What does it mean to be an official madhhab? Hanafism and the Ottoman empire

Peters, R.

Published in:
The Islamic school of law: evolution, devolution, and progress

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Chapter Ten
WHAT DOES IT MEAN TO BE AN OFFICIAL MADHHAB? HANAFISM AND THE OTTOMAN EMPIRE
Rudolph Peters

Introduction

In this paper I will explore the special relationship between the Hanafi madhhab and the Ottoman Empire. I will do so by analyzing two aspects of this relationship. First I will discuss the question of how Hanafi doctrine, between the twelfth and sixteenth centuries, was molded into an unequivocal body of rulings ready to be applied by the qadis. Secondly I will examine how the relationship between the Hanafi and the other madhhabbs was organized after the Ottoman conquest of non-Hanafi regions. My conclusion will be that the result of this combined activity was the emergence of a distinctive Ottoman Hanafism, one that accordingly was well suited to the requirements of the bureaucratic set-up of the Ottoman state.

If someone would like to know the ruling of the Shari‘a on some specific legal issue and consults the standard fiqh texts, he is likely to be bewildered by the multitude of opinions, even within one madhhab. One of the questions that has intrigued me for some time already is how such a fluid doctrine full of contradictions could be enforced by courts. Or in other words, how Islamic legal doctrine with its many conflicting views and rulings could be transformed into positive law. In theory, three institutions could play a role in this process: the madhhab, as a community of scholars and a doctrine, the State, and the qadi. Here I will focus on the madhhab and the State, since, in the Ottoman Empire, the role of the judge was relatively minor in this respect. The State and the Hanafi jurists developed a body of law that did not leave much room for judicial discretion on points of law. In this paper I will first pursue how this transformation from a scholarly, often contradictory doctrine into a more or less homogeneous body of law came about between roughly the twelfth and the seventeenth centuries.

The second aspect of the relationship between the Hanafi madhhab and the Ottoman State became practically relevant after the Ottoman conquests
of the Arab Middle East, in the early sixteenth century. For then the Ottomans began to rule over large groups of Sunni Muslims following other madhhabs. I will show that the State, on the basis of existing Hanafi doctrine, elaborated a law of conflict that clearly regulated the position of the other madhhabs and their judges.

*Transforming the doctrine into positive law*

The process of transformation of the Shari'a into positive law is an operation in which the jurists of a madhhab, the State, and the qadis have a role to play. These roles may vary. One may think of a model in which the State has a limited role in the process: it creates law courts and appoints qadis to whom the application of the doctrine is entrusted. These qadis then have extensive discretionary powers in applying the Shari'a according to their independent reasoning (*ijtihad*). Since they are not bound by a clear and unequivocal body of rules, they can adjudicate cases on their own merits, using only the broad principles given by the Shari'a doctrine. This type of justice would resemble closely what Max Weber called *Kadi-Justiz*. This is the situation in present-day Saudi Arabia, where the qadis are free to adjudicate according to any ruling within the Hanbali madhhab and even from other madhhabs, if their *ijtihad* leads them there. This is also the way Lawrence Rosen describes the modus operandi of the Moroccan qadis. At the other end of the spectrum we would have a state which considers itself the only source of the law to the exclusion of the legal scholars: Positive law then is what the State enacts and the qadis have to apply, without much room for discretionary decisions. This is the state of affairs that prevails in most of the Islamic world these days, now that nearly everywhere Islamic law, to the extent that it is applied, is enforced through state-enacted laws. The Ottoman type of justice that existed between the sixteenth and the nineteenth centuries stood somewhere between these two extremes. The Hanafi jurists and the State defined precisely what the prevailing Hanafi doctrine was, thus creating an unequivocal body of rules and restricting the qadis' freedom in choosing specific views from Hanafi doctrine.

That the State could thus interfere with the doctrine of the law was not self-evident. There is no agreement among the different madhhabs that this is allowed. If a qadi is appointed on the condition that he adjudicates according to one madhhab, all madhhabs, except the Hanafis, regard the appointment as void, or they hold that the appointment is valid, but the stipulation inoperative, at least if the qadi is a *mujtahid*. If the head of state
orders or forbids a qadi to follow a certain madhhab in specific cases, such an order or prohibition would also be void. The only way for the State to influence the administration of justice, according to these madh­habs, is to prohibit the qadis from hearing certain types of cases.

For the Hanafis an appointment on the condition that the nominee exclusively applies one certain madhhab is valid, but only if he himself belongs to that madhhab. According to them, sentences pronounced by qadis according to the doctrine of another madhhab are invalid, since they cannot but be motivated by false and arbitrary personal views. Later Hanafi jurists asserted that a qadi who is a muqallid may only adjudicate according to the correct opinion of the madhhab (sahih al-madhhab, ma ‘alayh al-‘amal wa l-fatwa) and that, in addition, the sultan may oblige him to do so. Their argument is that decisions based on other views are ultra vires, since the qadi has exceeded his competency, which is to give judgment according to the correct Hanafi opinions.

This process shows interesting similarities with the Roman Lex citandi, enacted in AD 426. This law had the same objectives, namely, imposing some order on the legal doctrine elaborated by the Roman jurists. It instructed judges to follow only the opinions included in the works of five specific jurists, regarded as eminently authoritative, and gave rules to select an opinion in case of difference of opinion among them.

The role of the jurists

With regard to a specific point of law, the Hanafi madhhab usually gives several opinions, for often the three founding fathers, Abū Ḥanīfa, Abū Yūsuf, and Muḥammad al-Shaybānī held different views. On some issues there were even more views, since other opinions, ascribed to less important jurists from the formative period, such as Zufar or al-Ḥasan b. Ziyād also found their way into the standard Hanafi works. In the older, more concise works, the various views would just be juxtaposed. In more extensive works, such as al-Mabsūt by al-Sarakhsi (d. 483/1090), and in the collections of fatwas, the authors would argue why they would prefer certain opinions, for instance because they considered the arguments in favor of them stronger, or because they regarded them as more fitting to changing social circumstances. Such preferred views could become generally accepted and then find their way into the standard textbooks. But in general, the different opinions were juxtaposed without an indication of what opinion was more correct. In the early centuries of the Hanafi madhhab this did not pose many problems. Lawyers, be they qadis or muftis, were supposed
to be mujtahids to some extent and capable of distinguishing between correct and incorrect views. However, gradually it was felt that the scholars were losing this ability. Nevertheless, they had to work with these standard texts of the Hanafi madhhab. In order to find the authoritative and correct views, they could no longer rely on reasoning based on proofs (adilla) or on content. Instead, formal rules were needed for muftis and qadis to guide them in making the right selection of opinions.

During the late twelfth century jurists began to argue that there was a hierarchy of authority among the founders of the Hanafi madhhab and to formulate rules to determine whose opinion was most authoritative if there was a difference of opinion on a specific issue. In the chronology of the early sixteenth-century Ottoman jurist Kamâlpaşazâde (d. 940/1534), this process coincided with the gradual extinction of the fifth class of jurists (out of seven), consisting of those capable of determining authoritative from non-authoritative opinions (āṣḥāb al-tarjih min al-muqallidin), such as al-Marghînâni (d. 593/1197). The rules elaborated during the late twelfth century were not yet uniform nor undisputed. Some jurists, such as al-Ghazâwî (d. 593/1197), in his al-Hâdi al-Qudsi, continued to argue that it was better to examine the strength of the arguments for each opinion rather than to be led by formal criteria. However, the doctrine that finally prevailed was the following: If confronted with conflicting opinions on an issue, the qadi or mufti must first follow the opinion of Abû Hanîfâ, then that of Abû Yusuf, then that of Muḥammad al-Shaybânî and finally those of Zufar or al-Ḥasan b. Ziyâd (without preference for either of them). Slightly different criteria were also proposed but did not prevail. Even as late as the sixteenth century there were differences of opinion, e.g., about whether Zufar and al-Ḥasan b. Ziyâd occupied the same rank or whether Zufar was more authoritative. Later scholars added the rule that in questions related to the administration of justice Abû Yusuf’s opinion was to be preferred and in cases touching upon the cognate relationships (dhawû l-arihâm) Muḥammad al-Shaybânî’s view. If no opinion of any of the older jurists was known, then the opinion must be adopted of the majority of scholars from the following centuries, such as Abû Ḥafs al-Kabîr (d. 216/831), al-Ṭahâwî (d. 321/933), Abû Ja‘far al-Hinduwânlî (d. 362/973), or Abû l-Layth al-Samarqandi (d. ca. 390/1000). A final rule was that if on one issue there were two views, one based on analogy and the other on istihlân, the latter should be adopted.

Through this process, Hanafi opinion by the sixteenth century had become standardized, unequivocal, and easy to apply. Although the textbooks still mentioned the different opinions with regard to one issue, they clearly indicated which opinion was the prevailing one. The following passage from
**WHAT DOES IT MEAN TO BE AN OFFICIAL MADHĦBAB?**

*Multaqā al-abhur* by Ibrāhīm al-Ḥalabī (d. 956/1549), one of the most popular textbooks in the Ottoman Empire, \(^6\) makes this clear:

Some people wanting to acquire more knowledge have asked me to compile a book containing the issues dealt with in *[the Compendium by]* al-Qudūrī [d. 428/1037], in *al-Mukhtār* [lit. *fatwā*, by al-Mawsīlī, d. 693/1284], in *Kanz* [al-daqa‘īq by al-Nasafi, d. 710/1310] and *Waqīyat* [al-rūwāya fi masā‘il al-hidāya, by Tāj al-Sharī‘a, d. 8th/14th c.] in an easy and accessible style. I responded to this request and added some indispensable issues dealt with in the *Majma‘* [al-bahrayn wa-multaqā al-nayyirayn, by Ibn al-Sa‘ātī, d. 694/1285] and a small part from *al-Hidāya* [by al-Marghīnānī, d. 593/1197]. I clearly indicated the controversies among our Imams and [with regard to each issue] I have first mentioned the most preferable opinion (al-arjah) among those held by them, and then the other opinions. However, in some places I have specifically connected them [the opinions not mentioned first] with words expressing preference (al-tajjih) [Muḥammad Shaykhzāde: such as “the correct opinion, the preferable opinion, the opinion to be selected for giving fatwas”]. Regarding the controversies among the later scholars or among [the authors of] the books I just mentioned, all views that I introduced with the words “it has been said” (qīla) or “they have said” (qālū), even if they are linked to words like “the correct view” (al-jahīh) are less preferable than opinions not introduced in such a way.\(^7\)

The final stage of this development was reached in the nineteenth century when texts on certain topics were written that only contained the authoritative opinions, leaving out the rejected views. Examples of these are the textbook on Islamic criminal law by ‘Omer Hilmi\(^8\) and the legal compilations by the Egyptian Qadri Pasha.

**The role of the State**

When the Ottoman State emerged, the Hanafi madhhab, brought by the Seljuqs from Central Asia, was already well established in Anatolia. Therefore it was the obvious choice for an official madhhab. The State appointed Hanafi qadis and at a certain moment began to instruct them to apply exclusively Hanafi doctrine. As we have seen, the Hanafi madhhab was the one that accepted such administrative practices without reservations. Moreover, according to this madhhab, Hanafi qadis, especially if they are muqallids, must follow the most authoritative opinion of the madhhab. If they do otherwise, their sentences are void. To emphasize this point, a sultanic order was issued in 1537 to enjoin the qadis in Anatolia and the Balkans (Rūm) not to follow Shafi‘i opinions for certain purposes.\(^9\) Furthermore, the Ottoman sultans began to instruct qadis when they were

---

\(^6\) The Compendium by al-Qudūrī is a foundational work in the Hanafi tradition, covering a wide range of Islamic legal topics.

\(^7\) The idea of preference in fatwās is crucial in the Hanafi school for determining which legal opinion to follow in practical cases.

\(^8\) ‘Omer Hilmi was a prominent legal scholar and the first head of the General Court of Criminal Cases in 1877.

\(^9\) The edict by the Ottoman sultans on the Hanafi branch of the law was a significant step towards uniformity in legal practice across the empire.
appointed that they must adjudicate according to the most authoritative Hanafi views. The standard formula used in the letters of appointment was:

( . . ) to adhere to enforcing the provisions of the laws of the Prophet and to applying divine commands and interdictions, not to overstep the boundaries of the true Shari'a, properly to follow in the questions that present itself the various opinions [transmitted] from Hanafi imams, to find their most correct opinions (asahh-i aqêdê) and to act accordingly.²⁰

The sultan, however, could decide for whatever reason to instruct the qadis with regard to certain cases to follow not the prevailing view, but another, less authoritative opinion. In the sixteenth century, there were already thirty-two of these orders.²¹ Many of them date from the period of office of the famous Ottoman state mufti (shaykh al-İslâm) Abû l-Su'ûd (d. 982/1574).²² Sometimes such an order would just corroborate an already existing preference of certain muftis for a specific opinion. Often, however, the sultan, prompted no doubt by leading jurists, would introduce a change in the legal system by enforcing a view that was regarded as weak and without authority. I will give two examples, one in which the sultan corroborated an existing preference and one in which the sultan abolished an authoritative opinion in favor of a weaker one.

In the Mültaqâ al-abhur the following statement is made regarding a marriage concluded by a legally capable woman without the consent of her matrimonial guardian. The authoritative rule, ascribed to Abu Hanifa, is that such a woman can validly contract her own marriage and that her marriage guardian can demand rescission of the contract by the judge in the event she has married herself to a person who is not her coequal:

Marriage concluded by a free woman of full legal capacity is valid. However, the marriage guardian is entitled to oppose [such a marriage] if the husband is not her coequal (kefe'). Al-Hasan b. Ziyäd (d. 201/819), however, has reported from the Imam [Abû Haniîa] that it is not valid and Qâdikhan (d. 592/1196) has issued fatwas according to this opinion. According to Muhammed [al-Shaybânî, d. 189/805] such a marriage is concluded conditionally [i.e., conditional on the guardian’s approval] even if the husband is her coequal.²³

The commentator Muhammed Shaykhzade (d. 1078/1667) observes regarding the alternative opinion of Abû Ḥaniîa transmitted by al-Hasan b. Ziyäd:

This opinion is more correct and cautious and therefore preferable for fatwas in our days because not every matrimonial guardian is proficient in litigation and not every judge is just. Therefore it is more appropriate to close this door, especially now that an order to that effect has been issued by the Sultan and that he has instructed muftis to issue fatwas accordingly.²⁴
This seems to be not entirely accurate. The text of Abū l-Su'ūd's *Ma'dīrūţāt* mentions that the sultan imposed an opinion of Muhammad al-Shaybānī, according to which a legally capable woman may not conclude a valid marriage without her matrimonial guardian’s consent, unless she does not have one. In that case, it is not required for her to obtain the qadi’s approval for concluding a valid marriage, unlike persons who are legally incapable such as minors. That the sultan imposed al-Shaybānī’s opinion rather than the alternative view of Abū Ḥanīfa transmitted by al-Ḥasan b. Ziyād must have had practical reasons. According to the latter opinion, it must first be examined whether or not the bridegroom is a coequal before the validity of the marriage can be established, whereas according to al-Shaybānī, no marriage is binding without the guardian’s consent. Although the sultan did not follow precisely the opinion that the jurists preferred for giving fatwas, he evidently followed a trend among the jurists aimed at imposing greater familial control over females.

Another sultanic order dealt with the law of *qasāma* (extrajudicial oath, repeated 50 times). When a body, with traces of violent death, is found on private property, the next of kin, after a special procedure consisting of accusing the owner or inhabitants of the property and having them swear a number of oaths, can demand the victim’s blood price from them. In this connection, Abū Ḥanīfa and Muhammad al-Shaybānī hold that the owner’s solidarity group (*āqīla*) is liable, whereas according to Abū Yūsuf’s view, the actual occupants (owners or tenants) and not their solidarity groups must pay it. The latter opinion was weaker, according to the formal rules, but socially more beneficial. For its enforcement would stimulate the vigilance of the residents and their diligence in keeping their neighborhood safe, since they themselves and not their solidarity groups were held liable. For that reason it was imposed by a sultanic order.

Other sultanic orders regarded the punishment of Muslims or Christians for insulting the Prophet Muhammad, and the violation of price regulations for money lending (via *hilās*).

When Egypt became autonomous during the nineteenth century, the same procedure was used by the khedives in the field of Shari‘a justice. In 1858 the qadis were ordered to apply the opinion of Abū Yūsuf and Muhammad al-Shaybānī in cases of manslaughter in order to determine whether the killing had been committed deliberately or not. The prevailing view within the Hanafi madhhab, held by Abū Ḥanīfa, was that criminal intent is only assumed to exist if the killer used a sharp weapon or instrument that can sever parts of the body, or fire. According to Abū Yūsuf and Muhammad al-Shaybānī, however, there is criminal intent if a weapon or implement is used that as a rule is lethal. Since in Egypt
people were often killed by being beaten with the *nabbūt*, the long wooden stick Egyptian peasants usually carry with them, the khedive gave the less authoritative opinion force of law, so that killers using these sticks could be sentenced to death. A similar decree was issued in 1873, instructing qadis to follow Abū Yūsuf’s non-authoritative view according to which a Muslim may be sentenced to death for killing a non-Muslim temporary resident (*musta‘min*).30

A special type of state interference with the application of Hanafi doctrine is the introduction of a statute of limitations of fifteen years, by forbidding the qadis to take cognizance of claims after this period unless the plaintiff had a legal excuse.31 Here the sultan did not order the judiciary to follow a certain Hanafi opinion, but forbade the qadis to hear certain cases unless the sultan himself had issued a special order regarding the lawsuit.

*From Hanafi monopoly to Hanafi hegemony*

When in 1516–1517 the Ottomans conquered large parts of the Arab Middle East, they ruled for the first time over regions where the population followed non-Hanafi Sunni madhhabs. In these countries there was already a tradition of coexistence of qadis belonging to different madhhabs.32 In Egypt and Syria the Ottomans preserved this system of madhhab plurality, but placed it under Hanafi supremacy.33 The qadis belonging to the other madhhabs were given the position of deputy (*nā‘ib*) to the Hanafi qadi and were thus subordinated to him. Only the Hanafi qadis were paid by the State and rotated throughout the Empire as part of their career. The other qadis were locally recruited and usually appointed for life.34 In this section I will analyze how, after these conquests, the Ottomans on the basis of Hanafi doctrine regulated the position of these other madhhabs and their qadis. I will show that they were able to use, with some specifications and modifications, the existing Hanafi doctrines on these issues. Thus they created and enforced a Hanafi inter-madhhab law of conflict. I will focus on two aspects of this law of conflict: the practical implications of the coexistence of qadis following the different madhhabs and the status of their sentences.

Qadis had several functions. They not only decided legal disputes, but also registered important legal acts and contracts, such as the establishment of *waqfs* (charitable trusts), the sale of real estate, commercial partnerships, and marriages. The availability of qadis following four different madhhabs enabled those who wanted to register their contracts and uni-
lateral legal acts to select or exclude certain clauses or stipulations. For instance, if the founder of a *waqf* wanted to facilitate the replacement of the *waqf* property by other property (*istibdal*), he would register the *waqf* with the Hanbali qadi, since this school allowed this. Or if the relatives of a minor girl whose father and grandfather had died, wanted to marry her off themselves rather than request the state authorities to act as marriage guardians, they would register the marriage with the Hanafi qadi, since this madhhab allowed all male agnatic relatives to act as marriage guardians for minor girls, whereas according to the other schools only the father or grandfather could do so. Litigation, too, was affected by the coexistence of qadis of different madhhabs. The party who was able to choose the forum could use this to his advantage. A woman who was irrevocably repudiated would prefer to sue her ex-husband for maintenance before a Hanafi qadi, since only according to the Hanafis is she entitled to full maintenance. And an abandoned wife, whose husband had left property for her maintenance, could only sue for a divorce before the Hanbali qadi.

It is not clear how in the case of litigation the choice of forum was determined under Mamluk rule. After the Ottoman conquest, Hanafi doctrine was applied. The Hanafi jurists, however, held opposing views concerning the jurisdiction of the various qadis. Abū Yusuf’s position was that the plaintiff could choose the forum. His argument was that he is the one who claims something that is due him and wants to redress a wrong. Therefore, it is he who selects the court. Muḥammad al-Shaybānī, however, disagreed with Abū Yusuf, at least in those cases where there are several qadis, each with his own territorial jurisdiction or his own jurisdiction regarding persons (such as a military qadi). In such a situation the choice of forum is the defendant’s. This means that if there are two qadis, one with exclusive jurisdiction over neighborhood A and the other over neighborhood B, a defendant living in B cannot be forced to answer a claim before the court in A. Similarly, a civilian cannot be sued against his will before a military court. Muḥammad al-Shaybānī’s argument here derives from the definition of defendant as “the one who is forced to defend himself,” whereas the plaintiff is the one who is free to sue or not to sue. Since the defendant can be forced to answer a claim, the qadi must have jurisdiction over him. This implies that only the qadi of the defendant’s place of residence or the civilian qadi (if the defendant is not a soldier) is competent. Muḥammad al-Shaybānī’s opinion has become the authoritative one among the Hanafis.

However, his view did not apply to the situation in the large cities of the Arab Middle East. Although there were several qadis in one town, each belonging to a different madhhab, they all had full jurisdiction over
the entire town (and its environs). In such a situation, Muhammad al-Shaybānī’s argument for giving the choice of forum to the defendant does not apply and the plaintiff may select any of these qadis, because they all have the required jurisdiction. Nevertheless, the sultan, as mentioned by Abū l-Su‘ūd, forbade qadis to hear cases if the defendant had not agreed to the choice of forum. This was within his powers, for, as the jurists point out, if qadis acted against these instructions, they would exceed the terms of their appointment and their sentences would be void. The fatwa in which the issue is dealt with is interesting and worth quoting:

Q: If Zayd, who is a Hanafi, dies while away [from his hometown], and his Shafi‘i creditors produce evidence of their claims [against the estate] in the absence of the heirs, and if the Shafi‘i qadi finds for them and the Hanafi qadi thereafter issues execution on the judgment, is this legally acceptable?

A: No. The qadis in the Well-Protected Dominions [i.e., the Ottoman Empire] have been forbidden to give judgment contrary to the defendant’s madhhab and the Hanafi qadi’s order of execution is therefore null and void. Abū l-Su‘ūd. Muhammad [al-Shaybānī] held that the defendant’s choice of qadi is decisive. This is the ruling according to which fatwas must be issued. Qāḍīkhān and Majma‘ al-fatāwā.

The fatwa probably points to the existence of a practice in the Arab regions of the Empire of applying Shafi‘i law whenever the defendant failed to appear in court. Under Hanafi law, the court in such cases cannot pronounce a sentence. It is clear that the Ottoman State wanted to uphold Hanafi law, even in cases where other madhhabs offered remedies for substantive and procedural legal problems. This, I believe, was motivated by a bureaucratic tendency to impose uniformity in the administration of justice based on Hanafi doctrine, at the expense of pragmatic flexibility.

This fatwa leads us to the other issue, namely, the status of the sentences pronounced by the non-Hanafi qadis. After the Ottoman conquest, the Hanafi qadi in the Arab regions was given precedence over the other qadis. As appears from the fatwa quoted above, the non-Hanafi qadis heard cases and pronounced judgments only with the defendant’s consent. However, for the enforcement of such a judgment, a warrant of execution was required, issued by the Hanafi qadi, who was higher in rank than the others. In principle, all sentences of other qadis would be endorsed. The basic rule here is that sentences based on ijtihad cannot be reversed by other qadis. Its rationale is to prevent endless litigation. Yet there were certain limits. Hanafi doctrine in this respect was very much like the modern law of conflict of many states with Western legal systems, according to which national courts, under certain conditions, may apply foreign law, but only if this does not violate the ordre public (public policy), i.e., essen-
WHAT DOES IT MEAN TO BE AN OFFICIAL MADHHAB? 157

tional values of the legal system. For the Hanafi jurists, these essential values consisted in unequivocal texts of the Quran and hadith or the *ijmāʿ*. The Hanafi qadi would issue warrants of execution for the sentences of the other qadis unless they violated such texts as interpreted by Hanafi doctrine.59 Hanafi textbooks list a number of issues that are legal according to other madhhabs, but cannot be endorsed by Hanafi qadis. Among these issues we find the following:

1. Capital sentences based on the *qasāma* procedure, i.e., fifty oaths sworn by the victim's next of kin, a possibility recognized in Maliki law;

2. Sentences based on the testimony of one witness and an oath sworn by the plaintiff, recognized by all madhhabs except the Hanafis;

3. Sentences upholding the validity of a temporary marriage (*muṭaʿ*), recognized in Imami Shiʿite doctrine;

4. Capital sentences pronounced in spite of the fact that one of the victim's female heirs has waived her right to demand retribution, valid under Maliki law;

5. Sentences regarding a triple repudiation pronounced in one session as a single one, based on an opinion espoused by some Hanbalis.40

Through the application of this law of conflict, the Ottomans could both uphold Hanafi supremacy and meet the practical demands of the local population. However, we must not exaggerate the practical importance of this system. It functioned only in a few large cities. Elsewhere, the non-Hanafis would appeal to their muftis, who would then act as arbiters, thus enabling the population to live according to its own madhhab.41

At the moment I have no information about whether the Ottoman system of a plurality of jurisdictions under Hanafi hegemony continued to function in Syria into the nineteenth century. In Egypt it was abolished in 1802.42 Later, in 1835–36, Egyptian muftis were forbidden to give fatwas according to other madhhabs43 and only Hanafi law was enforced.

Conclusion

In this paper I have argued that the application of Islamic law does not necessarily leave the qadi much room for discretion. In the particular case of the Ottoman Empire it can be shown that both Hanafi legal scholars and the State developed tools in order to restrict the qadis in their freedom to choose legal opinions for their decisions. Hanafi scholars developed formal criteria to determine which opinions were more authoritative or more correct and held that sentences pronounced in disregard of these
rules were void. This was corroborated by the Ottoman State, which enjoined the qadis, when they were appointed, to follow the most authoritative opinions of the Hanafi madhhab. In some cases, however, the qadis, for reasons of expediency, were instructed by the sultan to follow other opinions. In this way a typical Ottoman Hanafi doctrine came into existence, with legal textbooks that, although they contained the whole range of Hanafi opinions on a certain issue, could be read as clear legal codes. The result was a uniform legal doctrine and a predictable administration of the law.

When the Ottoman Empire, from the beginning of the sixteenth century, began to rule over regions with Muslim populations following other madhhabs, the Hanafi monopoly was limited to the Balkans and Anatolia. Here the qadis and muftis were explicitly forbidden to follow other madhhabs, which, it would seem, they sometimes did in order to circumvent certain difficulties within the Hanafi doctrine. In the newly conquered areas, however, the judges and muftis of other madhhabs were tolerated, but under the supremacy of the official, state-paid Hanafi qadi. On the strength of a sultanic decree, the competence of these qadis in regard to each lawsuit depended on the defendant’s choice. The sentences of non-Hanafi qadis had to be approved and given a warrant of execution by the Hanafi court. Before doing so, the court would check whether the sentence violated, from the Hanafi perspective, texts of the Quran, the hadith, or the *ijma*. As we have lists of rulings that were regarded as unacceptable in this respect, we have an idea about what, according to Hanafi scholars, was seen as the inviolable core of Hanafi doctrine. This is comparable to the function of public policy in the law of conflicts in many Western or Western-inspired legal systems, which consists of the essential national legal principles that may not be violated when courts must apply foreign law.

Ottoman Hanafi doctrine developed and was elaborated by Hanafi jurists and the State, acting in close cooperation. As a result of this cooperation a legal doctrine and practice emerged that were both uniform and predictable. These qualities made the resulting legal system well suited to the bureaucratic character of the Ottoman State.
NOTES TO PP. 145–150

67. Witness the efforts of al-Bahram to “prove” that al-Tusi’s thought does not deviate from that of Imam ʿAlī (Gleave 2000:52–55).
68. Calder 2000, Wheeler 1996:167–224. Wheeler’s comments are particularly pertinent: post classical ʿHanafi scholarship is built upon the accretion of interpretation regarding the opinion of the second century authorities. . . . The exposition of the second century opinions, through the medium of subsequent scholarship, shows how the authority of a given definition of practice is less about the interpretation of revelation and more about being able to justify a given interpretation in the light of the traditional conclusions reached by previous generations of scholarship.” (Wheeler 1996:224) Hallaq, on the other hand, argues that the fatwa analyzed in Hallaq 1994b “bespeaks of the space in the Islamic legal system which was open for the introduction of different, indeed diametrically opposing, opinion.” (Hallaq 1994b:74). See also Gerber 1999:71 ff. for a similar, though more nuanced, discussion of the interaction of conservative and innovatory forces in late classical Hanafi-Ottoman law.

Notes to Rudolph Peters

4. The jurists liken this issue to the question of adding certain stipulations to nominate contracts. In this case it must be determined whether or not a given stipulation is valid, or whether or not it vitiates the contract to which it was added.
7. Al-mutun al-arbaʿa: al-Mukhtār li Ijāzat al-ʿawāliṣ by al-Mawṣilī (d. 693/1284); Kanṣ al-daqīq by al-Nasafī (d. 710/1310); al-Wiṣāya by Tāj al-Sharīʿa (8th/14th c.), and Majmaʿ al-Bahram by Ibn al-Sāʿātī (d. 694/1285).
8. Later jurists usually quote al-Sajawandī (d. ca. 596/1200), the author of al-Faraʾid al-Sirājīyya, as the auctor intellectualis of this hierarchy. See Ibn ʿAbidin 1882, 1:52.
10. See n. 12.
12. Some held that a mufti was free in following either opinion, if ʿAbū Yūsuf and Muḥammad al-Shaybānī together had one opinion and ʿAbū Ḥanīfa another. Ibn ʿAbidin 1882, 1:52. Other jurists held that if the three ʿHanafi founding fathers were divided, the majority opinion must be followed. Selle 1962:15, quoting Qāḍīkhan (d. 592/1196).
14. The most complete exposé of these formal selection criteria can be found in Ibn "Abidin 1907–1908:25 ff. See also Ibn "Abidin 1882, 1:51–52, and 4:419.
15. This seems to be a special Hanafi feature. An admittedly quick scanning of texts of other madhhabs revealed that only the Shafi'is developed some formal criteria to determine the authoritative opinion in cases where there are conflicting views transmitted from al-Shafi'i. See e.g. al-Ramlî (d. 1004/1595–6) 1984, 1:50–51.
17. Shaykhzade 1883, 1:7 (text of the Mutilqā).
19. Akçindiz 1990:70. See also Horster 1935:30–31. The purpose of having recourse to a Shafi'i qadi was to give a wife the right to demand a divorce on the ground that her husband was absent and had left her without means to support her. In Syria and Palestine, women would go in such cases to a Shafi'i mufti to obtain such a divorce. See Tucker 1998.
32. See e.g. Escovitz 1982; Jackson 1995.
33. For the changes in the administration of justice in Egypt, immediately after the Ottoman conquest, see Behrens-Abouseif 1994:69–85.
35. For these and other practical issues related to the presence of four qadis, see al-Qalqashandî 1987, 11:197–202, quoting al-Tabrîzî by al-Umarî (d. 749/1349).
36. Ibn "Abidîn 1882, 4:580–581; Ibn "Abidîn 1882–1883, 1:218–219. In Egypt certain types of cases, such as those regarding long-term rentals of waqf property and rescission of marriage contracts, were first reviewed by the Hanafi qadi before being heard by a deputy belonging to another madhhab. Nahal 1979:17.