal procedure, they also evolved it to hand over to the next victors. Sarkār's indictment of the *Mughal* judicial system that "The main defect of the department of law and justice was that there was no justice" could be based on merely his own religious prejudice.[1182] In this connection, Sarkār has also made a singular observation that there was not even any "proper distribution of courts in proportion to the area to be served by them" which could be right, for the Indian empire was spread over such a vast area.[1183] It also points to the fact that the criminal procedure was not properly evolved during the *Mughal* era due to this fact. However, it is also to be kept in mind that they did not inherit a complete code from their ancestors but whatever they got, they evolved it into a system that stayed in India since the British came. Moreover, their objective was not to dispense justice, but to consolidate their power.

[1181] Ahmad, M.B., *The Administrationof Justice*, 16.
[1182] Sarkār, *Mughal Administration*, 199.
[1183] Ibid.,199.

6.3. Use of *Farmāns* for Overriding Punishments and Islamic Procedural Laws

As it has been stated time and again during this entire discussion that the *Mughals* were keen in dispensing justice to the people so that they could be called just rulers and that they also loved to be considered fountain heads of justice.[1184] Specifically where crimes of *Ḥudūd* were not involved, the *Mughals* were very quick in either increasing the punishment or decreasing it altogether. This happened specifically in the case of rebellion, corruption and robberies against the government. However, such crimes were often treated with impunity and the accused were given strict punishments including maiming that was purely against *Islam*. The reason is due to non-definite status of such offenses where the discretionary power was in the hands of the emperor.[1185] It happened during the murder of one of the nobles of Akbar Khusham Uzbek was killed by two of his rival nobles Farhat Khān and Sangram Hoshnak. The emperor ordered a punishment for both to be blinded forever. They were then cruelly killed by making them hang from the wall of the fort and then pulled up by where their necks were broken.[1186] Although this was a simple act of murder for which the murderers should have been killed or hanged or awarded capital punishment. However, the *Farmān* was issued otherwise to make their capital punishment exemplary. This rather became an example to be followed though there are no historical evidences whether this was followed or not, but this was set a procedure for the killing of a murderer, though it was later revoked. Here it seems that the system was more preventive and not retributive at all. The officials, including the *Kotwāl* and other judicial officials were used to be present at that time to carry out

[1184] Ahmad, M.B., *The Administration of Justice*, 15-16.
[1185] S. A. Q. Hussaini, *Administration under the Mughals* (Dhaka: Paradise Library, 1952), 205.
[1186] Elliot, *History of India*, vol. 51, 26.

judicial *Farmāns*.[1187] In fact, sometimes the *Mughal*s used to add a few more laws through their *Farmān*s through capital punishment was only reserved for certain crimes that include obstruction in the regal hunting expedition and even selling dog's meat.[1188] It, however, is not clear whether they added to the new procedural rules and laws or not. However, in the first instance as given of Akbar's punishment, it is clear that this was a new procedure that stayed limited only to the emperor while *Qāḍīs* and other officials did not follow this new procedure. Gulbadān Begūm has recorded two instances of Bābur whereby some of his commanders such as Khurso Shāh and Mīrza Khān and Mīrza Mohammad were given mercy for acting against the interests of the emperor.[1189] These could be excesses of the emperors in both case. In *Akbar Nāmah*, it is stated that the emperor could commit excess in some "fit of passion" such as he ordered to chop off the tongue of Hamzaban for his rude behavior and it happened with another official named as Khawaja Bhul. There is also another instance that a person named Qasim was castrated for violating the honor of a chaste woman at that time.[1190] These types of mercies and punishments became some precedents in their own right but they were not made examples. It could be stated that they were specific examples of the royal family that only the royal members could do or follow in certain specific circumstances.

However, there were general and common *Farmān*s which set examples for improvement and reformation in the judiciary. These also include procedural laws which the *Mughal*s improved with the passage of time. Abū 'l-Faẓl has dilated upon such instances in *Ā'īn*. These typically general *Farmān*s could have the traces of procedural

[1187] Ibn Hasan, The Central Structure of the *Mughal* Empire, 331-332.
[1188] Ibid., 332.
[1189] Begūm, *Humāyūn Namā*, 5,8.
[1190] Abū 'l-Faẓl, *Akbar Nāmah*, Vol. 3, 29, 577.

laws and codes which later turned into rules and regulations and evolved into procedural laws. Regarding objectivity and unbiasedness, Vincent Smith refers to Abū 'l-Faẓl saying that the king used to say that an unjust act is like a judgement against the king himself, which is an indication how much unbiased the emperor used to stress upon when deciding a case.[1191] Abū 'l-Faẓl has also mentioned some instructions Akbar issued to his judicial officials regarding justice. They include the use of Islamic mode of trial in letter and spirit. The books of *Fiqh* had all the procedure for the judicial officials.[1192] Akbar even used to advise the judicial officials to use scolds and threats and imprisonment for minor crimes but with careful deliberation. The question of relation and sect should be set aside when deciding case.[1193] This is again a reference to a rule that Akbar wanted his judicial officials to follow. Abū 'l-Faẓl, in fact, has presented a full code of justice envisaged by Akbar. These are pieces of advice to the judicial officials about deep reflection before deciding a case, discretionary power, trial procedure and the capability and hard work to arrive at the truth.[1194] It is, however, another matter that it has been stated time and again that even the *Qāḍī* and the emperor could not pardon the *Ḥudūd* crimes. It is said that it was applied exactly like during the period of caliphs as it has had to be carried out in every case whether there is repentance or not.[1195] However, it is quite another thing that the *Mughal*s sometimes resorted to using their own dictatorial and sovereign position to tinker with *Ḥudūd* but it did never enter the legal log books except the history treatises. Moreover, such cruel and barbaric decisions were mostly carried out during the rebellions or during the time when the king or the emperor was on some

[1191] Smith, *Akbar: The Great Mughal*, 34.
[1192] Abū 'l-Faẓl, *Āʾīn*, Vol. 2, 570-72.
[1193] Ibid.
[1194] Ibid., Vol. 2, 573.
[1195] Hussain, *Administration under the Mughals*, 199.

military skirmishes. Gulbadān Begūm has narrated several other such incidents such as of Humāyūn's treatment with Khawaja Ghazi and Roshan Koka to whom Humāyūn imprison after he returned from Persia. Humāyūn also ordered the cutting of heads of the soldiers of Mīrza Kamran after he was arrested in botched plot and his soldiers were handcuffed.[1196] Both of these incidents were against the spirt of the Islamic criminal procedure. However, they also did not become precedents for other such royal *Farmāns* which could have impacted the whole judicial system. However, there were *Farmāns* which comprises detailed instructions which set new foundations for *Mughal* specific procedure which could also mean that Islam allows circumstantial and regional changes if they suit the public interest.

6.4. Use of *Farmāns* for Additions in Islamic Procedural Codes

Three *Mughal* monarchs made significant contributions in the dispensing of justice in their empire during their rule. Starting from Bābur, who got compiled *Fatāwā-i*-Bāburī which could make an impact as *Fiqh-i Fīrūz Shāhī.*[1197] Although both quasi-legal Islamic documents gave room to the *Sulṭāns* as well as the *Mughal* emperors for interpretations, *Mughals* did not avoid issuing different *Farmāns* in terms of administration of justice in their vast empire. It is true that every *Mughal* emperor regarding himself a "viceregent of God "but it is also true that as a sole ruler, every *Mughal* emperor had been all in all even in the terms of justice.[1198] The first major attempt by any *Mughal* monarch about laying down some procedural rules for the judicial administration and judicial officials was made by Akbar, who flouted the idea of

[1196] See Begūm, *Humāyūn Namā*, 26-68.
[1197] Zafarūl *Islam, Fatāwā Literature of the Sulṭanate Period* (New Delhi: Kanishka Publishers, 2005), 24-26. See *Mālik, Islam in South Asia*, 109-110.
[1198] Ibn Ḥasan, *The Central Structure*, 310.

justice.[1199] Hussain remarks that he tried to "do justice according to traditions of his age and country, which indicates rules and regulations later became procedural laws with the passage of time.[1200] He laid the foundations of deep deliberations before awarding any punishment so that no innocent should be punished and the procedure of reminding the convict three times before he was punished.[1201] Hussain highlights his entire justice system saying that *Shāhī Farmāns* were issued to guide *Qāḍīs* and *Muftīs* about the principles of justice and its administration.[1202] Akbar also laid the foundations of the royal judicial administration by holding a court and administering justice after which he used to guide and order the judicial officials to dispense justice in the light of his instructions.[1203] Another important decision taken by him was the adaption of trial by ordeal method of administering justice. Although it almost became a tradition, it was later on dispensed with during the period of Ālamgīr.[1204] It was because there were several Muslim clerics who objected to this old fashioned method of trial and hence after wards no other Muslim or *Mughal* monarch dared to hold such a trial.[1205] Although Abū 'l-Faẓl had given various important points about the idea of justice and the role of monarch, most of them were not relevant to the formation of procedural codes in the evolution of the judicial administration of the *Mughals*. However, these points laid down rules according to which it is easy to decipher procedures adopted after that. These rules not only underlined the idea of justice presented by Akbar but also his role, his instructions to the

[1199] Hussain, *Administration of Justice*, 32.
[1200] Ibid.
[1201] Smith, *Akbar: The Great Mughal*, 344.
[1202] Hussain, *Administration of Justice*, 34-35.
[1203] Ibid., 35.
[1204] Ibid., 37.
[1205] Ibid., 37..

judicial officials and his own view of the judicial administration.[1206] Abū 'l-Faẓl has also discussed the role of *Qāḍīs* and *Mīr Adl* in detail regarding their appointment, role, duties, performance and even conduct.[1207] These instructions include the cumbersome job of the administration of justice, the role of a *Qāḍī*, his role in inquiry and investigation, his conscious efforts about the rights of the litigants, his character, his life, his circumstances, his intelligence and even his discrimination.[1208] These instructions must have been issued by Akbar through *Farmāns* to lay down procedures adopted by the later *Mughal* emperors during their own rules. Akbar, however, stands apart from others in that several of the documents which survived the disasters of the time demonstrate his keenness for justice. *Mir'at* presents such several such letters written by Akbar to different governors including one to the governor of Gujarat in which he advised him about different punishments. Although it is mostly advisory, these advisory notes became procedural rules with the passage of time. Such as he asked the governor to desist from disfigurement and mutilation of body during capital punishment and also asked him to be sparing in inflicting extreme punishments.[1209] Even sometimes Akbar's routine as described shows that the emperor laid down various procedural laws just out of habit of dispensing justice such as appearing in the window to let the people see him or *Jharokah* justice system and getting reports in about justice in the open court.[1210] This sort of addition continued during the period of Jahāngīr and Shāh Jahān. Jahāngīr too laid down some procedures for the benefit of the public lest they should think he is not as justice loving as his father. He used to hold the court in the same way on different week ends

[1206] Abū 'l-Faẓl, *Ā'īn*, Vol.2,570-72.
[1207] Ibid., 42-43. See Sarkār, *Mughal Polity*. 40, 215. Also see Day. *The Mughal Government*. 85-88.
[1208] Abū 'l-Faẓl, *Ā'īn*, Vol. 2,573. See Early, *Emperors of the Peacock Throne*, 217-218.
[1209] Khān, Mir'at-e-Aḥmadi ,174. Also see Abū 'l-Faẓl, *Ā'īn*,Vol.1, 160-165.
[1210] Abū 'l-Faẓl, *Ā'īn*, Vol.1,165.

and sometimes two hours every day.[1211] He also introduced the golden chain justice system. Manucci relates a story of an investigation of a dead body that the king ordered and found the real culprit through the pottery.[1212] Jahāngīr established some very good procedures such as no death sentence without his permission and the strict conformity to the trial when trying a convict and that presentation of evidences.[1213] This led to the period of Shāh Jahān who did not do much in terms of establishing procedural laws. However, what impressed the foreign travelers about his precedents was the objectivity of the emperor about which Manucci was all praise.[1214] Even in matters of appeal, he set examples to be followed.[1215] This continued during the next emperors, setting a sort of procedural rule that a royal member should not intervene in the official matters.

Wahed Hussain referring to Dr. Muḥammad ul Alllah says that though justice continued during the period of Shāh Jahān, he established a system of appeals so that the people could be satisfied with the decisions and that no mistake should be made.[1216] The other major attempts at establishing procedural laws and modified codes were made during the period of Aurangzēb Ālamgīr who was also a staunch supporter of the religious clerics. Besides a keen on the improvement of justice system on the lines of Islamic jurisprudence, as his letter to the governor of Gujarat shows when he ordered him to extend the court's duration during a week asking the *Qāḍīs* to stay in the court and dispense justice until afternoon or *Zūhār* prayers.[1217] Some of the best procedural code

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[1211] De Laet, *The Empire of the Great Mogol*, trans. J. S. Hoyland, and S. N. Banner Ji, (Calcutta: Imperial Library, 1927), 93.
[1212] Manucci, *Storia*, Vol. I, 174.
[1213] Mus. Add. 22417 f. 11.
[1214] Manucci, *Storia*, vol. I, 197.
[1215] Elliot, *History of the Mughal Empire*, vol. 5II, 170-171.
[1216] Hussain, *Administration of Justice*, 41. See also Elliot, *History of India*, vol. 5III, 170-173.
[1217] Khān, Mir'at-e-Aḥmadi ,201.

regulations were stipulated in his *Farmān-i-Shāhī* to the *Dīwān* of Gujarat.[1218] It reached emperor that the justice was not properly executed in Gujarat at which he wrote a long letter comprising various pieces of advice to the *Dīwān*. These pieces include various legal injunctions and procedural and codal rules and regulations such as mode of punishment, presence of *Qāḍī*, crime committed by a non-Muslim, method of punishment, and mode of imprisonment. In one instance, it is quite detailed;

"If the *Qāḍī* sends a man for detention, take the *Qāḍī*'s signed order for your authority and keep the man in prison. If the *Qāḍī* fixes a date for trial, send the prisoner to the *Adālat* on that date; otherwise send him there every day so that his case may be quickly decided."[1219]

However, *Fatāwā*-i Ālamgīrī is a bit detailed even about the mode of trial where the procedural codes are present in minute details. It outlines the shape of the building as "quadrangle" with a hall, side rooms, a platform and a "rich carpet" including seats for a *Qāḍī* and a *Muftī* and other religious scholars. It also states the presence of files of the concerned parties and the ways the witnesses and the evidences are presented in the court. Even the stenographers and record keepers are there to record every move of the court and the cross examination during the trial.[1220] This part of *Fatāwā* is one of the best ways of formulating rules and regulations which later became applicable during the British Raj and ultimately turned into procedural laws.

This convention was established in such a way that it became a rule and then turned into a procedural law long after the period of Aurangzēb during the East India

[1218] Sarkār, *Mughal Administration*, 122-130.
[1219] Ibid., 122-123. Also see Hussain, *Administration of Justice*, 57-58.
[1220] Sarkār, *Mughal Administration*, 117. See Hussain, *Administration of Justice*, 67-68.

Company's rule. The best about procedural law was done through his personal interest in the compilation of *Fatāwā-i 'Ālamgīrī* for which he did much in gathering clerics from every nook and corner of the world and set them to work on this tome of legal codes and procedural rules.[1221]

6.5. After *Mughals*

The above discussion demonstrates that the *Mughal*s from Bābur to Aurangzēb contributed to the evolution of overall Islamic jurisprudence and the role of *Farmān-i-Shāhī* has been critical in this respect. Therefore, *Farmāns* are stated to be instrumental in furthering procedural rules and regulations and ultimately transforming them into laws in the long run, a task done by the British when streamlining codification of the Islamic personal laws into their own format. This issue becomes clear due to the actions taken by the company. However, these were mostly limited to the amending what gives their economy a boost and increase their military control with least military skirmishes.[1222] That is why despite its demise from India, the edifice of the *Mughal* Empire continued to exercise its impacts through legal means amended slowly and gradually by the company. As honours, rituals and most of the legal terminology stayed the same, there was little change in criminal procedure and procedural laws. Despite this, there were various institutional additions which brought into existence new rules and regulations.[1223] That is why the Hastings Plan which was promulgated in 1772 established courts on the same lines as established by the *Mughal*s. The indigenous norms, rules and laws stayed the

[1221] Ahmad, *The Administration of Justice*, 27.
[1222] D. Washbrook, "Law State, and Agrarian Society in Colonial India," *Modern Asian Studies* 15 no. 3. (1981): 649-652. doi:10.1017/S0026749X00008714
[1223] Nicholas B. Dirks, "From little king to landlord: property, law, and the gift under the Madras permanent settlement," *Comparative Studies in Society and History* 28, no. 2 (1886): 307-308.

same in case of various issues related to the public or personal laws such as case, marriage and other issues. In both the Hindu and Islamic personal laws, the norms and laws stayed unchanged. [1224] Although the British also promulgated their own procedural codes as well as codal laws, they provided guidelines in procedural laws for Islamic clerics and pundits to apply in the Hindu personal laws.[1225] It is pertinent to mention here that the terms and legal vocabulary used in certain procedural codes and conventions during the *Mughal* period stayed the same even during the British period.[1226] It is stated that after the Hastings Plans, the company had to rely heavily upon the local legal codes which were entirely of the *Mughal* period updated latest and only related to the Muslim or Islamic jurisprudence. However, in the case of Hindus, they had to rely on the Hindu pundits.[1227] Due to prolonged implementation of *Sharī'ah* in India, it has evolved to the point where it was easy to adopt it as a legal code for the Indian Muslims or wherever they were in majority. Most of the successor states adopted, modified and reinterpreted various legal injunctions of the *Mughal* period to make easy for them to codify criminal laws.[1228] It is only because the *Mughal*s left strong evidences of their great work about legal and procedural laws in criminal jurisprudence in compiled shapes to let the successors follow their footsteps. There is no denying the fact that the *Mughal*s demonstrated their acumen in issuing *Farmāns* in respect of criminal jurisprudence be it procedural or legal or sectional, it was actually *Sharī'ah* which came to their rescue

[1224] Washbrook, "Law, State and Agrarian Society," 652.
[1225]Bengal Regulation, VII of 1793.
[1226] Hussain, *Adminsitration of Justice*, 105.
[1227] Asaf A. A Fyzee, "Muḥammadan Law in India." *Comparative Studies in Society and History* 5, no. 4 (1963): 401-402. doi:10.1017/S0010417500001821
[1228]Asaf A. A Fyzee, "Muḥammadan Law in India." *Comparative Studies in Society and History* 5, no. 4 (1963): 401-402. doi:10.1017/S0010417500001821.

during critical legal complications and complexities.[1229] To understand colonized culture, the British used the same old courts and same old classical legal codes including procedural laws and codal formalities for juridical administration. Therefore, it was wrongly assumed that only the single legal code could resolve all the problems.[1230] Problem, however, arose when the legal codes were not applicable in all cases, specifically in the case of Muslims who were quite touchy about *Sharī'ah*. Though clerics were hired regarding the progression in Anglo Muhammadan law, the British judges stayed wary of the clerics. However, the issue was somewhat resolved with the cooperation of the both having abstract laws got through *Fatāwās* and applied in the relevant context by the British.[1231] In fact, the British managed it from the very first day when the East India Company managed to be appointed as *Dīwān* in Bengal through a royal *Farmān*. In fact, Clive Lloyd, who became the first British administrator did not succeed while his successor Hastings avoided imposing English codes which Clive could not impose.[1232] Sir Roland Wilson quoted his words saying that the "de jure" sovereign was only the *Mughal* emperor or at least he was considered so due to the force and power of the *Farmān* and the people's habit of accepting *Farmān* as the ultimate law.[1233] It could be that the public has been habitual of being governed through a *Farmān* since long and have not adopted to the English way of government that made them hard pressed and

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[1229] K. M. Yūsuf, The Judiciary in India under the *Sulṭāns* of Delhi and the *Mughal* Emperors, *Indo-Iranica*, 18, no. 4 (1965), 401-404.

[1230] It seems that in the formation of this plan, Hastings simply drew on the strategy that had been adopted during the *Mughal* period and remained in force in the successor states. See Fyzee, Muḥammadan Law, 402.

[1231] Abū al Hussain, *Muslim Law as Administered in British India* (Calcutta: Das Publishers, 1935), 14.

[1232] Milton Walter Meyer, *Asia: A Concise History* (Oxford: Rowman and Littlefield Publishers Inc. 1997), 149-150.

[1233] Sir Roland Knyvet Wilson, *A Digest of the Anglo-Muhammadan Law* (London: Thacker Spink & Co. 1895), 25-26. Also see, John F. Riddick, *The History of British India: A Chronology* (London: Prager, 2006), 14-15.

against which they soon as launched rebellion. Mukhia's beautiful words about *Farmān* and its significance only reveals their reality at this juncture when East India Company is incharge of the whole India but *Farmān* is required for legal validity. He says, "The *Farmān* was an extension of his Majesty in Person."[1234] This is just a manifestation of the power of *Farmān* of the *Mughal* period. However, as soon the English codified laws came into force and the British judges started giving verdicts in the name of the British Crown, the *Farmān* went into oblivion never to recover again.

Bernier laments Terry's words saying that it is myopic and short sightedness to say there were no written laws or codal formalities or procedural laws. This is entirely ridiculous to say that such a huge system was running without any rules and regulations.[1235] Describing the account of the justice and judicial administration in India, Bernier says that *Qāḍīs* and the emperors were equal in the eyes of laws. Everything done in the courts was in the written format, including the petition, documents, and decisions.[1236] The writing of *Mazharnāmahs* is a case in point. Bernier means that whatever has been written in the other books and narrated by the writers is just out of malice. Otherwise, it would not have been possible to tame millions through a cane. He further says that even in the case of evidences and procedures of examining evidences, there were proper rules and regulations. Islamic jurisprudence was formally followed in this connection which had a complete code of law and procedures. However, the weaknesses were there, he added saying that they were the corrupt practices of the *Qāḍīs*

[1234] Mukhia, *The Mughals of India*, 61-62.
[1235] Bernier, *Accounts of Foreign Travellers*, 236.
[1236] Ibid., 236-237.

who created loophole in the system.[1237] However, he also added that all the emperors took personal interest and established equality in the eyes of laws for all. There were no lawyers to charge heavy fees or heavy fees of the courts. [1238] These comments are highly significant in respect of the evolution of Islamic jurisprudence during the *Mughal* period. Although the *Mughal*s were despots and not democratic or true Islamic caliphs, they were still statesmen in their own right who used their will (*Farmāns*) very judiciously in the judicial as well as procedural matters, the reason that they left behind them a rich legacy of procedural codes and Islamic laws.[1239] They set examples before the world how they run the judicial administration through *Qāḍīs* and their own *Farmāns*. Bernier further argued that Akbar used to take special care of his idea of justice due to punishments awarded to the innocents. He ensured that no innocent was punished. That is why even the procedure of capital punishment was made compulsory to be sanctioned by the emperor himself. [1240] Even Jahāngīr as stated above used to award punishments through a complete procedure and arranged a courier in the matter of capital punishments. The best task in this connection was done by Aurangzēb Ālamgīr who was very harsh in the issues of justice. Although he acted not in accordance with the Islamic jurisprudence in murders of his near and dear ones when occupying the thrown, he warned other military generals not to stand against the *Qāḍīs* and their decisions.[1241] However, his contribution to legal evolution in India is matchless. Specifically, with respect to the development of *Ḥanafī Fiqh* and its legal code is tremendous. In this connection, his letter to the *Dīwān*

[1237] Ibid., 236-237. See Javid Iqbāl, *Islam and Pakistan's Identity*, (Lahore: Iqbāl Academy, 2003), 102-103. Also see Rahmān, *Criminal Sentencing*, 92-93. Manucci relates a story of the corruption practices, saying a magistrate was killed due to a snake bite for taking bribery. Also see Manucci, *Storia*, vol. 1,197.
[1238] Ibid. 236.
[1239] Ibid., 286. Also see Ahmad, *Judicial Administration in Medieval India*, 31-33.
[1240] Monserrate, *Commentry*, 209.
[1241] Sarkār, *Mughal Administration*, 34,112.

of Gujarat has wide-ranging impacts on the procedural law and its evolution in India.[1242] Despite having different opinions, various scholars have hailed the *Mughal*s for bringing religious tolerance through the issuance of frame with respect to criminal jurisprudence. In fact, in formulating procedural codes and regulations, *Mughal*s did a tremendous job, the reason that they were popularized due to their distributive justice and its effectiveness. That is the very reason that it spread far and wide in the empire. This could be that it was localized through *panchāyat* system at work in the rural areas.[1243] Although the *Mughal*s used Islamic criminal law in its best way, they evolved it to the existing circumstances at that time in which they were placed. In fact, Lippman's critique[1244] of the Islamic criminal procedure is almost universal and there is no denying the fact that Islam does not bar from applying them in any environment and circumstances. It evolved and changed during the *Mughal* period due to changing circumstances and main instrument of change was the *Farmān-i-Shāhī*. Not only they continued with the existing judicial administration set up by the *Sultanate* of Delhi, but also continued with the religious *Fiqh* in order to consolidate their power. However, in terms of procedural laws, they brought changes, amendments and even alternations through their *Farmāns*.[1245] The major evolution that has been occurred during their period in Islamic criminal jurisprudence was in the appointment of *Qāḍīs*, full details of their responsibilities, establishment of judicial institutions, inclusion of religious clerics and *Muftīs* in the

[1242] Khān, Mir'at-e-Aḥmadi,310.
[1243] Bernard Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change* 8, no. 1 (1959): 79-82. http://www.jstor.org/stable/1151938.
[1244] Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law," 46.
[1245] Ahmad,M.B,The *Administation of Justice*, 68.

proceedings of the courts, hierarchy of the court and their working hours.[1246] Their contribution in the evolution of adjective law, procedures and jurisdiction and decisions about jurisdiction was not less.[1247] The *Mughal* period has been very much ahead in working of courts as well as the law of limitations on the courts. The *Mughal*s never shirked their responsibility of dispensing with justice at every cost. Even in the post-punishment period, there are instances of the interference of the emperor through his *Farmān* at one or the other stage. However, the most important part was played by unconventional intervention in the shape of establishing regal justice institutions. These institutions had their own procedures where judicial officials used to be present. However, they set the conventions of trial and other procedures which were then followed throughout the empire.[1248] Some of the best examples discussed in this chapter are the court of Akbar, golden chain justice of Jahāngīr, open *Darbār* system of Jahāngīr, *Jharokah-i-Darshan* of Shāh Jahān and *Eḥtisāb* System of Aurangzēb.[1249] Although the *Mughal*s inherited a good penal code, they always tried to develop their own, the examples of which are cannon laws, *Fatāwā-i Bāburī*, *Fatāwā-i 'Ālamgīrī* and various other such booklets of rules and regulations. Although there are no more documentary evidences, yet there are various evidences and rudimentary documents which present details of the evolution of procedural laws, penal codes and the whole *Ḥanafī* Islamic jurisprudence in the *Mughal* empire which worked as a guiding light for the East India Company and the coming future states to codify their criminal procedures and streamline their procedural laws and codal formalities for their judiciary and judicial systems.

[1246] Ibid., 155-56. See Khān, Mir'at-e-Aḥmadi,Vol. 1, 282-83. Also see Hussain, *Administration of Justice*, 204.
[1247] Ahmad, *Judicial System*, 196. Also see Hussain, *Administration of Justice*, 108-109.
[1248] Ahmad, M.B., *The Administration of Justice in Medieval India*, 205.
[1249] Sarkār, *Mughal Administration*, 09-118.

CONCLUSION

Conclusion

The whole argument started with the introduction to *Mughals*, their *Farmān-i-Shāhī* and its status in the light of the Islamic criminal procedures passes through various shades of the history, social circumstances, religious polemics and criminal procedural debates. Though various dialectics ensured in these pages have very little relevance, they, however, are very much significant in the deduction of the inferences used to see the *Farmān* in the light of the criminal procedure of Islam or *Fiqh-i-Islāmī*. Before stating the impacts and implications of the *Mughal's Farmān* on the evolution of Islamic criminal procedure and procedural code, it is fair to have some background review.

The very important part has been that Islamic cover was manipulated to give legitimacy to *Farmāns* during the first phase of the *Mughal* rule in India. This move of the *Mughal*s aligned with the Islamic *Fiqh* and gave it a touch of Islamic criminal procedure. Although the *Mughal*s took cognizance of the entire social milieu and political circumstances, they also took care of the religious sensitivities of the followers of the other religions. But they paid special attention to the Muslim sensitivities and Islamic way of life.[1250] Despite very strong dictatorial underpinnings, the Islamic cover provided the *Mughal*s with necessary legitimacy for military and political stabilization and consolidation of their power. Although there have been hiatus and pauses during the period of Humāyūn due to the rule of Sher Shāh Sūrī[1251] and during the period of Akbar

[1250] Qureshi, *Administration of the Mughal Empire*, 8-15.
[1251] Badā'ūnī, *Muntakhab-al-Tawārīkh*, 571-75.

in the shape of *Dīn-i Ilāhī*[1252], the force of the *Farmān* stayed the same. Although during the initial phases, the *Mughal*s were very judicious and kept sensitivities of the locals in mind as in the time of Akbar, who introduced *Dīn-i Ilāhī* to pacify Hindus and followers of other religions and even stopped levying *jiziya* on Hindus.[1253] Despite this, his empire continued becoming strong due to the force of *Farmān* and its Islamic backing.

Moreover, the *Mughal* adopted a specific style of writing or articulation of *Farmān* to suit the purpose. Although there have been various other sources in civil laws and other rules and regulations, Islam and its duly evolved *Fatāwā* collections in India formed the basis of the *Mughal Farmān*s. That is the very reason that the *Farmāns* carried a valid legal authority at that time due to the force of the religion behind them. The *Mughal*s were very shrewd in this sense that they used Hindu personal laws to pacify the big majority and won the martial Muslim minority to give legal cover to their *Farmāns*.[1254] In this background, the *Mughal*s heavily used Islamic criminal laws developed in the shape of *Fatāwā* earlier during the period of *Sultanate* of India. A fair evolution of the Islamic criminal law and its contents has given a deep understanding of the *Farmān* and its contents too. Moreover, a review of several *Farmāns* taken from different historical books also to the same conclusion that the Islamic criminal laws being applied since antiquity were modified, changed, altered and even cut short to apply in specific circumstances for the public administration.[1255] Reviewing the role of *Farmān-i-Shāhī* in light of the Islamic criminal law and through the lens of history, it gets clear that *Farmān* has done three major functions in the legal administration and judicial

[1252] Sarkār, *Mughal Polity*, 391-92.
[1253] Sarkār, *Mughal Polity*, 391. See Early, *The Mughal World*, 226-27.
[1254] Sarkār, *Mughal Polity*, 391-94.
[1255] Early, *The Mughal World*, 226-27.

administration. The first function was of a constitutional framework during those olden times when legislation over constitutional issues was also non-existent. Whenever the *Mughal*s wanted to change some administration on central and provincial level or need some change in the government or military structure, they used to issue a *Farmān* which could be stated to have the significance of a constitutional order or legal framework order. However, in terms of judicial administration, such *Farmāns* were effective on top level such as the appointment of judicial officials and officials of the central judicial department. However, at bottom level, these have two major functions.

The first function was related to the Islamic criminal system as a whole and second was related to the evolution or change in the procedural code and penal code.

As far as its function in the Islamic criminal system is concerned, *Farmān* has played an important role on account of its specificity. This specificity lies in its writing and articulation style and sources, for Islamic criminal system has the full backing of the masses as well as cognizant clerics of that time as is clear from the historical record. Therefore, whatever *Farmān* was issued regarding *Ḥudūd*, *Ta'zīr* and *siyh*, it was first reviewed by the *Farmān* writers, other writers and even sometimes viewed by the emperor himself to see if it was in accordance with the Islamic criminal system. The review of all the *Farmāns* issued in this connection has demonstrated this fact that they did three major functions with the Islamic punishments. The *Farmāns* issued therefore changed the sentence from the original one, reduced them or increased them. However, in one way, they also went over and above the original prescribed punishments of the Islamic criminal system. However, it only happened during the peak era of the *Mughals* or when the masses were not fully cognizant or the clerics joined hands with the officials

or above all the emperor committed a mistake and later reverted to the original *Farmān*. Whatever the case may be, the functions of the *Farmān* in the punishment system either amended the punishment, changed it or introduced a new punishment. If the new punishment was not in accordance with the Islamic criminal procedure, it was later annulled by another *Farmān* by the same emperor or the emperor coming after him. On the other hand, *Farmāns* did very commendable job in the evolution of criminal procedural code. This procedure comprises the changes and amendments in the role of *Qāḍīs*, the authorities of the *Qāḍīs* and the department of judicial administration and overall the role of *Muftīs* in the interpretations of the judicial procedure. The *Mughal*s did a commendable job in this connection by defining the role of *Qāḍīs* and their authorities. They also separated *Muftīs* and their roles, and the role of minor officials. Moreover, they have also given role of the judicial institutions and sometimes went beyond this to establish separate unconventional institutions as given in fourth chapter. These unconventional institutions further established conventions of dispensing the justice. In one sense, the role of the chief justice, *Muḥtasib* and other relevant major and minor officials have also been counted as the evolution in procedural laws. In this connection, their role of *Farmān-i-Shāhī* is very important. It is because the emperor and kings have been considered the fountain of justice and the legislative role of the *Farmān* regarding judicial administration has been instrumental in the compilation of all rules and regulations.

The other roles of the *Farmāns* have also been listed in the compilation of the procedural laws. In this connection, *Farmāns* have been only limited to the compilation of rules and procedures and *Fatāwā* collections among which *Fatāwā-i 'Ālamgīrī* has

been very important. Moreover, the third important role of the *Farmāns* has been the compilation of the penal codes. Although it took several years to reach this stage where penal codes have become important. In both of the last role, *Farmāns* have been instrumental in every way from procedural laws to penal codes.

As far as the procedural evolution is concerned, it has been gradual since it involves rules and regulations of the appointments of the *Qāḍīs*, their professional capabilities and their affiliation with Islam and the political dispensation, *Farmāns* were mostly concerned with constitutional issues rather than administration issues. On constitutional level, the *Farmān's* role has been to present legal decree about the appointment of the chief *Qāḍī* and other legal issues in the administration of the judicial department at the top level and general administration at the provincial level. On the other hand, they also presented norms and judicial conventions as stated above in the shape of judicial administration and dispensation by the royal courts set up during different times of different emperors.

The same goes with the penal codes. The rules that were set up, changed or altered by different emperors through *Farmāns* were later merged in the penal codes which were not as evolved and developed as now, yet they were significant at that time. They developed into penal codes when merged with the Islamic criminal penal codes, for the emperors hardly issued any *Farmāns* related to other religious communities. Therefore, only *Farmāns* related to the Islamic criminal penal codes were issued and they too were either withdrawn or later on changed if they were deemed against the Islamic penal codes or already established penal codes, then they were changed accordingly after losing their worth. All this discussion points to certain aspects which are helpful when

legislating and evolving the *Farmāns* and decrees into proper procedural and penal codes to be documented and implemented. It is because the review has demonstrated that these aspects are not permanent but provisional and change from time to time and society to society and even region to region. These aspects not only include the belief system, cultural background, race, ethnicity, tribal systems, topical conventions, customs, traditions, religiosity and family structure, language and economic systems and above all the environmental impacts on human beings. The entire discussion about *Farmāns*, if taken into the modern terms, points toward parliamentary legislation that takes a researcher to the reel of documentation of bills, passing of those bills and the making of laws; whether they are procedural or penal codes.

FINAL REMARKS

Final Remarks

These *Farmāns* serve and have served as examples for modern democratic system to consider the following aspects of a social fabric before legislating on some issues:

1. The entire historical review of the *Farmāns* and the issuance of *Farmān* show that the belief of the people has been at the heart of the system, whether it was administration of the justice or dispensation of the justice or whether it was on individual level or collective level. For example, the *Mughals* took the entire Islamic criminal jurisprudence and implemented it throughout their empire with little tinker with it to meet the changing requirements of the time. That is why they dealt with the Hindus according to their own personal laws. Both of these examples show that the people are very sensitive toward their beliefs. Hence, no criminal, procedural or any codal law could be legislated or implemented without considering the belief system of the public. The examples of several collections of *Fatāwās* and their implementation during the *Mughal* period is a case in point. There is another prime example of this, *Fatāwā-i 'Ālamgīrī*. Therefore, the takeaway is that whenever legislation is made, it should always keep the public belief and other minorities in consideration before moving forward.
2. The second most important aspect is the cultural customs, conventions and traditions which are very important. Sometimes full customs, conventions and traditions are transformed into laws which are later included in the statute books. However, sometimes the legislation is done on the basis of these customs and traditions. These customs and traditions play an important role in making legislation in accordance with the wishes of the people. Although the *Mughals*

were despots, most of their *Farmāns* and the issuance of the *Farmāns* in a specific language, clearly demonstrate that they were very sensitive to the existing social conventions, customs and traditions of that time or else they must have lost. Hence, it is lesson that any legislation done for criminal, procedural or penal codes must take social and cultural customs, conventions and traditions into account before going for implementation. It could be stated that any legislation not conforming to these standards is liable to fail at the very outside or is going to die down during implementation. Therefore, the takeaway is that whether it is parliamentary system or presidential system, cultural customs and traditions are of paramount importance in criminal procedural code and criminal penal codes and final codification of the laws including their implementation.

3. The third most important aspect is that topical time and situation are of critical significance. Society is always in evolution. What has been suitable and beneficial for the forefathers of this generation may not be the same for this generation and the next coming generation. The old and ancient laws seem obsolete and do not fulfil the needs of the existing realities. Even in the case of religious beliefs, there are transformations, developments and evolutions. In this research, it has been revealed that *Dīn-i Ilāhī* could not conform to the situations prevalent during the time of Shāh Jahān or Aurangzēb, the reason that it was forsaken and given up entirely. The *Fatāwā* collections and rules books of the *Mughal* period do not come up to the standard of the modern times. Therefore, each time there is a new legislation, it must conform to the new social standards and social criteria. However, it follows the same old pattern and same old evolutionary process. The

use of *Farmān* leads the modern legal minds to the old ways of revising and changing the *Farmāns* and their writing styles to adopt them to topical situations and prevalent trends. The take away is that whenever there is any need of legislation, the new legislation and new implementation methods must conform to the topical situations and should respond to the public demands and requirements of the time.

4. The fourth most important aspect of *Farmāns* and their implementation is that ethnicity and race play an important role in the national cohesion and stability. Sometimes there are huge tribes and huge families and in the modern democratic system, their role becomes all the more too important for the public office holders. A small legal amendment impacting the small ethnicity having significant contribution in a local social stability could lead to unrest and outright rebellion in case it is not withdran or it does not conform to the racial and ethnic requirements. Therefore, any legislation impacting a specific community, group and family must conform the racial and ethnic standards of freedom and equality. The *Mughals* played the same cards through their *Farmāns* when dealing with Gujarat and several other areas. The take away is that whenever there is a new legislation, its codification and implementation, it must be in accordance with the wishes of all the communities, ethnicities and races living in that specific state.

5. The fifth important point is the language and linguistic considerations in the legislation and codification of laws pertaining to crimes and criminal procedure codes. It is because not only the semantic issues but also articulation issues play an important role in judicial procedures, trials and judicial interpretations. In this

connection, the language and linguistic considerations play an important role making it clear for the judges, lawyers, the petitioners and the defendants to understand it easily and seek the intervention of the judiciary likewise. It impacts the legislation and implementation in two ways. The first is the issue of semantic ambiguity which could lead to either wrong sentence or wrong interpretation or wrong judicial procedure. The second is the issue of multiplicity of interpretations which could lead to some other confusion and ambiguity. That is what the *Farmāns* have displayed when it comes to its composition. It is because the *Mughals* paid special attention not only to the language of *Farmāns* but also to the niceties of the linguistic features. They even barred others from using the same type of language, including the royal family. This gives a good clue to the importance of language. That is why it is recommended that specific attention is to be paid to the language, although judiciary and lawyers pay much attention to remove ambiguities and their special departments working on this issue.

6. The last important factor is the economic as well as environmental consideration. It is because both these factors loom large when the justice is administered and trial is conduced. Moreover, economic factor is important in punishments and imprisonment. In the same way environment plays an important role in legislation because most of the laws must conform to the people of specific area living in a specific region. The reason is that the environment has a strong impact on the economy and both impact each other and the public at large. That is why criminal laws and procedural codes in several countries differ from country to country and from place to place. Even in the same country, sometimes procedural laws differ

great deal such as rules about the timing of the judicial proceedings often depend on the situation of day to day weather. In the same way, penal codes also depend on several environmental considerations where clothing, dressing, eating habits, daily living style and even individual habits play a role in the legislation and formulation of procedural and penal codes and their final compilation.

In short, there are various factors that have shaped the issuing, writing, articulating, implementation and legislation of *Farmāns* during the *Mughal* period which are like guiding lights for the existing and future political and democratic dispensations to take care of. The fast transformation in cultural, ethnic and social orientation, crumbling of belief system, evolution in conventions and traditions, elimination of customs and global warming have made it imperative for the governments to seek guidance from the old legislation. Specifically, in the Subcontinent and in the prevalent atmosphere of Pakistan and India, it becomes imperative that they should consult these documents to legislate in order to frame new procedural and penal codes in the light of the aspects to make them to be in conformity against the existing social norms and codes so that the political stability and solidity could be achieved which is the primary aim of the jurisprudence. This means that the traditions must continue despite their shortcomings and drawbacks to meet the progressive evolution in legal matters including Islamic jurisprudence regarding procedural and penal matters.

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List Verses of Holy Qur'ān

S.No.	Verses	Page No.
1.	يَا أَيُّهَا الَّذِينَ آمَنُواْ أَطِيعُواْ اللّهَ وَأَطِيعُواْ الرَّسُولَ وَأُوْلِي الأَمْرِ مِنكُمْ	45
2.	وَلاَ يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلاَّ تَعْدِلُواْ	155
3.	إِنَّ الَّذِينَ أَجْرَمُوا كَانُواْ مِنَ الَّذِينَ آمَنُوا يَضْحَكُونَ	157
4.	مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا	164
5.	وَمَن يَقْتُلْ مُؤْمِنًا مُّتَعَمِّدًا فَجَزَآؤُهُ جَهَنَّمُ	165
6.	وَلاَ تَقْتُلُواْ النَّفْسَ الَّتِي حَرَّمَ اللّهُ إِلاَّ بِالحَقِّ وَمَن قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلاَ يُسْرِف فِّي الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا	165
7.	تِلْكَ حُدُودُ اللّهِ فَلاَ تَعْتَدُوهَا وَمَن يَتَعَدَّ حُدُودَ اللّهِ فَأُوْلَئِكَ هُمُ الظَّالِمُونَ	168
8.	إِنَّ اللّهَ يَأْمُرُ بِالْعَدْلِ وَالإِحْسَانِ وَإِيتَاء ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاء وَالْمُنكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ	174
9.	وَالْعَيْنَ بِالْعَيْنِ وَالأَنفَ بِالأَنفِ وَالأُذُنَ بِالأُذُنِ وَالسِّنَّ بِالسِّنِّ	176
10.	مِنْ أَجْلِ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءتْهُمْ رُسُلُنَا بِالبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَلِكَ فِي الأَرْضِ لَمُسْرِفُونَ	176
11.	كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالأُنثَى بِالأُنثَى	177
12.	وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاء فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُوْلَئِكَ هُمُ الْفَاسِقُونَ	192
13.	إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللّهَ غَفُورٌ رَّحِيمٌ	192
14.	إِنَّ الَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ الْغَافِلَاتِ الْمُؤْمِنَاتِ لُعِنُوا فِي الدُّنْيَا وَالْآخِرَةِ وَلَهُمْ عَذَابٌ عَظِيمٌ	192
15.	إِنَّمَا جَزَاء الَّذِينَ يُحَارِبُونَ اللّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الأَرْضِ فَسَادًا أَن يُقَتَّلُواْ أَوْ يُصَلَّبُواْ أَوْ تُقَطَّعَ أَيْدِيهِمْ	197

	وَأَرْجُلُهُم مِّنْ خِلافٍ أَوْ يُنفَوْاْ مِنَ الأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الآخِرَةِ عَذَابٌ عَظِيمٌ	
200	يَا أَيُّهَا الَّذِينَ آمَنُواْ لاَ تَقْرَبُواْ الصَّلاَةَ وَأَنتُمْ سُكَارَى حَتَّى تَعْلَمُواْ مَا تَقُولُونَ	16.
200	يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ لِلنَّاسِ وَإِثْمُهُمَآ أَكْبَرُ مِن نَّفْعِهِمَا	17.
200	يَا أَيُّهَا الَّذِينَ آمَنُواْ إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالأَنصَابُ وَالأَزْلاَمُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ	18.
228	فَتَعَالَى اللهُ الْمَلِكُ الْحَقُّ وَلَا تَعْجَلْ بِالْقُرْآنِ مِن قَبْلِ أَن يُقْضَى إِلَيْكَ وَحْيُهُ وَقُل رَّبِّ زِدْنِي عِلْمًا	19.
228	وَقَالُواْ لَوْلا أُنزِلَ عَلَيْهِ مَلَكٌ وَلَوْ أَنزَلْنَا مَلَكًا لَّقُضِيَ الأَمْرُ ثُمَّ لاَ يُنظَرُونَ	20.
261	يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْنِسُوا	21.
262	يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْنِسُوا وَتُسَلِّمُوا عَلَى أَهْلِهَا ذَلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ تَذَكَّرُونَ	22.
307	وَأَن لَّيْسَ لِلْإِنسَانِ إِلَّا مَا سَعَى	23.
307	لَقَدْ خَلَقْنَا الْإِنسَانَ فِي أَحْسَنِ تَقْوِيمٍ	24.
307	وَلاَ تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى	25.
308	يَا أَيُّهَا الَّذِينَ آمَنُواْ كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالأُنثَى بِالأُنثَى	26.
308	وَلْتَكُن مِّنكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنكَرِ وَأُوْلَئِكَ هُمُ الْمُفْلِحُونَ	27.
309	يَا أَيُّهَا الَّذِينَ آمَنُواْ كُونُواْ قَوَّامِينَ بِالْقِسْطِ شُهَدَاء للهِ وَلَوْ عَلَى أَنفُسِكُمْ أَوِ الْوَالِدَيْنِ وَالأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللهُ أَوْلَى بِهِمَا	28.

List Verses of the Holy Qur'ān