Syed Mahmood and the Transformation of Muslim Law in British India

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September 2004

A thesis submitted to McGill University in partial fulfilment of the requirements of the degree of Doctor of Philosophy

Your file Votre référence
ISBN: 0-494-12853-4
Our file Notre référence
ISBN: 0-494-12853-4

Abstract

The British colonial administration in India transformed Muslim law in the nineteenth century through the three concurrent processes of translation, legislation, and adjudication. Although Indian Muslims were gradually displaced in their traditional position as interpreters of that law in the role of *muftīs*, discerning and applying the *sharī'ah* according to *Ḥanafī* principles of *fiqh*, they nonetheless played a vital role in the transformation of Muslim law. Towards the end of the nineteenth century, Muslim participation became more noticeable and significant as they moved into increasingly influential positions in the British judicial administration. Syed Mahmood (1850-1903) was a pioneer in this movement, being one of the first Indian Muslims to study law and become a barrister in England, being the first non-European member of the Allahabad Bar, and being the first Indian Muslim appointed to any High Court in British India. During his tenure as judge of the High Court at Allahabad, he wrote numerous judgments on matters of civil law, including matters which the British regime had determined were to be governed by Muslim law, or rather, by the amalgam of Muslim and English law called "Anglo-Mohammedan law" into which it had been transformed. He understood certain aspects Muslim law, especially criminal law and laws of evidence, to have been abrogated by British law in India, but stoutly resisted the incursion of English law and promoted the acceptance of Muslim law as the customary law in other areas. His critique of the British administration of justice in India and his persistent independence of thought while serving on the High Court brought him into conflict with his fellow judges. He was eventually forced to resign in 1892, but his recorded judgments in the Indian Law Reports continued to provide an authoritative exposition of Muslim law for succeeding generations of jurists. In addition to elucidating the transformation of Muslim law, the study of Syed Mahmood's life and writings reveals how some Muslims in India were working as active agents to construct a new kind of knowledge of their culture under British colonial domination.

Résumé

Lors du dix-neuvième siècle, l'administration coloniale britannique a transformé le droit musulman en Inde en employant trois processus concertés : la traduction, la législation et le jugement. Bien que les Indiens de foi islamique aient perdu, petit à petit, leurs positions d'interprètes de la loi en tant que *muftīs*, ce que jadis leur avait permis d'étudier et d'appliquer la *sharī'ah* selon les principes de *fiqh* de l'école *Ḥanafī*, ils ont malgré tout joué un rôle important dans la transformation du droit musulman. Vers la fin du dix-neuvième siècle, la participation de Musulmans est devenue plus perceptible et considérable, puisqu'ils ont atteint des positions avec plus d'influence dans l'administration judiciaire britannique. Syed Mahmood (1850-1903) était l'un des pionniers de ce mouvement, étant donné qu'il était un des premiers Indiens de foi islamique à étudier le droit musulman et devenir avocat en Angleterre, le premier membre du barreau d'Allahabad qui n'était pas d'origines européennes, et le premier Indien de foi islamique nommé à une des cours suprêmes de l'Inde britannique. Au cours de la période qu'il était juge à la cour suprême d'Allahabad, il a écrit de nombreux jugements concernant le droit civil, y compris des questions que le régime britannique permettait d'être régies par le droit musulman, ou plutôt, par l'amalgame du droit musulman et du droit britannique appelé droit «*Anglo-Muhammadan*». Selon lui, certains aspects du droit musulman, voir le droit criminel et les lois au sujet des preuves et du témoignage en particulier, avaient été abrogés par le droit britannique en Inde. Pourtant, il a vaillamment résisté l'incursion du droit britannique et il a travaillé pour que l'on accepte que le droit musulman, en tant que droit tenancier, régi d'autres domaines. Sa critique de l'administration judiciaire britannique en Inde et la façon dont il a manifesté de l'indépendance dans sa pensée lorsqu'il était juge à la cour suprême ont mené à des conflits avec ses collègues. En fin de compte, il a été obligé de démissionner en 1892, mais ses jugements, attestés dans les Rapports de Droit Indien, ont continué à fournir une exposition autorisée du droit musulman pour les générations de juristes qui le suivirent. L'étude de la vie et des écrits de Syed Mahmood n'est pas seulement utile pour élucider la transformation du droit musulman, mais, de plus, cela révèle comment certains Musulmans en Inde se sont activement dédiés à construire une nouvelle forme de connaissance à propos de leur culture sous la domination coloniale britannique.

Acknowledgments

I would like to express my appreciation to my advisor and thesis co-supervisor, Prof. Sajida Alvi, for constant encouragement and insightful suggestions throughout my years of graduate studies. Her assistance in defining the parameters of this research topic and in carefully reading my various chapters has been invaluable. Similarly, I am grateful to Prof. Wael Hallaq for sharing the duties of thesis co-supervisor and inspiring me to study Muslim law, a subject which I had found intimidating. He has helped to motivate me to integrate a stronger theoretical component in my writing. Two other scholars who have taken a special interest in my work on Syed Mahmood have been Prof. David Lelyveld of William Paterson University, and Prof. Avril A. Powell of SOAS; and I am grateful for their input.

I would also like to thank numerous librarians, archivists, and other scholars in their assistance in procuring the materials I needed for my research. In particular, I am grateful to Salwa Ferahian, Wayne St. Thomas and Stephen Millier of the Institute of Islamic Studies Library for their cheerful and ready help whenever I was chasing down some elusive publication. The staff Inter-Library Loans department are likewise to be commended for putting up with my seemingly unending requests for 19th century journal articles and books. In England, the staff of the British Library, especially David Blake and the others at the Oriental and India Office Collection enabled me to locate necessary manuscripts and government documents. The librarian at Lincoln's Inn, Guy Holborn, introduced me to the world of legal education in the Inns of Court and directed me to some very helpful sources.

In India, the staff at the National Archives in Delhi, and at the U.P. Provincial Archives in Lucknow were provided invaluable assistance in gaining access to fragile official documents and personal manuscripts. Librarians at Maulana Azad Library of the Aligarh Muslim University, of the Nehru Memorial Library in Delhi, of the Indian Law Institute in Delhi, and of the India International Centre also in Delhi were also helpful. I was particularly grateful for the numerous scholars in India who showed me such excellent hospitality and graciously gave of their time to listen to the details of my project. Among these were Prof. Radhika Singha, my research guide during my stay in India, Prof. Asghar

Abbas of the Sir Syed Academy who directed me to key Urdu sources, Prof. Farhat Hasan who was such a gracious host at Aligarh, Prof. Sushil Srivastava of Allahabad University, and Prof. Mushirul Hasan of Jamia Millia in Delhi.

My research in India was funded by the Government of India (GoI) through the India Studies Program of the Shastri Indo-Canadian Institute (SICI). Neither the GoI nor SICI necessarily endorses the views expressed herein. Other financial assistance came in the form of a SSHRC grant and regular Fellowships from the Institute of Islamic Studies. Ann Yaxley and the other office staff at the Institute have taken care of so many of the practical details through all my years of study there; I could not have survived without their help and encouragement. My fellow students have also been a great support and helpful in providing feedback. I want to thank Heather Empey, and for translating the Abstract at the last minute, and Charles Fletcher for making the official submission of the thesis in my absence.

Finally, I want to thank my many friends in Montreal for being patient with me while I was busy with completing my dissertation. I also want to express my gratitude to my parents and other family members for their prayers and unfailing support over the years. It is to them this work is dedicated.

Note on transliteration

For the transliteration of Arabic and Urdu words, I have followed the transliteration schemes of the Library of Congress and the American Library Association, as found in *ALA-LC Romanization Tables: Transliteration Schemes for Non-Roman Scripts*, comp. and ed. By Randall K. Barry (Washington DC: Library of Congress, 1991). For proper names of Muslims who wrote primarily in English, I have retained the spelling they adopted. For those who wrote primarily in Urdu, I have transliterated their names according to the ALA-LC scheme mentioned above. I have generally retained the place names as they were most commonly known with the exception of Awadh for Oudh.

Abbreviations

MAOC - Muhammadan Anglo-Oriental College
N.-W. P. – North-Western Provinces
ICS – Indian Civil Service

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Introduction

Syed Mahmood (1850-1903) is a forgotten pioneer of the transformation of Muslim law in modern South Asia. He was the first Muslim to be appointed as a judge to any of the High Courts of British India, and that at the comparatively young age of 32. In that appointment he contributed numerous landmark judicial decisions that shaped the content of not only Muslim law but also law in general, and the way it was administered in India. Prior to achieving that post, he blazed a trail that was followed by his younger contemporaries in their involvement in the judicial administration of British India. He was one of the first Indian Muslims to study in England and to receive his legal training in the English system of jurisprudence. He was the first Indian to be enrolled as a barrister in the High Court of Judicature at Allahabad in 1872. He was the first Indian to be appointed as a District Judge in the restructured judicial system of Awadh in 1879. He was also the first Indian to be appointed to as a Puisne Judge to the High Court at Allahabad, in addition to being the first Muslim in any of the High Courts in India. In all these fields, he had cleared the path for the greater participation by Indian Muslims in the administration of justice in their country. But Syed Mahmood's contribution cannot be limited to creating new career opportunities for Muslim youth in India. His greatest contribution is his lasting legacy in the way Muslim law is perceived and administered in the countries of South Asia today.

Muslim law has never been limited to a fixed text, but has been in the process of formation and transformation as Muslims continue to reflect on past centuries of jurisprudence produced by other Muslims, to seek to understand the law's relevance for their contemporary world, and to formulate law in light of such reflection and understanding. Historically, this process of forming and transforming law has been primarily the domain of Muslim jurists, though the enforcement of those laws in any region was determined to some extent by the political rulers of that region who promulgated additional laws and appointed the judges to adjudicate questions of law. In India before the British rulers took over that responsibility, Muslim law had been promulgated to the widest extent by the Mughal rulers of the 16th and 17th centuries. Centralized authority under the Mughals di-

minished in the 18th century, but the judicial infrastructure they had established continued to function.

When the British took control of the revenue collection in the Bengal region in the latter half of the 18th century, they also began to exercise increasing control of the judicial authority in the areas under their control. The 20th century Indian legal scholar Asif A. A. Fyzee has described the transformation of Muslim law in India under British colonialism.

> In the earlier days of British rule, the influence of Muslim Law, pure and simple, was felt everywhere. Originally the Company had merely the right of collecting the revenue. The administration of justice, civil and criminal, remained as it had been under the Mahomedan rule. The law-officers were mostly Muslims; the criminal law was Muslim; in civil matters, the Muslim Law was applied to Muslims and the Hindu Law to Hindus in accordance with the opinion of Pandits attached to the courts.[1]

But incrementally, the laws were changed until Muslim laws in regard to evidence and criminal law were abolished by codified laws in the 1860s and 1870s. In civil matters, too, the influence of Muslim law was increasingly restricted through legislation and the introduction of principles drawn from equity and the common law of England. "Thus the system known as 'Muhammadan law' in India and Pakistan is the *sharī'at*, as modified by English law, both common and statutory, and Equity, in the varying social and cultural conditions of the subcontinent."[2]

The transformation of Muslim law in India under British colonialism was implemented by three concurrent processes throughout the late 18th and 19th centuries: (1) translation, (2) legislation, and (3) adjudication leading to judicial precedents. Each process resulted in the publication of texts which became authoritative legal sources in the administration of Muslim law. Firstly, with limited access to original works of Muslim jurisprudence primarily due to their lack of facility in the Arabic and Persian languages, British judges relied heavily on English translations of a few key texts when deciding a case involving Muslim law. As a consequence, these few texts or rather their translations gained inordinate prominence as definitive expressions of Muslim law. Although their

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[1] Asaf A. A. Fyzee, *An Introduction to the Study of Mahomedan Law* (London: Oxford University Press, 1931), 38-39.

[2] Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India and Pakistan* (Oxford: Clarendon Press, 1965), xxi.

stated aim was to continue to administer Muslim law (as well as Hindu law) where it did not conflict with their own perceptions of justice, in reality the British rulers rigidified that law through their efforts to discover and translate authoritative texts that governed those rules. The *'ulamā*, (sing. *'ālim*: a Muslim scholar trained in the traditional Muslim sciences) who had continued to play the role of legal experts attached to the courts to advise the British judges appointed by the government, were increasingly sidelined by suspicious rulers who distrusted their discretion in deciding questions of Muslim law. In fact, the motivation for translating a select few traditional texts of *fiqh* (Muslim jurisprudence) was explicitly expressed to be the need to replace the living authorities of Muslim law with invariable textual authorities.

Secondly, early in its rule, the British government in India began legislating "Regulations" that regulated the both the content and application of the existing laws including Muslim laws. These Regulations were declared to have the authority to override those aspects of Muslim law which they addressed. In the 1830s, the local legislatures in Madras and Bombay were abolished, and legislative authority was centralised in the Governor-General and his council. At the same time the process of codification was accelerated through the appointment of a Law Commission and the introduction of comprehensive Acts to replace Muslim criminal law and laws of procedure entirely.

Finally, with the introduction of English judges into the judicial system of India, the English practice of recognizing judicial precedent as an authoritative source of law took root early and persisted despite the efforts of the promoters of codification to displace its authority. Decisions by the judges of the higher courts and of the highest court of appeal, the Privy Council in England, were recorded and disseminated to guide other judges and lawyers in their deliberations. Syed Mahmood was active in all three areas—in translation, in legislation, and in adjudication—making significant contributions of his own in each area and offering a decisive critique of the British activity in each as well.

From the beginning of British rule, Muslims played various roles in the transformation of Muslim law. As mentioned, *'ulamā* were assigned to the courts as law officers to issue authoritative opinions from Muslim law, or *fatwās*, on questions of Muslim laws which the British judges would then be bound to administer. Muslim scholars were also

the ones commissioned by the British rulers to translate authoritative texts of *fiqh* to be used in the courts as a gradual replacement of the work done by the court officers. Unlike the *Fatāwá-yi Ālamgīrī*, commissioned by the Mughal emperor Awrangzeb (r. 1658-1707) and produced by *'ulamā* a century earlier, these texts were not fresh compilations of law with attending commentaries and abridgements of previous works. In fact, any attempt by the Muslim translator to interpolate his own interpretation or application of the law to the changing times was seen as a corruption of the original text and condemned by the British administrators. Thus the creative transformation of Muslim law by the *'ulamā* was severely restricted. However, Muslims from the *ashraf* classes traditionally involved in bureaucratic administration continued to be employed by the British to serve as judges at the lower levels of legal administration.[3]

Syed Mahmood's father, Sir Sayyid Aḥmad Khān (1817-1898), came from such an *ashraf* heritage, joined the British Civil Service as an uncovenanted officer, and rose through the ranks of the judicial system to the highest post an Indian and an uncovenanted member of the civil service could reach at that time. He foresaw that if Indians, and Indian Muslims in particular, were to achieve posts of influence under British rule, they would need to adopt the language of the rulers and be trained according to their system of education. Accordingly, he provided for an English education for his two sons, the younger of which, Syed Mahmood, excelled in that system. Mahmood shared his father's vision for the establishment of an educational institution that would train young Muslims to be prepared for substantial positions in the British Indian bureaucracy. He undertook his education in England with the intention of becoming familiar with the English model of higher education at Cambridge University in order to replicate that system in India. At the same time, he also obtained his legal training in London, and upon returning to India he opted for a career in law, not in education.

By his deliberate choice of a judicial career, Syed Mahmood demonstrated his early conviction that modernization could be achieved within that setting. The moderniza-

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[3] The *ashraf* classes were those families of Muslim gentry that had evolved from the days of the early Muslim kingdoms and consolidated their influence in successive regimes by contributing their skills as administrators, soldiers and literati. See: C. A. Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870* (Cambridge, UK: Cambridge University Press, 1983; reprint, New Delhi: Oxford India Paperbacks, 2002), 189-193.

tion and advancement of the Muslim community was a key concern expressed in many of his speeches, often in the context of the promotion the Muhammadan Anglo-Oriental College (hereafter MAOC) at Aligarh, the outcome of the vision that he shared with his father. That Mahmood chose to work as a lawyer and then as a judge rather than as a teacher or educational administrator as his father desired constituted a significant departure from Aḥmad Khān's conviction that the key to advancement lay in the reform of Muslim education. Syed Mahmood perceived that the reclamation of the chief bureaucratic role traditionally played by the *ashraf* class to which his family belonged would require more than simply obtaining a facility in the language and education of the British rulers. Under British rule, real power lay in the law, specifically in the creation of law through legislation and in the interpretation of law through adjudication.

While members of previous generations of Muslims had provided tacit approval of changes in Muslim law introduced by the British through their active participation in the lower levels of the judiciary, Syed Mahmood articulated an acceptance of that transformation in his judgments at the highest levels of the judicial system in India. But his approach to the transformation of Muslim law was never simply a passive submission to the imperial regime. Nor can his labour be seen as active complicity in the destruction of the traditional practice of Muslim law. Rather, in his incisive critique of the British administration of Muslim law, and of law in general, Syed Mahmood never hesitated to challenge the perceptions and assumptions of his British masters and colleagues which did not measure up to his sense of justice and his understanding of the development of Muslim law in history.

In addition to his impact on the *manner* in which Muslim law was administered in India, Syed Mahmood's influence can also be seen in the *content* of that law. While the major forces in the transformation of the content of Muslim law in India in the 19th century were those processes of translation, legislation and adjudication initiated by the British colonial government, Syed Mahmood was able to shape the direction of those changes through his involvement in all three processes. In the area of translation, Syed Mahmood multiplied exponentially the number of authoritative sources used in the courts in deciding questions of Muslim law. In his use of the authoritative works of *fiqh*, he refused to be limited to the two or three sources that had been translated into English and were ac-

cepted as the standard sources utilized by the English judges. Rather he devoted himself to exploring the questions that arose in regard to Muslim law in a wide range of works of *fiqh*, and enabled his fellow judges to incorporate them into their own judgments by assisting in their translation. The official Indian Law Reports, published as a repository of the most influential rulings by the High Courts and consulted as an authoritative source of law, bear striking witness to Mahmood's impact in page after page of Arabic text which he included as footnotes to the translated portions of *fiqh* on which he based his judgments.

In the area of adjudication, Syed Mahmood made a definitive contribution to the content of Muslim law as it was being administered by the British in India. Mahmood never claimed to be a *mujtahid*, a Muslim jurist trained in traditional Muslim jurisprudence, or even an *'ālim*. But in his role as a judge that administered Muslim law, he did view himself as following the pattern of such seminal Muslim jurists such as Abū Yūsuf (d. 798), one of the two chief disciples of Abū Ḥanīfah (d. 767) and considered to be one of the founders of the Ḥanafī school of Muslim law. Although he relied heavily on the authoritative writings of previous generations of Muslim jurists and saw himself as bound to follow their opinions, he did not hesitate to appeal to the primary sources of the Qur'ān and Ḥadīth to discover the intent of the law when he felt a fresh interpretation was necessary. While serving as a judge of the High Court, Mahmood made influential rulings in matters such as pre-emption, gifts and endowments (*waqf*), conjugal rights, legitimacy of adoption, and the performance of prayers in mosques—rulings which are still cited in legal decisions today. Thus, while he was not a *mujtahid* with the authority to make independent rulings in Muslim law, his extensive contributions in the Indian Law Reports have been most influential in shaping the content of Muslim law as it is administered in South Asia today.

A prominent Muslim jurist in India has recently argued that, alongside the traditional sources of Muslim law, such judicial decisions by Indian courts "constitute in India the most significant 'source' of Islamic law to the extent it remains applicable in this

country."[4] In making this statement, he neither approves nor condemns this development; he merely states its reality and points out that it is indeed a departure from the traditional practice of Muslim law. Syed Mahmood likewise gave his rulings from such a position of realism. In his legal writings, he did not advocate a deliberate departure from the traditional *sharī'ah* or Muslim law; but nor did he lament the transformation or express a longing to return to the former state.[5] He made a deliberate choice to work within the system and use the instruments and institutions of the system to control the direction of the transformation of Muslim law in India.

In addition to working for that transformation through translation and adjudication, Syed Mahmood made distinctive contributions in the area of legislation as well. Whether it was through assisting his father in preparing his speeches before the Viceroy's legislative council, through writing letters as a private citizen to the central and provincial governments, or through submitting lengthy memoranda on proposed legislation in response to requests for his input as a High Court judge, Mahmood actively sought to influence the policies implemented by the colonial government. He was a proponent of the codification of law because he saw it as a means to restrict the on-going importation of English law by judges unacquainted with India or its traditional laws. In his judgments on the Bench, Mahmood was not content to apply merely the letter of the law, but would appeal to the principles of equity and justice that he felt were in the mind of the legislators in framing the rules he was called on to administer.

Since the processes of adjudication and legislation were often seen as rival forces, championed by officials with conflicting philosophies of how justice was to be administered in India, for Syed Mahmood to promote both meant that he would need to embody

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[4] Tahir Mahmood, *Islamic Law in Indian Courts since Independence: Fifty Years of Judicial Interpretation*, IOS Readings in Islamic Law (New Delhi: Institute of Objective Studies, 1997), 7.

[5] Syed Mahmood's contemporary, Abdur Rahim likewise commented, "Once the British India Courts in adjudicating upon questions raised before them have ascertained from the available materials, the Mohammedan Law applicable to the subject, these decisions themselves according to the principles of British Jurisprudence, form henceforth a fresh basis and starting point. If a rule of Mohammedan Law is laid down by a judgment of the Privy Council or has been settled by a uniform course of decisions of the Indian High Courts, it must be accepted even though it may not agree with a proper reading of the original authorities." See: Abdur Rahim, "A Historical Sketch of the Growth of Mohamedan Jurisprudence," *Calcutta Law Journal* 3 (1906): 109n. Abdur Rahim and other Muslim jurists of the early 20th century were more vocal than Syed Mahmood, who by then had died, in their criticism of the transformation of Muslim law, and actively lobbied for legislated changes.

that contradiction. Thus he can at times be seen insisting that a judge does not make law, but only makes his decision according to the rules he has been given, while at other times Mahmood definitely "made law" by the interpretation he gave certain statutes. And although he promoted codification, he would also state its limitations, wanting to preserve some flexibility for the judges to rule according to their convictions of justice and equity without being completely tied to legislated rules. As another demonstration of such contradictions, he would at times criticize the judgments of fellow judges as inadequate, while quoting other judges of equal authority to justify his dissent. Similarly, he would denounce certain aspects of the government's administration of justice and yet seek to extend its jurisdiction to encompass new areas. He believed his severe criticisms to be expressions of unswerving loyalty to British rule. Likewise in communal matters, his support for the application of Muslim law was never at the expense of promoting a just law for all of India and for all Indians, whatever their communal background. Such contradictions characterized his life, and make it a most fascinating study.

Syed Mahmood's contributions to the transformation of Muslim law in India have been largely neglected by historians and survive primarily as footnotes in legal texts on Muslim law.[6] Overshadowed by the life and writings of his illustrious father, Aḥmad Khān, his legacy has not received the attention it deserves. A large part of his father's achievements in the reform of education, in fact, would not have been possible without the assistance of Syed Mahmood. But when he reached the age at which his father had made his most significant achievements, Mahmood had his life cut short. He once commented that when he first began to plan the course of his life, he decided to follow the pattern of his ancestors and devote the first third of his allotted 70 years to educating himself, the second third to earning a living, and the remaining third to "retired study, authorship and devotion to matters of public utility, following the steps of my father."[7] Tragically, when he had successfully completed the first two and he reached the final phase, his mind had deteriorated through alcohol abuse and his body had wasted away through

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[6] Asaf A. A. Fyzee, one of the foremost writers on Muslim law in South Asia in the twentieth century, cited more decisions by Justice Syed Mahmood than by any other judge in his compendium of significant cases, and dedicated that volume to the memory of Mahmood, "Master of law and master of language." Fyzee, *Cases in the Muhammadan Law*, v, xi.

[7] S. Khalid Rashid, "Justice Mahmood's Resignation: Mystery Unveiled," *Aligarh Law Journal* 5, Mahmood Number (1973): 299.

disease. He died shortly before his 53rd birthday a broken man, having been forced to retire from his post as judge of the High Court, having been estranged from his father just prior to the latter's death five years previously, having been stripped of his roles at the college he had helped to found, having been separated from his wife and only son, and having suffered such a financial deterioration that his possessions had to be sold to cover his debts. Whereas his father's numerous writings and volumes of letters continue to be republished, Syed Mahmood's contributions to Muslim thought at the end of the 19th century are hidden away for the most part in bound volumes of the Indian Law Reports and brittle files of government correspondence.

Contribution of this study

The question this study addresses is what role the Indian Muslims played in the transformation of Muslim law under British rule. While recognizing the obvious imbalance of power when considering the involvement of the colonized and the colonizers in India in the 19th century, the impact of Muslims themselves on the British understanding of their laws was not insignificant. The methodology used to examine this history is to examine the life and writings of Syed Mahmood who typified the ideal toward which a certain influential segment of the Muslim community was striving. Mahmood was from an upper class Muslim family, educated in England, successful in a private legal practice, listened to by key government leaders, appointed first as district judge and then a High Court judge, and selected to serve on the provincial legislative assembly. His personal qualities of a sharp mind, eloquent speech, excellent writing skills, strong convictions regarding equality and justice, and a fearlessness to speak his mind made certain that his impact was felt. That impact on the transformation of Muslim law both in the manner it was administered and in its content is examined in the following chapters. At the same time, Mahmood's career is reviewed to demonstrate how the Muslim community itself was being shaped by the forces of British colonialism, and illustrates the response of one who alternately co-operated and resisted those forces in his efforts to promote the betterment of the Indian people.

This dissertation begins with an examination of the life and work of Syed Mahmood from a historical point of view, describing his legal training and career in the con-

text of British colonial rule in India in the latter half of the 19th century. This is the first comprehensive historical study of Mahmood, and is based on primary sources that, in many instances, were examined in this context for the first time. Because of the paucity of biographical works, it has been necessary to provide a detailed account of his life before examining his contribution to the transformation of Muslim law. However, the importance of this first chapter transcends a mere recital of facts, and functions as a template for the subsequent analysis of Mahmood's legal thought and his critique of the British government in India. To fully understand Mahmood's perception of Muslim law, it is imperative to be aware of his training both in India and in England. His participation in the British judicial system is presented as a deliberate choice, in preference to fully devoting himself to assisting his father in the running of the MAOC, and in preference to serving in the judicial administration of the Muslim state of Hyderabad.

In the same way, to appreciate his critique of the British administration of Muslim law, it is likewise necessary to have an understanding of the forces that led to his appointment as a judge and those that led to his retirement. Therefore the second chapter presents an analysis of his interaction with various levels of the British administration. It demonstrates the ambivalence of his desire to integrate into that administration while at the same time maintaining a position from which he could critically comment on its weaknesses. The motivations of the various players whose decisions affected Mahmood's career at that time are also analyzed. This analysis shows that the British regime was neither a united nor unitary actor, as it examines the various personalities with differing political assumptions who interacted with each other and with Mahmood, intervening in his rise to a position of considerable influence.

The third chapter focuses more directly on Syed Mahmood's perception of Muslim law and its on-going transformation throughout history as it was adapted to meet the needs of its practitioners. Although he did not complete his planned volumes on Muslim law, much of his understanding of Muslim law can be gleaned from his numerous judgments on questions regulated by those rules. His articulation of the historical development of Muslim law reveals his belief in the flexibility of Muslim law and its adaptability to the changing needs of the Muslim populations. What are presented most cogently in his

judgments are his method of dealing with differences in legal traditions, and his handling of disputes between emerging divisions in the Muslim community in 19th century India.

An extension of that analysis to the administration of Muslim law by the British colonial power is presented in chapter four, demonstrating that while Syed Mahmood promoted the replacement of some elements of the traditional Muslim laws with Indian laws as codified by the British government, he resisted the wholesale importation of English law. Accordingly, his unrelenting criticism of the misinterpretations due to the inadequate translations has been highlighted in this chapter. Likewise, his arguments to extend the application of the Muslim laws of pre-emption as the customary law for other communities are also presented. Throughout his time on the Bench, Mahmood was a strong advocate for the continued application of Muslim law to those areas of civil law that had been guaranteed to the Muslim and Hindu communities since the British takeover of judicial responsibilities in the Bengal region towards the end of the 18th century.

In the chapter five, the final chapter, Syed Mahmood's perspective of the British administration of law in India in general, not limited to matters of Muslim law, is analyzed. Receiving particular attention is his promotion of the codification of law, set in the context of the support for the codification project in India by the influential law members of the Viceroy's legislative council. Mahmood's implementation of the legal concept of "justice, equity, and good conscience" as a guiding principle, is considered in greater depth as well. One aspect of the judicial administration to which Mahmood objected was its high cost for the average Indian. He presented proposals to reduce the expense which were eventually adopted by the government and implemented. The dissertation concludes with an evaluation of the impact of Syed Mahmood on the transformation of Muslim law in India prior to the start of the 20th century.

Note on the use of the term "Muslim law"

In this study, the term "Muslim law" is used in preference to the term "Islamic law" though the two are considered synonymous. This is done to emphasize the human application of the law rather than its divine origin as believed by Muslims. Asif Fyzee struggled with the terminology he had inherited from the British rulers in India. Initially, he adopted "Mahomedan Law," in spite of its ugliness as a term, to refer to "that portion

of the Muslim Civil Law which is applied in British India to Muslims as a personal law."[8] He pointed out that the religion brought by the Prophet Muḥammad was Islam, not Mahomedanism; and his followers are Muslims, not Mahomedans. Nevertheless, the term "Mahomedan Law" allowed him to distinguish between *fiqh*, the system developed by Muslim scholars that he termed "Muslim law," and that smaller part of *fiqh* which was applied to Muslims by the British legal system in India.[9] In subsequent publications, he modified the spelling to "Muhammadan law," and replaced "Muslim law" with "Islamic law" which he used synonymously with *sharī'ah* or *fiqh*.[10] Strictly speaking, he stated, "Muslim," could not be applied to any thing or concept but only to a rational human being capable of making a decision about his or her faith. He argued that "Islamic law," that is, the *sharī'ah* or *fiqh*, in its "pure and undiluted form" had never been completely enforced as law in South Asia. "Muhammadan law," though a term introduced by the Europeans, was then a convenient expression for that portion of the Islamic law that was being applied to Muslims in the subcontinent.[11]

Later still, Fyzee made another change, this time adopting "Muslim Personal Law" in place of "Muhammadan law." He explained that the latter term was "neither accurate nor felicitous," but that he had used it in his books "in conformity with the general practice among scholars and for want of a better one."[12] He still maintained his objection to the application of "Muslim" to non-human things or fields of study, but chose to employ it to reflect its usage in the relevant legislated statutes. For him, the distinction remained between "the classical system propounded by the legists of Islam, *fiqh* or *shari'a*" (Islamic Law), and "that portion of the Islamic Civil law which is applied in India to Muslims as personal law" (Muslim Personal Law).[13]

In this dissertation, that distinction between the two systems is not maintained, and both the classical system as well as that implemented by the British, are referred to as

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[8] Fyzee, *Introduction*, 7-8.
[9] Ibid.
[10] Fyzee, *Cases in the Muhammadan Law*, xxi. For Fyzee's distinction between *fiqh* and *sharī'ah*, see: Fyzee, *Introduction*, 24. "The path of *Shari'at* is laid down by God and His Prophet; the edifice of *Fiqh* is erected by human endeavour."
[11] Fyzee, *Cases in the Muhammadan Law*, xxi.
[12] Asaf A. A. Fyzee, *The Reform of Muslim Personal Law in India*, Indian Secular Society (Bombay: Nachiketa Publications Limited, 1971), 11.
[13] Ibid.

"Muslim law," to emphasize the human element in the application of those rules which Muslim scholars had in preceding centuries determined to be law. To answer the objection that the fundamental distinction must be upheld because the British who were applying the Muslim law were not Muslims, this dissertation demonstrates that notwithstanding British colonial domination, Muslims *were* vitally involved in the processes that transformed Muslim law in 19th century India, and their contribution must not be ignored. The end product or that which Fyzee refers to as "Muslim Personal Law" in the 20th century is admittedly vastly different from *fiqh* as it was practised by Muslim judges under the Mughal rulers in India. But then the law administered in the 16th and 17th century by Mughals in India with its Hindu majority was different from that which the eponymous founders of the four major schools of Muslim law practiced in Syria and Iraq. Likewise the "founders" themselves had considerably added to and modified that which was delivered by the Prophet to guide the Arab tribes in Mecca and Medina. "Muslim jurists and Islamic legal culture in general not only...experienced legal change in very concrete terms but were also aware of change as a distinct feature of law."[14] But whereas the modalities and agents of legal change that had dominated in Islamic legal culture had been the four juristic roles of the *qaḍī*, the *muftī*, the author-jurist, and the professor,[15] the Muslims who had the most impact in shaping the transformation of Muslim law in India at the end of the 19th century and the beginning of the 20th were those who served as barristers and puisne judges in the High Courts of British India.

Literature review

A. Sources for the life and work of Syed Mahmood

Details of Syed Mahmood's life are scattered throughout a variety of sources and have not previously been assembled into a coherent narrative. Biographical writings on his life are limited to one brief biography published in Urdu, directed at the level of high school students, by Muḥammad Amīn Zubayrī in the 1930s[16] and a few obituaries pre-

[14] Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge, UK: Cambridge University Press, 2001), 166.
[15] For a definition and explication of these roles, see: Ibid., 166-235.
[16] Muḥammad Amīn Zubayrī, *Tazkirah-i Sayyid Maḥmūd Marḥūm* (Aligarh: Muslim University Press, n.d.). I located a copy in the Aligarh Muslim University, but none in North American or British libraries.

sented upon his death.[17] Subsequent descriptions of his life were in large part based on these few early sources.[18] Additionally, memories and anecdotes continued to circulate in judicial and educational circles in north India, some of which have found their way into articles published in such collections as the special "Mahmood Number" of the *Aligarh Law Journal* in 1975, and in the two volumes published on the centenary anniversary of the Allahabad High Court in 1966.[19] Other reminiscences by individual authors include a tribute by another judge of the Indian high courts which focuses on Mahmood's contribution to Indian jurisprudence,[20] histories of the college Mahmood helped to establish at Aligarh,[21] an homage by friends who prized his skills as a conversationalist, his facility in reciting poetry, and his ability to speak eloquently on any literary or historical subject,[22] and two early biographies of his father which contain a valuable record of the familial context.[23] In more broadly based historical studies, the chief contribution to research on Syed Mahmood has been made by David Lelyveld in his work on Mahmood and his fa-

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[17] Satish Chandra Banerji, "Syed Mahmood: Recollections and Impressions," *The Hindustan Review and Kayastha Samachar*, n.s., 7, no. 3 (1903): 439-443; Tej Bahadur Sapru, "Syed Mahmood, as a Judge," *The Hindustan Review and Kayastha Samachar* 7 n.s., no. 3 (1903): 443-452. A speech given by 'Abdul Ḥaqq, also known as Bābā'-I Urdū, at an assembly of condolence in Hyderabad shortly after Syed Mahmood's death was later published as: 'Abdul Ḥaqq, "Sayyid Maḥmūd marḥūm kī vafāt par taqrīr," in *Chand Ham 'Aṣr*, 2nd ed. (Karachi: Urdu Academy, 1961): 1-12.

[18] See for example the article on Syed Mahmood in *Indian Judges: Biographical and Critical Sketches* (Madras: G.A. Natesan, 1932), 305-323, which is taken from the obituaries by Satish Chandra Banerji and Tej Bahadur Sapru. This article has been reprinted several times and continues to be a chief reference for any discussion of Syed Mahmood.

[19] Uttar Pradesh (India). High Court of Judicature, ed. *Centenary: High Court of Judicature at Allahabad, 1866-1966*, 2 vols. (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966).

[20] M. Hidayatullah, "Justice Syed Mahmood," in *A Judge's Miscellany*, ed. M. Hidayatullah (Bombay: N. M. Tripathi, 1972).

[21] Mīr Wilāyāt Ḥusayn, *Āp Betī: Yā M.A.O. Kālij 'Alīgaṛh kī Kihānī* (Aligarh: Sayyid Hadi Husayn Zaidi, 1970). I thank the Director of the Sir Syed Academy, Professor Asghar Abbas for directing me to this source, as well as to other resources in Urdu.

[22] Muḥammad 'Abdul Razāq Kānpūrī, *Yād-i Āyyām* (Hyderabad, Deccan: 'Abdul Ḥaq Academy, 1946), 359-370. Jalil Ahmad Kidwai, "A Forgotten Hero of our Struggle," in *Sar Sayyid, Mazamīmah, Sayyid Maḥmūd*, ed. Jalil Ahmad Kidwai, Silsilah-yi Matbūat-i Rās Masūd Akadmī, 10 (Karachi, Pakistan: Ross Masood Education and Culture Society of Pakistan, 1985).

[23] George Farquhar Irving Graham, *The Life and Work of Syed Ahmad Khan C.S.I.* (Edinburgh: William Blackwood and Sons, 1885); Alṭaf Ḥusain Ḥālī, *Ḥayāt-i Jāvīd jis men 'Alá Jināb Jawwād ud-Dawlah 'Arif-i Jang Dāktar Sar Sayyid Aḥmad Khān kī Zindigī ke Ḥālāt aur un kī Sirkārī, Mulkī, Qaumī aur Mazhbī Khidmāt Mufaṣṣal biyān kī gai hain*, 4 ed. (New Delhi: Qaumi Kaunsil barai Farugh Urdu Zuban, 1979). Portions of the latter have been translated as: Altaf Husain Hali, *Hayat-i-Javed: A Biographical Account of Sir Sayyid*, trans. K. H. Qadiri and David J. Matthews, IAD Oriental (Original) Series, no. 10 (Delhi: Idarah-i Adabiyat-i Delli, 1979).

ther, Aḥmad Khān, and the MAOC they founded.[24] Lelyveld has convincingly argued that these two men were ultimately disillusioned in their efforts to promote fraternity and social equality between English and Indian officials of similar rank through their work in educational and judicial reform. That theme is explored further in this dissertation, as Syed Mahmood's relationship with the British government in India is examined.

While incorporating these sources, this dissertation is not limited in its analysis to such tributes and anecdotal accounts based on the reminiscences of colleagues and friends. Syed Mahmood's own writings and speeches are the foundation on which his biography is constructed. His writings include published books and journal articles in Urdu and English, letters written to government officials, memoranda written on proposed legislation, and judgments included in the published law reports. Published collections of his correspondence are limited to one volume containing some of his letters written to Theodore Beck, principal of the MAOC, towards the end of his life.[25] Other correspondence and official memoranda by Syed Mahmood are located in the National Archives of India in New Delhi, the provincial archives of Uttar Pradesh in Lucknow, the Oriental and India Office Collections as well as other manuscript collections at the British Library, and the archives of the Cambridge University Library. The India Office Records found in the National Archives of India and the British Library contain numerous writings by Syed Mahmood in files of correspondence on various bills and other government business. Particularly significant are two lengthy letters written by Mahmood and accompanied by copious appendices containing his response to charges of incompetence directed at him by the Chief Justice in Allahabad. One of these contains the only extant autobiographical work by Mahmood known to exist.[26]

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[24] David Lelyveld, *Aligarh's First Generation: Muslim Solidarity in British India*, OUP ed. (Princeton, NJ: Princeton University Press, 1978; reprint, Delhi: Oxford University Press, 1996); David Lelyveld, "Macaulay's Curse: Sir Syed and Syed Mahmood," in *Sir Syed Ahmad Khan: A Centenary Tribute*, ed. Asloob Ahmad Ansari (Delhi: Adam Publishers, 2001), 193-213. Professor Lelyveld was of immense assistance in guiding the author to helpful sources, in suggesting fruitful contacts in India, and in providing general encouragement and insight, for which the author is very grateful.

[25] Khaliq Ahmad Nizami, ed., *Theodore Beck Papers from the Sir Syed Academy Archives*, Selected Documents from the Aligarh Archives, 2 (Aligarh: Aligarh Muslim University, 1991).

[26] Syed Mahmood, Aligarh, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 9 September 1893, Appendix IV: Biographical Information, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London.

Syed Mahmood's speeches are also an important primary source, since he was known for his skill in oratory starting at an early age. Shan Muhammad has gathered some of these in his volumes of the documentary record of the MAOC.[27] Other speeches can be found in the newspaper reports of the gatherings he addressed in periodicals such as the *Aligarh Institute Gazette* and the *Pioneer* of Allahabad. Because of the influence his father, and subsequently he himself, had in both the Indian Muslim community and in British government circles, journalists were quick to report events in which one or the other or both were prominent. In addition to the writings and speeches of Syed Mahmood himself, letters written by his colleagues in the judicial system or by government officials concerned with his promotion and resignation have also proved a valuable source for differing perspectives. These, too, can be found in the India Office Records, as well in the collections of private papers of government officials in various British archives.

Syed Mahmood did not write a comprehensive work on Islamic law or its legal principles, though an obituary suggests that it had been his desire to produce a four-volume work on those topics.[28] The major sources for his legal thought, then, are an Urdu translation and commentary on the Evidence Act, published in 1876[29] and approximately 300 of his legal judgments recorded in the *Indian Law Reports, Allahabad Series* from 1882 to 1893, the time during which he delivered judgments as a judge on the Allahabad High Court. His nearly 300 recorded judgments during these twelve years vary in length from a few pages to a number that are more than 50 pages long. His lengthier judgments tend to be detailed expositions of the laws applying to the questions raised by the suit, often accompanied by an extensive discussion of the fundamental legal principles involved. Syed Mahmood justified his lengthy decisions by pointing out that they were frequently dissenting judgments in which he disagreed with his fellow judges. Although lawyers and jurists have studied these judgments to decide current questions of law, they have not previously been studied from a historical perspective to discover their contribu-

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[27] Shan Muhammad, ed., *The Aligarh Movement: Basic Documents, 1864-1898*, 3 vols., (Meerut, India: Meenakshi Prakashan, 1978).

[28] "The Late Mr. Syed Mahmood," *The Indian People. A Weekly Record & Review*, 15 May 1903, 185.

[29] Syed Mohammed Mahmood, *The Law of Evidence in British India, being a Commentary in Hindustani on the Indian Evidence Act (I of 1872.) as Amended by The Indian Evidence Act Amendment Act, (XVIII of 1872.) together with The Indian Oaths Act (X of 1873.): Sharḥ-i Qānūn-i Shahādat-i Mujriyyah-yi Hind ya'nī, Aikṭ Awal sanh 1872 ḥasb-i tarmīm-i Aikt 18-i sanh 1872, ma'ah Qānūn-i ḥalf-i mujriyyah-yi Hind, ya'ni Aikt 10-i sanh 1873,* (Aligarh: Aligarh Institute Press, 1876).

tion to the development of Muslim law in British India, particularly their impact on the growing body of case law as it impinged on the traditional interpretation of Muslim law. This dissertation rectifies that neglect and brings the seminal thinking of Syed Mahmood into the academic conversations regarding not only the evolution of Muslim legal thought in South Asia, but also regarding the broader involvement of Muslims in the British rule in India.

B. Transformation of Muslim law under British colonialism

Michael R. Anderson has prepared a brief but comprehensive study of the textualization and consequent transformation of Muslim law in India.[30] He convincingly demonstrates that by their declared efforts to preserve Muslim law for the Muslims, British colonial administrators "often distorted its subject matter, frequently reflecting British preoccupations more accurately than indigenous norms."[31] He identifies the three devices of translation, textbook, and codification employed by the British to "adapt indigenous arrangements to the dictates of colonial control."[32] He shows how the Orientalists' fixation on texts is seen both in their conviction that proper knowledge of India could not be acquired without a detailed study of the classical legal texts, and in their subsequent production of textbooks distilling a plethora of rulings on Muslim law into a systematized framework. These devises served to bring Muslim law under British control in that they "minimized doctrinal differences and presented the Shari'a as something it had never been: a fixed body of immutable rules beyond the realm of interpretation and judicial discretion."[33] He goes on to describe how the legal structures introduced into India by the British and the attempts to codify customary law further "fixed the fluid practices of indigenous society in legal categories that could serve as a basis for political and legal decisions."[34] Before concluding, he broadens his perspective to address albeit briefly the impact of the colonial transformation of Muslim law on how Muslims in India viewed their

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[30] Michael R. Anderson, "Legal Scholarship and the Politics of Islam in British India," in *Perspectives on Islamic Law, Justice, and Society*, ed. R. S. Khare (Lanham, MD: Rowman & Littlefield Publishers, 1999), 65-91.
[31] Ibid., 69.
[32] Ibid., 84. The three processes of translation, legislation, and adjudication addressed in this dissertation closely parallel Anderson's three devices. The differences reflect diverging emphases and time periods studied.
[33] Ibid., 74-75.
[34] Ibid., 79.

own law, as well as the reformation of Muslim thought continuing in India *apart* from colonial influence. What Anderson does not address—and what this dissertation seeks to clarify—is the impact of those Indian Muslims who chose to work within the colonial framework and to employ the same devices to bring about the changes in the administration of Muslim law in line with their own priorities.

Another thorough analysis of this transformation has been contributed by Scott Alan Kugle, who "reframe[s] the analysis of Anglo-Muhammadan law in the field of cultural history."[35] After stating his premise that the practice of jurisprudence is an exertion of power, he builds on that foundation by analyzing British colonialism in India and its impact on Muslim law. He emphasizes the British use of law and legal discourse to attempt to establish the legitimacy of their exercise of power in India, and to regulate the ownership of property as a centralized state.[36] Kugle goes on to demonstrate how the British then fundamentally reshaped Muslim law by imposing English assumptions and legal concepts to frame the technical vocabulary of Islamic law and guided how those rules were applied.[37] Like Anderson, he focuses on the initial impact of translation, but expands the impact of that translation project to implicate it in British efforts to control the Muslims involved in the judiciary. "Translations gave [the East India Company officials] tools with which to question the legitimacy of qazi's decisions, and gave them de facto authority to restructure the conception of law."[38] In addition, he contends, the British colonial authorities actually "created very new legal texts under the guise of simply 'translating' the books already codified by Muslim jurists."[39] With respect to adjudication and legislation, Kugle draws no clear distinction but conflates the two under the rubric of "codification," and shows how through the use of binding precedent and published digests, British officials restricted the application of Muslim law.[40]

Kugle then outlines the impact these changes had on Indian Muslims' own perceptions of their law, and makes the somewhat surprising claim that the British colonialists

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[35] Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 312.
[36] Ibid.: 267-268.
[37] Ibid.: 266-300.
[38] Ibid.: 270.
[39] Ibid.: 273.
[40] Ibid.: 279-280.

were responsible for the spreading commitment to *taqlīd* among Indian Muslims by giving it a legal reality that it did not possess previously.[41] A more problematic assertion, however, and the point at which this dissertation parts company with Kugle's analysis, is his description of the Indian Muslims trained in England and employed by the British in judicial posts in India as men for whom "Islamic law became a form of political rhetoric," and who refrained from challenging the way Muslim law had been framed by British courts. Adopting the British legal discourse, he argues, was a necessity for them if they wished to communicate in that milieu.[42] This dissertation, however, argues that men such as Syed Mahmood *did* protest the way Islamic law was being framed by British courts, and *did* seek to revive a more creative and fluid approach to Muslim law. While Mahmood did choose to work within the conceptual framework imposed by the British, he used that language to challenge the changes being introduced. Kugle does qualify his sweeping generalization by pointing to the example of Faiz Badruddin Tyabji as "the first attempt by a British-trained lawyer to break out of this frame and critically assess how it developed over the preceding century" in his 1913 publication. This dissertation shows that this time frame must be reassessed because Syed Mahmood had begun to conduct such a critique thirty years earlier, first as a District Judge and then as a Puisne Judge of the High Court at Allahabad.

While the translations of Muslim texts of jurisprudence such as Hamilton's *Hidāyah* and Baillie's portions of the *Fatāwá-yi 'Ālamgīrī* were heavily relied upon by the judges and other court officials in administering Muslim law in British India, these translations were also the target of criticism from the beginning. Primarily, it was the accuracy of the translation and its faithfulness to the original text that was challenged. In his judgments, Syed Mahmood persistently criticized the translations, and regularly provided his own translations and analysis of relevant texts, as is discussed in chapter three of this dissertation. More recent scholars have challenged not only the textual accuracy but the whole translation project itself as a form of colonial domination and control. Bernard S. Cohn has argued that:

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[41] Ibid.: 297-299. He defines *taqlīd* as "being bound to apply the decisions of past legitimate jurists without the application of new juridical reasoning." See p. 297, note 125.
[42] Ibid.: 303.

> the British conquest of India brought them into a new world which they tried to comprehend using their own forms of knowing and thinking.... Unknowingly and unwittingly they had not only invaded an epistemological space as well. The British believed that they could explore and conquer this space through translation: establishing correspondences could make the unknown and the strange knowable."[43]

A key component in this project was the translation of legal texts. Promulgation of laws was a necessary adjunct to the collection of revenue from those who owned or tilled the land—and the collection of revenue was the central reason for the British increasing involvement in the administration of Indian territories.[44] Governor Hastings had declared his intention to rule the Indians by Indian principles, leading to the attempt to discover what those principles were, then to establish some fixed body of law which subsequently could be translated into English so that the British judges could have some idea of the nature and content of this law.[45] Sir William Jones who was a key player in this process was convinced that there were specific bodies of both Hindu and Muslim law which was "locked up in the texts and the heads of the pandits and maulavis," which he then set out to objectify through systematization, ordering them into hierarchies of knowledge, and translation.[46] He was proceeding on the assumption that an authoritative code of law as a fixed entity could be discovered for India in the legal texts utilized by Muslim jurists and scholars, and that this code of law could be isolated from those practitioners, translated in a reformulation consistent with English concepts of law, and put into practice by English judges with little or no training in the Indian languages or culture. Cohn's work effectively exposes these deeper preconceptions that shaped the British transformation of Muslim law.

C. Indian Muslim involvement in the transformation of Muslim law

While studies tracing the history of the transformation of Muslim law in India under British colonialism abound, relatively little has been written on the involvement of Indians as agents in that development. Throughout the late 18th and the 19th century, Indian Muslims were actively involved in the transformation of Muslim law. In the work of

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[43] Bernard S. Cohn, *Colonialism and its Forms of Knowledge: The British in India*, Princeton Studies in Culture/Power/History, ed. Sherry B. Ortner, Nicholas B. Dirks, and Geoff Eley (Princeton, NJ: Princeton University Press, 1996), 53.
[44] Ibid., 59.
[45] Ibid., 26-27, 60-62.
[46] Ibid., 29, 68-72.

translation, Muslim scholars had assisted Charles Hamilton (1753-1794), William Jones (1746-1794), and Neil B. E. Baillie (1799-1883) by preparing the Persian translations on which their English versions were then based.[47] When J. H. Harington (1764-1794) noted defects in Hamilton's translation, he appointed Maulavi Muhammad Rashid to prepare a compendium of the mistakes along with corrections from the original Arabic.[48] In the work of judicial precedent, Muslims served as the "law officers" who assisted the British magistrates in cases dealing with Muslim law, by providing the *fatāwá* on the basis of which the judges were required to pass their sentences.[49] A collection of these *fatāwá* then became the heart of William H. Macnaghten's (1793-1841) collection of *Principles and Precedents* to guide British officials in their administration of justice. Muslims also continued to occupy judicial posts throughout the period of British rule.[50] In the work of legislation and decrees, however, Indian involvement—Muslim or otherwise—was noticeably absent, until the Indians began to be invited to participate in the Governor-General's legislative councils after the 1857 Revolt. Syed Mahmood's participation as an active agent in all three processes that transformed Muslim law can be seen as an example of the fullest involvement with the British colonial power. Yet his critical stance clearly indicates that this involvement was not a simple submission to a dominant power.

The existence of such Indian participation at various levels of influence in the transformation of Muslim law under the British problematizes a basic bifurcation of the relationship into ruled and ruler. Jamal Malik's observations on this dynamic for the earlier period of this encounter certainly ring true for the latter half of the 19th century as well:

> The examination of the complex and sometimes ambivalent processes of cultural encounter and reciprocal perception serves to deconstruct the mirrored binary op-

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[47] Abul Hussain, *The History of the Development of Muslim Law in British India*, Tagore Law Lectures, 1935 (Calcutta: Abinas Press for the author, 1934), 48-52. For a detailed discussion of these translations, see chapter 5.

[48] Lt. Col. Vans Kennedy, "An Abstract of Muhammedan Law," *Journal of the Royal Asiatic Society of Great Britain and Ireland* 2 (1835): 84-85. See also: Hussain, *History of the Development*, 60-61.

[49] Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1817*, Beiträge zur Südasienforschung, Süasien-Institut, Universität Heidelberg, band 79 (Wiesbaden: Franz Steiner Verlag, 1983), 108-117. Fisch explains both the theoretical strength and practical limits of this office, illustrating its functioning and gradual decline as government Regulations reduced its influence.

[50] B. B. Misra, *The Administrative History of India, 1834-1947: General Administration* (Bombay: Oxford University Press, 1970), 511-527.

> positions of a European Self and a Non-European Other or European Other and Non-European Self, with all their connotations for colonialism. Rather, colonialising and colonialised people were mutually complicit and interpenetrated, rather than reducible to one-sided appropriations by Europeans versus resistance and self-assertion of colonialised people. Especially the binary view of the one-sidedness of European expansion and domination and Non-European reaction and submission is questioned, that is, the traditional subject-object relation.[51]

All parties negotiated and re-negotiated their respective world-views and perspectives of each other, and had the sensitivity to understand them. "Accordingly, culture is not regarded in essentialist terms but rather as a field of discourse, a field in which different social realities meet and contest while the respective repertoires operating in this field differ according to context, space, and time."[52] While the inequalities in the equation of power must not be ignored, significant interaction among the participants, Indian and European, contributed the formations and re-formations of understandings of their own and the other's cultures. This interaction, sharply critical at times, can be seen as "a process of mutual teaching and learning," and "need not always be squeezed into the procrustean beds represented by the concepts of colonial domineering and Indian resistance," as C. A. Bayly has noted.[53]

In another work that explores these mutual relationships in great depth, Bayly observes that British military and economic power was very much dependent on Indians who made up the majority of the army and who controlled—albeit under severe constraint—the vast bulk of the capital and means of agricultural production. "Colonial officials, missionaries and businessmen were forced to register the voices of native informants in ideology and heed them in practice even if they despised and misrepresented them."[54] To limit the study of the transformation of Muslim law in British India, then, to only the impact of British actions and ideologies is an inadequate representation of the "dialogic" element of that history. Such an understanding of the dialogic process in the

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[51] Jamal Malik, "Perspectives of Mutual Encounters in South Asian History 1760-1860: Introduction," in *Perspectives of Mutual Encounters in South Asian History 1760-1860*, ed. Jamal Malik, Social, Economic and Political Studies of the Middle East and Asia (S.E.P.S.M.E.A.), no. 73 (Leiden: Brill, 2000), 2.
[52] Ibid., 3.
[53] C. A. Bayly, "Orientalists, Informants and Critics in Benares, 1790-1860," in ibid., p. 98.
[54] C. A. Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870*, Cambridge Studies in Indian History and Society, 1, ed. C. A. Bayly, Rajnavayan Chandavarkar, and Gordon Johnson (Cambridge, UK: Cambridge University Press, 1996), 142.

production of knowledge has been applied by Kapil Raj in a study of Sir William Jones and his work in producing legal texts at the end of the 18th century.[55]

This "knowledge" of Muslim law was constructed by all the members of that historical situation, though admittedly not always in equal measure. Local participants used the context to create new answers to new existential problems in ways that they saw as beneficial. Such a view, while rejecting the presumption that knowledge was simply the product of an imposition by the hegemonic colonial power onto a subordinate colonized society, does not ignore "that in the colonial situation both domination and exploitation occurred on a constant basis."[56] However, though imperial actors used the situation to derive advantages for themselves and sought to exclude the colonized from areas of formal juridical and economic power, these attempts by the British to impose their ideas were used by local inhabitants to conjure up something else which they could utilize to their own advantage. This dissertation employs this historiographical approach to argue that Indian Muslims were actively participating in the transformation of Muslim law in the 19th century. This thesis is developed through an examination of the influence Syed Mahmood had in shaping the discourse of Muslim law, while at the same time exploring how he was in turn influenced by the milieu in which he, by deliberate choice, lived his life.

Focusing on the involvement of Indian Muslims such as Syed Mahmood in the transformation of Muslim law frees the historian of Muslim communities in South Asia from a perspective that would tend to deny them any agency in the transformation of their law. Such a restricted perspective would be unhelpful in an attempt to gain a broad view of the changes occurring in 19th century India; in the analysis of such changes, the participation of Indian Muslims as active agents is vital. Richard Eaton has observed how a restricted perspective fails in providing the necessary explanatory tools because of its preoccupation with colonialism as the only actor. As he assesses the recent historiography of modern India and the intellectual shift to discursive analysis, he notes:

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[55] Kapil Raj, "Refashioning Civilities, Engineering Trust: William Jones, Indian Intermediaries and the Production of Reliable Legal Knowledge in Late Eighteenth-century Bengal," *Studies in History (New Delhi)* 17, no. 2 (2001).

[56] Eugene F. Irschick, *Dialogue and History: Constructing South India, 1795-1895* (Delhi: Oxford University Press, 1994), 8. Irschick's work has been foundational in such a dialogical approach to the formation of culture in a colonial context. See especially pp. 6-11.

> Thus 'colonialism,' or rather an all-pervasive 'colonial discourse,' became not only an actor in its own right, but ultimately the only true actor in modern Indian history. Studies appearing in the 1980s and 1990s seemed to suggest that the various social classes of British India were so enmeshed in webs of power and discourses of power, even to the extent of collaborating with the colonial state, that resistance to the colonial system was rendered ineffective or futile. In retrospect, it seems ironic that historians, of all people, should have identified as the engine of history a discursive framework that, being itself ahistorical and structuralist, could not logically be used to explain anything that occurred in any specific time and place, or indeed, to explain any change whatsoever.[57]

This study of Mahmood's life and thought demonstrates that it would be facile to read the history of his life and the "change" in which he participated, from the restricted perspective of collaboration or simply subjugation. His critique of and resistance to, as well as his co-operation with, British colonial authorities, especially as represented by the judicial system, was incisive and uncompromising.

C.1 Involvement of the 'ulamā

One recent study of the response and involvement of Indian Muslims to the transformation of Muslim law is contained in Muhammad Qasim Zaman's thorough work on the *'ulamā* in contemporary Islam.[58] His focus is on the changes that occurred in the way that the *'ulamā*, the Muslim scholars trained in the traditional Islamic sciences, perceived and administered the *sharī'ah*. After establishing the premise that the administration of Muslim law in the history of Muslim communities including those of Mughal India was much more flexible than the British administrators (or even much of modern scholarship) were willing to credit, Qasim Zaman states that, under the British, the *'ulamā* were willing to adopt the rhetoric of adhering to an invariant corpus of Muslim law to enhance their own religious authority.[59] However, their role as interpreters of Muslim law to the state as it administered the law to the Muslim community was effectively displaced by the reduction of the law to texts through codification and through the appointment of non-Muslims as judges to administer Muslim law. This latter imposition violated the *'ulamā's*

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[57] Richard M. Eaton, "(Re)imag(in)ing Other2ness: A Postmortem for the Postmodern in India," in *Essays on Islam and Indian History*, ed. Richard M. Eaton (Delhi: Oxford University Press, 2000), 142.
[58] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, Princeton Studies in Muslim Politics, ed. Dale F. Eickelman and James Piscatori (Princeton, NJ: Princeton University Press, 2003). See especially his first chapter, "Islamic Law and the 'Ulama in Colonial India: A Legal Tradition in Transition."
[59] Ibid., 24.

tradition of person-to-person transmission of learning and their "idea that religious texts can be properly understood only by those who are 'authorized' (*ijaza*) to interpret them."[60] The British, by their declaration of a limited number of texts as authoritative and their assumption that any judge, Muslim or not, was qualified to administer Muslim law, had completely disregarded these fundamental precepts. Whereas the *'ulamā* had been able to continue to influence the interpretation and adjudication of Muslim law to some degree in their role as government-appointed, indigenous legal guides, even these positions were abolished in 1864. Being shut out of their traditional role in relation to the state's administration of justice, the *'ulamā* expanded their role as *muftis* and issued an increasing number of *fatāwá* on matters of Muslim law to the Muslim community towards the end of the 19th century.[61]

In contrast to the response of the *'ulamā* to the transformation of Muslim law, Syed Mahmood was motivated not to withdraw from involvement with the colonial rulers but to seek a position of high authority in the British judicial system. Mahmood was not trained as an *'ālim* nor ever professed to have the authority of one. Yet the fact that he was a *Muslim* judge, even though appointed by a non-Muslim ruler, imparted some validity to his role according to Muslim law.[62] As chapter three of this dissertation demonstrates, not only did Syed Mahmood work actively within the court to have a wider number of texts of Muslim jurisprudence recognized as authoritative by the British judges, he also promoted an understanding of Muslim law that was more flexible and eclectic in its own sources of authority. That he had some sympathy for the *'ulamā* of the Ahl-i Ḥadīth who rejected the doctrine of *taqlīd*[63] is seen in his favorable rulings on their behalf in disputes regarding their rights to pray in certain mosques, also discussed in chapter three.

Another work which addresses the role of the *'ulamā* in British India is Barbara Metcalf's volume on the Muslim scholars of the Deoband *madrasah*.[64] Metcalf traces the rise of importance of issuing *fatāwá* by the *'ulamā* from the early 19th century onwards as the British assumed greater control of the judicial system. As the *'ulamā* were increas-

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[60] Ibid., 28.
[61] Ibid., 25-27.
[62] Ibid., 27.
[63] Ibid., 23-24, 39-41.
[64] Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (Princeton: Princeton University Press, 1982).

ingly excluded from the government courts, their *fatāwá* became "a vehicle for disseminating ever more detailed guidance in minute concerns of every day life, including in their purview decisions about customary practices that had been of little concern to the state, but were of great moment to Muslims seeking to preserve an authentic expression of their religion under alien rule."[65] The *'ulamā* emphasized the issuing of *fatāwá* partly as "an attempt to circumvent the British courts with their hybrid Anglo-Muhammedan law," and even went further to actively discourage their followers from using government courts.[66] This resulted in the growth of a parallel system of justice without government sanction, but also without government control. Metcalf's work is most helpful in providing a broader sociological background to changes in the Indian Muslim communities under British rule, with a special focus on the *'ulamā* and their part in bringing about that change. Syed Mahmood is, however, mentioned only tangentially.[67] An earlier work which expands the historical context to begin with the 13th century Delhi Sultanates in tracing the role of the *'ulamā* and their implementation of the *sharī'ah* is M. Mujeeb's work, *The Indian Muslims*.[68] Several articles in a recent volume on Islamic legal interpretation present a series of glimpses into the world of the *'ulamā* through an examination of *fatāwá* issued by them during the British colonial rule.[69]

C.2 Involvement of Muslims in the British civil service

Whereas the role of the *'ulamā* in the judicial administration of British India was gradually eliminated, the involvement of another group of Muslims increased progressively. The *ashraf* class had traditionally been associated with the administration of Mughal rule in the pre-British era as well as during the spread of British influence in In-

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[65] Ibid., 50.
[66] Ibid., 146-147, 153-155.
[67] Ibid., 286, 334.
[68] Mohammad Mujeeb, *The Indian Muslims*, new ed. (1967; reprint, New Delhi: Munshiram Manoharlal Publishers, 1995). For the treatment of the *sharī'ah* in the pre-modern period, see pp. 236-252, 271-282; for the modern period, see pp. 389-414.
[69] Juan R. I. Cole, "Sacred Space and Holy War in India," in *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Cambridge, MA: Harvard University Press, 1996); Muhammad Khalid Masud, "Apostasy and Judicial Separation in British India," in ibid.; Barbara Daly Metcalf, "Two Fatwas on Hajj in British India," in ibid.; Usha Sanyal, "Are Wahhabis Kafirs? Ahmad Riza Khan Barelwi and His *Sword of the Haramayn*," in ibid.

dia.[70] In his work on the college Syed Mahmood helped his father to found, David Lelyveld includes a study of this class and their predilection for government service.[71] The *kachahrī*, or complex of courts and government offices, was an arena of power, of economic security, of intellectual challenge, and of stimulating social interaction for those who chose to participate. Able Muslims such as Sir Sayyid Aḥmad Khān rose rapidly from being an assistant to serving as a lower-level judge and then as a Subordinate Judge before his retirement. Gregory Kozlowski, who has published a very thorough analysis of the British transformation of one aspect of Muslim law, that of *waqf* or pious endowment, includes in his work a study of the British Indian judicial institutions.[72] He begins with a brief summary of the development of the *sharī'ah* and its inherent tensions between theory and practice. He continues with an outline of the establishment of the Anglo-Indian courts and their evolution throughout the 19th century. His survey of Indian Muslim involvement in judicial administration encompasses the judges such as Sir Sayyid as well as the later Muslims who gained the legal education in England and practiced as barristers in India, a number of whom were later appointed as judges. He makes the point that in their interpretation of the *sharī'ah* these English-educated Muslims followed the pattern of English law books and not pattern of traditional Muslim scholarship, making their interpretations suspect in the eyes of traditionally educated Muslims.[73] He also comments that these modernists had little real influence on the decisions of the High Courts to which they were appointed, taking Syed Mahmood as an example.[74] This dissertation disagrees with that position and argues that despite the Privy Council's rejection of a couple of his rulings and despite his eventual enforced retirement from the bench, Mahmood's contributions were influential in bringing about changes that cannot be so easily dismissed. Nevertheless, Kozlowski's analysis of the laws promulgated by the British and the under-

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[70] David Lelyveld, in his study of the *ashraf* class, defines *sharāfat* in terms not only of respectable ancestry but of a character of "dignified temperament, self-confident but not overly aggressive, appreciative of good literature, music, and art, but not flamboyant, familiar with mystical experience, but hardly immersed in it." See: Lelyveld, *Aligarh's First Generation*, 28-30.
[71] Ibid., 57-68.
[72] Gregory C. Kozlowski, *Muslim Endowments and Society in British India*, Cambridge South Asian Studies, 35 (Cambridge, UK: Cambridge University Press, 1985), 96-155.
[73] Ibid., 117.
[74] Ibid., 117-119.

standings of Muslim law that lay behind them is a seminal contribution that spawned the later works of Anderson and Kugle discussed earlier.[75]

C.3 Involvement of Muslims who studied law in England

In the transformation of Muslim law towards the end of the 19th century, the involvement of Muslims who studied law in England played a key role as Kozlowski has suggested. In a sense, then, education could be considered to be a fourth process of transformation, in addition to the translation, legislation, and adjudication discussed earlier. Initially texts such as those produced by Standish Grove Grady were intended to provide ready manuals for students studying Indian law. With the reform of the legal education in England, partly in response to calls for reform from officials in India, Grady was appointed to lecture on Hindu and Muslim law at the Inns of Court in London. He produced manuals of the two works of law for the use of his students and legal practitioners in India.[76] Another educational institution that had a significant impact on the understanding and practice of Indian law was the Tagore Law Lectures presented annually in Calcutta. These lectures were published and became a source of law for the judges in the High Courts and elsewhere. One of the first to lecture on Muslim law was Shama Churn Sircar who presented the Tagore Law Lectures of 1875 in Calcutta, and published them as a digest of Sunni and Shi'i law.[77]

Syed Ameer Ali's Tagore Law Lectures of 1884 were published as the first systematic digest by a Muslim, of Muslim law as it had been transformed by the British in India.[78] It was at this time that Syed Mahmood was making his own contributions to the

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[75] Ibid., 123-131.

[76] Standish Grove Grady, *A Manual of the Mahommedan Law of Inheritance and Contract, comprising the Doctrines of the Soonee and Sheea Schools, and based upon the Text of Sir W. H. Macnaghten's Principles and Precedents, together with the Decisions of the Privy Council, and High Courts of the Presidencies in India* (London: Wm. H. Allen and Co., 1869). See also: Standish Grove Grady, *Treatise on the Hindoo Law of Inheritance comprising the Doctrines of the Various Schools, with the Decisions of the High Courts of the Several Presidencies of India, and the Judgments of the Privy Council on Appeal* (Madras: Gantz Brothers, 1868).

[77] Shama Churn Sircar, *The Muhammadan Law, being a Digest of the Sunni Code in Part and of the Imamiyah Code*, Tagore Law Lectures (Calcutta: Thacker, Spink & Co., 1875).

[78] Syed Ameer Ali, *Mahomedan Law containing the Law relating to Succession and Status compiled from Authorities in the Original Arabic*, 7 ed., ed. Raja Said Akbar Khan, vol. 2 (New Delhi: Kitab Bhavan, 1976; reprint, 1986). Syed Ameer Ali, *Mahommedan Law compiled from Authorities in the Original Arabic containing the Law relating to Gifts, Wakfs, Wills, Pre-emption and Bailment (with an Appendix on the Law of Wakf)*, 5 ed., ed. Raja Said Akbar Khan, vol. 1 (New Delhi: Kitab Bhavan, 1976).

development of this hybrid of traditional Muslim law and English law, though it would appear that the volumes that he had intended to write on the subject were never completed. Other contemporaries of Syed Mahmood who contributed digests of the Muslim laws were Almaric Rumsey,[79] Roland Knyvet Wilson,[80] Dinshah Fardunji Mulla,[81] and A. F. M. Abdur Rahman.[82] While these digests focused on presenting Muslim laws applicable in Anglo-Indian courts in a systematic framework, other writers sought to analyze the transformation of Muslim law in more depth during that same period. Notable among these works were Wilson who contributed one of the digests,[83] Syed Karamat Husein,[84] Abdur Rahim,[85] Faiz Hassan Badruddin Tyabji,[86] and A. J. Robertson.[87] In addition to these volumes, shorter studies of recent developments in Muslim law were published by British judges working in India, as well as by Indian Muslims studying in England. Journal articles were written by Raymond West,[88] W. H. Rattigan,[89] S. Khuda Bukhsh,[90] and

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[79] Almaric Rumsey, *Moohummudan Law of Inheritance and Rights and Relations affecting it: Sunni Doctrine: comprising together with much collateral information, the Substance greatly expanded of the Author's Chart of Family Inheritance* (London: W. H. Allen, 1880).

[80] Roland Knyvet Wilson, *A Digest of Anglo-Muhammadan Law Setting Forth in the Form of a Code, with Full References to Modern and Ancient Authorities, the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India* (London: W. Thacker and Co., 1895).

[81] Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (Bombay: Thacker & Company, 1905).

[82] A. F. M. Abdur Rahman, *Institutes of Mussalman Law: A Treatise on Personal Law according to the Hanafite School, with References to Original Arabic Sources and Decided Cases from 1795 to 1906* (Calcutta: Thacker, Spink & Co., 1906).

[83] Roland Knyvet Wilson, *An Introduction to the Study of Anglo-Muhammadan Law* (London: W. Thacker and Co., 1894).

[84] Syed Karamat Husein, *A Treatise on Right and Duty: their Evolution, Definition, Analysis and Classification according to the Principles of Jurisprudence being a Portion of the Muhammadan Law of Gifts* (Allahabad: 1899; reprint, Delhi: Delhi Law House, 1984).

[85] Abdur Rahim, *The Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki, Shafi'i, and Hanbali Schools* (London: Luzac & Company, 1911).

[86] Faiz Badruddin Tyabji, *Principles of Muhammadan Law: An Essay at a Complete Statement of the Personal Law Applicable to Muslims in British India* (Bombay: D. B. Taraporevala Sons, 1913).

[87] A. J. Robertson, *The Principles of Mahomedan Law, with an Appendix Tracing the Growth of Personal Law, the Progress of Legislation, and the Jurisdiction of the Courts in Relation thereto, from the Time of the East India Company* (Rangoon: Myles Standish, 1911).

[88] Raymond West, "Mohammedan Law on India: Its Origin and Growth," *Journal of the Society of Comparative Legislation* 2 n.s., no. 1 (1900). Raymond West, "Modern Developments of Mohammedan Law," *Journal of the Society of Comparative Legislation* 2 n.s., no. 2 (1900).

[89] William Henry Rattigan, "The Influence of English Law and Legislation upon the Native Laws of India," *Journal of the Society of Comparative Legislation* n.s., 3, no. 1 (1901). William Henry Rattigan, "The Scientific Study of the Muhammadan Law," *Law Quarterly Review* 17 (1901).

[90] S. Khuda Bukhsh, "The Origin and Development of Muslim Law," *Journal of the Moslem Institute* 3, no. 2 (1907).

Syed H. R. Abdul Majid.[91] Later jurists, writing prior to the achievement of independence in 1947, such as Abul Hussain[92] and Wahed Husain,[93] continued this tradition of studying the impact of British rule. Analyses of the understandings of Muslim law by all these modernists, and the impact of their writings and legal careers are sorely needed. Some studies on the various High Courts in which these jurists practiced, have begun to elucidate the subject. The institutions studied include the court at Allahabad[94] and the court at Calcutta,[95] but neither provide an in depth analysis of the contributions of Muslims to the general administration of Muslim law.

Several scholars have addressed specific facets of the transformation of Muslim law in colonial India. A regional focus on the Punjab and the interface of British efforts at the codification of customary law there with the *sharī'ah* has been provided by David Gilmartin.[96] Radhika Singha has concentrated her study on a period antecedent to this study of Syed Mahmood, looking at the transformation of Muslim criminal law by the British colonial power in the early decades of their control of the judicial administration.[97] Her study analyzes issues of control, authority and power more fully than earlier studies. Singha has considerably expanded the foundational work done on the same subject by Jörg Fisch, whose study of the role of Muslim law officers in the British courts has already been mentioned.[98] In a study that also focuses on the early developments in criminal law under the British in Bengal, Shahdeen Malik has provided a helpful discussion on the historical discourse on colonial criminal law and how the various approaches to legal

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[91] Syed H. R. Abdul Majid, "A Historical Study of Mohammedan Law," *Law Quarterly Review* 27 (1911); Syed H. R. Abdul Majid, "A Historical Study of Mohammedan Law, II," *Law Quarterly Review* 28 (1912); Syed H. R. Abdul Majid, "The Moslem International Law," *Law Quarterly Review* 28 (1912); Syed H. R. Abdul Majid, Raymond West, and Roland Knyvet Wilson, "Wakf as Family Settlement among the Mohammedans," *Journal of the Society of Comparative Legislation* n.s. 9 (1908).

[92] Hussain, *History of the Development.*

[93] Wahed Husain, *History of the Development of Muslim Law* (Calcutta: published by the author, n.d.).

[94] Gillian Frances Mary Buckee, "An Examination of the Development and Structure of the Legal Profession at Allahabad, 1866-1935" (Ph.D., University of London, 1972).

[95] Mahua Sarkar, *Justice in a Gothic Edifice: The Calcutta High Court and Colonial Rule in Bengal* (Calcutta: Firma KLM Private Limited, 1997).

[96] David Gilmartin, "Customary Law and *Shari'at* in British Punjab," in *Shari'at and Ambiguity in South Asian Islam*, ed. Katherine Pratt Ewing (Berkeley: University of California Press, 1988).

[97] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, Oxford India Paperbacks (New Delhi: Oxford University Press, 1998).

[98] Fisch, *Cheap Lives.*

history affect the resulting analyses.[99] Such studies are most welcome in shedding light on particular aspects of the transformation of Muslim law in British India, and this dissertation seeks to make a similar contribution with regard to the participation of Muslims in the latter half of the 19th century, particularly in north-western regions of India.

D. Comparative perspective

Studies of the transformation of Muslim law in the 19th century help to provide a comparative perspective and a broader context in which to understand the changes that were occurring in India. In his work on the history of Muslim law, N. J. Coulson includes British India in his analysis. He insists that the British "had initially aimed at the preservation of the existing legal system, which was the traditional Ḥanafī law sponsored by the Mughal Emperors and administered by the *Kazis* (*qāḍīs*)."[100] But with the reorganization of the courts and the introduction of English law for the Presidency cities in 1772, the application of Muslim law began to be limited to certain regions, till legislation in the 1860s removed Muslim law altogether from matters of procedural law and substantive criminal law. All that remained were certain matters of civil law, and even they had become anglicized by the British and Indian judges trained in English law.

The administration of Muslim law by British or anglicized courts led to "a remarkable fusion of the two systems...aptly termed Anglo-Muhammadan law, because, through the introduction of English legal principles and concepts, the law applied by the Indian courts came to diverge in many particulars from traditional Sharī'a law."[101] His view, however, is predicated on the assumption the correct application of Muslim law must be done according to the traditional doctrine of *taqlīd*, which Coulson defines as "adherence to established authority"[102] or "imitation."[103] He ascribes to Muslim law a rigidity as a result of the "closing of the door of *ijtihād*" from the tenth century onwards, and postulates that jurisprudential activities thus circumscribed and fettered by the principle of *taqlīd*, were "henceforth confined to the elaboration and detailed analysis of estab-

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[99] Shahdeen Malik, "Historical Discourse on Colonial Criminal Law," *Journal of the Asiatic Society of Bangladesh, Hum.* 44, no. 1 (1999).
[100] N. J. Coulson, *A History of Islamic Law*, Islamic Surveys, no. 2 (Edinburgh: Edinburgh University Press, 1964), 154-155.
[101] Ibid., 164-165.
[102] Ibid., 170.
[103] Ibid., 80.

lished rules" in commentaries upon the works of past masters.[104] Writers such as J. N. D. Anderson basically share Coulson's perspective of Muslim law and developments in India.[105]

Coulson's assumptions of the end of *ijtihād* have been refuted by Wael B. Hallaq who demonstrates that in practice and in theory the activity of *ijtihād* continued well past the tenth century and was, in fact, "exercised up to the premodern era and...claims for the right of ijtihad and its superiority over taqlid were voiced incessantly."[106] He also challenges the conception of *taqlīd* as blind or mindless acquiescence to the opinions of others and sees it rather as "the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine."[107] In this, Hallaq notes, *taqlīd* resembles all the major legal traditions in the way they are inherently disposed to accommodating change while remaining conservative by nature.

Another scholar who also advocates this broader understanding of change in Muslim legal history is Haim Gerber, who has examined the changes in Ottoman Turkey.[108] While Turkey was not colonized in the way India was by the British, the effects of European modernization in matters of law were being felt, and the *'ulamā* responded with their own program of transformation of Muslim law. The French colonial context of Algeria is scrutinized by Allan Christelow who demonstrates how the French transformed the Muslim judicial system by imposing their formal structures on the system and how prominent figures in the Muslim judiciary responded to the French intervention.[109] Nathan J. Brown analyzes the transformation of Muslim law in Egypt in the late 19th century, carefully tracing the involvement of Egyptians in the various stages of that proc-

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[104] Ibid., 81.
[105] J. N. D. Anderson, "Islamic Law and Its Administration in India," in *Contributions to the Study of Indian Law and Society: South Asia Seminar 1966-1967* (Philadelphia: South Asia Regional Studies, University of Pennsylvania, 1967). J. N. D. Anderson, "The Anglo-Muhammadan Law," in *Contributions to the Study of Indian Law and Society: South Asia Seminar 1966-1967* (Philadelphia: South Asia Regional Studies, University of Pennsylvania, 1967).
[106] Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16 (1984): 20.
[107] Hallaq, *Authority, Continuity and Change*, ix.
[108] Haim Gerber, *Islamic Law and Culture, 1600-1840, no. 9*, Studies in Islamic Law and Society, ed. Ruud Peters and Bernard Weiss (Leiden: Brill, 1999).
[109] Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, NJ: Princeton University Press, 1985), 5-42.

ess.[110] His observation that the adoption of a law code in the 1880s was "an attempt to contain foreign influence" in the Egyptian courts, even though it was more divergent from Muslim sources than most would have liked, correlates with a similar phenomenon in India where Syed Mahmood promoted codification for the same reason.[111] Brown's work on Egypt, where the British entered as an occupying force only in 1882, provides a helpful contrast to their direct control of the transformation of the judicial system in India for more than a century prior to that period. For still another colonial context, Nur Fadhil Lubis has produced a comprehensive study of the transformation of Muslim law under the Dutch in Indonesia.[112]

Brinkley Messick is another scholar who writes of the changes in the Ottoman Empire. He describes the state's codification of portions of the *sharī'ah* according to a European legal structure between 1869 and 1876, making the civil law accessible to anyone and thus threatening the exclusive jurisdiction of the *'ulamā* as the exclusive interpreters of Muslim law.[113] As he moves on to analyze the colonial understanding of the *sharī'ah*, particularly in Yemen, Messick makes the helpful distinction between the mainstream Orientalists whose perspective of Muslim law was "generalizing and essentializing" and the scholars who addressed the practical issues of colonial administration of Muslim law and were more "contextually sensitive and pragmatic about differences and similarities."[114] Comparatively, in India, Syed Mahmood focused exclusively on the colonial administrators as the target audience in his exposition of Muslim law because that was the context in which he was primarily involved, unlike some of his contemporaries such as Chirāgh 'Alī (1844-1895) and Ameer Ali (1849-1928) who also confronted the misrepresentations of the *sharī'ah* by mainstream Orientalists in their writings.

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[110] Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge Middle East Studies, 6, ed. Charles Tripp (Cambridge, UK: Cambridge University Press, 1997); Nathan J. Brown, "Shari'a and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* 29 (1997).
[111] Brown, *Rule of Law*, 30.
[112] Nur Fadhil Lubis, "Islamic Legal Literature and Substantive Law in Indonesia," *Studia Islamika* 4, no. 4 (1997).
[113] Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society*, Comparative Studies on Muslim Societies, ed. Barbara Daly Metcalf (Berkeley: University of California Press, 1993), 54-58.
[114] Ibid., 58-59.

Studies by scholars of the British-Indian context have not been limited to the impact of colonialism on Muslim law. J. Duncan M. Derrett has been one of the most prolific scholars in this field, with a particular focus on changes in Hindu law.[115] Marc Gallantar's helpful articles on the impact of colonialism have been collected in one volume, edited by Rajeef Dhavan whose extensive introduction provides a most comprehensive review of the transformation of colonial law in India.[116] Sudhir Chandra has provided a detailed study of the British colonial treatment of women by enforcing a strict interpretation of the Hindu law of marriage.[117] Such studies in legal history go beyond a linear account of the development of "modern" legal systems by colonial powers in "traditional" cultures, to examine the discourses of power and domination that underlie such transformations. However, these studies also demonstrate that colonized peoples were actively participating in such transformations as well, at times co-operating with the colonial powers and at times subverting the legal discourse and the production of legal knowledge to achieve their own ends. It is this dialogical approach that has been adopted to present the multi-faceted history of Syed Mahmood and his involvement in the transformation of Muslim in India at the end of the 19th century.

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[115] See his classic work: J. Duncan M. Derrett, *Religion, Law and the State in India* (New York: The Free Press, 1968). Some of his other essays have been republished a multi-volume set, the most relevant to the period addressed by this dissertation being: J. Duncan M. Derrett, ed., *Essays in Classical and Modern Hindu Law*, vol. 4, Current Problems and the Legacy of the Past (Leiden: E. J. Brill, 1878).

[116] Marc Galanter, *Law and Society in Modern India*, ed. Rajeef Dhavan (Delhi: Oxford University Press, 1989).

[117] Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights* (Delhi: Oxford University Press, 1998). The case around which Chandra has centred his discussion was one that Syed Mahmood addressed in *The Indian Law Reports* 13 All. (1890) 126, Binda v. Kaunsilia, pp. 126-164.

Chapter 1 – The Life of Syed Mahmood

It is necessary to begin any evaluation of Syed Mahmood's contribution to the transformation of Muslim law and general legal thought in British India with an analysis of his historical context, with a particular emphasis on his education in both India and England. Such a biographical sketch also provides a valuable backdrop against which to view his legal writings. Concurrently, biography as history opens a window of understanding the working of the British legal system in late 19th century India, and the participation and criticism of Indians in the construction of that system.

The historians' neglect of Syed Mahmood needs to be addressed. Firstly, the fact that his writings are hidden away in the Law Reports and government archives, and not as published tomes to be reprinted regularly such as those by his contemporary, Syed Ameer Ali, may have led to the assumption in both scholarly and popular circles that he was a marginal figure, making no contribution either to the administration of British India or to the development of Indian thought. In order to dispel this negative perception, his biography is presented in considerable detail, showing his vital involvement at numerous levels of the Indian and Muslim communities as well as the British administration. The areas in which he made unique and pioneering contributions, especially in the transformation of Muslim law, are highlighted.

Secondly, his credentials as a "good Muslim" may have been questioned, as indeed they were by his detractors even during his lifetime. The final years of his life when his physical and mental abilities declined because of drink and disease tend to overshadow his earlier achievements. His estrangement from his father at this period in his life, and his subsequent alienation from his former colleagues in the running of the college he had helped to establish, also cast a pall on his memory. To correct this misperception, this comprehensive biography demonstrates that throughout his life he identified himself as a Muslim, as well as an Indian and a subject of the British crown, and that he was actively involved in the education and improvement of the Indian Muslim community. At the same time, Mahmood's efforts to promote harmony between people of diverse backgrounds, and his support for initiatives that improved the situation of all Indians, regardless of religious affiliation, is presented to provide a well-rounded perspective of his interests.

Syed Mahmood's overt support for the British regime in India is a third factor in his neglect by historians. His pro-British stance may have made him suspect in the eyes of nationalist and post-colonialist historians who disapprove of any actions they would consider collaboration with an imperialist power, or who see such actions simply as a corroboration of the premise of British colonial hegemony. This biographical account of Syed Mahmood's life portrays the complexity of his relationship with the British and the British government in India. At times he is strongly supportive while at other times he is strongly critical of aspects of their rule. The fact that his premature death occurred in 1903 precluded his involvement in any substantial way in the nationalist activities of his contemporaries in the early decades of the twentieth century, and has resulted in the absence of his name in most listings of the heroes of independence. Yet this biographical sketch coupled with the more detailed analysis in subsequent chapters demonstrates his vital involvement in the earlier efforts to increase greater Indian participation in the administration of their country and to influence the courts and the legislature to the benefit of all Indians under British rule.

The details of his life have been assembled from a wide variety of sources, though sources in the English language predominate. The absence of a body of letters in the Urdu language is perplexing. It has proven impossible to locate any correspondence of Syed Mahmood with his mentors or peers in the Muslim community apart from a few in English dealing with college business.[1] Even more inexplicable is the lack of any correspondence with his father who was a prolific letter writer.[2] The prominence of British government records, official law reports and English newspaper accounts do not, however, invalidate the findings because it is in these that Syed Mahmood's voice has been most clearly preserved, and it was through these media that he most often chose to express himself.

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[1] The Director of the Sir Sayyid Academy in Aligarh informed me that there was a considerable amount of uncatalogued papers at the Academy which might contain such correspondence, but that archive was not accessible because of its unorganized state.

[2] Surprisingly, even a collection of Sayyid Aḥmad's letters edited by Syed Mahmood's son, Ross Masood, contains no correspondence between his grandfather and father. Sir Sayyid Aḥmad Khān, *Khutūt-i Sar Sayyid*, ed. Sayyid Ross Masud (Badayun: Nizami Press, 1931).

1.1 The Education of Syed Mahmood in India

1.1a Early Education

Syed Mahmood was born in Delhi on 24 May 1850. In an autobiographical account written by Syed Mahmood as an appendix to accompany a letter to the British government in India, Syed Mahmood briefly described his education and his rise to the position as High Court Justice in Allahabad. It is significant that the first half of this singular autobiographical writing is devoted to a history of his ancestors. He quoted extensive sections from Lieut. Col. G. F. I. Graham's biography of Sir Sayyid Aḥmad Khān, describing the positions and honours held by two of Mahmood's great-grandfathers, his two grandfathers, and his father.[3] Thus Syed Mahmood saw himself firmly within the *sharīf* tradition, tracing his lineage from men notable for their service to the Mughal rulers and for their scholarship. The *ashraf* class of the Muslim community had their roots in the Indo-Muslim political thought of Mughal Empire. This thinking was "grounded primarily in the premise that an essential part of being a Muslim consisted of belonging to, and identifying with, the ruling power," and that they as the politically significant class of Muslims "formed a part of a superior race whose noble foreign origins entitled them to a degree of deference beyond that commonly accorded to indigenous Indian groups."[4] That Syed Mahmood saw his current identification with the British rulers as a continuation of that tradition is evident in this statement about his father: "My father Sir Syed Ahmed is the first member of my family in the direct line of ancestry who entered the British service as a young man in a very subordinate position and may be regarded as having given a new start to the socio-political character and prospects of the family."[5] Mahmood's class consciousness is also revealed in an earlier note on the employment of Indians in the civil service. He stated, "I am quite alive to the fact that nothing can be better than using the new Native Civil Service rules as means of obtaining the co-operation and allegiance of

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[3] Syed Mahmood, Aligarh, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 9 September 1893, Appendix IV: Biographical Information, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London. Syed Mahmood wrote the letter not only to request permission to retire from the Bench of the High Court in Allahabad, but also to defend himself against complaints about his work and character by the Chief Justice, Sir John Edge.

[4] Farzana Shaikh, *Community and Consensus in Islam: Muslim Representation in Colonial India, 1860-1947*, Cambridge South Asian Studies, 42 (Cambridge, UK: Cambridge University Press, 1989), 79.

[5] Syed Mahmood, Appendix IV: Biographical Information.

the wealthy and prominent families by enlisting their cadets in the Government service, and by entrusting them with administrative responsibilities."[6] He qualified his endorsement of this class by suggesting that the government should not select men from families so well off as to be wholly independent of government service, but "from men of good families, having sufficiently limited private means to make it worth their while to stay in Government service for the sake of the emoluments, dignity, and position it brings."[7] This class, he added, is the one that is "in need of a career for their sons to maintain their ancestral position in life in the absence of adequate private means."[8] One gets a strong impression that Syed Mahmood saw his family in this predicament.

Born into an *ashraf* family, Syed Mahmood began his education, in the traditional fashion of that educated class, with the study of the Arabic alphabet in preparation for learning the Qur'ān, as he stated, "at the age of 4 years 4 months and 4 days customary among the Mahamedan gentry of the class to which my family belong."[9] These studies took place in a *maktab* or school attached to a mosque that had been built by his maternal aunt in Delhi. At home, Ḥāfiẓ 'Abdul Raḥīm, who had been employed by Aḥmad Khān to manage the printing work of the Aligarh Scientific Society and later the *Tahzīb ul-Akhlāq* journal, was appointed as his teacher.[10]

In 1857, the Revolt had a profound impact on Syed Mahmood's family. His father, Sayyid Aḥmad Khān was working as a *ṣadr amīn*[11] in Bijnor, but the rest of the family remained in Delhi. Syed Mahmood describes the effect of the Revolt on his education as follows:

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[6] Letter from Syed Mahmood, Calcutta, to H. W. Primrose, 7 Feb. 1882, p. 80i, No. 88a, Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.

[7] Ibid., p. 80k.

[8] Ibid.

[9] Syed Mahmood, Biographical Information. For the early education of boys from *ashraf* families, see: Lelyveld, *Aligarh's First Generation*, 50-51.

[10] Ḥālī, *Hayāt-i Jāvid (Urdu)*, 744. See also Lalah Sri Ram, ed., *Tazkirah-yi hazar Dastan ma'ruf bah Khum Khana-yi Jāved*, vol. 2 (Lahore: Munshi Naval Kishor, 1908-1940), 544.

[11] The *sadr amīn* was "a chief commissioner or arbitrator, the title of a class of native civil judges under the British government, distinguished as Sadr Amīns and Principal Sadr Amīns: these are the second and third in rank, counting from the first or lowest, viz. the Munsifs." William H. Morley, *The Administration of Justice in British India: Its past History and present State comprising an Account of the Laws peculiar to India* (1858; reprint, New Delhi: Metropolitan Book Co.,1976), 356.

> I had not nearly finished the Koran and had begun to learn Persian when the disastrous events of the great Mutiny occurred on the 10th of May 1857 at Meerut, and the Sepoy Mutineers took possession of Delhi the next day perpetrating the horrible atrocities of a general massacre of Europeans including women and children described at pages 567 and 571 of vol. III of Beveridge's *History of India*. I well remember the horror and consternation and terror which seized the whole fortified city of Delhi, and the eighth year of my life began amidst surroundings of horror, anarchy and terror not calculated to promote those early studies in the Mosque which I was the pursuing...My recollections of the siege of Delhi during the hot months of June, July, August and the first half of September and some of its striking incidents of the military operations of the siege including the bombardment of the city, and sufferings of the inhabitants and of my family and neighbours in particular are vivid, for I remember that during the whole of that period and for months afterwards all my studies were stopped, Delhi having been taken by storm on the 14th September 1857 and the whole city captured by the 20th September 1857. It was indeed not till 1858 when my father had been appointed *Principal Saddar Amin* of Moradabad the highest judicial office then open to my countrymen that I resumed any studies of the Koran and the Persian language."[12]

The failure of the Revolt followed by the brutal punishment of the rebels by the British and the general suspicion with which the Muslim communities led loyal Muslims such as Aḥmad Khān to conclude that the *ashraf* class of Muslims could only continue to thrive under British patronage. Syed Mahmood recalled:

> It was not till sometime in 1860 that I well remember my father sending for me and impressing upon me the truth that a great revolution had passed upon India, that the times had changed and that in order to live a life of a good and honest *ashraf* (gentleman) I must always entertain feelings of loyalty to the Queen of England and must add the study of the English language to my study of the Koran, the Persian language and elementary Arithmetic.

Mahmood's primary study, however, continued to be the Persian language after he had finished with his Qur'ānic studies. Aḥmad Khān had organized a committee in Muradabad to manage a small Persian language school there, and enrolled Syed Mahmood as a student.[13] In 1862, shortly after Syed Mahmood's mother had passed away, Aḥmad Khān took his son with him to the District of Ghazipur to which he was being transferred to serve in the same judicial capacity he had had in Muradabad.[14] To assist Syed Mahmood in his study of the English language there, his father appointed a "Bengalee Baboo"

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[12] Ibid., pp. 16-17.
[13] Sir Sayyid Ahmad Khan, *Sir Sayyid Ahmad Khan's History of the Bijnor Rebellion*, trans. Hafeez Malik and Morris Dembo, IAD Oriental (Original) Series, no. 21 (Delhi: Idarah-i Adabiyat-i Delhi, 1982), xviii. For a description of this period of a boy's education, see: Lelyveld, *Aligarh's First Generation*, 51-53.
[14] Hali, *Hayat-i-Javed (English trans.)*, 84.

to tutor him. Furthermore, his studies of English were given a new impetus by the European who was assisting Aḥmad Khān in translating his *Commentary of the Holy Bible* into English.[15] His studies in Persian and Arabic grammar continued apace with his English studies. When his father was transferred once again in 1864, Syed Mahmood followed him to Aligarh where he entered the Government Anglo-Vernacular School of that city. Twenty years later, when the leading notables of Aligarh came together to join Syed Mahmood in celebrating his appointment to the Allahabad High Court, he reminisced about his studies there as a child, and was pleased to see many familiar faces including numerous class-mates who had remained in Aligarh to pursue their various careers there.[16] In 1866 when he had completed that course of instruction, he was sent to Delhi to study at the Government College, then under a Principal who had taken high Honours in Cambridge University.[17] The culmination of his studies in India occurred in Benares as a result of his father's being reassigned once again.

> Early in 1868 when my father was transferred to Benares in the double capacity of Judge of the Small Cause Court with powers of a Subordinate Judge I was called by him to go to that city and enter the Queen's College Benares which under the eminent Anglo-Sanskrit scholar and poet Mr. Ralph T. H. Griffith, the well-known translator of the epic *Ramayana* into English verse and author of the poems entitled "*Idylls from the Sanskrit*", enjoyed a high reputation as a seminary of the English language and literature in this part of the country. I continued my studies in that College not foregoing my Arabic studies which I prosecuted at home under a learned private tutor, a *Maulvi* who had come with me in that capacity from Delhi. Towards the end of 1868 I passed the Matriculation Examination of the University of Calcutta and the results were announced in January 1869 when I was found to have stood first in order of merit and that the percentage of marks which I had secured in the English and the Arabic language and literature were so high that they closely approached the maximum marks allotted to those subjects in the University Examinations. This gave me a right to double scholarships in my College I having passed in the first Division and having taken the first place in the order of merit so far as the English and the Arabic languages and literature were concerned.[18]

The college in Benares was the product of the amalgamation of the Benares Sanskrit College and the English Seminary in 1844, with the intention that in this institution, the

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[15] Syed Mahmood, "Biographical Information," p. 18. See also Ḥālī's account, "The whole thing was translated into English by a European who was paid one hundred rupees a month for two hours' work a day." *Hayat-i-Javed*, p. 76.
[16] *The Aligarh Institute Gazette*, 9 May 1882, 507.
[17] Syed Mahmood, "Biographical Information," p. 18.
[18] *Ibid.*, pp. 18-19.

knowledge of the East and that of the West would be united.[19] This philosophy closely paralleled Aḥmad Khān's thinking on education and would have reinforced those ideas in Syed Mahmood as well.

Syed Mahmood was actively participating in public life from an early age, having already caught his father's vision for reform in the educational system. At the age of 14 he made a speech to the Scientific Society held on Aug. 16, 1864, in which he emphasized the need for education.[20] He followed his exhortations with a practical demonstration of his commitment by contributing Rs. 5 to the library and another Rs. 10 to the building fund. He made another speech at the Scientific Society's Institute on Feb. 14, 1866, which was covered in the *Aligarh Institute Gazette*.[21]

1.1b Application for scholarship to study in England

As Syed Mahmood was finishing his studies at Queen's College in Benares in 1868, a unique opportunity presented itself for him to take a major step in accomplishing his desire to unite in himself the learning of the East and that of the West. The Government of India passed a resolution on 30 June, 1868 for scholarships to be awarded to promising Indian youth to enable them to study in England. The Government stated that it was motivated to establish the scholarships by the "expediency of encouraging Natives of India to resort more freely to England for the purpose of perfecting their education, and of studying for the various learned professions, or for the civil and other services of [India]."[22] The scholarships were to be held "on condition of a residence in Great Britain," and were to consist of an allowance of £200 per year, tenable for three years, plus a sum of £150 for passage money and outfit on leaving India and the same amount on leaving England. The scholars were given the power to choose the course of study they wished to follow, and were not to be restricted to obtaining a University degree or for passing the competitive examination for admission into the Indian Civil Service. Nine such scholar-

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[19] Michael S. Dodson, "Re-Presented for the Pandits: James Ballantyne, 'Useful Knowledge,' and Sanskrit Scholarship in Benares College during the Mid-Nineteenth Century," *Modern Asian Studies* 36, no. 2 (2002): 258, 274.
[20] Muhammad, ed., *Aligarh Movement*, 48-49.
[21] Ibid., 93. See also *Aligarh Institute Gazette*, 30 Mar. 1866.
[22] United Kingdom. East India (Civil Service), "Extract from the Proceedings of the Government of India in the Home Department (Education), under the date the 30th June 1868," in *Papers Relating to the Admission of Natives to the Civil Service of India* (London: George Edward Eyre and William Spottiswoode, 1868), 6.

ships were to be awarded, apportioned to the various regions of India; but only 3 were to be awarded by open competition. The Governor General in Council reasoned that, "Considering the present state of education in India, and the general condition of the people, it is not advisable to award the scholarships wholly upon the principle of open competition. It is of great social and political importance to give to the sons of Native gentlemen of rank and position a larger share of the advantages now offered than they would be likely to obtain under such a system."[23] In Syed Mahmood's region, the North-Western Provinces, it was to be the responsibility of the local government and administration to nominate the person they considered duly qualified, one having a good moral character and physically capable of undergoing the course of life and study in Europe. It was emphasized that, "It would in every case be an indispensable condition that the selected candidate should be a good English scholar, able to read, write, and speak the English language with fluency and accuracy."[24]

Sir Sayyid Aḥmad Khān applied for the one scholarship being offered in the region for his son.[25] In his letter of application, he stated that his desire was that Syed Mahmood might "stay there a few years to attain a thorough knowledge of the English literature, and that he may qualify himself for the civil and other high employments in India." He further wrote, "I intend also to put him in any Inn of Court, say, Lincoln's Inn, that he may pass as a Barrister there."[26] Aḥmad Khān planned to accompany his son to England, and therefore applied for furlough. It was Aḥmad Khān's friend, Sir William Muir (1819-1905), Lt.-Governor at the time, who nominated Syed Mahmood for that government scholarship, the first to be awarded in the North-West Provinces.[27]

According to the directions of the Secretary of State for India, the Duke of Argyll, this scheme of providing scholarships to carefully selected students was to be considered

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[23] Ibid., 7.
[24] Ibid.
[25] Graham, *Life*, 103.
[26] Syud Ahmad, Benares, to Secretary to Government, North-Western Provinces, 8 December 1868, located in the India Office Records, Proceedings and Consultations 1702-1945, General Department. North-Western Provinces, P/438/33, File 200, dated May 1869, British Library, London.
[27] Secretary to Government, North-Western Provinces, to Secretary to Government of India, Home Department (No. 365A.), Camp Jellalabad, 23 January, 1869, located in the India Office Records, Proceedings and Consultations 1702-1945, General Department. North-Western Provinces, P/438/33, File 202, dated May 1869, British Library, London.

experimental only, and in the following year was suspended and not revived in another form until seventeen years later.[28] Argyll argued that an advanced English education would not be enough to qualify some of the Indian races to exercise ruling authority. "In vigour, in courage and administrative ability some of the races of India most backward in education are well known to be superior to other races which, intellectually, are much more advanced. In a competitive examination the chances of a Bengalee would probably be superior to the chances of a Pathan or a Sikh. It would, nevertheless, be a dangerous experiment to place a successful student from the colleges of Calcutta in command over any of the martial tribes of Upper India."[29] Appointments of Indians to the Civil Service were therefore made by nomination rather than by competition, and were confined largely to those whose merit had been demonstrated in the higher ranks of the subordinate civil service. Even these were to be limited to a few in order to maintain the stability of British rule with "a large proportion of British functionaries in the more important posts."[30]

1.2 Legal training in England in the mid 19th century

1.2a Demands for reform in the training of British judges in India

By the middle of the 19th century, demands for reform in the legal education of civil servants headed for India were being voiced by key administrators in India, motivated in a large part by a desire to maintain control over India and by attitudes of cultural superiority and suspicion. E. J. Howard, Director of Public Instruction, wrote an influential letter to the government in 1859 arguing that unless the British were prepared to hand over the control of the judicial system to the Indians, those civil servants coming from Britain needed to acquire a better judicial training. He noted that in India the legal training provided by the government was resulting in well-trained young men—but all were Indians, and the posts open to them were limited to the lower levels of the judiciary. The legal education received by the old order of civil servants trained at Haileybury College in England "was very slender, and quite inadequate to supply even the foundation of really practical legal knowledge," while the civil servants of the new order for the most part had

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[28] F. H. Brown, "Indian Students in Great Britain," *The Edinburgh Review* 217 (1913): 141-142, 145.
[29] Edward C. Moulton, *Lord Northbrook's Indian Administration, 1872-1876* (Bombay: Asia Publishing House, 1968), 76.
[30] Ibid., 78.

not received "even the slightest instruction in law or jurisprudence."[31] Howard foresaw a time when the agitation to have a professionally trained judiciary would reach such a level, and when Indian lawyers trained in India would be procurable in such numbers, that they would be impossible to ignore, resulting in the Government having "to give Natives a monopoly of the judicial bench."[32] While he held to a belief in the inherent superiority of the European over the Asian, he recognized that that assumption was being challenged by the superior education received the Indian jurist in comparison with that received by English civil servants before taking up judicial posts in India.

> The preference given to Europeans in India, as I understand, is not given to their blood, but their presumed merit. This merit, it is true, is not thought to be founded solely on their intellectual qualities or acquired knowledge. Government have an assurance that an English gentleman has been bred up under the motives and restraints of a Christian home; that he has lived without stain among men of honor (according to English notions of honor); and finally, that he is, and even to death will be, a true and loyal servant of the Queen. Without wishing to say anything offensive against our Native fellow-subjects, it is certain that an English Government cannot repose the same kind, or at least the same amount, of trust on its Native servants whose life and antecedents are hidden, as it were, behind a veil from English eyes. Still a Native student, who has passed through college and the law classes with a good character, who has spent some years in practice as a Vakeel,[33] or in the office of Sheristadar,[34] and afterwards served with credit as Moonsiff[35] and Sudder Ameen,[36] has a right to be considered as trustworthy for yet higher office, and certainly his claims would appear strong against those of an English Civil Servant who had never opened a law book, or mastered a principle of jurisprudence.[37]

He went on to recommend a requirement of two years of study: the first to be taken in England, dealing with principles of jurisprudence, and the second in India focusing on the practical application of the laws in existence there. For the study of jurisprudence—the

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[31] Government of India, *Selections from the Records of the Government of India, Home Department. No. 70. Papers Relating to the Question of Forming a Separate Judicial Branch of the Civil Service in India, and the Legal Training of Civil Servants* (Calcutta: Office of Superintendent of Government Printing, 1868), 82-83. On Haileybury, see: Peter Penner, *The Patronage Bureaucracy in North India: The Robert M. Bird and James Thomason School 1820-1870* (Delhi: Chanakya Publications, 1986), 202-239.

[32] India, *Selections from the Records*, 84.

[33] An authorised pleader in a court of justice.

[34] The head Indian officer in a collector's office or court of justice.

[35] The lowest grade of judge under British government in India.

[36] A subordinate magistrate under East India Company rule. Definitions are taken from: Francis Robinson, *Separatism among Indian Muslims: The Politics of the United Provinces' Muslims 1860-1923*, Paperback edition, revised ed. (Delhi: Oxford University Press, 1993), 437-439.

[37] India, *Selections from the Records*, 84.

principles of right and duty which lie at the bottom of all positive laws among all civilized nations—he recommended the study of Roman law and not the laws of either India or England.

> No legal system existing in India can be advantageously selected as the basis of scientific legal study. The Hindoo and Mahomedan codes are unsystematic, and are bound up with religious dogmas in such a manner and to such an extent as to render them quite unsuitable for the purpose required. The English Statute Law of India, prevailing beyond the local jurisdiction of the Supreme Courts, is too fragmentary and incomplete to constitute the ground-work of jural study.... The common law of England (in its widest sense) is not open to the objections above-mentioned, but, as I humbly think, it is almost equally unsuitable as the basis of an Indian Judge's education. The English law is vast in extent, highly artificial, and unsystematic. It retains many feudal and other technical doctrines which must be investigated historically before they can be understood, and thus inflicts upon the student much labor which, for the training of an Indian Judge, would be almost or quite useless.[38]

The year of study in India, however, would be of a more utilitarian nature, focusing on branches of law of great practical importance including the Muslim and Hindu laws.

Henry S. Maine (1822-1888), who had arrived in India in 1862 to assist the government in framing legislation as the Legal Member of the legislative assembly, disagreed with the need for legal education in India. In a minute dated 2 Dec. 1863, he argued that requiring the aspiring civil servant to study a year in a climate such as India's was costly and inefficient.[39] He recommended alternatively that the legal course studied in England be expanded. For that he suggested that the Secretary of State enter into communication with "the only body in England which undertakes to give a systematic legal education—the Inns of Court."[40] In the decades that followed, Indian students such as Syed Mahmood were to flock to the four "Inns" of London, Lincolns Inn, Grays Inn, Inner Temple, and Middle Temple, to obtain their education in law and their certification as barristers to practice in the High Courts of India.[41]

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[38] Ibid., 89-90.
[39] Ibid., 229-230.
[40] Ibid., 229.
[41] For a brief description of the various Inns, and of the process of gaining admission, see an article written for prospective students coming from India in the early 1880s: A. D. Tyssen, "The English Bar," *Journal of the National Indian Association*, no. 122 (1881): 69-81.

1.2b Demands for reforms in legal education in England

The study of law at the Inns of Court, the main institution for the training of barristers in England, was coming under increasing criticism for its lack of a systematic approach to educating and examining potential barristers. Partly in response to the growing criticism, a Council of Legal Education had been established 1852 to systematize and standardize the legal education of the students before admitting them to the Bar.[42] Whereas previously all that had been required for an applicant to be called to the Bar was eating the prescribed number of meals in the commons of his inn over three to five years, the Council now established "Readerships" in five key subjects of law on which the Readers would give lectures and private classes. A Royal Commission appointed two years later made further recommendations to raise the intellectual qualifications and professional knowledge of those called to the Bar. These recommendations included requiring an entrance examination for non-graduates, making both the lectures and the pupillage under a practicing barrister compulsory, and giving a final examination before qualifying someone as a barrister.[43] Although these recommendations were not adopted at that time, the Inns of Court continued to take steps to improve the quality of legal education.

An analysis of the system of the English legal education in *The Solicitors' Journal* early in 1869, the year Syed Mahmood arrived in London, described the rules applied in the Inns of Court, but found their impact still somewhat insufficient to bring about the reformation that the editors felt was necessary.[44] To be admitted to an Inn of Court as a student, an applicant would have to pass an elementary examination in English and Latin, unless he came from a university. He would remain a student for twelve terms—that is, three years—during each of which he would still be required to dine in the Inn's hall six times. An exception was made for those who were also members of a university in which case three dinners a term was enough. The purpose of the dinners was to bring the members of the Inn, both barristers and students, "into constant intercourse, by making them live together, dine together, discuss law together."[45]

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[42] Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (London: Heinemann Educational Books, 1967), 65-66.
[43] Ibid., 66-67.
[44] "Legal Education, No. III," *The Solicitors' Journal and Reporter* 13 (1869): 262-264.
[45] Ibid.: 263.

In addition to the dinners, the students were to attend the public and private lectures of any two of the appointed readers for a period of one year as a condition of being called to the bar. Readers at that time delivered public lectures once a week for about seven months of the year on their appointed subjects of common law, equity, real property law, constitutional law and legal history, and jurisprudence and civil law. Each also conducted a private class on his subject about the same number of times. Examinations were then held on the subjects of the various lectures two or three times a year for those students who wanted to be called to the bar and chose to take the examination. The only further requirements were the initial payment of fees and stamp duties in order to be admitted to the Inn and then to be admitted to the Bar, and the commitment not to serve as an attorney. The latter requirement served to preserve their elite role as barristers with the exclusive right to advocacy before the superior courts. Because the examinations were still voluntary, the editorial summed up the effectiveness of the introduction of the lectures thus: "Under such circumstances we need hardly say that nobody ever attends the lectures of the readers to any real purpose, except the few who intend to pass the examination. The rest, the great mass of students, learn law as pupils in the chambers of men in practice."[46] While it recognized the "immense value" of this mode of learning, it argued that it ought never to be the sole or even the primary mode.

Students coming from India, both Indian nationals as well as civil servants returning on two-year furloughs to obtain certification as barristers in order to serve in courts in India, were permitted to be called to the Bar after only eight terms of dinners rather than the usual twelve.[47] The Rules for the Examination of the Students issued by the Council of Legal Education for students proposing to be called to the Bar with a view to residence in India stated the limits of the reduction thus: "That not more than four Terms under any circumstances be dispensed with in favour of students coming from India, or the Colonies, with a view to return to residence there..."[48] They went on to stipulate that it was not expedient to dispense with any terms except if the students abided by the rules and

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[46] Ibid.
[47] Daniel Duncan, *The English and Colonial Bars in the Nineteenth Century* (London: Croom Helm, 1983), 132.
[48] "Law Students' Journal: General Examination, Michaelmas Term, 1871," *The Solicitors' Journal and Reporter* 15 (1871): 754.

satisfactorily passed an examination in Hindu and Muslim law, the Indian Penal Code, the Code of Criminal Procedure, the Indian Succession Act, and other codes that were to become law in India, with the proviso that each of the four Inns of Court retained the liberty to disregard the above condition in special circumstances. Judges in Calcutta before whom the barristers would eventually appear to plead their cases, raised a strong objection to the shorter number of terms for the students from India, intimating their intention of introducing examinations of their own if the practice was not abandoned. It was felt that barristers going to India should be properly grounded in the law in which they proposed to practice.[49] Towards the end of 1872, it was proposed that this concession for Indian students be removed, and all students be placed on the same footing and be required to attend 9 terms, with reductions available only to those who secured first class honours in the examinations.[50]

1.2c Curriculum reforms in English legal education

The need to develop a course of instruction to better serve the needs of those preparing for a legal career in British India was recognized by the Royal Commission. It had explicitly stated that the study of the scientific branches of legal knowledge, beyond what one might gain in the period of practical study in a barrister's chambers, was needed by those who might be appointed to any judicial office in India or in the other colonies.[51] The Council of Legal Education took further action in 1869 and adopted the recommendations of the Joint Committee of the Four Inns of Court to add to the existing five Readerships, appointing "a Reader of Hindoo, Mahomedan and Indian Law."[52] Standish Grove Grady (1815-1891), a barrister of Middle Temple, was the first to hold this readership, from 1869 to 1873.

In his inaugural lecture on 13 Nov. 1869, Grady indicated that the need for the readership was based on the vastness of the Indian portion of the British Empire both in population and territory, the lack of elementary works on Indian law available to the stu-

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[49] *The Solicitors' Journal and Reporter* 15 (1871): 263.
[50] "Legal Education," *The Saturday Review* 34 (1872): 653.
[51] Raymond Cocks, *Foundations of the Modern Bar*, The S.P.T.L. Book Series, ed. P. S. Atiyah (London: Sweet & Maxwell, 1983), 97.
[52] Ronald Roxburgh, ed., *Records of the Honorable Society of Lincoln's Inn: The Black Books*, vol. 5, A.D. 1845-A.D. 1914 (London: Lincoln's Inn, 1968), 153.

dent, and the resulting ignorance of civil servants of the law they were sent to India to administer.[53] He then proceeded to trace the sources of law, both in general terms and with particular reference to Hindu and Muslim law in India. In discussing Muslim law, he gave a brief account of the Prophet Muhammad, the division of the Muslims into Sunni and Shi'i factions, and the points of law on which the latter two disagreed and the books each faction considered authoritative.[54] He went on to describe the modifications introduced by British legislation to the laws of India and the mode of their administration. The report of the lecture noted the presence of "many natives of India and pupils from the colonies," quite possibly including Syed Mahmood and his father who were in England at the time.[55]

In his work on Hindu law, Grady pointed out the plural nature of the sources of Indian law, demonstrating that the transformation of Muslim law through legislation and adjudication as discussed earlier in the Introduction, also applied to Hindu law. He argued that law as it was being applied in India derived not only from Hindu law (5 different schools) and Muslim law (2 schools), but also from English common law and statute law "as it prevailed in England in the year 1726," from acts of Parliament expressly relating to India enacted since 1726, from statutes which had been extended to India by the acts of the Legislative Council of India, from the common law of India, from the codes of civil and criminal procedure and revenue law that were currently being written and enacted, from English civil law, from the Regulations made by the Governor-General, and from other acts of the Legislative Council of India.[56] In addition to these, the courts were also relying on the accumulated body of rulings by judges as precedents to inform their judgements, and, when all these sources seemed inadequate, on the principle of "justice, equity, and good conscience."

The books Grady proposed to examine during the course of his lectures at the Inns provide some indication of the content of his lectures. In his first year, for the Michaelmas term of 1869, he listed the following: 1) Sir Thomas Strange, *Elements of Hindu*

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[53] "Chair of Hindu, Mahommedan and Indian Law," *The Solicitors' Journal and Reporter* 14 (1869): 62.
[54] More detail on Grady's view of the sources of Muslim law is given in: Grady, *Manual of the Mahomedan Law*, xxvi-xlviii.
[55] "Chair of Hindu Law," 62.
[56] Grady, *Treatise on the Hindoo Law*, xliii-xliv. See also: "The Administration of Justice in our Indian Empire," *The Solicitors' Journal and Reporter* 14 (1869): 23.

Law, 2) Sir W. H. Macnaghten, *Principles and Precedents of Hindu and Mahommedan Law*, 3) his own *Hindu Law of Inheritance*, and 4) his *Mahomedan Law of Inheritance and Contract*, 5) *The Hedaia*, 6) *Al-Sirajiyyah*, 7) *Civil Procedure Code*, 8) *The Indian Penal Code*, 9)*The Criminal Code of Procedure*, 10) *Intestacy and Testamentary Act*, the latter four being laws enacted in India.[57] Candidates for Honours were to be examined in all of the above books, while those seeking a Pass Certificate would be tested only on certain subjects. The list of books for subsequent years was considerably reduced, and specializations were introduced. The "Rules" for the Trinity term in 1870, for example, indicate that in Muslim law the focus that term was to be on inheritance issues and contracts issues,[58] while in the following term the aspects of Muslim law that were to be studied were Increase, Return, and Pawn, or *rahn*.[59] Pre-emption, or *shuf'ah*, was dealt with by Grady in the Trinity term of 1871, and could have been the stimulus for Syed Mahmood's special interest in the subject which he repeatedly addressed in detail later as a judge on the bench of the Allahabad High Court. In the following term, Michaelmas of 1871, special rules were issued for the examination in Hindu, Muslim and Indian Law, separate from those published for the other Readerships.[60] Only five certificates were awarded that fall, but the following spring saw many more, including Raj Narain Mittra, Sitaram Narayan Pandit, Mahomed Wuhiduddin of Calcutta, and W. H. Rattigan who was to figure prominently in the jurisprudence of the Punjab, both as a judge and an author. However, sitting for the General Examinations remained optional until 1872, the year Syed Mah-

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[57] "Rules for the General Examination of Students" Michaelmas Term, 1869, Library of Lincoln's Inn. I am grateful to Guy Holborn, Librarian at Lincoln's Inn, for his assistance in bringing these materials to my attention. Bibliographical details for the books are as follows:
1) Thomas Andrew Lumisden Strange, *Elements of Hindu Law; referable to British Judicature in India* 2 vols. (London: Payne and Foss, 1825);
2) William Way Macnaghten, *Principles of Hindu and Mahammedan Law Republished from Principles and Precedents of the Same*, 2nd ed. (London: Williams and Norgate, 1862);
3) Grady, *Treatise on the Hindoo Law.*
4) Grady, *Manual of the Mahomedan Law.*
5) Marghinani, 'Ali ibn Abi Bakr, *The Hedāya or Guide; A Commentary on the Mussulman Laws: translated by the order of the Governor General and Council of Bengal by Charles Hamilton*, 2nd ed. (London: Wm. H. Allen, 1870);
6) *Al Sirajiyyah, or the Mahommedan Law of Inheritance. Reprinted from the translation of Sir W. Jones ... With notes and appendix by A. Rumsey* (London: W. Amer, 1869);
[58] "Rules for the General Examination of Students" Trinity Term, 1870, Library of Lincoln's Inn.
[59] "Rules for the General Examination of Students" Michaelmas Term, 1870, Library of Lincoln's Inn.
[60] "Rules for the Examination in Hindu, Mahomedan, and Indian Law, to be held on the 27th and 28th of October, 1871," dated 20 July, 1871, Library of Lincoln's Inn.

mood was called to the Bar. Since his name is not in the lists of those awarded certificates in the examinations in Hindu, Mahomedan, and Indian Law in either 1871 or 1872, it would appear that he did not sit for those exams.[61] In 1872, the lectures on Hindu and Muslim law were allowed to lapse, and were not re-instated until 1907, except for a brief revival in 1892 under Herbert Cowell.[62]

1.3 Syed Mahmood in England

1.3a Indian students in England

Syed Mahmood was among the first Indians to arrive in England to study law. A trickle of students had begun arriving in the 1840s and continued at low ebb for several decades.[63] The number of Indians named in the lists of those called to the Bar or graduating from university remained low until the 1880s when their number rapidly increased. *The Indian Magazine*, a journal produced by the National Indian Association set up to assist Indians living in Britain, began publishing lists of the students, giving their respective regions of origin, religions (termed "race"), courses of study, and places of residence or study along with their names. By 1885, there were 160 students, 163 in 1887 (of which half were new students), increasing to 207 by 1890, to 302 in 1896, and to 367 at the turn of the century.[64] Of the various regions, the North-West Provinces (or N.-W. P.) provided the greatest number of Muslims in 1887, totalling 19, the majority of which were studying law. In this list were included Syed Karamat Husein (1854-1917) who later taught law at the MAOC, thereafter serving as a justice on the Allahabad High Court, and Mahdī Ḥasan who was the younger brother of Shiblī Nu'mānī (1857-1914). In 1890, Muslims from the N.-W. P. studying in Britain had declined to 14, while the number from Bengal had risen to 17; once again law was the course of study for the majority of these. One of the students that arrived in London in 1896 from Karachi to study law at Lincoln's Inn was Mu-

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[61] On the content, conduct, and impact on Indian students of the exams introduced in the following decade, see: Joseph A. Shearwood, "The Bar Examinations," *Journal of the National Indian Association*, no. 123 (1881): 150-159.

[62] Buckee, "Examination", 302.

[63] Rozina Vishram, *Asians in Britain: 400 Years of History* (London: Pluto Press, 2002), 87. Vishram surveys a broad range of biographical accounts and other sources to give a detailed picture of the experience of Indian students and other travellers in England at this time, pp. 85-122.

[64] "Indians in England," *The Indian Magazine* 17 (1887): 57-62; "Indian Gentlemen in the West," ibid. 21 (1890): 152-158; "List of Indian Gentlemen in the West," *The Indian Magazine and Review* 25 n.s. (1900): 11-19; 79-81.

hammad Ali Jinnah (1876-1948) who was later to figure prominently in the founding of Pakistan.[65] Syed Mahmood's experience as a student in England and then as a barrister in Allahabad, as well as his rapid rise to the positions of District Judge and Puisne Judge of the High Court served as an example to other Muslims in British India, particularly the graduates of the MAOC where his influence was strong. The MAOC founded by his father at Aligarh was directly patterned after Syed Mahmood's experience at Cambridge, and several of the leading European teachers also came from Cambridge University.

1.3b Syed Mahmood at Lincoln's Inn

In accordance with the desire Aḥmad Khān had indicated in his letter of application, Syed Mahmood was admitted to Lincoln's Inn on May 10, 1869, a few short weeks after his arrival in London.[66] Since a legal education at that time consisted less of lectures and more of observation and apprenticeship to a practicing barrister, Mahmood attached himself to John Pearson, QC, who coached him as a private tutor.[67] His respect for his mentor is revealed in that he dedicated his Urdu translation of the new Indian Evidence Act of 1872, his first contribution to Indian jurisprudence, to Pearson.[68] Since the historical record of Syed Mahmood's time at Lincoln's Inn is scanty, his tribute to Pearson—and none to any of the lecturers—would indicate that his pupillage to this barrister had a greater impact on his legal education than the lectures given at the Inns. In reflecting back on his legal training in London later in his career, he noted that his education had included attending "numerous sittings of [the English Divorce] Court to learn the rules of relevancy of evidence as understood in the English law."[69] Syed Ameer Ali (1849-1928),

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[65] For a description of Jinnah's experience at Lincoln's Inn, see Qutubuddin Aziz, *Quaid-i-Azam Jinnah and the Battle for Pakistan* (Karachi: The Islamic Media Corporation, 1997), 20-30.

[66] Joseph Foster, *Men-at-the-Bar: A Biographical Hand-list of the Members of the Various Inns of Court, including her Majesty's Judges, etc.* (London: Reeves and Turner, 1885), 300.

[67] Graham, *Life*, 198. Pearson had been appointed Queen's Counsel in 1866.

[68] The dedication reads as follows: "To John Pearson Esquire Q. C. Bencher of Lincoln's Inn, this work is, with kind permission, inscribed as an humble token of sincere respect and gratitude." Syed Mahmood, *The Law of Evidence in British India, being a Commentary in Hindustani on the Indian Evidence Act (I of 1872.) as Amended by the Indian Evidence Act Amendment Act, (XVIII of 1872.) together with the Indian Oaths Act (X of 1873.); Sharḥ Qānūn-i Shahādat-i Mujriyyah-yi Hind, y'anī Aikṭ Aval Sanh 1872 'i Ḥasb-i tarmīm Aikt 18 Sanh 1872 'i ma'ah Qānūn-i Ḥalf-i Mujriyyah-yi Hind y'anī 10 Aval Sanh 1873 'i* (Aligarh: Institute Press, 1876) frontispiece. The copy in the British Library has this handwritten note on the flyleaf: "To Sir William Muir K. C. S. I. with the best respects of the author. Allahabad 30th Oct. 1876."

[69] Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, p. 59, British Library, London.

who had been admitted to another Inn of Court, Inner Temple, likewise spent more time with his tutor than in a classroom, according to his memoirs.

> As I had taken my Law Degree at the Calcutta University, I had to undergo no examination. I thus had ample time to devote myself to Chamber work and attend the Common Law Courts, mostly with or for Mr. Baylis (afterwards Judge Baylis) in whose chambers I read.... Mr. Baylis was most kind and hospitable to his pupils, and treated us as members of his family. After finishing my studies with him I entered the Chambers of Mr. Alfred George Martin of the Chancery Bar. Mr. Martin later received a knighthood. He had a large practice and his pupils were quite busy.[70]

Ameer Ali was called to the Bar at Inner Temple in 1873, a year after Syed Mahmood.

Since Mahmood was a member of Christ's College in Cambridge at the same time as he was preparing for the Bar, he qualified for the exception that permitted him to attend three, instead of the requisite four, dinners per year at Lincoln's Inn. The number of years he was required to attend was also reduced because as student from India, he qualified for the exemption granted those students from attending the full four years. Accordingly, Syed Mahmood, took advantage of the offer in order to reduce the inconvenience of travelling from Cambridge to London for the dinners,[71] and was called to the Bar on 30 Apr. 1872 three years after being admitted to Lincoln's Inn.[72] An account of these dinners from the perspective of an Indian student is given by a contemporary of Mahmood's, Romesh Chunder Dutt (1848-1909), who successfully qualified for the Civil Service in the examinations in England in 1869. He subsequently took his training as a barrister at Middle Temple at the same time that Syed Mahmood was at Lincoln's Inn. On a return visit to England more than a decade later, Dutt reminisced about his experience of dining at Middle Temple.

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[70] Syed Ameer Ali, "Memoirs of the Late Rt. Hon'ble Syed Ameer Ali," *Islamic Culture: the Hyderabad Quarterly Review* 5 (1931): 535.

[71] His father, writing to Sir William Muir towards the end of 1870, commented regarding his son, "He is now a member of Lincoln's Inn, preparatory to becoming a barrister; and as he runs up from Cambridge to London to attend lectures and eat his dinners, I look forward to his being a barrister-at-law in two years at the most." He also wrote that because of the extra expenses, he had been forced to contribute additional funds equivalent to the amount of the original scholarship received from the government, in order to enable his son to live at an appropriate level. See: Graham, *Life*, 198-199.

[72] J. A. Venn, ed., *Alumni Cantabrigienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900. Part 2, from 1752 to 1900*, vol. 4, Kahlenberg-Oyler (Cambridge, UK: Cambridge University Press, 1951), 291.

> ...We came to the stately ancient hall where we had our dinners along with venerable Benchers and rising Barristers and Students like ourselves, – imbibing with our substantial dinners those legal associations with which the atmosphere was supposed to be full! And in those good old days, these dinners (besides attendance at certain lectures) were considered a sufficient qualification for a young man to be called to the Bar![73]

The impact of his studies at Lincoln's Inn on Syed Mahmood's legal thought can be seen in a number of areas. He had arrived at Lincoln's Inn at a time when reforms to legal education that had been promoted by certain Victorian jurists were finally being implemented, as has been discussed earlier. Syed Mahmood's judgements in the Allahabad High Court reflect these reformers' regard for those "who looked beyond the letter of the law and discovered the principles which enabled the law properly to be categorised and criticised."[74] Syed Mahmood consistently appealed to the fundamental principles which underlay specific laws or rulings. His familiarity with a wide range of legal literature also reflects the exposure he received in London to influential jurists and texts. Here, also, began his acquaintance with the tradition of English law which he incorporated in his own rulings, but with a critical eye, discerning which English judgments were too limited by their context to be applicable in India. In his judgments, he frequently made reference to the principles of equity, reflecting the impact of his stay at Lincoln's Inn which, of the four Inns of Court, was known for its emphasis on equity, being the locality of Equity Counsel and Conveyancers and of Equity Courts or Courts of Chancery.[75]

At a more fundamental level, Syed Mahmood's understanding of law was framed by his English legal education. He expressed his jurisprudence in the terms provided by English law, not in the terms of traditional Muslim *fiqh*. Even when dealing with Muslim law, he defined it in an English framework, as did his contemporaries who went to Eng-

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[73] Romesh Chunder Dutt, *Three Years in Europe 1868-1871, with an Account of Subsequent Visits to Europe in 1886 and 1893*, 4th ed. (Calcutta: S. K. Lahiri, 1896), 105. Another visitor from the United States who published his observations of London at this period of time as well described these "Hall Dinners" in detail; see, Daniel Joseph Kirwan, *Palace and Hovel: or, Phases of London Life, being Personal Observations of an American in London, by Day and Night; with Graphic Descriptions of Royal and Noble Personages, their Residences and Relaxations; together with Vivid Illustrations of the Manners, Social Customs, and Modes of Living of the Rich and the Reckless, the Destitute and the Depraved, in the Metropolis of Great Britain, with Valuable Statistical Information, Collected from the Most Reliable Sources* (Hartford: Belknap & Bliss, 1870), 523.

[74] Raymond C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence*, Cambridge Studies in English Legal History, ed. J. H. Baker (Cambridge, UK: Cambridge University Press, 1988), 14.

[75] Kirwan, *Palace and Hovel*, 522.

land to receive their legal education.[76] The textbooks and primers on Muslim law authored by this rising generation of Indian Muslim lawyers and judges were based on English patterns, reflecting English assumptions.[77]

1.3c Syed Mahmood at Cambridge

Syed Mahmood was formally admitted to Christ's College at Cambridge for the Michaelmas term in 1870, and resided there two years, but without graduating.[78] One of his contemporaries at Cambridge was Ananda Mohan Bose (1847-1906), later a leader in the Indian National Congress. Though both were admitted to Christ's College only one month apart, Syed Mahmood looked to A. M. Bose with great respect, and would later in life refer to him as "my tutor when I was an undergraduate at Cambridge."[79] It would appear that apart from one other student from India—Mirza Hoosein Khan of Bombay, who was admitted in 1865—these two were the first Indian students to study at Cambridge or Oxford.[80]

The journal of Christ's College, *The Fleur-de-Lys*, noted the arrival of the two students from India, and made regular reference to their involvement in college life throughout their stay. The 21 May 1870 issue reported the arrival of A. M. Bose and Shripad Babahi Thakur of Bombay, and the 5 Nov 1870 issue listed Syed Mahmood as one of the freshmen who came into residence that term.[81] Both Syed Mahmood and A. M. Bose gained recognition among their peers in the Christ's College Debating Club. The journal reported, "We may indeed congratulate ourselves on the success of our debates during the present term.... Our staff of speakers also has been largely augmented from the freshmen; and we may mention with especial pleasure the fact that two of the principal

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[76] Kozlowski, *Muslim Endowments*, 116-118. Kozłowski's assumption that Mahmood's facility in Arabic was limited to what he learned in Cambridge is not borne out by Mahmood's own account of his early education as discussed earlier. But that he did require assistance in Arabic translation is verified by 'Abdul Ḥaqq's statement in his eulogy that Syed Mahmood would have a Muslim scholar read out relevant passages of Arabic *fiqh* when necessary, though the scholar did express his astonishment at Syed Mahmood's profound insight into the meanings of certain words; see: 'Abdul Ḥaqq, "Sayyid Maḥmūd marḥūm kī vafāt par taqrīr," in *Chand Ham 'Aṣr*, 2nd ed. (Karachi: Urdu Academy, 1961): 4.

[77] Kugle, "Framed, Blamed and Renamed," 301-303. These texts will be discussed more fully in chapter 3.

[78] Venn, ed., *Alumni Cantabrigienses*, 291.

[79] Banerji, "Syed Mahmood," 442.

[80] Brown, "Indian Students," 140.

[81] "Occasional Notes," *The Fleur-de-Lys: A Christ's College Journal* 1, no. 2 (21 May 1870), 12; "Freshmen," *The Fleur-de-Lys: A Christ's College Journal* 1, no. 4 (5 Nov 1870), 7.

speakers this term have been Messrs. Bose and Mahmood, who must find considerable difficulty in preparing their speeches in a language not their own."[82] Syed Mahmood also participated in the larger forum of the Cambridge Union debates, giving an Indian perspective on the Russian question during one such debate.[83] On another occasion, Syed Mahmood presented the motion that "in the opinion of this House, England has failed in her duties to India," while A. M. Bose supported the motion with a rousing speech that carried the day with a vote of 74 to 26.[84]

The pair made a further contribution in print, by publishing articles in the journal on their respective religious traditions: "A Brief Historical Sketch of the Brahmo Somaj," by Bose[85] and "A Brief Sketch of the Rise and Progress of *Islam*," by Mahmood. The author of the piece, which was presented in two instalments in successive issues, is given as "An Ishmaelite" and presumably is Syed Mahmood, in part because in one footnote he directs the reader to Syed Ahmed's *Series of Essays in the Life of Mohammed*, copies of which, he states, were in the libraries of the Union Society and Christ's College.[86] He had assisted his father in the writing of that work in English the previous year, in response to Sir William Muir's *Life of Mahomet*.[87] Indeed the topics he addressed in his articles in the college journal closely reflect the content of the first few essays of his father's volume, being primarily a sketch of pre-Islamic Arabia and Muhammad's life up to the *hijrah* (migration) to Medina. The articles, however, were merely a very brief and preliminary introduction, lacking the detailed defence of early Muslim history found in both his father's *Series of Essays* and Syed Ameer Ali's *A Critical Examination of the Life and Character of Mohammad*, also published in England two years later.[88] In addition to these

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[82] "Christ's College Debating Society," *The Fleur-de-Lys: A Christ's College Journal* 1, no. 6 (17 Dec. 1870), 10-11.
[83] Ibid.
[84] Hem Chandra Sarkar, *A Life of Ananda Mohan Bose* (Calcutta: Classic Press, 1929), 35.
[85] "A Brief Historical Sketch of the Brahmo Somaj," *The Fleur-de-Lys: A Christ's College Journal* 1, no. 5 (19 Nov. 1870),1-3, and continued in the next number. The author is given as "A Member of the Brahmo Somaj" and is presumably A. M. Bose.
[86] An Ishmaelite, "A Brief Sketch of the Rise and Progress of *Islam*," *The Fleur-de-Lys: A Christ's College Journal* 1, no. 7 (8 Mar. 1871): 1-3; no. 8 (25 Mar. 1871): 1-4.
[87] Alan M. Guenther, "Response of Sayyid Ahmad Han to Sir William Muir's Evaluation of *Hadit* Literature," *Oriente Moderno* 82, no. 1 (2002): 229.
[88] Avril A. Powell, "Modernist Muslim Responses to Christian Critiques of Islamic Culture, Civilization, and History in Northern India," in *Christians, Cultural Interactions, and India's Religious Traditions*, ed. Judith M. Brown and Robert Eric Frykenberg, Studies in the History of Christian Missions (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2002), 61-91.

two pieces in *The Fleur-de-Lys*, Syed Mahmood was actively contributing articles to the new journal his father had created after his return from England, *Tahzīb ul-Akhlāq or the Muhammadan Social Reformer*, sending one essay on "Friendship"[89] and another on "The Severity of Piety."[90]

The presence at Cambridge of Muslims such as Syed Mahmood as well as other foreigners generally, gave rise to "exaggerated depictions of the various dangers posed by the 'foreign element' within the university."[91] The *Moslem in Cambridge* which was published from 1870 to 1873 attempted to present an amusing prophecy of the transformation of the university in twenty years to one that was no longer Christian, white and "British." The satirical journal was "got up" by one of Syed Mahmood's fellow students at Christ's College, Gerald Stanley Davies (1845-1927).[92] Each page of the journal was headed by "La Ilah Ill' Allah wa Mohammed Resoul Illah," and contained humorous articles and cartoon illustrations on sports, meetings, police intelligence, advertisements, and the like, portraying Cambridge as taken over by foreigners—not just Muslims—and women. However, no specific students are mentioned, nor is there any response from the Indian students indicated.

Syed Mahmood did well in his studies at Cambridge, prompting educational reformers back in India to comment that his academic accomplishments were proof that Indian Muslims still possessed the ability to attain scholarly renown.[93] In the annual exams in 1871, he achieved tenth place over all, and was tied for first place in the English language paper. This success in English, when competing against native English speakers, was likened by Mushtāq Ḥusayn in the same article to the Indian scholars of past generations who excelled in Persian as much as the Iranians themselves.[94] In addition to achieving superior marks in the examinations, Mahmood also wrote a prize-winning essay while at Cambridge, a copy of which was subsequently bound and deposited in his father's li-

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[89] Syed Mohammed Mahmood, "Dosti," *Tahzīb ul-Akhlāq* 2 (1871): 3-4.
[90] Syed Mohammed Mahmood, "Shiddat-i Itqa'," *Tahzīb ul-Akhlāq* 2 (1871): 78-80.
[91] Paul R. Deslandes, "'The Foreign Element': Newcomers and the Rhetoric of Race, Nation, and Empire in 'Oxbridge' Undergraduate Culture, 1850-1920," *Journal of British Studies* 37 (1998): 66.
[92] Note bound up with the three issues of the journal, *The Moslem in Cambridge*, in the Cambridge University Library.
[93] Mushtāq Ḥusayn, "Sayyid Muḥammad Maḥmūd Sāḥib Salatallah Ta'alay," *Tahzīb ul-Akhlāq* 2 (1871): 95.
[94] Ibid.

brary.[95] At Cambridge, he also had the opportunity to continue his studies of the Arabic language, applying the skill later in his work as a judge, when he decided cases on Muslim law.[96] In later years, Syed Mahmood gave £ 200 to found two prizes at Christ's College, one in Arabic and one in Persian.[97]

Before he left England, he sent his father an essay on Cambridge University which was published in the *Tahzīb ul-Akhlāq* as well as in the *Aligarh Institute Gazette*.[98] In this he described the founding of the university and its colleges, its administrative structure involving masters and fellows, the daily life of a student, and the various courses and examinations offered. He concluded with an exhortation to the *Kamitī-yi Taraqqī-yi Ta'līm-i Musalmān* (Committee for the Progress of Muslim Education) to establish a school patterned after Cambridge.[99] In the article, he did not recount incidents of his own experience, but rather highlighted the aspects of a student's life that impressed him. He seemed to have been especially struck by the living arrangements of the students, in which each was assigned two rooms—one as a bedroom and one for study and receiving friends. He described in detail the prevailing custom among the students to fasten the outer door of their rooms to indicate that they were not in their rooms, or that they did not wish to be disturbed in their studies. Since he was one who throughout his life enjoyed lively, unhindered social interaction with his friends, his recording of this detail possibly indicates that the sanctity of this custom (and of a student's privacy) was one that his fellow students had forcibly impressed upon him![100]

While Aḥmad Khān and his friends argued for the necessity of sending their sons to England to study in order to keep pace with learning in Europe, they also recognized that their fellow Muslims feared that the religious identity of their sons would suffer. It

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[95] Graham, *Life*, 380.
[96] Kozlowski, *Muslim Endowments*, 118.
[97] Venn, ed., *Alumni Cantabrigienses*, 291.
[98] David Lelyveld, *Aligarh's First Generation: Muslim Solidarity in British India*, OUP ed. (Delhi: Oxford University Press, 1996), 119; Syed Mohammed Mahmood, "Yuniwirsity Kaimbirij," *Aligarh Institute Gazette*, 22 Mar. 1872.
[99] Syed Mahmood. "Yūnīwirsiṭī Kaimbirij," *Tahzīb al-Akhlāq ya'ni Majmu'ah Maẓāmīn Janāb Nawāb Intiṣār-i Jang Maulawī Mushtāq Ḥusayn Sāḥib wa Mistar Sayyid Maḥūd Sāḥib Baristar aiṭ Lāw wa Maulawī Khwājah Alṭāf Ḥusayn Sāḥib Ḥālī wa Maulawī Muḥammad Ẓakā Ullah Sāḥib shams al-'Ulamā wa Fārqlīṭ Sāḥib*, vol. 4, (Lahore: Allah Wālī kī Qaumī Dukān, n.d.), pp. 83-91.
[100] For a description of life at Cambridge from a decade later, by another Muslim who studied at Christ's College, see: Sayyid Kazim Ali, "English University Education and Life," *Journal of the National Indian Association* (1881).

was important, then, to re-assure the readers of the *Aligarh Institute Gazette*, that Syed Mahmood was conducting himself as a good Muslim, performing his prayers, keeping the fast, and refraining from all that was forbidden in the *sharī'ah*.[101] After leaving England, Mahmood continued his contact with fellow students from Cambridge, one of whom was Archibald Liversidge (1847-1927), who became a prominent professor of science in Australia. Close to the end of his life, Syed Mahmood wrote of his intention to go to Australia to repay the visit Professor Liversidge had made to India to see him—an intention that he was not able to accomplish due to ill health.[102]

1.3d Other activities in England

In addition to his studies, Syed Mahmood devoted considerable time to assisting his father in his research and educational planning. Aḥmad Khān had chosen to accompany his son to England with the purpose of gathering materials in European languages to refute Sir William Muir's portrayal of the prophet Muhammad in his *Life of Mahomet*.[103] He relied on Syed Mahmood to interpret for him, since his use of the English language was limited.[104] Aḥmad Khān utilized his visit to England to meet with English nobility; and his letters home during this period indicate that Syed Mahmood accompanied him to most of such meetings, though he notes that he had made one visit to the Secretary of State for India alone, and had been able to understand his questions and give replies albeit in poor English.[105] Another major motivation for Aḥmad Khān's trip to England was the opportunity to examine the educational system in England with a view to reforming the system of education in the Indian Muslim community along that pattern. In this venture, too, Syed Mahmood provided indispensable assistance as they visited universities and discussed the adaptability of those systems to India.[106] In a speech in 1889 reviewing the

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[101] Lelyveld, "Macaulay's Curse," 199; Mushtaq Husayn, "Sayyid Muhammad Mahmud," 96.
[102] Letter by Syed Mahmood, Aligarh, to E. A. Molony, Collector Magistrate, Aligarh, 26 July 1899, in "Political Pension of late Sir Saiyid Ahmad," Political Department, N.-W. P. & Oudh, File no. 486A, 1899, Box 58, Uttar Pradesh State Archives, Lucknow.
[103] Guenther, "Response," 229.
[104] Lelyveld, *Aligarh's First Generation*, 105. Muhammad Amin Zubiri, *Tazkirah Sayyid Mahmud Marhum* (Aligarh: Muslim University Press, n.d.), 3.
[105] Letter by Aḥmad Khān, London, to Mahdi 'Alī, 20 Aug. 1869, in, Aḥmad Khān, *Musāfir-i Landan*, edited by Shaykh Muḥammad Ismā'īl Pānīpatī, Urdū ka Kalāsīkī Adab, 2 (Lahore: Majlis-i Tarraqī-yi Adab, 1961, p. 238.
[106] S. K. Bhatnagar, *History of the M.A.O. College Aligarh*, Sir Syed Hall Publication, 1, ed. K. A. Nizami (Bombay: Asia Publishing House, 1969), 33-34.

development of the plans for the college he founded, Sir Sayyid expressed his deep gratitude towards his son for making it possible for him to acquire the information and experiences he did during his stay in London, by assisting him with the language.[107]

Students arriving from India found the life in London to be busy, divided between their studies and an active social life. Prior to commencing his studies at Christ's College, Cambridge University, Syed Mahmood studied Latin, Greek, and English history privately for one year.[108] Traces of these studies are seen in the book his father was writing at the time, *Essays on the Life of Muhammad*, in its lengthy quotations from Latin.[109] Syed Mahmood had the opportunity of visiting the libraries of the India Office and the British Museum while assisting his father with the collection of materials for this book. The representation of Indians in the imagination of the English as found in the books in the India Office library disturbed Syed Mahmood. His father recounted how Mahmood had been perusing a standard text depicting the manners and customs of the races of India, highlighting their savagery. When a young Englishman approached him and asked if he was an "Hindustani," Mahmood had been embarrassed to identify himself as such and had quickly added that his ancestors had formerly been of another country.[110] His father's interpretation of the incident was that Indians had much work to do to change such images.

Several other Indian young men were studying in England during the time of Mahmood's sojourn there, and their accounts can provide a fuller description of the experiences of Indian students in Britain. Romesh Chunder Dutt, who had arrived in England a year earlier to appear at the Open Competition to qualify for the Civil Service, published his letters from that period to serve as a guide book to Indian youths intending to visit Europe. His description of his experience of studying for his exams in London would likely be indicative of Syed Mahmood's experience as well.

> We passed our days in the University College—either in the class rooms or in the library. In the evening we returned to our lodging houses, took our dinner, went out for a stroll, returned and took a cup of tea, and then resumed our studies which

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[107] Sir Sayyid Ahmad Khan, *Maqalat-i Sar Sayyid*, Urdu ka Klasiki Adab, vol. 12, *Taqriri Maqalat*. (Lahore: Majlis-i Tarraqi-i Adab, 1963), 188.
[108] Graham, *Life*, 198.
[109] Lelyveld, "Macaulay's Curse," 198.
[110] Graham, *Life*, 188-189.

> we kept up as long as we could. And in the morning after a hasty bath and breakfast we went to the College again. We had some introduction letters to some families living in or near London, and we also made the acquaintance of some others. But our time was mostly passed in our own lodgings or the class room during the past year.[111]

Another Indian, a Shi'i Muslim from the Bengal, Syed Ameer Ali, also arrived in London for his studies at this time. Ameer Ali's career in many ways paralleled that of Syed Mahmood's. He was admitted to the Inner Temple a year after Syed Mahmood had been admitted to Lincoln's Inn.[112] His memoirs contain a detailed account of his many contacts with various members of British society. He seems to have been more active than Syed Mahmood in involving himself in British society, taking on speaking engagements throughout Britain and publishing his views.[113] In his final year, Ameer Ali also spent much of his leisure time researching and writing his book defending Islam and its prophet against the attacks of Orientalist scholars, *A Critical Examination of the Life and Teaching of Mohammed*, which was published in 1873 just prior to his return to India.[114]

The reason for Syed Mahmood's departure from Cambridge before he graduated remains somewhat of a mystery. He himself alluded to the causes in the vaguest of terms when, in a letter arguing for furlough and retirement benefits for native judges equal to those of British judges, he stated, "Circumstances into which I need not enter compelled my return to India before it was possible for me to graduate at the University; but I can truly say that my residence in England was sufficiently long to secure for me a great number of valuable friendships, and to create a variety of tastes and interests which must always operate as a powerful inducement to me to re-visit England."[115] Mahmood returned to India towards the end of 1872, and was feted at a dinner hosted by his father in Benares where he was posted at the time. In his speech expressing his admiration for Eng-

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[111] Dutt, *Three Years*, 17.
[112] Ameer Ali, "Memoirs," 535.
[113] Avril A. Powell, "Islamic Modernism and Women's Status: The Influence of Syed Ameer Ali (1849-1928), forthcoming.
[114] Ameer Ali, "Memoirs," 540.
[115] India Office Records, Public and Judicial Department Records, L/PJ/6/242, File 25, date 18 Dec 1888, British Library.

land, he went on to thank both his father and Sir William Muir for their contributions to making his education in England possible.[116]

Aḥmad Khān's intention for his son was for him to settle at Aligarh and assist in establishing a college after the pattern of the colleges of Cambridge and Oxford, now that he had received an intimate exposure to the operation of those colleges. Accordingly, in 1873, Syed Mahmood presented a proposal for a Muslim university that was patterned after what he had experienced at Cambridge, a revision of his earlier essay.[117] He had prepared his proposal with the help of professors and scholars in England.[118] Aḥmad Khān anticipated that Syed Mahmood would assist in other projects as well, such as the editing of the periodicals he had started.[119] But Syed Mahmood's focus had shifted from education to law, and he enrolled as a barrister in the Allahabad High Court. In his later years, as Aḥmad Khān reflected back on the career of his son shortly after his forced resignation from the Allahabad High Court, he stated that his desire for his son to gain an education in England had been that he might be able to capably refute the writings of English authors who misrepresented Islam, its founder, and Muslim society in general.[120] He was pleased that Syed Mahmood had written a series of articles for the Allahabad newspaper, *The Pioneer*, reviewing the new edition of Sir William Muir's biography of Muhammad, in effect continuing the work on which father and son had collaborated a few years previously while in England.[121] But Aḥmad Khān went on to state that he never had intended his son to earn his living as a barrister, but had tolerated it since it did not necessarily work against his purposes. This would seem to contradict the fact that it was Aḥmad Khān who had written of his intention to enrol Syed Mahmood in Lincoln's Inn

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[116] "A Christian cum Mahomedan Entertainment," *The Pioneer*, 4 Dec. 1872.
[117] Syed Mohammed Mahmood, "A Scheme for the Proposed Mohammedan Anglo-Oriental College," in *Selected Documents from the Aligarh Archives*, ed. Yusuf Husain (Bombay: Asia Publishing House for the Department of History, Aligarh Muslim University, 1967), 222-237.
[118] Ahmad Khan, *Maqalat,* vol. 12, 191.
[119] Yusuf Husain, ed., *Selected Documents from the Aligarh Archives* (Bombay: Asia Publishing House for the Departement of History, Aligarh Muslim University, 1967), 201.
[120] Sir Sayyid Ahmad Khan, "Mistar Sayyid Mahmud ki Nisbat Anarbel Sar Sayyid Ahmad Khan Sahib Bahadur ke Khyalat," in *Maktubat-i Sar Sayyid*, ed. Shaykh Muhammad Isma'il Panipati, vol. 1 (Lahore: Majlis-i Tarraqi-i Adab, 1976), 138.
[121] The articles appeared in March of 1878, and were signed, "By a Mahomedan." The style and content of the articles are consistent with other writings of Syed Mahmood. The first was entitled, "Review: The Life of Mahomet, by Sir William Muir, LL.D. (New Edition), 1877," and appeared in *The Pioneer* on 1 Mar. 1878, pp. 3-4. The remaining three were entitled, "Review: Muir's Life of Mahomet," and appeared consecutively on March 2, 7, and 15.

when he initially applied for the government scholarship, as mentioned earlier.[122] Whether anticipated or not, Syed Mahmood's enrolment as a barrister marked a decisive turning point in his career, as he continued to toward the reform of the Muslim community in India, but in the field of jurisprudence rather than of education as his father had desired.

1.4 Syed Mahmood's legal career in India

1.4a The Indian judiciary

As the first Indian barrister to be enrolled as an advocate in the High Court at Allahabad, Syed Mahmood opened the door for other non-Europeans into this exclusive group. Indians had worked as pleaders in the Allahabad High Court, as well as its principle subordinate courts, since it was instituted to replace the Ṣadr 'Adālat in Agra in 1866. However, since only those fully qualified as barristers by being called to the Bar in Britain were referred to as advocates, these Indian-trained practitioners were known as vakīls.[123] In the 1850s, under the previous judicial system, examinations had been instituted as a formal means of selecting non-barrister practitioners to practice as vakīls in the higher courts, including the Ṣadr 'Adālat (chief court of civil justice) at Agra. When that court was abolished and the High Court was established at Allahabad, the institution became increasingly anglicized with the language of the court changed to English and the barrister-judges (forming at least 1/3 of the bench according to its constitution) shaping the functioning of the court according to the English pattern with which they were most familiar.[124] The distinction between advocates and vakīls in Allahabad, therefore, had been exaggerated at first by factors of race and education, the advocates being primarily Europeans educated in the Inns of Court in London, and the vakīls consisting of the former Indian pleaders at Agra or recent Indian graduates from colleges and law schools of northern India.[125] In terms of numbers, the vakīls outnumbered the advocates six to one at first. At the time of his enrolment, then, Syed Mahmood was an anomaly, being an Indian

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[122] Ahmad Khan, "Mistar Sayyid Mahmud," 139.
[123] Buckee, "Examination", 99. For a fuller discussion of the vakils though in the Madras context, see, John J. Paul, *The Legal Profession in Colonial South India* (Oxford: Oxford University Press, 1991).
[124] Buckee, "Examination", 89-92.
[125] Ibid., 101.

educated and called to the Bar in England, and then serving as an advocate in the High Court.

On December 16, 1872, within weeks of the welcoming supper for Syed Mahmood in Benares, an announcement appeared in *The Pioneer* to the effect that the High Court of the North-Western Provinces, on the motion of the Government Advocate, had enrolled "Syud Mahommed Mahmood, Esquire, of Christ College, Cambridge, and Lincoln's Inn, Barrister-at-Law, as an advocate of the Court."[126] This was followed five weeks later by a similar announcement regarding George E. A. Ross, (1847-1931) who subsequently became an intimate friend of Masood's.[127] Syed Mahmood continued working as a barrister until 1878 when he retired from the Allahabad Bar. The following year he was appointed as District Judge, third grade, in Awadh. This was his substantive appointment until he was appointed as Puisne Judge of the High Court for the North-Western Provinces at Allahabad in 1887, though as early as 1882 he was appointed to serve temporarily as an officiating judge at the High Court. He was called back three more times to take the place of judges on furlough or retirement before receiving his permanent appointment. He also interrupted his work as District Judge to assist with judicial reforms in Hyderabad in 1881, and with the Government of India's Education Commission in 1882. Syed Mahmood served in the High Court at Allahabad until 1893, when he was forced to retire. Thereafter he divided his time between assisting his father with the running of the MAOC and reviving his practice as a barrister in the court at Awadh. He also served briefly on the provincial legislative council in 1896 to 1897, and after years of failing health, passed away in 1903.

By the end of the century, the number of Indian advocates who had followed Syed Mahmood's lead in qualifying for the Bar in London and joining the Bar Association in Allahabad far exceeded the number of European advocates there.[128] However, in spite of their numbers, the Indians did not exert a comparative influence in the Bar Association since they were generally less fluent in their use of the English language and had fewer social contacts with the judges and government authorities who facilitated advancement

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[126] *The Pioneer*, 16 Dec. 1872, 1.
[127] *The Pioneer*, 22 Jan. 1873, 1.
[128] Buckee, "Examination", 102.

to judgeships. Though they had certain privileges their fellow vakīls did not, Indian advocates were less qualified than the vakīls in other respects. Vakīls had received a much more rigorous training in the Indian universities, one which was much more suited to the Indian context than that offered at the Inns of Court.[129] The first woman barrister was not enrolled in India until 1919. Cornelia Sorabji (1866-1954) had studied law in England, and applied to be enrolled as a vakīl in the Allahabad High Court as early as 1897. But, even after passing the necessary examinations, she was not accepted because "they felt it would be impertinent of an Indian High Court to admit women to the Rolls before England had given the lead."[130] When the Bar was opened to women in 1919 she applied again and was immediately accepted.

Syed Mahmood had set a precedent for the other Indian advocates when he was appointed first as a District Judge in 1879, then as officiating judge of the High Court in 1882, then as a full Puisne Judge in 1887. Later, after his resignation from the bench, a measure was instituted which also made it possible for vakīls to be appointed as honorary advocates, qualifying them for advancement to positions of judgeships as well.[131] Chief Justice Edge (1841-1926) who instituted the change gave as his reasons the fact that many Hindus were prohibited by caste restrictions from going overseas, and that many from both the Hindu and Muslim communities were prevented from going to England for the required education by lack of funds, and so felt that it was "unjust and impolitic" to exclude capable natives from the roll of advocates simply because they had not been called to the Bar in England.[132] Students from MAOC were prominent among the Muslims being enrolled as advocates and vakīls at Allahabad. A survey of students who had studied at MAOC from its inception in 1877 to 1900 showed that close to 25% of the respondents were working as advocates, vakīls, or judges in various courts.[133] Syed Mahmood had made a significant contribution to the establishment of the law faculty at MAOC, as will

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[129] Ibid., 102-105. See also Brown, "Indian Students," 146-147.
[130] Cornelia Sorabji, *India Calling: The Memories of Cornelia Sorabji, India's First Woman Barrister*, ed. Chandani Lokugé (New Delhi: Oxford University Press, 2001), 78-79, 201.
[131] Buckee, "Examination", 104.
[132] "Anonymous attack on Sir John Edge's administration of the office of Chief Justice at Allahabad," India Office Records, Public and Judicial Department Records, L/PJ/6/479, File 877, 26 Mar 1898.
[133] Lelyveld, *Aligarh's First Generation*, 322-324.

be described later. In the following pages, Syed Mahmood's career in various legal roles is discussed in detail.

1.4b Syed Mahmood as barrister

When he joined the Bar at the Allahabad High Court in 1872, Syed Mahmood was the only non-European barrister practicing there.[134] How he viewed the importance of the advocates in the judicial system is revealed in a speech he gave to the Bar Association in 1885 after he had been serving as a Judge of the High Court. He explained that he saw the role of the advocates, especially the English barristers who were independent of the government in a way the civil servants were not, to be essential in maintaining justice in the British courts in India by restraining arbitrary decisions by the judges:

> The existence of a well-educated and honest and independent Bar is one of the greatest guarantees which the British rule has brought to the people of this land to secure justice from being mutilated by the exercise of arbitrary power. The vast majority of Englishmen in India, holding as they do positions of authority in the administrations, fill a place totally distinct from the position filled by the Englishman as an advocate. To him people resort freely for help, trusting full well that neither the differences of race and religion nor the requirements of political or administrative necessity will affect the discharge of his duties. And to speak openly, gentlemen, it is my experience that it is not unfrequently the case that the advocate in discharging his duties to his client succeeds in preventing the judge from going wrong, not only upon questions of law but upon that which is even more important, questions of fact.[135]

One way he saw the members of the Bar playing this crucial role was in bridging the language gap between the people and judicial system "by rendering intelligible to the people what would otherwise seem to the masses of the Indian population as unintelligible as the decrees of fate." That Syed Mahmood personally felt this responsibility is clear from the translation he produced of the Law of Evidence in 1876, during his years as a barrister.

For the next six years, from 1872 to 1878, Syed Mahmood practiced as a barrister principally in the Allahabad High Court, but also occasionally in the Punjab, the Central

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[134] Sri Satyendra Nath Varma, "History of the High Court Bar Association," in *Centenary: High Court of Judicature at Allahabad, 1866-1966*, ed. Uttar Pradesh (India) High Court of Judicature, vol. 1 (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966), 166. The first Indian barrister enrolled in the Calcutta High Court, as early as 1865, had been Jnanendra Mohan Tagore; he also had studied at Lincoln's Inn and had been called to the Bar in 1862. See Sarkar, *Justice*, 42.

[135] "Mr. Syed Mahmood on Bench and Bar," *The Pioneer* (17 Apr. 1885): p. 6.

Provinces and Awadh.[136] His career as a lawyer is described in his obituary as lacking that greatness and distinction which he later demonstrated as a judge.[137] In the reports of cases appearing before the High Court in Allahabad, published in the Indian Law Reports (Allahabad Series) from 1875 to 1878 and earlier in 1875, in the North-Western Provinces High Court Reports, Syed Mahmood is mentioned as the advocate in a range of cases including ones involving Muslim laws of inheritance, of divorce, of pre-emption, and Hindu laws of succession, as well as general civil and criminal cases.[138] One who is mentioned more frequently than Syed Mahmood in cases dealing with Muslim law is Maulavi Mehdi Hassan, and at times they would serve together on such cases.[139] Mahmood's contemporary, Syed Ameer Ali, was enrolled as an advocate in the High Court at Calcutta in 1873 a few months after Syed Mahmood was enrolled at Allahabad. Ameer Ali quickly made a name for himself as an expert in Muslim law, and was invited to give the Tagore Law Lectures at the Calcutta University in 1884.[140] He was subsequently appointed to officiate in the position of Presidency Magistrate of Calcutta, and later as a judge on the bench of the High Court at Calcutta in 1890.

In 1878, Syed Mahmood retired from the Allahabad bar with the intention of quitting his practice as a barrister, after certain incidents occurred that, according to his father, he had found unpleasant.[141] Newspaper reports stated that he had been publicly insulted from the Bench by Chief Justice Sir Robert Stuart, Q.C. (1816-1896).[142] Details of the disagreement have proven difficult to locate. Stuart refers to the incident a couple of years later in a strongly worded letter advising against the appointment of Mahmood as judge of the High Court. The only possible reasons that Mahmood would even be consid-

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[136] India. Public Service Commission, *Proceedings of the Public Service Commission*, vol. 2, *Proceedings relating to the North-Western Provinces and Oudh* (Calcutta: Government of India, 1887), 120.
[137] Sapru, "Syed Mahmood," 444.
[138] See *N.-W. P. High Court Reports: Reports of Cases heard and determined in the High Court, N.-W. Provinces, in 1875*, vol. 7 (Allahabad: N.-W. P. Government Press, 1876), pp. 60-74, 201-203, 211-213, 362-365; *Indian Law Reports: Allahabad Series*, vol. 1, pp. 105, 132, 156, 277, 280, 303; vol. 2, p. 71.
[139] *N.-W. P. High Court Reports: Reports of Cases heard and determined in the High Court, N.-W. Provinces, in 1875*, vol. 7 (Allahabad: N.-W. P. Government Press, 1876), pp. 60-74, 201-203, 211-213, 362-365; *Indian Law Reports: Allahabad Series*, vol. 1, p. 483.
[140] Syed Ameer Ali, "Memoirs of the Late Rt. Hon'ble Syed Ameer Ali," *Islamic Culture: the Hyderabad Quarterly Review* 6 (1932): 3.
[141] Aḥmad Khān, "Mistar Sayyid Maḥmūd," 139.
[142] "The High Court N.-W.P. and its Chief Justice," *The Civil and Military Gazette*, 10 Apr. 1879, 2.

ered for the post, he opines, is that the government was looking for an Indian to appoint and that Mahmood's father was seen as a loyal ally by the government.

> I have a still lower opinion of those of Mr. Mahmood. The claims of that gentleman may be summed up thus: *he is a native of the country, and he is his father's son!* – that is all. In himself he is nothing. He is a Barrister no doubt, but he is ignorant of his profession, and misconducted himself so grossly in my Court, and in my presence, that I was obliged to administer a public and most severe rebuke to him from the Bench. I am told he regrets the offence, and is anxious to call on me and apologise. If so, I shall receive him, but to make such a man a Judge of a High Court would be a most painful mistake.[143]

The intervention of government officials and the requisite apology on the part of Syed Mahmood at that time, however, did bring about a reconciliation of sorts, and Mahmood's advancement as a judge was secured in due time. Stuart's condescension was not unique, however, and Mahmood repeatedly faced such prejudice in his career.

The time when Syed Mahmood was serving as a barrister was an era of extensive codification of the law in India, a process that had begun in the 1830s with the efforts of T. B. Macaulay, the first chairman of the Law Commission, but had not become established policy until the 1860s. The Law of Evidence had been passed in 1872. As his first contribution to legal literature, Syed Mahmood chose to translate this Act along with its subsequent amendments into Urdu in 1876 and accompany it with a commentary.[144] In an article lamenting the paucity of interest in law among Indians, *The Aligarh Institute Gazette* noted that Syed Mahmood's work on the Law of Evidence was the only one of its kind, dealing thoroughly with the principles on which the law was based, and advocated that such books should be written on each of the new laws that were being passed.[145] The lack of popular interest in such works on law is perhaps indicated by the fact that towards the end of 1878, an announcement appeared in the *Gazette* that the MAOC had purchased

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[143] Letter from Sir R. Stuart, Chief Justice, High Court, N.-W.P., Allahabad, to the Marquis of Ripon, 15 May, 1881, no. 281, "Letters from Persons in India, Commencing from January 1881," The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1881, British Library.

[144] Syed Mohammed Mahmood, *The Law of Evidence in British India, being a Commentary in Hindustani on the Indian Evidence Act (I of 1872.) as Amended by The Indian Evidence Act Amendment Act, (XVIII of 1872.) together with The Indian Oaths Act (X of 1873.): Sharḥ-i Qānūn-i Shahādat-i Mujriyyah-yi Hind ya'nī, Aikṭ Awal sanh 1872 ḥasb-i tarmīm-i Aikt 18-i sanh 1872, ma'ah Qānūn-i ḥalf-i mujriyyah-yi Hind, ya'ni Aikt 10-i sanh 1873,* (Aligarh: Aligarh Institute Press, 1872).

[145] "Civil Procedure Code ya'ni Zabitah-i Diwanī 'Adālat," *The Aligarh Institute Gazette*, 13 Apr. 1877, 233.

the remaining books and were offering them at a discounted rate.[146] A second edition of his work came out in 1887, and a third in 1893.[147]

Syed Mahmood's decision to pursue a career as a barrister and not primarily in education indicates his conviction that the needs of the Muslim community could be equally served through reform in the legal system as through reform in education. True, he was following his father's footsteps in occupying his middle years to earning a livelihood while intending to devote his retirement to writing and beneficent works. But his writings reveal a growing perception that work in the judicial administration was more than a lucrative enterprise, and was a viable means by which to labour for the good of his fellow-countrymen. While Mahmood continued his involvement in the MAOC project at Aligarh, his career as a barrister in Allahabad, as a district judge in Awadh, and finally as a puisne judge in Allahabad once again increasingly dominated his time and his concern. A legal career no longer was the means to finance his other pursuits, but became an end in itself because of the opportunities that role provided to directly influence the British administration of India.

1.4c Syed Mahmood as District Judge

On 1 August 1879, Syed Mahmood joined the Indian Civil Service as a District Judge, third grade.[148] He was appointed by the Viceroy of India, Lord Lytton (1831-1891), as a District and Sessions Judge, to serve in Sitapur, Rai Bareli District in Awadh.[149] Lord Lytton had been impressed with Mahmood's oratory and skill in preparing his arguments when a delegation including him and his father had visited the Viceroy.[150] Early in 1879, Lord Lytton had occasion to hear Syed Mahmood present an address to him during the celebration of the laying of the foundation stone of the college at Aligarh. The speech was an expression of gratitude to all those who had assisted in establishing the school, and of appreciation for the recent efforts of the government to over-

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[146] *Aligarh Institute Gazette*, 2 Nov. 1878, 1260. The *Agra Akhbār* criticised Aḥmad Khān for using college funds to purchase the whole edition in order to save his son from a financial loss. See *Selections from Vernacular Newspapers* (1879): 191.

[147] Syed Mohammed Mahmood, *Sharḥ-i Qānūn-i Shahādat-i Mujriyyah-yi Hind ya'nī, Aikṭ 18-i 1872, ma'ah Qānūn-i ḥalf-i mujriyyah-yi Hind, ya'ni Aikt 10-i sanh 1873*, 2nd ed. (Hyderabad, Deccan, India: Matba'-i Burhaniyah, 1887).

[148] Robinson, *Separatism*, 433.

[149] Kidwai, "Forgotten Hero," 77.

[150] Hidayatullah, "Justice Syed Mahmood," 80.

come the hindrances to the promotion of education among the Muslims of India.[151] When he was appointed as District Judge, Mahmood acknowledged that it was through Lord Lytton's personal interest that he had received the post, taking pride in the fact that his was the "first appointment in Upper India of a native of the Country being placed at the head of the Judicial administration of a whole division."[152]

In November 1883, Syed Mahmood returned to the Rae Bareli court as District Judge after his first period on the Allahabad High Court had ended, and his service on the Education Commission had been completed. But this was interrupted twice more, once in 1884 and then again in 1886, when Syed Mahmood was reappointed as acting puisne judge in Allahabad. A record of his work as District Judge survives in the judgments of the Privy Council in Britain on several cases that were appealed to that level. In one case on the subject of fraud where Syed Mahmood's decision was confirmed by the Judicial Commissioner of Awadh, the judges of the Privy Council amended part of his judgment while agreeing with most of it.[153] In two other cases, however, the Privy Council restored Syed Mahmood's decisions in their entirety and disagreed with the Judicial Commissioner of Awadh who had reversed those judgments. One case dealt with the meaning of a mortgage deed which Mahmood ascertained from its wording in the original Hindustani; the judges of the Privy Council chose to agree with his interpretation rather than that of the Commissioner.[154] In the other case, the question was regarding the legal effect under Muslim law of a certain agreement of compromise made by Muslims in a matter of inheritance. Syed Mahmood's decision, which was quoted extensively and upheld in the judgment of the Privy Council, dealt with the principle in Muslim law that "a mere possibility, such as the expectant right of an heir apparent, is not regarded as a present or vested interest and cannot pass by succession, bequest, or transfer, so long as the right has

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[151] See *The Pioneer*, 9 Jan. 1879, p. 5 for a transcript of the speech, and 11 Jan. 1879, pp. 3-4 for an account of the meeting as well as of the dinner that followed.

[152] Letter by Syed Mahmood, Rai Bareli, to Sir Richard Meade, British Resident at Hyderabad, 29 Jan. 1881, Salar Jung Personal Papers, vol. 2, 1874-84, Accession No. 751, Andhra Pradesh Provincial Archives, Hyderabad. I am indebted to Prof. David Lelyveld for this reference and his notes on this letter.

[153] *The Law Reports: Indian Appeals being Cases in the Privy Council on Appeal from the East Indies*, L.R. XI (1883-1884) I.A. 211, Raja Ajit Singh v. Raja Bijai Bahadur Singh.

[154] *The Law Reports: Indian Appeals being Cases in the Privy Council on Appeal from the East Indies*, L.R. XII (1884-1885) I.A. 1, The Deputy Commissioner of Rae Bareli v. Lal Rampal Singh; for a full account of the case as it was tried in India, see: Arshad Masood, "The Case that Raised Syed Mahmood to High Court Judgeship," *Aligarh Law Journal* 5, Mahmood Number (1973).

not actually come into existence by the death of the present owner."[155] An argument by the plaintiffs based on an analogy with Hindu law was dismissed by Mahmood who stated: "The Hindu Law has so little in common with the principles of Mahomedan Law, that it can never be safe to draw generalised inferences on mere analogies."[156] The judges of the Privy Council felt that in overturning Mahmood's decision, the Judicial Commissioner had not correctly interpreted the applicable Muslim law, or inadequately consulted it, and so reversed his decision, restoring Mahmood's original construction.

While the political context of Syed Mahmood's elevation to the High Court bench is discussed in detail later chapters, it should be noted that the appointment was not without controversy and resistance from the Chief Justice under whom Mahmood had served as barrister. In his response to his appointment in a letter addressed to Viceroy Ripon (1827-1909), Syed Mahmood stated that he felt proud to be the first Muslim subject of the Empress of India, Queen Victoria, on whom such an honour had been conferred.[157] He mentioned in a postscript to the letter that friendly relations between him and Chief Justice Robert Stuart under whose direction he would now be working had been restored. As mentioned earlier, Stuart's conduct in 1878 had led Mahmood to retire from his work as a barrister in the Allahabad High Court. It would appear that Sir A. C. Lyall (1835-1915) had encouraged Mahmood to call on Stuart and offer an apology and an explanation which the latter then felt bound to accept.[158] One of Syed Mahmood's fellow judges, Douglas Straight (1844-1914), who proved to be a strong friend and supporter of Syed Mahmood and the MAOC as well, gave an early evaluation of Mahmood's work in a letter to the Viceroy: "Syed Mahmood does his work exceedingly well. He is slow but

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[155] *The Law Reports: Indian Appeals being Cases in the Privy Council on Appeal from the East Indies*, L.R. XII (1884-1885) I.A. 91, Abdul Wahid Khan v. Mussamat Nuran Bibi, p. 94.
[156] Ibid.: 93.
[157] Syed Mahmood, Allahabad, to Secretary to Viceroy Ripon, 6 June, 1882, Additional MS 43631, folio 143r., Ripon Papers: Second Series (Vols. XX-CLIV), British Library.
[158] Letter from Sir R. Stuart, Chief Justice, High Court, North-Western Provinces, to J. Gibbs, Member of the Viceroy's Council, 27 Apr. 1882, enclosed in Letter from J. Gibbs, Simla, to the Marquis of Ripon, 29 Apr. 1882, no. 286 of Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.

painstaking; and if one could get him to be a little less prolix, no fault could be found. Personally, I like him immensely."[159]

Syed Mahmood's working relationship with Chief Justice Sir William Comer Petheram (1835-1922), who succeeded Stuart to the position of Chief Justice, was not free of tensions either. When the Government was considering giving him a full appointment in the place of retiring Justice Oldfield, (1828-1918) Sir Arthur George Macpherson (1828-1921) wrote that Petheram did not desire to see Syed Mahmood made permanent because he "delays the work or does not do it as satisfactorily as an European Judge should probably do it."[160] Syed Mahmood's lack of efficiency was later a key complaint by the next Chief Justice, Sir John Edge, when Mahmood was forced to retire early.[161] Interestingly, a similar complaint of slowness was made against Syed Ameer Ali who also had applied for the anticipated vacancy at the Allahabad High Court. It was felt that Mahmood had a stronger claim to the position than Ameer Ali who had closer ties to the Calcutta court where, however, no vacancies were anticipated in the near future.[162] Though he could understand Petheram's responsibility to keep court matters running as efficiently as possible and thus his dissatisfaction with both Syed Mahmood and Syed Ameer Ali as permanent judges, Macpherson felt that as Chief Justice he would always wish to have "a good practical native" in his court.[163]

Syed Mahmood in turn gave his assessment of Chief Justice Petheram and his behaviour in a Minute written after the end of his third period as officiating Puisne Judge, in May 1886. Although Petheram had left the Allahabad court by then, Syed Mahmood wanted to put on record that if he was to be offered a permanent position on the court sometime in the future, he would not be willing to accept the appointment if his position was reduced to what it had been by Petheram towards the end of 1884, and if he once

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[159] Letter from D. Straight, Judge of the High Court, N. W. Provinces, Allahabad, to H. W. Primrose, Private Secy. to the Viceroy, 17 Aug. 1882, no. 176a of Letters from Persons in India, July to December, 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 2, July to December 1882, British Library.

[160] Sir Arthur George Macpherson, to Lord Randolph Churchill, Aug. 1885, Additional MS 9284/7/832, Papers of Lord Randolph Churchill, Cambridge University Library.

[161] Syed Mahmood's early retirement as well as the charges made by Edge are discussed in detail in the next chapter.

[162] Ibid.

[163] Ibid.

again received the "summary treatment and slight courtesy" which he had received from Petheram during the course of his duties.[164] "To put the matter in simple, though perhaps colloquial English," he wrote, "I have no ambition to be a dignified dummy in connection with the administration of justice, though I may possibly be willing to be so in some other less important capacity."[165] He explained that he understood his duties to include writing extensive judgments, especially on matters of Muslim law since he was the only Muslim on the Bench, and in writing minutes giving his advice to the government on proposed bills when requested to do so. He regretted that the Chief Justice continually made adjustments to his working schedule that reduced the time that he wished to give to these tasks. Mahmood had a clear sense of his contribution to the court, as well as a strong sense of equality with his fellow judges; and he steadfastly resisted any encroachment on either his mission or his self-respect.

1.4d Syed Mahmood in Hyderabad

Syed Mahmood's involvement in the Civil Service took on a new dimension starting from 13 July 1881 when he served temporarily under the Foreign Department of the Government of India.[166] Upon his request, the Government sent him to the Hyderabad State in the Deccan with a view to his being employed under the Government of His Highness the Niẓām.[167] Syed Mahmood felt that his abilities could be better utilized in surroundings where his nationality and knowledge of the language, customs, habits and modes of thought of his fellow-countrymen would be a distinct advantage, rather than in a situation where his greatest asset was knowledge of the rules of law and judicial procedures. Therefore he had expressed his willingness to join the service of the Niẓām's Government in Hyderabad with the desire to introduce reforms in its judicial system.[168] He had a special longing to see the city of Hyderabad, it being a Muslim city, and felt his presence there could bring about an even greater rapport between that administration and

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[164] Appendix O, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug 1893, British Library, pp. 9A-10A.
[165] Ibid. p. 10A.
[166] *The India Office List for 1895 containing an Account of the Services of Officers in the Indian Service and other Information*, (London: Harrison and Sons, 1895), 393.
[167] Letter from J. R. Reid, Offg. Secretary to the Government of the North-Western Provinces and Oudh, Naini Tal, to Secretary of the Government India, 8 May 1882, India Office Records, Public and Judicial Department Records, L/PJ/6/76, File 1021, date 14 Jun 1881, British Library, London.
[168] Letter by Syed Mahmood to Richard Meade, 29 Jan. 1881.

the British Government in India. In spite of the fact that both his father and one of the judges in Allahabad had advised against such a transfer, and in spite of his own recognition that such posting would involve difficulty and uncertainty, he wished to apply his faculties in other directions than his current course. Within two months of his application, the influential *vazīr*, or Prime Minister, Sir Salar Jang (1829-1883), with the encouragement of the British Resident, Sir Richard Meade (1821-1894), had approved Syed Mahmood's appointment in spite of some opposition from within the Hyderabad administration.[169]

Syed Mahmood's duties were to be connected with the codification of laws and the general reform of the judicial system that Salar Jang was planning to introduce, for which Mahmood was paid Rs. 2,000 per month.[170] The substantive law administered in Hyderabad was the Muslim law in all criminal cases, while in civil cases Muslim law applied only to Muslims, and Hindu law applied to Hindus. Procedural law was decided by the Minister of Justice who was empowered to issue circular orders for that purpose.[171] Syed Mahmood would participate in a commission that had been set up to reform the judicial system, with Sir Salar Jang as the president, H. E. Trevor as vice-president, and several other experienced officers as members, with the responsibility of examining the existing judicial system and suggesting reforms in terms of defining the courts' powers and jurisdiction and of preparing rules of procedure.[172] One newspaper report described Syed Mahmood's intentions in the following ambitious terms:

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[169] Letter by Salar Jang to Richard Meade, 4 Mar. 1881, Salar Jang Personal Papers, vol. 2, 1874-84, Accession No. 755, Andhra Pradesh Provincial Archives, Hyderabad; Letter by Salar Jang to Richard Meade, 18 Mar. 1881, Salar Jang Personal Papers, vol. 2, 1874-84, Accession No. 762. I am indebted to Prof. David Lelyveld for these references and his notes on these letters.

[170] Zubayri, *Tazkirah-i Sayyid Mahmud Marhum*, 13. For an overview of the judicial reforms planned by Salar Jang, see Vasant Kumar Bawa, *The Nizam between Mughals and British: Hyderabad under Salar Jang I* (New Delhi: S. Chand & Company Ltd., 1986), 78-84.

[171] Saiyid Husain Bilgrami and C. Willmott, *Historical and Descriptive Sketch of His Highness the Nizam's Dominions*, 2 vols., vol. 2 (Bombay: Times of India Steam Press, 1884), 146. In the introduction to the first volume, the compilers, Bilgrami and Willmott, acknowledge the assistance of several officials in compiling the sketch. Syed Mahmood is mentioned in this list as the one who commenced an Administration Report from which some of the material in the early chapters was drawn; see pp. iii-iv of vol. 1. For a thorough description of the judicial system as it existed at the time, as well as its historical development, see pp. 146-184. For a modern analysis of the judicial developments in Hyderabad, see: M. A. Muttalib, *Administration of Justice under the Nizams, 1724-1948* (Hyderabad, Deccan, India: State Archives, Andhra Pradesh, 1988). Syed Mahmood's assistance in the reforms is mentioned, but no clear details are given; see pp. 147, 154-155, 192.

[172] *The Pioneer* (19 July 1881): 1; see also ibid. (25 Oct. 1881): 1.

> [He will] closely scrutinise the Courts in the capital, as well as those in the Districts, and then submit his report with proposals. His intention is to abolish the whole of the existing rules, practice, &c.; to reorganise the system on a new basis with a view to facilitate work; to lay down simple and clear rules to meet the ends of justice; and to check malpractices.[173]

His stay in Hyderabad was brief, however. It would appear that he was not able to become as fully involved in bringing about the judicial reforms he had hoped. In a letter written shortly before Syed Mahmood departed from Hyderabad, Sir Salar Jang explained to Sir Steuart Colvin Bayley (1836-1925) who had succeeded Meade as Resident in 1881, that the introduction of judicial reforms would take longer than anticipated because it would be necessary to obtain competent judicial officers for the Judicial Council. With reference to this Council, he stated, "It is also evident that it will neither be possible nor desirable to obtain so many outsiders as will be required for this service," quite possibly hinting that the anticipated service of Syed Mahmood was not accomplishing the anticipated result.[174] He made an explicit reference to Mahmood's departure, as well as to the unwillingness of Trevor to work under Mahmood's leadership, later in the same letter. Sir Salar Jang also stated his conclusion, "It is not contemplated at present to undertake the work of scientific law-making and codification. The country is not yet prepared for any such process."[175] Since Syed Mahmood was committed to the process of law-making and codification in India, he would have been disappointed with this conclusion, and may well have conducted the analysis that led to the conclusion.

An intriguing political sidelight is the presence of the father of modern Muslim nationalism and proponent of pan-Islamism, Sayyid Jamāl al-Dīn al-Afghānī (1838-1897) in Hyderabad from April 1880 to October or November 1881.[176] Although he was actively promoting reform in Islam, he opposed the work of Sir Sayyid Aḥmad Khān and his followers whom he saw as partisans of his enemies the British, and wrote extensively while in Hyderabad, denouncing them.[177] In one scathing article published near the end of

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[173] "A Mahomedan Learned in the Law," *The Madras Mail* 14, no. 255 (28 Oct. 1881): 2.
[174] Salar Jung, G.C.S.I., Prime Minister to His Highness the Nizam, Hyderabad, to Steuart Bayley, K.C.S.I., C.I.E., 21 Mar. 1882, GOI, Foreign Political (A), July 1882, Nos. 512-515, National Archives of India, Delhi.
[175] Ibid.
[176] Aziz Ahmad, "Afghani's Indian Contacts," *Journal of the American Oriental Society* 89 (1969): 478-479.
[177] Nikki R. Keddie, *Sayyid Jamal ad-Din "al-Afghani": A Political Biography* (Berkeley: University of California Press, 1972), 152, 167.

his stay, he particularly targeted one of Aḥmad Khān's followers who had "patiently explained his loyalty [to the British] and elaborated upon the real purpose of his companions," comparing him to a dog which wags his tail for a bone.[178] Since the person is not named except by a nickname, identification with any one person is difficult. A number of Aḥmad Khān's key followers were holding influential posts in the Hyderabad administration at this time, including Sayyid Mahdī 'Alī known as Muḥsinul Mulk (1837-1907), serving as Revenue Secretary, Chirāgh 'Alī (1844-1895) serving as Assistant Revenue Secretary, and Mushtāq Ḥusayn known as Wiqārul Mulk (1841-1917) who was in close contact with the British Resident.[179] One whose presence has been overlooked in previous analyses is Syed Mahmood, who certainly had been vociferous in his support of the British regime in India on numerous occasions, and would have found himself in strong disagreement with Afghānī if they had met during the time that their stays in Hyderabad overlapped.

During his time of service to the Niẓām, Syed Mahmood paid a two-week visit to Bangalore to inspect the courts of justice in the Mysore state, and to obtain information regarding the working of the Mysore judicial system, intending to assist in carrying out the improvement of the courts of Hyderabad.[180] It was reported that Syed Mahmood "took notes of all that he saw, and the books and forms selected by him, formed a cart load to be sent to Hyderabad by railway."[181] Immediately following his visit to Bangalore, he continued on to the Madras Presidency nearby, for a ten-day visit with a similar purpose. He had the opportunity to observe the working of the village tribunal system making justice cheaper and more accessible at the village level—a system he subsequently sought to have introduced in the North-Western Provinces and Awadh.[182] An incident that occurred in Madras illustrates the division between the British and Muslims that Syed Mahmood worked continually to overcome. Sir Charles Arthur Turner (1833-1907) who had been a Puisne Judge in the Allahabad High Court from 1866-1879, during the time that Syed

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[178] Quoted in Ahmad, "Afghani's Indian Contacts," 480.
[179] Ibid.: 480-481.
[180] *Aligarh Institute Gazette* 16 (1 Nov. 1881): 1245.
[181] "A Mahomedan Learned in the Law," *The Madras Mail* 14, no. 255 (28 Oct. 1881): 2.
[182] "List of Papers Accompanying Letter no. 377, dated 11 May 1892," No. 1, "Extract from a Note by the Hon'ble Mr. Justice Saiyid Mahmud, dated 25th July 1886 – (Part II)" GOI, Home Judicial (A), July 1892, Nos. 332-381, National Archives of India.

Mahmood worked there as a barrister, had been appointed as Chief Justice in the High Court in Madras. He invited Syed Mahmood, who was staying with him as his guest, to accompany him to the Madras Club; but within minutes of entering, another member of the club came up to Sir Charles and told him, in front of Syed Mahmood, that no native was allowed in the Club.[183] Syed Mahmood felt the discrimination keenly. After visiting the law courts of Madras, he also went to Tanjore and Dharwar to observe the working of the "mofussil"[184] courts there.[185]

While he was in Hyderabad, Syed Mahmood heard that the Government had resolved to appoint a Native Judge in the High Court at Allahabad when the next vacancy occurred. He was then forced to decide whether to continue in the service of the Niẓām or to apply to be re-transferred to the North-Western Provinces in order to be available to fill upcoming vacancies in the High Court. Reflecting back on that decision a decade later he wrote, "The leading and representative members of the Muhammadan community in Upper India, including the Panjab, many of whom are my personal friends, wrote to me strongly requesting me to apply for the High Court Judgeship, and this advice was strongly backed by my father, Sir Saiyid Ahmad...."[186] He likewise noted that his choice was evidence of his loyalty to British rule since it involved relinquishing an offer which would have had greater pecuniary advantages than service in the British judiciary.[187] The Lahore newspaper, the *Reformer*, in a review of Syed Mahmood's career when he was appointed an officiating Judge of the High Court, offered a more sinister reason for his departure from Hyderabad. The paper stated that he had been frightened and fled the place when "a bigoted Musulman there considered him to be an unbeliever" because of his habit of wearing Western dress, and had intended to kill him.[188] An early biographer

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[183] Graham, *Life*, 378. Turner later served as the Judicial Member of the Council of India from 1888 to 1898.

[184] From *mufaṣṣal*. In British India, "a subordinate or separate district; the country, the provinces, or the stations in the country, as opposed to the Sudder (*Sadr*), or principal station or town." Morley, *Administration*, 354.

[185] "A Mahomedan Learned in the Law," p. 2.

[186] Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, p. 67, British Library, London.

[187] Ibid., p. 2.

[188] Government of India, *Selections from the Vernacular Newspapers, published in the Panjab, North-Western Provinces, Oudh, Central India, and Rajputana* (1882), 335. The incident was also reported in the English press; see "Mr. Sayad Mahmoud at Haidarabad," *The Englishman*, 44, no. 7 (9 Jan. 1882): 3. On

of Syed Mahmood simply states that Mahmood did not enjoy his time Hyderabad and returned after 6 months; no reference or source, however, is given for these details.[189]

Another factor which doubtless affected Syed Mahmood's decision to leave Hyderabad was the opportunity to be involved in the process of critiquing and even creating law in India by assisting his father who was on the Viceroy's Legislative Council. By February of 1882, he had left Hyderabad and joined his father in Calcutta where the Council was meeting. The strong endorsement of the codification process evident in Aḥmad Khān's speech on the Transfer of Property Bill during that session, leads one to suspect that Syed Mahmood may have had a hand in writing those speeches or at least in discussing their content with his father.[190] This suspicion is strengthened by his comments in a letter advising the government on proposed amendments to that Bill a few years later, where he indicates that he had "taken a great deal of interest in the Transfer of Property Act during its passage through the Legislature."[191] His equally strong endorsement of his father's speech on the Easements Bill during the same session is illustrative of the same.[192] In a Minute on the necessity of extending that Bill, Mahmood wrote that he was prepared to adopt every word of his father's speech for the purposes of his note, and that he considered that speech to best represent "how the people of the country, or at least those who may be taken to deserve a voice in such matters," regarded the issue.[193] Two years earlier, he had assisted his father in preparing a Family Waqf Bill to assist landed Muslim families evade the strict Muslim inheritance laws that would disperse their prop-

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the reactions of both Europeans and Indians to Indian nationals wearing western dress, see: Emma Tarlo, *Clothing Matters: Dress and Identity in India* (Chicago: University of Chicago Press, 1996), 23-61.

[189] Zubayrī, *Tazkirah-i Sayyid Mahmūd Marḥūm*, 13.

[190] "Viceregal Legislative Council" *The Englishman* 44, no. 28 (27 Jan. 1882): Supplement, p. 1. The Transfer of Property Act provided a code to regulate property law, but Muslim and Hindu rules regarding the transfer of property for their own communities remained unaffected. Codification in the thought of Aḥmad Khān and Syed Mahmood is discussed in detail in chapter 5.

[191] "Letter by S. Mahmud, Justice," 15 Dec. 1884, Proceedings, Judicial (Civil) Department, N.-W. P. & Oudh, Feb. 1885, Nos. 12-19 on Bill to Amend Transfer of Property Act, 1882, U. P. State Archives, Lucknow.

[192] On Aḥmad Khān's speech, see: India. Imperial Legislative Council. *Astract of the Proceedings of the Council of the Governor General of India, assembled for the Purpose of making Laws and Regulations under the Provisions of the Act of Parliament* v.21 (Calcutta: Office of the Supt. of Gov't. Printing, India, 1882), pp. 104-107.

[193] Syed Mahmood, "Necessity of extending the Indian Easements Act (V of 1882)," written 23 May 1886, N.-W. P. and Oudh, Judicial (Criminal) Dept. Proceedings (A), Mar. 1891, Nos. 32-58, U. P. State Archives, Lucknow.

erty holdings.[194] That he would be drawn to assist his father once again is hardly surprising, and may have seemed to him to more in line with his own ambitions to participate in the British administration in India in an influential role. That Syed Mahmood had left Hyderabad and was in Calcutta in early 1882 is also evident from a lengthy letter he wrote to the Viceroy from there on February 7, describing his views on the subject of the new Native Civil Service.[195]

Nevertheless, in spite of his abbreviated stay in Hyderabad, Syed Mahmood's relationship with Sir Salar Jang, the *vazīr* of Hyderabad remained cordial. During his trip to Simla to meet with the British Viceroy of India in May 1882, shortly after Syed Mahmood's had taken up his post at the High Court, Salar Jang stopped in Allahabad where he was hosted by Syed Mahmood.[196] Several years later, Syed Mahmood proposed a toast to Nawab Salar Jang II, who had succeeded his father to the position of Prime Minister of Hyderabad, when was visiting the MAOC.[197] Syed Mahmood commented on the help he had received previously from the guest's father, Sir Salar Jang. He considered Sir Salar Jang to be an active promoter of a feeling of fellowship between Englishmen and Indians that transcended distinctions of race and creed, resulting in that social intercourse among the various sections of the population of the British Empire that Syed Mahmood also continually sought to achieve.[198] On one of his visits to Aligarh, the new Nawab broached the subject of Syed Mahmood returning to Hyderabad to organize the judicial system, and began correspondence with the British government in India on the matter; but it would appear that both governing officials and Syed Mahmood were reluctant to jeopardize his

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[194] Letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 15 Jul. 1881, containing enclosure of letter from Syud Mahmood, District Judge, Bareli, to Lt.-Col. P. D. Henderson, Genl. Supdt. of Operations for the Suppression of Thuggee & Dacoity, 15 Jun. 1881, no. 35, Letters from the Secretary of State for India to the Viceroy, Commencing from January 1881, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3, 1881, British Library.
[195] "Employment of Natives in the higher branches of the administration, under the new Native Civil Service Rules," Additional MS 43630, folios 97-157 Sayyid Muhammad Mahmud, High Court Judge, Allahabad, dated 7 Feb 1882, British Library.
[196] *The Pioneer* (22 May, 1882): 5.
[197] Graham, *Life*, 347, 350-353.
[198] "The Nawab Salar Jung," *The Pioneer* (17 Feb. 1885): 4.

possible appointment to the High Court at Allahabad with an assignment which would take him out of the province.[199]

The major factors that prompted his early departure from Hyderabad leads one to conclude that Syed Mahmood preferred to work within the British judicial system in India rather than in the predominantly Muslim judicial system functioning in Hyderabad. The Niẓām of Hyderabad had employed a number of British-trained, Indian Muslim administrators from Delhi and other major centres of North India, many of whom had been recommended by Syed Mahmood's father.[200] That Mahmood would choose to not to stay and enjoy an influential position among them indicates the degree of his commitment to seeking advancement in the British system. His choice of British India over Hyderabad also demonstrates his conviction that the progress of the Muslim community was not limited to areas under direct Muslim control. In Hyderabad, Mahmood would have had the opportunity to work under Muslim rulers, administering Muslim laws within a primarily Muslim legal infrastructure. To leave that and return to work within the British structure signalled his acceptance of the legitimacy of the British administration of Muslim law. This did not mean an uncritical acceptance of their transformation of that law, since—as is demonstrated later in this dissertation—Mahmood was highly critical of their handling of Muslim law. Rather, he perceived flexibility in the British structure in which he could work and bring about the reforms he saw as necessary.

1.4e Syed Mahmood as Puisne Judge of the High Court

In spite of the misgivings of several officials, on 9 May 1887, Syed Mahmood received his full appointment as judge of the High Court, North-West Provinces in Allahabad after having served in a temporary capacity on the Bench in four separate periods.[201] After his initial stint as officiating judge from May to November, 1882, Syed Mahmood had been appointed to officiate at the High Court thrice more, from March 1884 to March 1885, from April to August, 1886, and finally for two months just prior to his full ap-

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[199] Letter from H. W. Primrose, Simla, to A. C. Lyall, 22 Oct. 1884, and letter from A. C. Lyall, Lucknow, to H. W. Primrose, 30 Oct. 1884, Lyall Collection, India Office Records, MSS EUR F/132/43.
[200] Karen Leonard, "Hyderabad: The Mulki-Non-Mulki Conflict," in *People, Princes and Paramount Power: Society and Politics in the Indian Princely States*, ed. Robin Jeffrey (Delhi: Oxford University Press, 1978), 67-68.
[201] *India Office List, 1895*, 393.

pointment in 1887. He recounted that when he was appointed to officiate for the fourth time in 1887, he was at that time still "wholly unaware whether I was or was not to be permanently appointed."[202] He was nonetheless ready to voice his disagreement with his fellow judges on matters he considered vital to the effective running of the court. Sir Tej Bahadur Sapru (1875-1949), who started practicing law before the High Court at Allahabad in 1896, commented on Mahmood's judgments and willingness to speak out against perceived injustices, in an obituary published in *The Hindustan Review*: "His innate sense of justice revolted against some of the absurdities and imperfections of our law, and though he did not deem himself at liberty to transgress the four corners of a statute, he could not at times forbear recording his protest against them. Indeed, whenever it was possible, he would endeavour to reconcile the inelastic language of codified law to broad principles of justice."[203] Mahmood's judgments are the basis for the detailed examination of Mahmood's jurisprudence in the later chapters of this dissertation.

In the intervening periods when he was not at the Allahabad High Court, Syed Mahmood returned to work as District Judge at Rai Bareli, as well as briefly at Fyzabad, another district in Awadh. His work as a judge was interspersed with periods of time when he assisted his father in his educational work at Aligarh. After his first officiating appointment, he went to England to recruit Theodore Beck (1859-1899) for the post of Principal of the MAOC. After his second appointment as officiating judge ended in March of 1885, Syed Mahmood decided to take a leave of absence for one year, during which his intention was to finish a book on Muslim law while living at Aligarh.[204] Although letters from his father to Major-General Graham later that year mention that Mahmood was busily engaged on his work on Muslim law and had written several hundred pages, no record has been found of its completion.[205] After his retirement from the Allahabad bench in 1893, the *Pioneer* commented that it was hoped that Mr. Justice Mahmood would utilise his leisure in completing and bringing out his work in four vol-

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[202] Rashid, "Justice Mahmood's Resignation," 269.
[203] Sapru, "Syed Mahmood," 445.
[204] Syed Mahmood, Aligarh, to Lord Randolph Churchill, Secretary of State for India, 17 July, 1885, Additonal MS. 9248/6/702, Papers of Lord Randolph Churchill, Cambridge University Library; see also the note in *The Pioneer* (2 Mar. 1885): 1, stating that Syed Mahmood might go home or to the hills, "there devoting himself to the completion of his work on Mahomedan Law."
[205] G. F. I. Graham, *The Life and Work of Sir Syed Ahmed Khan*, 2nd, rev. ed. (London: Hodder & Stoughten, 1909; reprint, Karachi: Oxford University Press, 1974), 264, 269.

umes on Muslim Law which had long been promised. The editors of the *Pioneer* were of the opinion that it "would certainly be an extremely valuable work, as written by one who combines Arabic scholarship and the legal culture of the West."[206] An obituary of Mahmood ten years later contains the lament that ill-health did not permit Mahmood to complete the four-volume work on Muslim law which he had been anxious to write, and which, if it had been completed, "would not only have proved a monument to its author's genius but would have furnished a striking testimony to the intellectuality of the Indian people."[207] What have survived are two volumes of excerpts of Arabic volumes on *fiqh* on the subjects of pre-emption and of divorce that Mahmood translated into Urdu but without any commentary; these were published in 1897.[208]

In the year that followed his full appointment to the High Court, he was married to the daughter of his father's maternal cousin, Nawāb Khwājah Sharfuddīn Aḥmad, on 13 March, 1888.[209] He purchased a house, #1 Church Road, in Allahabad that same year.[210] His first son, born in 1889, was named Sayyid Ross Masud, after Syed Mahmood's friend and fellow barrister, G. E. A. Ross. Masud's *bismillah* ceremony was held at the eighth annual meeting of the Muhammadan Educational Conference.[211] Throughout his life, Syed Mahmood remained closely connected with men who gathered about his father and supported the move for educational social reform. One such mentor was Mahdī 'Alī, later known by his title Muḥsinul Mulk, who had developed an uncle-nephew relationship with Syed Mahmood.[212]

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[206] As quoted in "The Hon'ble Justice Syed Mahmud," *Aligarh Institute Gazette*, vol. 28, no. 78, 29 Sept. 1893, p. 972.
[207] "Late Mr. Syed Mahmood," 185.
[208] Syed Mahmood, trans. and ed. *Kitāb al-Shuf'ah az Kitāb Mazhab Ḥanafī Majmu'a al-Baḥrayn wa Fatāwá Qāzī Khān wa 'ayn Sharḥ Kanan*, Part 1. Delhi: Maṭabi'-i Muṣlih, 1897; Syed Mahmood, trans. and ed. *Kitāb al-Shuf'ah az Kitāb Mazhab Ḥanafī Hidāyah wa dar al-Mukhtār wa Sharḥ Waqāyah*, Part 2. Delhi: Maṭabi'-i Muṣlih, 1897.
[209] Anis Ansari, "Syed Mahmood: His Life and Works," *Aligarh Law Journal* 5, Mahmood Number (1973): 8. It would appear that this marriage was one of the causes of his estrangement from his father's long-time colleague, Samī'ullah Khān, who had been working to arrange a marriage for his son, Ḥamīdullah Khān with the same woman; see, Shan Muhammad, *Sir Syed Ahmad Khan: A Political Biography* (Meerut, India: Meenakshi Prakashan, 1969), 92 n.
[210] David Lelyveld, "The Mystery Mansion: Swaraj Bhawan and the Myths of Patriotic Nationalism," *The Little Magazine* 4, no. 4, "Ghosts" (2004). Lelyveld traces the ownership of this house from Mahmood's time to when it was owned by the Nehru family. The article is also available on-line at http://www.littlemag.com/ghosts/davidlelyveld.html.
[211] Lelyveld, *Aligarh's First Generation*, 300-302.
[212] Ibid., 65.

1.4e (1) His judgments

The periods when Syed Mahmood was serving as a judge on the High Court of Allahabad were characterised by detailed, extensive written judgements, attested to by those of his rulings which were recorded in the *Indian Law Reports: Allahabad Series* from 1882 to 1893. During his first six-month service as officiating judge, nearly 30 of his judgments are recorded, including some of his dissenting opinions when sitting with other judges. Then in his first full year in 1884-1885, triple that number are recorded, including several that are 20-40 pages in length. This trend towards numerous, and sometimes lengthy, judgements continued during his four-month period of service in 1886 when another 30 were recorded. During his five years as puisne judge, he contributed as many again. Though the rate had decreased, it was at this time that he wrote his lengthiest judgements, including two on Muslim law that were both over 50 pages in length.

One must remember that not all judgments were recorded in the *Indian Law Reports*, only those deemed by the judges to have made a significant contribution to the understanding of the law and necessary for reference in future judgments. Syed Mahmood's contribution is all the more striking when compared with the brief judgments made by his contemporaries in the same period. Simply in terms of space, his judgments overwhelmingly dominate the volumes of the years he was sitting as judge. Syed Mahmood notes in his letter defending the diligence of his working habits that in the period of 1887 to 1892 the number of pages containing his recorded judgments in the Indian Law Reports was 1,064 while that of Sir John Edge was only 623, and that of another fellow judge, William Tyrrell, was only 124.[213] In comparison with the total number of decisions he rendered while serving on the High Court, however, the number of his recorded judgments form only a small fraction. During the period 1887 to 1892 when he contributed approximately 30 significant judgments to the Law Reports, Syed Mahmood delivered a total of 3,181 decisions, while Edge delivered 5,555 and Tyrrell 7,870.[214]

More important than the number and size of his judgments, though, was the high quality of their content attested to by his contemporaries. Whitley Stokes, Law Member

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[213] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, p. 34.
[214] Ibid.: 32.

of the Viceroy's Legislative Council from 1877-1882, commented on the quality of the recorded judgments of the High court while stating his indebtedness to them when writing his own volumes on the Anglo-Indian codes: "Of those judgments none can be read with more pleasure, and few with more profit, than those of the Hindu Muttusámi Ayyár and the Muhammadan Sayyid Mahmud."[215] The Allahabad English newspaper, the *Pioneer*, was frequently critical of Syed Mahmood, yet gave this testimony upon his retirement from the Bench in 1893:

> He had prepared himself by a long and thorough course of law studies for the duties of his high office, and he could, therefore, bring to the discussion of legal questions a good knowledge equally of legal principles and of the case-law of the land. He worked hard, and his judgments would bring to one focus almost everything that could be found in the legal literature of the country on any particular point. He also expressed himself in very good English, and every one of his judgments contains a long series of stately periods which, with their many fine expressions and their grand sweep, must be counted as some of the best compositions in English by an educated native of India.[216]

A glance at some of his lengthy judgments causes one to affirm the statement that Mahmood must have covered every possible reference to a particular topic, and his command of the English language is truly impressive. The *Pioneer* went on to comment favourably on his judgments on matters of Muslim law and on pre-emption, and on his capable use of English and American legal literature. But at the same time, the paper felt the judgments were frequently too long to be useful to the average lawyer or judge, and that prolixity was one of Syed Mahmood's besetting sins. "To enter on the discussion of every legal point from the first principles of jurisprudence may be extremely valuable from the academic point of view, but is singularly out of place in the judgment of a High Court Judge."[217] For one studying Mahmood's legal thought, however, this detail provides a rich resource for tracing the foundations of his jurisprudence.

Another contemporary, Tej Bahadur Sapru, justified the prolixity of Mahmood's judgments in an obituary published in *The Hindustan Review*:

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[215] Whitley Stokes, *The Anglo-Indian Codes*, vol. 1, Substantive Law (Oxford: Clarendon Press, 1887), xxviii.
[216] As quoted in: "The Hon'ble Mr. Justice Syed Mahmud," *The Aligarh Institute Gazette*, 28, no. 78, 29 Sept. 1893, p. 969-970.
[217] Ibid., p. 971.

> A common complaint against Mr. Justice Mahmood is that his judgments were prolix. It seems there is an element of truth in this charge, but at the same time it cannot be forgotten that he was appointed judge at a time when the Legislature had just passed two important measures, and when some other Acts, such as the Indian Limitation Act and the Specific Relief Act, not to mention others, had not been long in force. The Civil Procedure Code and the Transfer of Property Act were passed about the time that he was brought on the Bench in Allahabad and they had to be explained. A large number of his earlier judgments relate to questions arising under these enactments, and it will require much hardihood to maintain that he has not done much to remove doubts and elucidate many obscure questions which cropped up under them.[218]

While Syed Mahmood's contribution to the codification of law in India is examined in more detail in chapter 5, it is helpful to note here that the wordiness of his judgments was necessitated by the particular stage of juridical development of India when he was serving as judge. As legislation proliferated in the 1860s and 1870s, amendments to those laws were often necessitated by the encounter of the codified laws with real situations as addressed in the courts; and Mahmood was in the forefront of those working to clarify the law through his judgments.

In his judgments, Syed Mahmood considered it of supreme importance that the parties to the suit felt they had received justice. When attacked for taking to much time in preparing his judgments, he countered by arguing that he was not prepared to sacrifice the quality of the judgments in order to dispose of a greater number of cases. He described his approach to delivering judgments thus:

> I have both as a District Judge and as a Judge of this Court uniformly held it true as a principle which should guide a Judge in delivering his judgment that it is *not* intended *only* to satisfy his own mind and to be intelligible only to the lawyers engaged in the case, but that it should convey to the litigant parties the assurance that the dispute between them has been understood by the Judge and disposed of by him for the reasons mentioned by him in his judgment. Such a method is necessary because half the benefit of administering justice is lost if the parties are not satisfied that their case has been duly heard and fully understood.[219]

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[218] Sapru, "Syed Mahmood," 451.

[219] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, pp. 28, 34.

He added that as a result, judgments which aimed at achieving those results must necessarily be longer than judgments which proceeded upon a desire to expedite the largest number of cases in the shortest amount of time possible.

1.4e (2) His comments on legislation

As a member of the Allahabad High Court, Syed Mahmood and his fellow judges were asked to give their advice on various bills that the Government was considering. He prepared a detailed minute criticizing the levying of court fees in 1884.[220] He contributed two notes on the proposed amendments to the Transfer of Property Act within the next six months, arguing that the distinctions based on race or religion as earlier enshrined in the initial law should be abolished.[221] On 20 April, 1886, Syed Mahmood submitted a lengthy note on the administration of justice in the province of Awadh, drawing on his experience in that region both as a barrister and as a District Judge.[222] In the following year, he contributed a memorandum on the early draft of a proposed Indian Civil Wrongs Bill prepared (but never implemented) for the Government of India by Sir Frederick Pollock (1845-1937).[223] As a keen proponent of the codification process, Syed Mahmood's enthusiasm for the proposed Code of Civil Wrongs contrasted with the much more critical responses of all the other judges of High Courts and Chief Courts in India.[224] With the majority opinion opposing the draft Bill, the Government decided against enacting the legis-

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[220] "Minute recorded by Hon'ble Mr. Justice Mahmood," 19 Aug. 1884, N.-W. P. & Oudh, Proceedings Judicial (Civil) Department (A), Feb. 1885, Nos. 20-24, U. P. State Archives, Lucknow. This criticism is discussed in chapter 5.

[221] Note on the Bill to Amend Transfer of Property Act, 1882, written 15 Dec. 1884, N.-W. P. and Oudh, Judicial (Civil) Dept. Proceedings (A), Feb. 1885, Nos. 12-19, U. P. State Archives, Lucknow; "Remarks on the Bill to amend the Transfer of Property Act, IV of 1882," written by Syed Mahmood in Allahabad, 13 Jan. 1885, GOI, Home Judicial (B), Jan. 1885, Nos. 140-142, National Archives of India, New Delhi. [also contained in Home Legislative (A), Feb. 1885, Nos. 97-216, National Archives of India, New Delhi.] These writings, too, receive fuller treatment in chapter 5.

[222] "Note by the Hon'ble Syed Mahmud, Officiating Puisne Judge, North-Western Provinces High Court, dated Allahabad, 20th April 1886," India Office Records, Public and Judicial Department Records, L/PJ/6/213, File 1832, date 14 Jan 1888.

[223] Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law; to which is added the Draft of a Code of Civil Wrongs prepared for the Government of India*, 2nd ed. (London: Stevens and Sons, 1890), 518. Pollock had been called to the Bar at Lincoln's Inn in 1871, one year prior to Syed Mahmood's own call, and could well have begun a friendship with him at that time.

[224] "Appendix A7. Précis of Opinions received by the Legislative Department to the Government of India concerning Mr. Fred. Pollock's Draft Bill on Civil Wrongs for India." GOI, Home Legislative (A), March 1889, Nos. 98-105, National Archives of India.

lation. In other minutes on legislation, such as his note on the necessity to extend the Easements Bill mentioned earlier, Mahmood was fully supported by his fellow judges.[225]

Syed Mahmood's comments on one Bill proved to be much more productive than his work on the Civil Wrongs Bill. His extensive, detailed note on the Provincial Small Cause Courts Bill of 1885 continued to circulate in official circles in whole or in part for the next 10 years, and resulted in the introduction and legislation of two subsequent bills: The North-Western Provinces and Oudh Village Courts Act, 1892, and The North-Western Provinces and Oudh Honorary Munsifs Act, 1896.[226] Syed Mahmood made additional contributions to the latter Bill as a member of the N.-W. P. and Oudh Legislative Assembly in 1896. When the Public Service Commission held their hearings, Syed Mahmood contributed with both oral testimony was well as written submissions, continuing themes he had initially broached in his 1882 memorandum on the Civil Service.[227] Since those judgments of his which are recorded in the Indian Law Reports, along with these minutes written on various bills, are the major source for the evaluation of his judicial thought, a detailed analysis of this work is presented later in this study.

1.4e (3) His contribution to the administration of the court

Allocation of time

While on the Bench, Syed Mahmood took an active role in the running of the Court, beyond his duties on the Bench. On 2 May, 1886, he wrote a minute on various matters regarding the British judicial system in India, including a criticism of the cursory manner in which British judges dealt with intricate matters of Muslim law, and his reflec-

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[225] Syed Mahmood, "Necessity of extending the Indian Easements Act (V of 1882)," written 23 May 1886, N.-W. P. and Oudh, Judicial (Criminal) Dept. Proceedings (A), Mar. 1891, Nos. 32-58, U. P. State Archives, Lucknow.

[226] "Appendix A3. Note on the Provincial Small Cause Courts Bill of 1885," by Syed Mahmood, High Court, Allahabad, 25 July, 1886, GOI, Home Legislative, Feb. 1893, Nos. 97-114, National Archives of India.

[227] Government of India, Public Service Commission, *Proceedings of the Public Service Commission.* Vol. 2, *Proceedings relating to the North-Western Provinces and Oudh.* Section 2, "Minutes of Evidence Taken in the North-Western Provinces (Sittings at Allahabad)." "Witness XXIX, 5 Jan. 1887, Examination of Syad Mahmud, of the Uncovenanted Service, District Judge, Rai Bareilly." Calcutta: Superintendent of Government Printing, India, 1887, pp. 120-136; idem. Section 3, "Replies of Persons not Examined and of Associations and Societies, and other Selected Papers." "Supplementary Papers Received from the Honourable Syad Mahmud, Barrister-at-Law, Judge, High Court Allahabad. Appendix A to Mr. Mahmud's oral evidence." Calcutta: Superintendent of Government Printing, India, 1887, pp. 52-58.

tions on the relationship of the High Courts to the Government of India.[228] But his chief complaint in this minute was that the working schedule dictated by the Chief Justice did not allow sufficient time for the reflection on the broad bases of law necessary for writing comprehensive judgments on the cases that came before him in court; nor was adequate time given for preparing thorough responses to questions on legislation proposed by the government. Although he felt that commenting on proposed legislation did not fall within the purview of a judge's responsibilities, he recognized its necessity within British India. He had realized that in India, the assistance of the High Court judges was necessary because the government had no other means by which to obtain to proper advice in matters such as legislation and the appointment of subordinate judges; and he would not want to see it either deprived of the help of the High Courts, or have that help rendered in an inadequate manner.[229] He wanted to make his contribution, not primarily as an officiating judge of the High Court, but as "a simple native of India who is interested in the welfare of his countrymen, knowing full well that there is no parliament in India, and that the Legislature to get any competent advice must rely upon such of its subjects as happen to understand legal matters."[230]

Syed Mahmood felt that he was also not allowed sufficient time to prepare his judgments in a thorough manner, forcing him to spend his evenings and Sundays working to complete his judgments. He saw such work as judicial and therefore felt it should be done as part of his regular hours as a judge in chambers, not in addition to them. He wrote that he did not want to be influenced or directed by the administrative exigencies of the Government, but rather by "the cause of the administration of justice to the people for whom this Court has been established and who, as a matter of fact, are taxed to maintain it."[231] In assessing the number of hours a judge should be required to work, he noted that he had seen in the lives of eminent men that any work requiring any real exertion of the human intellect could not be done for more than four to five hours at a time, and that in the aggregate, few could work for more than eight hours in twenty-four. He himself was

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[228] Syed Mahmood, Minute of [2 May 1886], Appendix O, Public and Judicial Department Records, India Office Records, L/PJ/6/355, File 1680, date 15 Aug 1893, British Library, pp. 6A-13A of Appendix.
[229] Ibid., p. 7A.
[230] Ibid., p. 12A.
[231] Ibid., p. 9A.

spending his first three hours, from 7:00 to 10:00 a.m., correcting recorded judgments or writing judgments for cases in which they had been reserved, and his next five on the Bench as scheduled. Neither the state nor the public had any right to expect him to sit up after dinner each evening to do judicial work, or to work on Sundays. Personally, he saw the keeping of Sunday free of work as necessary for matters of health, not from any religious convictions, and pointed to the findings of the French Revolution as his authority.[232] He was willing, however, to do what was necessary in order to not appear obstructive or the cause of increasing the arrears, considering that his appointment at the time was only temporary, and so was prepared to work on Sundays or from 4:00 to 6:00 p.m. after the Court had risen to take care of those matters as directed by the Chief Justice. If his appointment were to become permanent, such an arrangement, he insisted, would be unacceptable.[233]

Handling of administrative correspondence

Shortly after he was appointed to officiate in 1887 for the final time before receiving his permanent appointment, he was involved in a case which led to a disagreement with his fellow judges regarding the handling of administrative and executive business, termed "English business." As a result, in a minute dated 11 Aug. 1887, Syed Mahmood objected to the practice of delegating the Court's authority to one of the judges to dispose of all such business without consulting other members of the court.[234] As long as there was no rule delegating such authority, he considered it his duty to require that anything done in the name of the Court be brought to his notice as a matter of principle, not because of any base motive on his part to take a prominent part in the working of the Court.[235] In another Minute, Syed Mahmood reiterated his objection, and stated his difficulty with the term "English business."

> I had serious cause to consider whether the epithet "*English*" ... was to be understood in the philological or in the ethnological sense. I, so far as I have had the honour of officiating in this Court, have always attempted to adopt the former

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[232] Ibid., p. 11A.
[233] Ibid.
[234] Sri K. P. Mathur, "The 'Judges in the English Department' Subsequently known as 'Judges in the Administrative Department'," in *Centenary: High Court of Judicature at Allahabad, 1866-1966*, vol. 1 (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966), 136-138.
[235] Rashid, "Justice Mahmood's Resignation," 269.

> sense, especially as the courtesy of the Chief Justices under whom I have served and of my brother Judges justified or rather encouraged the interpretation that my being a Native of India was no bar to my taking part either in "*English* business" or to my joining "*English* Meetings" so long as I could make myself sufficiently intelligible in the English language. My nationality has therefore not operated yet in keeping me out of "English Meetings" except the one occasion to which I have already referred.[236]

That Mahmood raised the issue indicates that he suspected the term had some implicit racial connotations; and by making the matter explicit, he sought to promote a rejection of any inequality on the basis of race or ethnicity.

In a special meeting called by the Chief Justice to consider the matter, the judges adopted the definition of the term to include "all correspondence in the English language addressed to the Registrar."[237] Chief Justice Edge resented Mahmood's interference and found his insistence that no one judge had the authority to act on behalf of the others in conducting such business obstructive.[238] Consequently, it was decided that all business be sent to Syed Mahmood for his perusal, even that which was normally handled by the Registrar without the input of any judge. Mahmood commented later that he would find when he rose from the Bench at 4:00 p.m. there would be a stack of correspondence and files often nearly 2 feet high on his table waiting for him, sometimes so much that the front seat of his carriage could hardly hold them; and included in the mass of papers would be much of a trivial nature, which he requested not be sent to him. Syed Mahmood rejected the complaint presented by Edge, that his request had caused any delay in the expeditious handling of the correspondence.[239] Shortly thereafter, rules were framed which established a procedure for dealing with such administrative matters and satisfied all the judges including Syed Mahmood.

Court holidays

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[236] Syed Mahmood, "Minute on 'English Business,' " dated 28th November, 1887, Letter from Syed Mahmud to the Chief Secretary to the Government of the North-Western Provinces and Oudh, dated Aligarh, 9 Sept.1893, Appendix B. 12, pp. 11-14, Public and Judicial Department Records, India Office Records L/PJ/6/361, File 2195, date 18 Oct 1893, British Library.

[237] Rashid, "Justice Mahmood's Resignation," 272.

[238] John Edge, et al., "Memorandum by the Hon'ble the Chief Justice and the Judges of the High Court of Judicature, North-Western Provinces," 22 Feb. 1889, GOI, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, pp. 2-3.

[239] Rashid, "Justice Mahmood's Resignation," 273.

Drawing on his experience in Rai Bareli where *Chahlam* was observed as Muslim holiday, closing the courts for that day, Syed Mahmood sought to implement a similar policy in Allahabad. He consulted Maulavi Sayyid Amjad 'Alī, Professor of Arabic at Muir Central College regarding the sanctity of the holiday for Muslims.[240] Amjad 'Alī confirmed that the day was important in the Muslim year as a day of mourning and prayer commemorating the martyrdom of Imām Ḥusayn on the plains of the Karbala. Syed Mahmood then asked the Registrar, I. B. Thomson, to circulate a note among Muslim barristers and pleaders requesting their views, a request that was executed on 8 Nov. 1887.[241] The immediate result was that the barristers and vakīls approved its observance. When the Registrar mentioned that Ash Wednesday had been removed as a holiday for the Christians in 1861, Syed Mahmood requested him to poll the Christian members of the Bar on their views of the need for the holiday. The Registrar did not comply with this request but appealed to Chief Justice Edge, and the incident became one of the factors leading to the resignation of Syed Mahmood a few years later. At the time, he wrote a minute dated 10 Dec. 1887, for the official court record stating that the Registrar could not evade the orders of any of the Judges of the Court by prematurely submitting the order to the Chief Justice.[242] As for the impact of his efforts to establish court holidays, the following year his fellow judges Edge and Straight agreed with his petition to have *Chahlam* recognized as such; and a recommendation to that effect was passed on to the government. It was sanctioned as a holiday from that time forth.[243] The issue of religious holidays, however, returned and became the catalyst for the final and irrevocable breach between Syed Mahmood and Sir John Edge, resulting in Mahmood's retirement from the Bench in 1893 as will be discussed in the following chapter.

1.4f Syed Mahmood as member of the Provincial Legislative Council

As early as 1888, Andrew R. Scoble (1831-1916), Law Member of the Viceroy's Council from 1886 to 1891, wrote to Syed Mahmood that Sir Arthur Colvin had submitted his name as a possible Additional Member for the Legislative Council because he

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[240] Prior to his work at Muir College in Allahabad, Amjad 'Alī had been professor of philosophy and logic at the MAOC from 1881 to 1887. Lelyveld, *Aligarh's First Generation*, 191.
[241] Rashid, "Justice Mahmood's Resignation," 274.
[242] Ibid.: 276.
[243] Ibid.: 267.

wanted a Muslim from the North-Western Provinces who was competent, and representative of the area and of the Muslims. Scoble had observed Mahmood's work as a judge by sitting with him on the Bench for a full day on one of his visits to Allahabad, in order to evaluate his proposal for judicial reform. With that personal acquaintance of Mahmood's work, he was fully convinced of his abilities as a legislator and would have gladly welcomed him as a member of the council, but had agreed with others on the Council that it would be inadvisable to remove Mahmood from the Bench to serve on the Legislative Council for two reasons. Firstly, the appointment would only have been temporary and would have disrupted judicial work; and secondly, the appointment would have weakened the public perception of the independence of the judiciary—if Syed Mahmood had still been in private practice it would have been no problem.[244] Syed Mahmood had been unaware of the proposal, but agreed with the decision that having the position of a High Court Judge should preclude a person from being a member of the Legislature. He wrote that his interests in legislative work were limited to those areas that directly affected the administration of justice, and that while he was perfectly content with his present service in the High Court, he hoped after retiring from judicial work he might "some day have an opportunity of rendering such humble assistance as [might] lie in [his] power in connection with legislative measures which would further the policy of codification in India."[245] He was able to do so after his retirement from his position as judge on the High Court at Allahabad.

Syed Mahmood was appointed to the N.-W. P. and Oudh Legislative Council on 23 Jan. 1896, and served for two years.[246] His appointment was greeted with approval by the vernacular papers of the Indian press.[247] One of Mahmood's responsibilities on the provincial Council was to serve on the Select Committee reviewing the Honorary Munsifs

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[244] Syed Mahmud, Aligarh, to the Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, p. 64, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library.

[245] Syed Mahmud, Aligarh, to the Chief Secretary to the Government of the North-Western Provinces and Oudh, 9 September 1893, Appendix VI, L, letter from Syed Mahmood to Andrew R. Scoble, 19 June 1888, manuscript in the India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library.

[246] *The India List and India Office List for 1897, compiled from Official Records by Direction of the Secretary of State for India in Council*, (London: Harrison and Sons, 1897), 57.

[247] India, Government of, *Selections from the Vernacular Newspapers published in the North-Western Provinces and Oudh, Received up to 8th January 1886*, pp. 64-65.

Bill.[248] The proposed legislation was the outcome of a scheme Syed Mahmood had placed before the provincial government several years earlier.[249] In his speech supporting the motion, he narrated the circumstances which had motivated him to present his scheme, describing his experience as a District Judge when he had under his charge a number of Honorary Assistant Commissioners who proved to be very able and qualified in their judgements. His deputation to Hyderabad in 1881-82 permitted him to observe the honorary jurisdiction in the south of India and its effectiveness there.[250] Considering how active he had been in contributing his opinions to proposed bills during the 1880s, his participation as a member of the council seems surprisingly minimal.

Syed Mahmood, like his father, was convinced of the necessity of reserving seats in elective assemblies for Muslim communities. Mahmood together with Theodore Beck published their views in the MAOC magazine on behalf of the newly formed Mahomedan Anglo-Oriental Defence Association.[251] They felt that if there were not separate electorates for Hindus and Muslims, the Muslims that were elected would be compelled to represent the Hindus who comprised the majority of the electors, and the Muslim community would remain unrepresented. As an illustration, they pointed to the unrepresentative nature of the Muslims who were frequently appointed as chairmen of meetings of the Indian National Congress when the majority of Indian Muslims did not necessarily support the Congress.[252] Their proposals for reserved seats and separate electorates, they stated, were based on one "cardinal fact": "Namely that the Mahomedans are for political purposes a community with separate traditions, interests, political convictions and religion."[253] Although the paper by Mahmood and Beck was critical of the National Congress, it was not as virulent an attack on the Congress as that contained in Beck's other writings.[254]

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[248] India. Legislative Council for the North-Western Provinces and Oudh, *Abstract of the Proceedings of the Legislative Council for the North-Western Provinces and Oudh, assembled for the Purpose of Making Laws and Regulations under the Provisions of the Indian Councils Acts, 1861 and 1892* (Allahabad, 1896), 3-4.
[249] Ibid., 27-28.
[250] Ibid., 31-32.
[251] Syed Mohammed Mahmood and Theodore Beck, "Musalmānon kī ṭaraf se Lajislativ Kāunsal aur Myūnisipolitiyon Vaghairah men Intikhāb," *The Muhammadan Anglo-Oriental College Magazine* n.s. 4, no. 12 (1896): 507-519. An English translation was printed in *The Pioneer*, 22 Dec. 1896, reprinted in Muhammad, ed., *Aligarh Movement*, 1063-1068.
[252] Mahmood and Beck, "Musalmānon," 513.
[253] Muhammad, ed., *Aligarh Movement*, 1066.
[254] Theodore Beck, *Essays on Indian Topics* (Allahabad: Pioneer Press, 1888), 93-127.

After Mahmood's death, his views on the Congress were interpreted as moderate by two contemporaries in two obituaries. S. C. Banerji, who had worked closely with Mahmood in his law practice in Lucknow, characterised Syed Mahmood as sympathetic to the Indian National Congress, and wrote that Syed Mahmood had told him he was prepared to accept many of the resolutions adopted at meetings of the Congress.[255] Another obituary appearing in *The Indian People* observed that Mahmood did not take any active part in Indian politics, either before his appointment to the High Court Bench or after his resignation.

> He never joined the Congress, but at the same time kept himself equally aloof from the anti-Congress propaganda, carried on for some years by his father. Being a man of liberal education and true culture, he did not share the narrow exclusiveness of the average Indian Musulman and his views on most of the controversial questions were characterized by a rare catholicity."[256]

His acceptance among the Hindus generally was demonstrated by the fact that they tried to send him as their representative to the Imperial Legislative Council, though he never received that appointment.[257]

1.4g Post-retirement legal career of Syed Mahmood

After his retirement from the High Court, Syed Mahmood initially resided in Aligarh to assist with the running of the MAOC. But he continued to take an active interest in legal matters; and in 1896 somewhat against his father's wishes, he resumed his practice as a barrister when he applied for enrolment as an advocate of the Court of Judicial Commissioners in Awadh. He took advantage of a meeting of the Provincial Legislative Council in Allahabad to leave Aligarh, and then proceeded to the court in Lucknow, taking Satish Chandra Banerji with him as his apprentice.[258] Although the officer presiding over that court initially questioned whether his status as a barrister had not become merged in that of a judge, and whether he was competent to practice again as a result, his

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[255] Banerji, "Syed Mahmood," 442.
[256] "Late Mr. Syed Mahmood," 186.
[257] Shan Muhammad, *The Growth of Muslim Politics in India (1900-1919)* (New Delhi: Ashish Publishing House, 1991), 119-120.
[258] Gyanendra Kumar, "Dr. Satish Chandra Banerji," in *Centenary High Court of Judicature at Allahabad 1866-1966*, vol. 1 (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966), 410.

application was eventually approved.[259] Later, stricter professional sanctions were imposed on retiring judges to prevent the repetition of such action, preventing them from returning to an active practice as a barrister after retirement from the bench.[260]

Syed Mahmood soon had a busy practice in Lucknow, in spite of the high fees which he demanded. However, his excessive drinking once again impaired his profession, as his work became erratic. On reflecting on their association in Lucknow, Banerji wrote:

> His habits became irregular, he became incapable of sustained work, and his clients fell off... He would sometimes work day and night and at other times not work at all. I recall many a day when he has positively refused to read the brief that I had prepared for him, and then on the following morning has called me up at 4 to explain to him the points in the case which he had to argue in Court that day.[261]

Others, too, noticed the impact of his intemperate habits which soon became the subject of stories and legends about the man. At the centenary celebrations of the Allahabad High Court in 1966 this story was recounted:

> One of the most outstanding Judges of the Allahabad High Court was Mr. Justice Mahmood, son of the illustrious Sir Syed Ahmad Khan. He was a Barrister, so after resigning from the Bench in 1894, he resumed his practice before the Judicial Commissioner's Court at Lucknow. Mahmood was fond of drinks. Once in a less sober mood, he appeared in Court and started arguing against his own client. On hearing his arguments, the client began to feel miserable. The Junior lawyer promptly pointed out the mistake to Mr. Mahmood, who, with great alacrity, shifted his ground and addressed the Judge thus: 'Sir, I have said all that my learned friend on the other side could have said on behalf of his client. I would now proceed to demolish these arguments'. With remarkable brilliance he shattered his previous arguments one by one and ultimately won the case.[262]

In spite of these difficulties, however, he was able with his earnings as a barrister once again to assist the MAOC in recovering from the heavy financial losses suffered as a result of embezzlement by a former college clerk.[263] He also applied his legal abilities to the

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[259] Banerji, "Syed Mahmood," 440.
[260] Buckee, "Examination", 65.
[261] Banerji, "Syed Mahmood," 440.
[262] Gyanendra Kumar, "Law and Laughter," in *Centenary High Court of Judicature at Allahabad 1866-1966*, vol. 2 (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1968), 214.
[263] "Late Mr. Syed Mahmood," 185.

embezzlement problem and headed up a group of barristers who prepared and conducted the legal proceedings.[264]

1.5 Syed Mahmood's work in the field of education

1.5a Mohammedan Anglo-Oriental College

When Syed Mahmood returned to India after completing his education in England in 1872, Mahmood took time out of his emerging legal career to assist his father in his work of educational reform, particularly in the establishing of the MAOC at Aligarh. Initially, he prepared a detailed plan for the establishment of the college along the lines of what he had experienced in Cambridge.[265] He also travelled with his father to the Punjab towards the end of 1873 and spoke at a rally organized to promote the project of the MAOC.[266] The extent of his assistance was highlighted in a speech Aḥmad Khān made in 1889 introducing his motion to nominate Syed Mahmood as Joint Secretary of the board of trustees, in the face of opposition from some long-time supporters of MAOC such as Maulavi Samī'ullah Khān (1834-1908). He enumerated the many ways in which Syed Mahmood's help had been indispensable in the operation of the College. In particular, he considered his son's influence to have been the primary factor in persuading European professors to come to India to teach at the school.[267] This was confirmed by the European staff members some six years later when opposition to Syed Mahmood's position as Joint Secretary arose once again. The principal, Theodore Beck (1859-1899), gave this testimony:

> Since [Syed Mahmood] appointed me in England in 1883—and I may add that I accepted my post solely on account of the sense of security and confidence which his personality produced on me—until now he has taken an active part in the decision of all important matters connected with the College. But more than this, his presence has been the chief cause of the cordial co-operation of the English Staff and the satisfaction they have taken in their work. Will it not be admitted by any one that the spectacle of a body of honourable Englishmen serving a purely Oriental Committee, most of whom are wholly unacquainted with their mode of life and manner of thought is to say the least unusual? We have however felt that in Mr. Syed Mahmood we had a man who not only was actuated by a sense of absolute

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[264] Bhatnagar, *History*, 127.
[265] Mahmood, "Scheme for the proposed Mohammedan Anglo-Oriental College," 222-237.
[266] "Summary: Punjab," *The Pioneer*, Friday, 2 Jan. 1874, p. 4.
[267] Ahmad Khan, *Maqalat,* vol. 12, 219.

> justice in his dealings with us and in the duties he owed to the Institution, but being moreover a Cambridge man and acquainted to a most extraordinary degree with the inner life of Englishmen has been able to sympathise with us in our domestic concerns, to know our difficulties and thus to prevent the friction that must otherwise inevitably have occurred between ourselves and our body of employers. I speak here not only of my own personal feelings but of those of the whole of the European Staff.[268]

Aḥmad Khān in his speech also acknowledged his reliance on Syed Mahmood for advice in all matters, and his imprint could be clearly noted in the correspondence relating to the school. He declared his firm conviction that Syed Mahmood was the one person who shared his vision for the College; and apart from him, no one would be able to administer the school in keeping with that vision.[269]

1.5b Education Commission

In February and March of 1882, when both Syed Mahmood and his father were still in Calcutta, the first meetings of the Government's Education Commission began. After the first couple of meetings, Syed Mahmood replaced Aḥmad Khān as a member of the Commission and continued his participation till March 1883, with a break from May to November when he officiated at the Allahabad High Court.[270] His father had felt compelled to resign from the Commission because he found "that his knowledge of English was not sufficient to enable him to follow, and take part in, the proceedings of the Commission in a way satisfactory to himself or consistent with the present dispatch of the business of the Commission."[271] Aḥmad Khān's appointment had been criticized in a newspaper for that very reason, stating that though he was qualified to serve on the Commission by his extensive experience in the field of education, his lack of ability to express himself in the English language would mean that the Muslim representation on

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[268] Nizami, ed., *Theodore Beck Papers*, 300-301.
[269] Ahmad Khan, *Maqalat,* vol. 12, 220, 224.
[270] *India Office List, 1895*, 393.
[271] H. W. Bruirse [sp.? – Private Secretary's Office, of Viceroy, presumably], Calcutta to MacKenzie, 26 Feb. 1882, GOI, Home Educational (B), Feb. 1882, Nos. 176-177, National Archives of India. Towards the end of his life, Aḥmad Khān explained the role of English Head Clerk in office of MAOC was to compensate for his lack of ability in conducting official correspondence in English: "I am not acquainted with reading or writing the English language and can only understand simple English sentences when spoken slowly in easy words and can sign my name in English." Sir Sayyid Aḥmad Khān Bahadur, Aligarh, to the Trustees of the Mahomedan Anglo-Oriental College, Aligarh, 1 Jan. 1896, "Confidential Report," p. 1, printed letter, bound copy in Reserved Stacks, Maulana Azad Library, Aligarh Muslim University.

the Commission would be weakened.[272] Syed Mahmood's excellent command of the English language would remove any such hindrance.

The Education Commission was chaired by W. W. Hunter (1840-1900) who a decade earlier had argued that the disproportionate non-involvement of Muslims in government was due to their reluctance to acquire education in the English schools and colleges.[273] Some of the questions asked and the conclusions reached by the Commission continued to reflect that concern. For example, question number 67 asked: "Are the circumstances of any class of the population in your Province (*e.g.*, the Muhammadans) such as to require exceptional treatment in the matter of English education? To what are these circumstances due, and how far have they been provided for?"[274] In its conclusions after listening to weeks of testimony from a broad range of the population involved at all levels of education, the Commission chose to quote extensively from Aḥmad Khān's submission to support its contention that the Muslim community were still keeping themselves aloof from the Government educational institutions. The commissioners stated that they adopted his views in which he argued that main reason the Muslims were antagonistic to the Government educational system was the intertwining of their religious beliefs with the Greek sciences of logic, philosophy, astronomy, and geography that had been translated into Arabic during the rule of the Abbasid caliphs. Since these sciences had found their way into religious texts throughout the subsequent centuries, the modern sciences taught by the British were viewed as incompatible with Islam, and the British educational efforts were seen as attempts to convert the people to Christianity.[275] Additional causes for the lack of participation in English education by the Muslims in the past were their political traditions, social customs, religious beliefs, and poverty, but Aḥmad Khān saw these as waning in influence, and was encouraged to see the Muslims "gradually

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[272] India, *Selections from the Vernacular Newspapers, 1882*, 157-158. Other reasons for his withdrawal have also been given. Ḥālī stated that Sir Syed had objected to the manner in which the Commission's meetings were held; see: Hali, *Hayat-i-Javed (English trans.)*, 183-184. Another account blamed Sir Syed's ill health; See: "Late Mr. Syed Mahmood," 186.

[273] William Wilson Hunter, *The Indian Musalmans: Are They Bound in Conscience to Rebel against the Queen?* (London: Trübner and Company, 1871), 174-180.

[274] India. Education Commission, *Report of the North-Western Provinces and Oudh Provincial Committee; with Evidence Taken before the Committee, and Memorials Addressed to the Education Committee* (Calcutta: Government of India, 1884), 146.

[275] Ibid., 76, 292, 297-298.

freeing themselves of old prejudices, and taking to the study of English literature and science."[276]

Syed Mahmood's contribution to the Education Commission was as one of the commissioners, cross-examining the various witnesses that appeared before it. The questions he asked demonstrate that he, too, sought to discern the factors that led the Muslims to hold themselves aloof from English education. Other concerns of his were for the education of Muslim women, the impact of the relations between the Hindus and Muslims on the attitudes of the latter to education, and the controversy over which language and which script should be used in public offices.[277] Syed Mahmood again addressed this last issue in a speech given at a reception held in Allahabad after the Education Commission had completed its session there. He acknowledged that numerous requests had been received for a fuller adoption of Hindi in the region, and expressed his support if the Commission should choose to extend its use in the schools.[278] His cross-examination of Mrs. Etherington, who had been Inspectress of Government schools in the North-Western Province, indicates his doubt that Muslim girls of "respectable families" would be attracted to attend schools beyond their own homes.[279] His most extensive cross-examination was that of his father, Aḥmad Khān, enabling him to expand on his themes of the Muslims' failure to acquire English education, and their need to fund their own educational institutions without expecting help from the government.[280]

In 1883, Syed Mahmood took leave without pay from his work for the Government and returned to England. One of his aims was to recruit a headmaster for MAOC from Cambridge University, and he returned with Theodore Beck.[281] He also had the opportunity to meet with the Secretary of State for India who was much impressed with him.[282] As he and Beck travelled by train across southern Europe on their return to India

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[276] Ibid., 77.
[277] Ibid., 188-189, 240-241.
[278] "The Education Commission at Allahabad," *The Pioneer*, 19 Aug. 1882.
[279] India. Education Commission, *Report*, 192.
[280] Ibid., 297-300.
[281] Lelyveld, *Aligarh's First Generation*, 194, 218.
[282] Letter from the Earl of Kimberly, Secretary of State for India, India Office, to the Marquis of Ripon, 24 Oct. 1883, no. 65 of Letters from the Secretary of State for India to the Viceroy, Commencing from January 1883, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3 vol. 3, 1883, British Library.

along with other British civil servants and civilians, one of their topics of conversation was the Ilbert Bill which had created such as stir in India.[283] Beck commented on the trip: "We talked a great deal of politics, and of course the subject which was always coming up was the Ilbert Bill. We were pretty well tired of the Ilbert Bill by the time we got to Bombay."[284] He does not give much indication of Syed Mahmood's position on the bill; Mahmood was not directly affected since High Court judges—both British and non-British—were not restricted as to jurisdiction.[285] The one comment Beck does record seems to indicate that Syed Mahmood viewed the British civilian position with extreme cynicism. He writes, "There were some negro sailors who danced and sang an African refrain in a coal hole, looking scarcely human. We stood watching them through a grating and wondered at the capacity of humanity for finding enjoyment. Then Mahmood said, 'These are the fellows who will receive jurisdiction under the Ilbert Bill.'"[286] That he was enjoyed startling those British planters and civilians travelling with them by arguing the indebtedness of Western thought to that of the East, was also noted by Beck.[287]

Another possible reason for Mahmood's relative silence on the issue was that the agitation against the Bill was predominantly in the Bengal region, where English Indigo planters felt threatened by any increase in the progress and autonomy of the Indians. As A. C. Lyall, Lt.-Governor of the N.-W. P., commented, "In Upper India, where there exists among Europeans and natives far less friction and a larger feeling of mutual respect than in the Lower Provinces, the tone of controversy over the Bill has been much less in-

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[283] Sir Courtenay P. Ilbert, Law Member of the Viceroy's Executive Council from 1882 to 1886, had introduced a bill that would have given certain Indian magistrates jurisdiction over European British subjects, in effect making them equal with British judges of the same rank. Sir A. C. Lyall, Lt.-Gov. of the N.-W. P. during that period from 1882 to 1887, described it in these terms: "The Bill proposed to abolish, once and for all time, all differences of jurisdiction resting on distinctions of race, and to remove from our code of criminal procedure one if its few remaining anomalies." Alfred C. Lyall, "Government of the Indian Empire," *The Edinburgh Review* 159 (1884): 17. The bill was strenuously opposed by British civilians in the Bengal region, and the government was forced to amend it by including the right to trial by jury the majority of which would consist of European British subjects.

[284] Theodore Beck, "A Journey to Aligarh," *The Cambridge Review* 5, no. 112 (1884): 148.

[285] Mahmood once noted that with regard to the rules applicable to the judges in the High Courts, "the personal nationality of the Judge has never been a requirement for the exercise of any kind of jurisdiction, whether civil or criminal." Syed Mahmood, "Minute on the India High Courts Bill, written in Aligarh, 4 Feb. 1889, GOI, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, p. 35.

[286] Beck, "Journey," 148.

[287] Ibid.: 147.

tolerant."[288] The *Aligarh Institute Gazette* did come out with an editorial early in the debate suggesting that the best response by Indians to the wide-spread agitation over the Bill was to remain silent. It did however express its approval in the measure which it considered "only intended to remove a serious anomaly which disfigures the law, and is another step in the direction of carrying out of Her Majesty's proclamation that all classes of her subjects shall enjoy equal rights."[289] This call for equality before the law reflects a key concern of Mahmood's in regard to relations between the British and Indians, and may indicate some of his influence in the composition of the editorial which went on to argue:

> The fact of the matter is that the mutual relations between the rulers and the ruled in any country depend on the law. If the law makes an invidious distinction of race, good feeling cannot exist between the two classes. If both classes are made subject to the same law, their mutual relations soon improve. No true love and sympathy can grow between Natives and Europeans until the law ceases to distinguish between them.[290]

Sir Sayyid Aḥmad Khān had voiced similar concerns when speaking on the Bill when it was discussed by the Governor-General's Legislative Council. He, too, emphasized the need for distinctions of race to minimized, and that the entire population of India—Hindu or Muslim, European or Asian—begin to feel that they were fellow-subjects of the British sovereign with equal rights before the law.[291]

1.5c Legal education at the Muhammadan Anglo-Oriental College

Although his legal career had taken Syed Mahmood far from Aligarh, he still maintained a strong interest in the welfare of the MAOC. On those occasions when he returned to Aligarh in the 1880s, he took an active part in teaching by taking the English classes, working out in a practical way his commitment to the spread of education in the

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[288] Lyall, "Government," 19.

[289] *Aligarh Institute Gazette*, 3 Mar. 1883, as summarized in *Selections from the Vernacular Newspapers published in the Panjab, N.-W. P. Oudh, Central Provinces, Central India, and Rajputana*, 1883, p. 206.

[290] Ibid.

[291] "Abstract of the Proceedings of the Council of the Governor General of India, Assembled for the Purpose of Making Laws and Regulations under the Provisions of the Act of Parliament 24 & 25 Vict., Cap. 67." 9 March 1885, contained in: Great Britain House of Commons. *Further Papers on the Subject of the Proposed Alteration of the Provisions of the Code of Criminal Procedure with respect to Jurisdiction over European British Subjects.* East India (Native Jurisdiction over British Subjects) 1883, C.M.D. 3512 (London: Chadwick Healy, mf. 89.421-2, p. 31-32. For the opinions of other Muslims, see: Zafar ul Islam, Joel M. Woldman, and A. B. M. Habibullah, "Indian Muslims and the Ilbert Bill: 1883-1884," *Journal of the Asiatic Society of Pakistan* 8, no. 2 (1963): 136-137.

English language.[292] Naturally legal education was another major concern of his, and he was vitally involved in the establishment of the teaching of law at the MAOC. The college had opened a law class in 1889, with Khwājah Yūsuf and two Hindu members of the local bar as the instructors.[293] When the Rule was passed that any graduate of the Intermediate Examination at Allahabad University could sit for the examination for a law degree, it was felt that the appointment of a competent lecturer in law at the MAOC was necessary. As a result, the principal recommended that Justice Mahmood along with his fellow judge, Justice Straight (1844-1914), and long-time friend, Arthur Strachey (1858-1901) form a committee for the purpose of selecting and nominating a suitable law professor.[294] Eventually, Syed Karamat Husein (1854-1917) of Lucknow was appointed on 1 Nov. 1891; later in 1908, he was to become the first Muslim to be appointed as a judge on the Allahabad High Court after Syed Mahmood's resignation. Syed Karamat Husein had studied with his uncle, Sayyid Hāmid Ḥusayn, who was a learned *mujtahid*, and had later gone to England to take his training as a barrister at Middle Temple.[295] He had met Syed Mahmood while practicing as a barrister at the High Court in Allahabad, and had been invited by him to teach at Aligarh. When Karamat Husein started teaching at Aligarh, only 37 students were enrolled in the law class; but by the following March, the number had risen to 66.[296] Although numbers were low, the quality of graduates was creditable, and regularly succeeded in the government examinations to qualify as vakīls.[297] Syed Mahmood assisted directly by sometimes preparing the test questions for the law examinations for the students.[298]

Law books in the college library were very limited until Syed Mahmood donated most of his collection of law books during his furlough of 1892-1893 when it seemed likely that he would not be returning to the Allahabad High Court. In an official letter to

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[292] Banerji, "Syed Mahmood," 439. See also Zubiri, *Tazkirah Sayyid Mahmud Marhum*, 12.
[293] Lelyveld, *Aligarh's First Generation*, 192.
[294] Letter by Maulvi Syed Karamat Husain, Aligarh, to Sir Syed Ahmed Khan Bahadur, 18 Jun. 1893, in "Report on the Law Class of the M. A.-O. College for 1892-93," Reserved Section, Maulana Azad Library, Aligarh Muslim University.
[295] Gail Minault, "Sayyid Karamat Husain and Education for Women," in *Lucknow: Memories of a City*, ed. Violette Graff (New Delhi: Oxford University Press, 1997), 156-158.
[296] Letter by Karamat Husain to Ahmed Khan, 18 Jun. 1893.
[297] Bhatnagar, *History*, 94-95.
[298] Lelyveld, *Aligarh's First Generation*, 237.

his father he wrote of his decision to donate his collection and provided rules and conditions to govern its use at the college.

> In view of this state of things and owing to the deep interest which I have all along taken in promoting the study of law in the College, I considered that the speediest course for supplying the urgent want of a Law Library was to make a gift of nearly all the books of my private Law Library to the College, and I accordingly separated them from the rest of my books and made them over to you to take possession of them as Life-Honorary Secretary of the College Trustees. You did so accordingly and have removed the books to Aligarh and they are in your possession, awaiting their being arranged and placed in some suitable part of the College building. As a rough and general estimate I may say that they are worth at least ten thousand (10,000) rupees and probably more considering that some of the most valuable books among them on general jurisprudence, the history of Law, Legislation and Codification are out of print and not available in the market, and they cost me considerable trouble and search to purchase them in England and India. The books which I have reserved from my present to the College, are principally those which have been presented to myself by the authors and my personal friends.[299]

With regard to the conditions of their use, he stipulated that borrowing privileges be limited to the Life Honorary Secretaries (his father and himself), the Principal and whomever he might designate to administer the library, the Law Professor, and the person who had donated the book or books which he wished to take out of the Law Library. The books, however, would be available for consultation *within* the library to all students and staff members who would have need of them. The books were to be housed within the one of the two rooms of the Mahdī Manzil, while the other could serve as the consultation room as well as a class room for lecturers on specialized legal subjects which would involve fewer students. He stated that it was his intention, "as soon as circumstances permit to deliver a series of lectures to selected students of the Law Class on some difficult and isolated questions of the higher departments of law which are not usually taught in the law classes of Indian Colleges and are not included in the ordinary law examinations."[300] It is not certain whether he was ever able to carry out that intention.

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[299] Letter by Syed Mahmood, Aligarh, to Sir Syed Ahmed Khan Bahadur, 15 June 1893, in "Report on the Law Class of the M. A.-O. College for 1892-93," Reserved Section, Maulana Azad Library, Aligarh Muslim University.

[300] Ibid.

1.5d Muhammadan Educational Conference

Syed Mahmood's interest in education was not limited to the MAOC at Aligarh. The letterhead of his printed stationary included "Fellow, and Member of the Faculty of Law, of the University of Calcutta; Fellow, and late President of the Faculty of Law, of the University of Allahabad" among his titles and offices.[301] He does not, however, seem to have been very active in these roles.[302] But he was an active participant in the Muhammadan Educational Conference ever since its inception at Aligarh in 1886. The following year when the Annual Meeting was held in Lucknow, Syed Mahmood paid the expenses for the meals of the delegates.[303] At the conferences in 1893 and 1894, he gave a series of lectures on the history of English education in India, providing extensive documentation from official sources, showing the backwardness of Muslims in comparison with Hindus in acquiring university degrees.[304] Nawab Muḥsinul Mulk spoke after the conclusion of his speech in 1893, thanking him for his excellent presentation and commenting that although his departure from the High Court was a great blow for the nation, he was doing a great service to the nation with such educational work. His words regarding Syed Mahmood give some indication that the Muslim community—especially those supporting the work of his father at MAOC—were ambivalent about his ability to serve the community from the Bench of the High court.

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[301] Letter by Syed Mahmood, Sitapur, to Nawab Mohsin-ul-Mulk Bahadur, Honorary Secretary, M.A.O. College Trustees, 21 Oct. 1900, 88/file no. 1, Sir Syed Academy, Aligarh Muslim University, Aligarh.
[302] On the teaching of law at Muir College in Allahabad generally, see: Buckee, "Examination", 292-294.
[303] Abdul Rashid Khan, *The All India Muslim Educational Conference: Its Contribution to the Cultural Development of Indian Muslims, 1886-1947* (Karachi, Pakistan: Oxford University Press, 2001), 39.
[304] Lelyveld, *Aligarh's First Generation*, 301. The lectures were later published as Syed Mahmood, *Likchar Sayyid Muḥammad Maḥmūd Iskvīr Beristar Aiṭ Lā, Laef Ānrīrī Janṭ Sikriṭarī Muḥammadan Ainglo Orīnṭal Kālij 'Alīgaṛh dar bāb Ishā'at va Maujūdah Ḥālat a'lá Ta'līm-i Angrezī ke Musulmānon men ba'd Angrezī sao Bars ke Guzashtah zamānah men y'anī min Ibtadāyi Sanh 1793 'i na'āyat Sanh 1893 'i jo unhon Ijlās hashtum Muḥammadan Ejūkeshunal Kānfarins muna'qidah 29 Disambar1893 men bimaqām 'Alīgaṛh diyā: Naqshahā va Dāigrāmha dar bāb Munāsibat Ta'līm Hindūstān aur Musulmānon ke bilahāẓ Ābādī va bilahāẓ Ta'līm-i Yūniversiṭī* (Āgrah: Mufīd-i 'Ām, 1894); and idem, *Likchar Dom Sayyid Muḥammad Maḥmūd Iskvīr Bāristar Aiṭ Lā dar bāb Ishā'at va Maujūdah Ḥālat a'lá Ta'līm-i Angrezī ke Musulmānon men aur yeh kih kis Ḥisāb se vo Taraqqī karte hen aur ūn ko Tadābīr Taraqqī Ikhtiyyār karnī chāhīyen, jo ūnhon ne bih Tasalsul abne Likchar Sābiq mūrkhah 28 Disambar Sanh 1893 'i keh Ijlās nahum Muḥammadan Ejūkeshunal Kānfarins muna'qidah 30 Disambar1894 men bimaqām 'Alīgaṛh diyā: Ek Ẓamīmah Mukhtiṣar Aḥvāl Maujūdah Ḥālat Ta'līm-i Angrezī Mussalmān* (Āgrah: Mufīd-i 'Ām, 1895). They were translated into English as Syed Mohammed Mahmood, *A History of English Education in India: Its Rise, Development, Progress, Present Condition and Prospects, being a Narrative of the Various Phases of Educational Policy and Measures adopted under the British Rule from its Beginning to the Present Period, 1781-1893, comprising Extracts from Parliamentary Papers, Official Reports, Authoritative Despatches, Minutes and Writings of Statesmen, Resolutions of the Government, and Statistical Tables Illustrated in Coloured Diagrams* (Aligarh: M.A.-O. College, 1895).

> Without a doubt, having a Muslim appointed as a judge on the High Court was a matter of pride, but its benefit was limited and temporary. The dissemination of education and training for the nation is a work that is profitable for all and lasts forever. He [Mahmood] was disappointed in his efforts to serve the nation through government service, nor was he able to perform his duties as a judge in the manner he desired. But now he is free and released from all restrictions, and is now able to give to the nation the blessings of his heart and mind which he never was able to do as a judge.[305]

Also at the conference in 1894, Syed Mahmood supported the resolution proposed by Nawab Muḥsinul Mulk that the Muhammadan Educational Conference sympathized with the Nadwatul 'Ulamā which had gathered earlier that year at Cawnpore for the purpose of reforming the old methods of religious and scientific education.[306] This association of *'ulamā* did not consist of those traditional religious scholars who had isolated themselves from the colonial sector, but were "intellectuals, government employees and a group of the religious elite, whose ideology was integrationism, e.g., integrating colonial norm into the traditional system."[307] One of their chief concerns was the promotion of Muslim education through the reformation of the traditional religious schools, the *madrasahs*, which were seen "as lacking in intellectual creativity and as equally indifferent to changes in Muslim societies and to the challenges facing them."[308] Qasim Zaman has demonstrated the extent to which the rhetoric of the Nadwa reformers was influenced by British colonial analyses of Indian education.

> The emphasis on "moral" instruction, which British officials though was lacking in Indian systems of education; on literature which in government schools had come to substitute for formal instruction in religion; on practical skills; on fostering a generation of 'ulama who would be more "representative" of the people; on bridging medieval and modern education; and, not least, on an intimate knowledge of Arabic, which to many colonial officials was a "classical language of India" and hence a mark of cultural authenticity, are all interpretable as responses to ideas much in vogue in late-nineteenth-century British India.[309]

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[305] Sayyid Mehdi Ali Khan, *Majmūah Lekcārs o Ispīcaz*, vol. 1 (Lahore: Matbu'ah Naval Kishor Gas Printing Works Press, 1904), 189. [Translation mine]
[306] Muhammad, ed., *Aligarh Movement*, 850.
[307] Jamal Malik, "The Making of a Council: The Nadwat al-'Ulama," *Zeitschrift der Deutschen Morgenlandischen Gesellschaft* 144, no. 1 (1994): 68-69.
[308] Zaman, *Ulama*, 69.
[309] Ibid., 71.

The council of *'ulamā* went on to establish a *madrasah* at Lucknow for the purpose of training other scholars according to the new curriculum they had developed.[310]

At the 1894 conference, Syed Mahmood, who sympathized with many of these aims, spoke up in support of the resolution on the establishment of the Nadwatul 'Ulamā, insisting that a wealth of centuries of scholarship remained untranslated in Arabic texts and that the key to this great treasury lay in the hands of the *'ulamā*.[311] He argued that with the paucity of English translations of *fiqh* texts, the study of Arabic was also essential for the proper administration of law in those matters designated by the British to be governed by Muslim law. "I assure you," he declared, "that there exist in the Arabic language such meritorious works on law and principles of law that I, as a lawyer, feel no diffidence in declaring that the intelligence, brilliance and comprehension of the fundamentals of jurisprudence exhibited by the authors of these works make the reader marvel at the degree of progress achieved by the Muslims in legal sciences in the days of these men."[312] A year later when the post of Joint Secretary of the Muhammadan Educational Conference was created, Syed Mahmood was the first person to be appointed to serve in that capacity.[313]

In his retirement letter, Syed Mahmood described how he had early in his career decided to follow the pattern of his ancestors and allot the first third of his life to educating himself, the second third to earning a living, and the final third in "retired study, authorship and devotion to matters of public utility," as his father had done.[314] Taking the average human life to be 70 years, he felt he had fulfilled the first as scheduled; the second had been abbreviated by the forced resignation; but with the pension provided by the Government, he anticipated another thirty years of fruitful activity. Unfortunately, his ill

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[310] For an overview of the movement, see: Metcalf, *Islamic Revival*, 335-347. For a more detailed discussion of its origins, see: Malik, "Making of a Council," 60-91.

[311] Fazlur Rahman, "A Review of Syed Mahmood's 'Kitab al-Talaq' and 'Kitab al'Shuf'ah'," *Aligarh Law Journal* 5, Mahmood Number (1973): 324-326.

[312] Ibid.: 325-326. A. F. M. Abdur Rahman, son of Nawab Abdul Latif of Calcutta, expressed a similar sentiment in the introduction to his attempt to codify Muslim law. "The laws of Islam, enveloped as they are, for the most part, in the ample folds of medieval tomes written in the rich and exuberant language of Arabia, remain a hidden mystery to our Judiciary and Executive, as well as to the European student unacquainted with the tongue of the Prophet of Islam." He suggested the remedy was to expound Muslim law by direct research into those original sources as had been done in the past. See: Abdur Rahman, *Institutes of Mussalman Law*, vii-viii.

[313] Khan, *All India Muslim Educational Conference*, 37.

[314] Rashid, "Justice Mahmood's Resignation," 299.

health and early death prevented him from undertaking much of the work he had longed to do, including the four volumes on Muslim law which he had been anxious to write.[315]

1.5e Conflict and withdrawal from the MAOC at Aligarh

As his father's health declined, Syed Mahmood gave up his professional practice as a barrister at Lucknow and returned to Aligarh to assist in the running of the MAOC. However, his drinking led to instability of behaviour and resulted in an estrangement from his father during that time.[316] Nevertheless, after his father's death on 27 Mar. 1898, he took up his responsibilities as Life Honorary Joint Secretary of the MAOC as his father had desired. Several years earlier, at the time of his resignation from the High Court he had written:

> So far as my own personal feelings in regard to my father's life-long work are concerned I have long ago given him my word of honour that upon his death I shall put aside every thing which would be inconsistent with employing my best energies in carrying on the work to which he has devoted the greatest and best portion of his life, namely, the amelioration of the educational and socio-political condition of the Mahomedans by promoting among them intellectual and moral enlightenment and feelings of deep and real loyalty towards the British Rule in India.[317]

His intention was to take up residence in the rooms reserved for him in the Mahdī Manzil which had been transformed into the Law Library with the contribution of books from Mahmood. He indicated to Theodore Beck, principal and registrar of the college, that this residence on campus was necessary to facilitate easy communication between himself as Life Honorary Secretary and Beck as Honorary Registrar.[318] His numerous and lengthy letters to Beck during that fall and winter give some evidence of the deterioration of his mental faculties and inability to handle his responsibilities in an efficient and effective manner.[319] His protracted letters are replete with minute details, convoluted arguments, and extensive quotations from official documents and his own writings to justify his posi-

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[315] "Late Mr. Syed Mahmood," 185.
[316] Bhatnagar, *History*, 128.
[317] Letter from Syed Mahmood, Aligarh to J. D. LaTouche, 9 Sept. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London, p. 72.
[318] Letter by Syed Mahmood, Aligarh, to Theodore Beck, 22 Jul. 1898, in Nizami, ed., *Theodore Beck Papers*, 180.
[319] Ibid., 167-364.

tion in the college. In addition to asserting his position as Life Honorary Secretary, Syed Mahmood was also working to preserve the character of MAOC.

> I have ... made provisional arrangements to secure the Constitution and the working of the College from the attacks of some of its enemies of long standing who, in consequence of opposing and working against the original aims and ends which my lamented father had in view in founding the College were expelled by the Trustees in the formal Meetings & Proceedings from having any concern whatsoever with the affairs of an Institution such as the Mahomedan Anglo Oriental College with which they by their words of mouth oral and written have for some years past proved themselves to have no sympathy and who by their action leave no doubt that they wish to employ the vulgar element of bigotry and affected orthodoxy to disturb the peaceful working of the College by the combined efforts and full accord of feeling between the Mohamedan Trustees and Mr. Principal Theodore Beck and other members of the European Staff of the College.[320]

One of the accusations directed at Mahmood by these "opponents" was that he had delivered over the affairs of the college from Muslim to Christian control by appointing Beck as Honorary Registrar.[321] In Syed Mahmood's opinion, the chief of these opponents was Samī'ullah Khān. Nine years earlier, he had opposed Aḥmad Khān's decision to designate Syed Mahmood, whom he considered unfit for the work, as Life Honorary Joint Secretary, and objected to the increasing influence of the European staff.[322] Now, Syed Mahmood had discovered, Samī'ullah had been contacted by Nawab Muḥsinul Mulk, who was being suggested as a possible replacement to Mahmood as Honorary Secretary. Mahmood wrote another lengthy missive to Beck, relating what he had uncovered and reviewing the record of Samī'ullah's opposition, including a letter Beck himself had written three years previously, defending himself against accusations by Samī'ullah.[323] By this letter, Mahmood sought a commitment from Beck to continue to oppose Samī'ullah's possible involvement in the college. Although this was the express purpose of the letter, one also senses in it Mahmood's reluctance to relinquish his own position—a move which now seemed inevitable because of public pressure. Two months later, at the meeting of the Trustees on 31 January 1899, however, Mahmood yielded to the pressure

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[320] Letter by Syed Mahmood to the Lt.-Governor of the N.-W. P.& O., quoted in letter by Syed Mahmood, Aligarh, to Theodore Beck, 16 Apr. 1898, in Ibid., 139-140.
[321] Ibid., 157-158.
[322] Lelyveld, *Aligarh's First Generation*, 271.
[323] Letter by Syed Mahmood, Aligarh, to Theodore Beck, 1 Dec. 1898, in Nizami, ed., *Theodore Beck Papers*, 217-330.

and "was elevated against his will to the post of President," while the executive duties of the Secretaryship were bestowed on Nawab Muḥsinul Mulk.[324]

Shorn of his influence at the college he had helped his father to establish, Syed Mahmood suffered further humiliation as his financial impoverishment worsened. In the year since his father's death he had retired from his professional work as an advocate and devoted himself to the affairs of the college, so now he was forced to request reimbursement from the college for even small expenditures.[325] Mahmood had begun receiving a pension that had been promised to his father, Sir Sayyid Aḥmad Khān, as a reward for his loyal services in the 1857 Revolt. At the time of awarding the pension, the Government had committed itself to continue the pension after Aḥmad Khān's death to his eldest son. Since his brother Ḥamīd had predeceased his father, Mahmood stood to benefit from the pension. The Government suggested that he nonetheless contribute a portion of the pension to Ḥamīd's widow, a suggestion to which he readily acquiesced, on the condition that the Government still acknowledge himself as the sole legal heir of his father according to Muslim law.[326]

Because of his limited financial resources and his ouster from the college, Mahmood had been forced to move into the house of his wife with whom his relations had been strained for some time. His inability or unwillingness to pay the rent had caused further conflict leading to a threat of physical violence. The magistrate of Aligarh, E. A. Molony, was called upon to intervene; and in two poignant letters he describes the sad state of Syed Mahmood's personal health and family affairs.

> I found Mahmood very sober & looking very well but I do not think he is sane, and being a man of very violent temper I do not think there is any accounting for his actions & I do not think his wife is safe there alone.... I certainly think that if

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[324] Letter by Theodore Beck, Aligarh, to Fraser, 11 Feb. 1899, in Ibid., 367. For further details, see Bhatnagar, *History*, 120-121. See also Lelyveld, *Aligarh's First Generation*, 314-316.

[325] Letter by Syed Mahmood, Aligarh, to Nawab Muḥsinul Mulk, 30 May 1899; and letter by Syed Mahmood, Sitapur, to Nawab Muḥsinul Mulk, 21 Oct. 1900, 88/file no. 1, Sir Syed Academy, Aligarh Muslim University, Aligarh.

[326] Letter by Syed Mahmood, Aligarh, to E. A. Molony, Collector Magistrate, Aligarh, 26 July 1899, in "Political Pension of late Sir Saiyid Ahmad," Political Department, N.-W. P. & Oudh, File no. 486A, 1899, Box 58, Uttar Pradesh State Archives, Lucknow.

> things remain as they are it is on the cards that there might be a terrible tragedy. In his drunken fits Mahmud might do anything.[327]

He recommended that an earlier suggestion by Mahmood that his father's pension be divided between his wife and son be followed, and that the boy, Ross Masud, be sent away to school at Lucknow. With the boy gone, Syed Mahmood's wife would feel free to join her family in Delhi. Syed Mahmood had withdrawn his son from the MAOC and, subsequently, from the local government school as well. He would not permit his wife to take Ross Masud to Delhi because her family lived in an unhealthy part of Delhi and because "her parents were bitterly opposed to European education."[328] Molony's second letter was accompanied by a hand-written letter in Urdu from Mahmood's wife in which she pleaded for government assistance in dealing with her husband. She requested that her son be put under the guardianship of a European professor of MAOC without any interference by Syed Mahmood, that her husband be required to pay some rent for living in her house or else vacate it, and that he repay a loan which he had borrowed from her.[329] Ross Masud was eventually put under the guardianship of Theodore Morison (1863-1936) and his wife, with whom he went to England in 1905 to be educated in the universities there as his father had been.[330]

Concurrent with his troubles with his family, Syed Mahmood continued to experience conflicts with the college at Aligarh as well. Theodore Beck, the principal of MAOC whom Mahmood himself had recruited in England in 1883 and who had repeatedly expressed his appreciation for Mahmood's efforts on behalf of the English staff, now wrote a sharply-worded rebuke to Mahmood in view of his actions in instigating the students of the college against the authorities of the school. For the preservation of the school his father had founded, Mahmood was requested to sever his official connection to the school

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[327] Letter by E. A. Molony, Aligarh, to J. O. Miller, Secretary to the Lt.-Gov. N.-W. P. & Oudh, 10 Aug. 1899, and 4 Oct. 1899, in "Political Pension of late Sir Saiyid Ahmad," Political Department, N.-W. P. & Oudh, File no. 486A, 1899, Box 58, Uttar Pradesh State Archives, Lucknow.
[328] Ibid.
[329] Ibid.
[330] Lelyveld, "Macaulay's Curse," 213. Morison had taken up the responsibilities of principal of MAOC after Beck's death in September 1899.

completely.[331] To Muḥsinul Mulk, Beck wrote that his patience with Mahmood was exhausted.

> Our students daily see the degraded spectacle of a drunkard wandering around & shouting at them & everybody, profaning their religious services & abusing their teachers. This man is supposed to be singled out for a post of honour in their nation. We who have known him long time what he was, have a feeling of tenderness & affection for him which can forgive much, but that is not the case with the general public. As the dreg of his mind proceeds with the advance of his unfortunate disease (for I treat his drinking as an incurable disease) he is getting more vindictive.[332]

Beck recommended that a complete break be made—that Syed Mahmood be removed not only from his position as Honorary President, but also from the position of Trustee, so that he would not be able to cause any more problems in the running of the college. Within two months of writing the letter, however, Beck had succumbed to illness and died. His successors at the school followed his suggestion and replaced Mahmood as President the following January, and the Trustees approved his status as merely a Visitor at their meeting on 25 Oct. 1901.[333]

1.6 Closing years

In 1900, Syed Mahmood left Aligarh altogether, and moved to Sitapur near Lucknow, where he lived with his cousin, Syed Mahomed Ahmed, formerly a Subordinate Judge in Sitapur.[334] There he continued to assist in college matters such as revising the Rules and Regulations of the College with a committee of the Trustees.[335] He lived in Sitapur until he died of heart failure on 8 May 1903. His body was taken back to Aligarh, where he was buried next to his father in Aligarh. Theodore Morison, in his annual report for the year, summed up Mahmood's contribution to and tragic estrangement from the school.

> Death has removed another of those who played an important part in the foundation of this College. Mr. Syed Mahmud, late Judge of the Allahabad High Court,

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[331] Letter by Theodore Beck, Simla, to Syed Mahmood, Aligarh, 18 July 1899, in Nizami, ed., *Theodore Beck Papers*, 380.
[332] Letter by Theodore Beck, Simla to Muḥsinul Mulk, 22 July 1899, in Ibid., 381.
[333] Bhatnagar, *History*, 172-173.
[334] Letter by Syed Mahomed Ahmed, Sitapur, to the Private Secretary of the Lt.-Governor of the United Provinces of Agra and Oudh, 29 May 1903, in "Political Pension of late Sir Saiyid Ahmad," Political Department, N.-W. P. & Oudh, File no. 486A, 1899, Box 58, Uttar Pradesh State Archives, Lucknow.
[335] Bhatnagar, *History*, 173.

> and son of Sir Syed Ahmad, died on 8th May 1903, and was buried next to his father near the College Mosque; the debt which the College owed in early years to the late Mr. Syed Mahmud cannot be overestimated, the generous help which he gave it from his private purse has never been made public and he, even more than his father, was responsible for the original design of a residential College for Muhammadans, though the credit of the far harder task of putting the plan into practice is solely due to the dauntless courage and pertinacity of Sir Syed; it was a matter of deep regret to the present authorities of the College that they could not work in harmony with Mr. Syed Mahmud to the end.[336]

Shortly after Syed Mahmood's death, past and present members of the government and the Allahabad High Court continued to play a part in the denouement. The Indian judge who took Syed Mahmood's place, Pramoda Charan Bannerji, communicated with Sir John Edge, now a member of the Council of India in London indicating that Mahmood had left his wife and son impoverished. Edge in turn consulted with Sir Charles H. T. Crosthwaite (1835-1915), former Lt.-Gov. of the N.-W. P. & Oudh and now a fellow member of the Council of India, who then wrote to the current Lt.-Gov., Sir James J. D. LaTouche (1844-1921) as follows:

> I think, considering Sir Syed Ahmad's services to the Mahomedans of India, and through them to the Government, that it would be wrong to leave his grandson and his daughter-in-law dependent on private charity. There has been, I think, a little soreness in the minds of Mahomedans regarding the forced retirement of Mahmud—a soreness, in my opinion, absolutely unjustified by the facts. It would be quite removed, and the Mahomedans of the United Provinces and elsewhere in India would consider it a proper and graceful act of the Government to recognize Sir Syed Ahmed's services by taking care of his descendant....I would put forward Sir Syed Ahmed's services as the reason for the grant, and say nothing of Mahmud.[337]

Latouche, in response, visited Aligarh to determine the situation of the extended family of Aḥmad Khān. He recommended to Lord Curzon (1859-1925), Viceroy of India, that pensions be provided for the widows of both Syed Mahmood and his brother Ḥamīd, as well as for the son, Ross Masud. Since Syed Mahmood had left a debt outstanding, concern was expressed that his library, also containing his father's books, not be sold and disbursed. Accordingly, LaTouche recommended that the Government provide funds to

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[336] Theodore Morison, *The History of the M. A.-O. College, Aligarh: From its Foundation to the year 1903; Together with the Annual Report for the year 1902-1903 and Appendices* (Allahabad: Pioneer Press, 1903), 44-45.

[337] Letter by J. D. LaTouche, Lt.-Governor, United Provinces, Naini Tal, to Lord Curzon, Viceroy of India, 7 Aug 1903, Papers of George Nathaniel Curzon, Marquess Curzon of Kedleston (1859-1925), Viceroy of India 1899-1905, European Manuscripts, Mss Eur F111/208.

cover the remaining debt on the condition that the library remain intact and become the property of either the MAOC or Ross Masud. He noted that in regard to Ross Masud, the Muslims of Aligarh were "unanimous in wishing that he should remain with Mr. Morison for two years or till Mr. Morison leaves India, and should then go to an English University," which he seemed eager to do.[338] The Government followed those suggestions and disbursed funds accordingly.[339]

1.7 Conclusion

Syed Mahmood began his life firmly rooted in the *sharīf* culture of Muslim India, and continued to identify himself with that heritage throughout his life. He shared with his father the conviction that the survival of that culture in British India after 1857 was best achieved through co-operation with the British rulers. Accordingly, he followed the pattern his father set for him of combining the traditional education of the Muslim elite with education in the English language and in government schools established in India by the British. This trajectory took him to England where studies at Cambridge University and the Inns of Court in London provided him with the qualifications he felt he needed to thrive in the British system in India. From the beginning, he was convinced of the essential equality of British and Indian subjects who shared a similar social rank, and continually sought to promote social interaction between the two. With this ideal underpinning his ambitions, he launched his legal career.

Mahmood's choice of a career as a barrister over one as an educator signified a definite step of independence from his father's influence. The parting was not acrimonious, and Syed Mahmood continued to uphold ideals and aspirations espoused by Aḥmad Khān. But in moving from his father's household—whether at Benares or at Aligarh—to Allahabad, the capital city of the North-Western Provinces, he demonstrated his desire to be situated closer to the centre of political and administrative power. While he continued to assist in the planning, promotion, and establishment of the MAOC at Aligarh, he did so at a distance, providing funds and guidance as one outside of the immediate action. His

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[338] Ibid.

[339] Letter by H. H. Risley, Offg. Secretary to Government of India, to Chief Secretary to Government of the United Provinces, 1 Oct. 1903, in "Political Pension of late Sir Saiyid Ahmad," Political Department, N.-W. P. & Oudh, File no. 486A, 1899, Box 58, Uttar Pradesh State Archives, Lucknow.

return to Aligarh after his retirement from the High Court, and again later after father's death is evidence that he had never abandoned his commitment to the dream of progress through education that he shared with his father. But his difficulties in conforming to his father's plans for him reveal his independent nature as well as the reality that his experiences in England had changed his perspective more than his father had anticipated.

In addition to establishing his independence, Mahmood's choice of a legal career also indicated his belief in that law was equally as important as education in the advancement of the Muslim community in India. Although he left his work as a barrister after only a few years, he did so only to advance to judicial posts of increasing authority, first as District Judge, then as an officiating judge and Puisne Judge of the High Court. And it is in the arena of law that Mahmood's contribution is most significant. Although this aspect is the focus of the final four chapters of this dissertation, it is fitting to briefly note the highlights of his contribution. Starting with his Urdu translation of the Evidence Act, he unceasingly worked towards making the British law intelligible to both other Indian practitioners of law who had not had his opportunity to study in English law, and to the Indian public at large. He was also a strong promoter of the role of barristers and other advocates in guiding the judiciary in interpreting the law and in enabling the people to understand and benefit from it. As a judge, his numerous, lengthy decisions show his attention to the broader principles of justice and equity which were not to be obscured by the details of the administration of the law and the pressure to pursue efficiency in that administration. The testimony of his contemporaries and subsequent generations of judges and lawyers who studied his decisions consistently acclaim his perspicacity in jurisprudence, and the continued relevance of those decisions in South Asian courts testify of his farsightedness. Aside from his written contributions, his movement through the judicial ranks blazed a trail that other Indians followed. His pioneering efforts are seen in that he was the first non-English barrister of the Allahabad High Court, the first Indian appointed as District Judge in the Awadh province, the first Indian to be appointed as a Puisne Judge of the Allahabad High Court, and the first Muslim to be so appointed to any High Court in British India. Such appointments increased rapidly after he opened the way.

Another specific choice made by Syed Mahmood was to pursue a career in the British civil service as judge rather than in the Hyderabad administration where he would have had comparatively more influence. Having been invited by the Prime Minister of Hyderabad to assist in the reformation the judicial administration, Mahmood would have had the opportunity to implement his vision of modernization and to demonstrate the adaptability of the existing Muslim legal system. However, he abandoned that project before his term had ended, and sought to be re-instated in his former position in the Indian Civil Service with prospects of advancement. Even in his eventual appointment as a Puisne Judge of the High Court, he exercised less authority to effect change than he could have in Hyderabad, although he was actively involved in commenting on proposed legislation, and in bringing about change through his judicial decisions from the bench. While his preference for the British government in India to the Muslim government in Hyderabad is an indication of his level of comfort with working for the British administration, it likewise could be seen as an indication of his belief in the necessity of reform of that administration and of his confidence that he could make a noticeable contribution in that reform.

Although Syed Mahmood was an "active agent" in his choices of a legal career and of a career in the Indian Civil Service, there were factors over which he exercised less control, ones which eventually led to his retirement and decline. Certain individuals within the British administration found it impossible to work with an Indian who had such an independent personality and was willing to speak his mind on issues of injustice. Successive Chief Justices of the High Court resisted his appointment and complained of his insubordination. Others who were more willing to listen to Indian opinion, such as Viceroy Ripon, valued Mahmood's insight on a wide range of topics. As is discussed in the following chapter, Mahmood's advancement in the Civil Service was due, not only to his tenacious ambition, but also by shifting winds of politics and influential personalities in India as well as in far-off England.

To what, then, can Mahmood's sad decline and tragic demise be attributed? Certainly his personality which bristled at the slightest insult and social prejudice made it difficult for him to work harmoniously with British officials who came to India convinced of their inherent superiority to the "Natives." He repeatedly exposed inequities and injus-

tices, and refused to tolerate them. His tendency to prolixity at the expense of efficiency in the court also earned him the ire of his fellow-judges who were inconvenienced by his work habits. His drinking habit compounded the problem by decreasing not only his efficiency, but also his acuity and discernment in his judgments—traits that even his opponents had acknowledge. Conversely, it could also be argued that it was his disillusionment and the fading of his dream of social and official equality with the British that fostered an increased dependence on alcohol. The diminishment of his abilities can be clearly seen in the lower quality of his writings in the final decade of his life when compared with those of the preceding decade, the time when he was achieving the peak of his career. However, though he might have been discouraged at what he had failed to achieve, his legacy lives on in his writings and deserves a fuller examination.

Chapter 2 – Relationship of Syed Mahmood to the government of British India

2.1 Assertions of equality

2.1a Strategic loyalty to British rule

Syed Mahmood followed his father's political principle of loyalty to the British Crown. After the tragedies he experienced in the 1857 Revolt, Sayyid Aḥmad Khān concluded that the only hope for the recovery and advancement of the Muslim community in India was through loyal service to the British rulers. He worked towards reconciling the Muslims, who were suspicious of their Christian conquerors, and the British, who were suspicious of their Muslim subjects and their tendency to rebellion.[1] He saw loyalty as a political necessity for the times; however he did not prescribe subservience but advocated cooperation with the Government for the sake of Muslim uplift.[2] Yusuf Abbasi's description of the loyalty of the Muslims from this period aptly applies to both Aḥmad Khān and Syed Mahmood:

> ...Loyalist Muslim leaders were men of intelligence and experience who had the capacity to pursue loyal policies without prejudice to individual or national self-respect. In this context their loyalty had a larger connotation, as it implied mixed loyalties to the Crown and to the interests of the Muslim nation, which were not necessarily congruent with each other. For them, loyalty did not imply the sacrifice or subordination of Muslim interests to Government policies; it meant finding a way to influence Government, through informed opinion and organized representation, in favour of adopting or modifying policies to suit the welfare of Muslims. Of course, they interpreted Government policies in terms of goodwill to their co-religionists. They thought that a satisfied Muslim nation was the best guarantee for the stability of the British Raj; and this view found its fulfilment in beneficial co-operation with the Government.[3]

With a view to bringing about a rapprochement between the British and the Indians, Aḥmad Khān founded a Scientific Society in 1864 with both Indian and British

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[1] See: Sir Sayyid Ahmad Khan, *Review on Dr. Hunter's Indian Musalmans: Are they Bound in Conscience to Rebel against the Queen?* (Benares: Medical Hall Press, 1872; reprint, Lahore: Premier Book House, n.d.). For the views of Aḥmad Khān and his contemporaries of the British in India generally, see: Peter Hardy, *The Muslims of British India*, First corrected South Asian ed., Cambridge South Asian Studies (Cambridge, UK: Cambridge University Press, 1972; reprint, New Delhi: Foundation Books, 1998), 92-139.

[2] Muhammad Yusuf Abbasi, *Muslim Politics and Leadership in South Asia, 1876-92*, Historical Studies (Muslim India) Series, 4 (Islamabad: Institute of Islamic History, Culture and Civilization, 1981), 60-64.

[3] Ibid., 29.

members. One of its chief purposes was to promote the translation of works of science and English literature into Urdu, "thereby enabling the people of India to develop a sense of respect for Western literature and scholarship," which he argued would provide "a basis of mutual understanding and friendship between the British and the Indians."[4] Syed Mahmood took an active role in these meetings, as was noted earlier. On one occasion, he made a speech that indicated themes, such as the equality of all British subjects, which were to recur in subsequent speeches and writings. On that occasion he addressed the Europeans present in the audience in English, praising the British nation for its efforts to bring progress and civilization to England, but noting that these efforts were unproductive in India because so many Indians were still uneducated. He also made a plea for more associations "in which the conquering race and the conquered now so frequently and happily meet like brethren in every part of the country."[5]

While in England meeting the requirements for becoming a barrister at Lincoln's Inn and pursuing his studies at Cambridge, Syed Mahmood was also being invited to attend elite functions through the invitation of his father's influential friends. There he began to expound his perception of the relationship between the Indians and the British. The *Aligarh Institute Gazette* published accounts of his speeches given in the form of toasts at the annual dinners of both the Royal Asiatic Society and the Royal Colonial Institute in June of 1872.[6] At the latter event, he challenged the guests not to consider India a mere colony of Britain, but to give it a position much closer, to see it "attached to the very centre and to the very heart of the British Empire."[7] He resisted the idea of domination, and sought to promote a relationship between the British and the Indians that reflected a greater equality.

2.1b Social interaction and friendships

When Syed Mahmood returned to India, his father gave a public dinner in his honour at Benares on 26 November, 1872. The gathering was unique in that numerous prominent Muslims as well as British officials ate and celebrated the occasion together. In

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[4] Hali, *Hayat-i-Javed (English trans.)*, 85.
[5] Muhammad, ed., *Aligarh Movement*, 106.
[6] *Aligarh Institute Gazette*, 30 Aug. 1872, 539.
[7] Ibid., 18 Oct., 655.

his speech, Syed Mahmood emphasized his pleasure at what he took to be evidence that England and India were being united socially, and not just politically.[8] He wanted to see the English people become known more as friends and fellow subjects than as rulers and foreign conquerors. He admitted that he had left England somewhat reluctantly.

> When I left England I could not help feeling with anxiety that I was perhaps destined no longer to enjoy the advantage of the refined society of Englishmen; but the manner and friendly way in which we have spent this evening justifies a hope that, though separated by thousands of miles form the land of Britons, I may not altogether be deprived of the advantages which I had the good fortune to enjoy during my residence in England.[9]

He gloried in the fact that Indian Muslims and Englishmen were meeting as social equals at the dinner, and expressed his hope that such interaction would continue.

One prominent illustration of Syed Mahmood's commitment to friendships between the British and the Indians was his own friendship with a fellow barrister, George E. A. Ross (1847-1931). Ross, the son of Justice Alexander Ross, had been enrolled as a barrister at Allahabad just five weeks after Mahmood.[10] He had been a student at Middle Temple during the years that Syed Mahmood was at Lincoln's Inn, and was called to the Bar on 17 November 1871.[11] In 1882 when Mahmood arrived in Allahabad to officiate as puisne judge for the first time, he shared a house with Ross.[12] Syed Mahmood even named his only son, Ross Masud, after his friend, an action which Aḥmad Khān declared to be a demonstration of the friendship that was possible between differing nations.[13] Syed Mahmood was also known to have composed a collection of poetry in honour of Ross and his wife.[14] George Ross went on to serve as Public Prosecutor for the provincial government until he retired from India in 1890, and then continued his practice in England before the Judicial Committee of the Privy Council till 1916. Syed Mahmood util-

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[8] "A Christian cum Mahomedan Entertainment," 3.
[9] Ibid., 4.
[10] *The Pioneer*, 22 Jan. 1873, 1. Justice Alexander Ross had been a judge of the High Court at Agra and then at Allahabad where the High Court was moved in 1871.
[11] Foster, *Men-at-the-Bar*, 402.
[12] Letter from W. E. Neale, Commissioner, Agra Division, to Marquess of Landsdowne, dated Agra, 2 Aug. 1892, accompanied by "Confidential Memo," European Manuscripts – Landsdowne Collection, Papers of the 5th Marquess of Landsdowne as Viceroy 1888-94 – Mss Eur D 558/23.
[13] Hali, *Hayat-i Javid (Urdu)*, 740-741.
[14] Kidwai, "Forgotten Hero," 85-86.

ized his leaves of absence from the court to visit Ross and his wife in England.[15] Such friendships were important to Syed Mahmood, and he sought to promote such interaction between Indians and Englishmen whenever he could.

At the time of the laying of the foundation stone of the MAOC at Aligarh in 1879, Syed Mahmood once again spoke of the essential equality between the British and the Indians. At the public dinner that evening, he proposed the toast to "the Empress of India and the prosperity of the British rule in India," emphasizing that the lack of proper education for Muslims had been the chief problem hindering social intercourse between the British and the Muslims in India.[16] He did not see the British as the rulers and the Muslims as the ruled, but rather saw them as fellow-subjects to the same monarch, governed by the same laws.

The themes of equality and unity were also pronounced in Syed Mahmood's speech on the eve of his appointment to the High Court. He extended their scope beyond the English-Indian nexus to emphasize that his appointment demonstrated the increasing representation of all Indians, without appeal to communal identity, in the higher levels of service in the British government in India. During a celebration given in his honour in Aligarh, he pointed out that the numerous speeches by both Muslims and Hindus preceding his own showed that both groups were pleased with his advancement. He went on to elaborate his conception of a unity transcending religious divisions:

> Having differences in religion does not eradicate the entire influence of those matters in which Muslims and Hindus work together. Those who know me well, also know that my training and upbringing was done in such a manner and in such an atmosphere that I value national unity (*ham waṭanī*) and its enthusiasm and ideas above all other ideas of humanity. Differences in religion are not something by which the brotherly relationship engendered by national unity is done away.[17]

He quoted a *ghazal* which he attributed to Shams-i Tabrīz (d. 1247), the influential teacher of Jalāl al-Dīn Rūmī (d. 1273):

What shall I do, O ye Muslims, for I do not know myself anymore;

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[15] Lelyveld, "Macaulay's Curse," 205.
[16] Graham, *Life*, 267-276, 282-284.
[17] *Aligarh Institute Gazette* 17 (9 May 1882): 507.

I am neither Christian, nor Jew, nor Zoroastrian, nor Muslim.[18]

He argued that these lines did not mean that this leader of Sufis had ceased to be a Muslim, but rather every word overflowed with compassion for everyone else regardless of his or her religion. Furthermore, this unity also found expression in equality among the subjects of the monarch of Great Britain without partiality. His appointment to the High Court was, in his view, a demonstration of the fact that whenever the English regime noticed a person trustworthy in honesty and aptitude, it promoted that person to a high position regardless of nationality. He expressed his hope that the number of capable persons from among the Hindus and the Muslims would continue to increase, and, concomitantly, the number of Hindustanis in positions of honour would also keep increasing.[19]

A few years, later after having served in an officiating capacity as a judge of the Allahabad High Court for some time, Syed Mahmood gave a speech to the bar association and reflected on his early years as the lone non-European barrister in the same court. He commented, "I am proud to feel that, being a native of India without a single drop of English blood in my veins, I am essentially a member of the English Bar, having the same rights, the same duties, the same obligations and the same responsibilities as any of the learned gentlemen round this table."[20] This equality with his British counterparts along with their acceptance of him was, for Syed Mahmood, "a forcible illustration of the abstract proposition, the union of nationalities, under the British rule"—a theme which he frequently reiterated during his career.

2.1c Rejection of conqueror/subject duality

However, Syed Mahmood's admiration for the British was not an uncritical acceptance of a superior force or a demeaning subservience. He gave his most thorough exposition of his views concerning the relationship of the British with the Indians in an article published in the *Calcutta Review* in 1879. While he unequivocally stated his belief in the security of British rule "as an absolute necessity of order and good government in this country, as the only means of her future prosperity and civilization," he was adamantly

[18] Ibid. This ghazal has also been ascribed to Rumi himself, though it is not found in the critical edition of the *Kulliyāt-i Shams*; see Annemarie Schimmel, *The Triumphal Sun: A Study of the Works of Jalāloodin Rumi* (London: East-West Publications, 1980).
[19] *Aligarh Institute Gazette* 17 (9 May 1882): 508.
[20] "Mr. Syed Mahmood on Bench and Bar," *The Pioneer* (17 Apr. 1885): p. 6.

opposed to the use of the terms "conqueror" and "subject."[21] (In this he sounds amazingly like a post-modern historian analyzing the Orientalist discourse of power). His objection to the use of the term "subject" by anyone other than the Queen was rooted in his contention that the English and Indians were alike "fellow-subjects." The inappropriate use of the term by Englishmen in India, Mahmood argued, led to social barriers preventing the free and egalitarian fellowship he consistently promoted.

> More frequently, indeed, the people of this country do not receive from Englishmen such recognition of fellowship: every British subject claiming his descent from some native of the United Kingdom, in the unfeigned consciousness of the political domination of his race, makes free use of an expression to which only one human being under the British constitution is entitled. "Our Indian subjects" is an expression which, in a speech from the throne, or in a royal proclamation, would not be out of place; but in the mouth of Englishmen who, like ourselves, do not breath the atmosphere of sovereignty, the expression sounds as an attack upon "the divine right of kings," and a violation of the exclusive privileges of royalty.... This difference of language, though apparently merely a verbal one, is in reality of greater consequence than a mere rule of grammar or use of idiom. If language is the vehicle of thought, if thought is the basis of human action, expressions in ordinary use indicate not only the feelings of those who use them, but also their behaviour towards those concerning whom the expressions are used.[22]

The use of the term "conqueror" was equally objectionable in Mahmood's opinion because the historical reality was that the inhabitants of India had assisted the British at every point of the advancement of their rule. "Conquest" in international law meant "the acquisition of territorial dominion by open force," whereas the greater portion of British dominions in India was not acquired by open force.[23] Mahmood went on to give numerous examples of "native agency, native friendship, native counsels, native valour," which played a key role in British expansion, concluding with:

> Those who have studied the history of the rise and progress of the British power in India, can hardly deny that native co-operation was an essential element of the success. The British empire in the East has been built up by the combined efforts of the two nations; it is the product of the bravery and energy of both the races. Without the one the other could not have been successful.... Let Englishmen, instead of assuming the vainglorious name of "conquerors," do justice to historical truth and national morality, to humanity and civilization, by recognizing, not only

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[21] Syed Mohammed Mahmood, "British Rule in India: Does it Owe its Origin to Conquest and its Maintenance to Physical Force?," *The Calcutta Review* 68, no. 135 (1879): 2.
[22] Ibid.: 1-2.
[23] Ibid.: 3.

> in words but in deeds, the millions who inhabit the vast continent of India, as their fellow-men, fellow-workers, and fellow-subjects.[24]

In seeking to change the language of discourse, Mahmood was demonstrating his refusal to be defined by colonialism. Whereas colonialism sets the limits within which those who seek to oppose it must operate and "creates a culture in which the ruled are constantly tempted to fight their rulers within the psychological limits set out by the latter," Mahmood promoted an alternative discourse that transcended these limits.[25] He undermined the colonialists' sense of superiority by denying their claim to have conquered India. Imperialists liked to see colonialism as a moral statement on the superiority of some cultures and the inferiority of others, and for Indians such as Mahmood to promote a theory of imperialism without winners and losers threatened that view.[26]

2.1d Participation in government

In the same article, Syed Mahmood went on to argue that just as the spread of British rule had not been achieved without the vital involvement of Indians, so the current running of the administration was not by superior force of arms, but once again by the willing assistance of Indians who saw in the British rule bringing "order and good government, peace and civilization."[27] The reliance on force alone, he explained, proved to be inadequate to maintain the Mughal Emperor Aurangzeb's control over his territory in India which was more extensive than that of any of his predecessors; and after his death, his vast empire disintegrated. What Aurangzeb could not establish by force with "his forty millions of co-religionists to whom war was a part of their sacred creed," the British "with two hundred thousand at the utmost, can hardly hope to achieve."[28] The only reason for the current British dominance in India was, according to Mahmood, the superiority of the training the British received for holding high civil and military offices in the colonial state. But he foresaw a day when more and more Indians would acquire the training to make it possible for them to take on the responsibility of administration themselves.

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[24] Ibid.: 7.
[25] Ashis Nandi, *The Intimate Enemy: Loss and Recovery of Self under Colonialism* (Delhi: Oxford University Press, 1983), 5.
[26] Ibid., 100.
[27] Mahmood, "British Rule," 11.
[28] Ibid.: 17.

> As India advances in civilisation, her children will share yet more in the administration of the country, till a day may come when no office of the State will be closed to the native; when the Secretary of State will take the advice of his Indian Members of Council; when the Viceroy of India will see among his colleagues as much of the native element as of the English; when laws will be framed by the consent of the country; when the highest tribunals will propound law through native, as through English mouths; when the responsibility of the administration of whole districts will depend upon native efficiency; when commissioned appointments in the army will be as often filled by natives as by Englishmen; and India, safe from internal disorder, will depend for its defence against foreign invasion on the military ability of a General Nabi Dad Khan or a Colonel Anup Sing, as it now relies upon the tactics of a General Jones or a Colonel Robinson.[29]

His concern that more Indians were needed in the Indian administration was a concern his father shared and had likewise promoted two decades earlier. What Syed Mahmood described as a "dream" was what he then subsequently worked to achieve. He himself was involved in the administration when he assisted his father in drafting the speeches to be delivered in the Viceroy's legislative council towards the end of the 1870s. Mahmood took a more visible role in the administration when as Puisne Judge of the High Court at Allahabad he wrote numerous minutes on proposed laws regarding which the government requested legal advice.

An assessment of Syed Mahmood's declarations of co-operation with the British imperial power demonstrates that it was grounded in an overriding conviction that under the British crown all subjects—whether English or Indian—were equal. Mahmood regularly combined expressions of loyalty with exhortations to increased social interaction between the Europeans and the people of India, as well as to increased participation in the civil administration of the country by the Indians. In his view, increased social interaction would lead to a greater understanding and appreciation one for the other; increased participation in the administration would satisfy the aspirations of the growing educated class. Syed Mahmood felt that this loyalty was justified because of the benefits such as peace and prosperity that the inhabitants enjoyed as a result of the rule of the British. The Muslim community especially could regain some of its former glory only, in his view, through the continued strength of the British regime. His very public protestations of loyalty were, then, like his father's before him, for the dual purpose of convincing his fellow

[29] Ibid.: 17-18.

Muslims of this conclusion and of convincing the British rulers they had nothing to fear from the Muslims. His strong belief in the equality of the English and the Indian prevented his admiration from ever becoming obsequious servility. His forthright criticism of aspects of the administration was not a contradiction of his loyalty, but another expression of it. He had argued in his *Calcutta Review* article, "I look upon a free and independent discussion of British rule in India, an honest criticism of its defects and shortcomings, far from being an act of disloyalty, as an act of unmixed loyalty."[30] In particular, his critique of various aspects of the judicial system of which he was a part, including the handling of Muslim law, will be the focus of the following chapters.

2.2 Mahmood's judicial appointments and British political strategy

Syed Mahmood's rapid rise to positions of increasing responsibility and authority was not only a reflection of his abilities or merely a consequence of loyalty to the British administration. Political forces—both Conservative and Liberal—found in his promotion in the civil service a cause to champion in their efforts to fulfill a royal pledge to open the doors of the Indian Civil Service. After the Revolt of 1857, there had been an increasing awareness of the need to involve more Indians in the administration of the government. Sayyid Aḥmad Khān had written a tract on the causes of the Indian Revolt and had cited "the exclusion of natives from high appointments" as one of the reasons for the dissatisfaction of the Indians leading to the uprising. He wrote:

> A few short years ago Muhammadans filled the most honourable posts under their own Government and the desire and hope for such is still in them. Under the English Government they longed for the advancement of their honor in the eyes of the world, but there was no way open to them.[31]

Likewise, the Queen's proclamation of 1 Nov. 1858 had expressly stated, "And it is our further will that, so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they may be qualified,

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[30] Ibid.: 3.

[31] Sir Sayyid Ahmad Khan, *The Causes of the Indian Revolt*, Oxford in Asia Historical Reprints (Benares: Benares Medical Hall Press, 1873; reprint, Karachi: Oxford University Press, 2000), 44.

by their education, ability, and integrity, duly to discharge."[32] Syed Mahmood referred to this proclamation as "the *Magna Carta* of British India guaranteeing ... the equality of rights and privileges between Her Majesty's European and Indian subjects."[33] The successive administrations that governed India after the 1857 Revolt implemented various schemes to bring more Indians into the civil service in conformity with the royal decree. The institution of the scholarship that took Syed Mahmood to England in 1869 as discussed in the previous chapter was one such effort.

An act of the English Parliament in the 1870 recognized that it was "expedient that additional facilities should be given for the employment of natives of India, of proved merit and ability, in the civil service of Her Majesty in India," and made provision for the government authorities to appoint Indians to "offices, places, and employments in the civil service" in India without requiring them to sit for the regular competitive exams in India.[34] However, by focusing on "proved merit and ability" the Act was also directed against the rising class of educated Indians without the necessary social standing who were passing the competitive exams in England to enter the civil service by their "mere intellectual acuteness."[35] Other stipulations reserved the majority of the Covenanted posts for Englishmen, and limited Indian appointments to the judicial branch with lower rank and pay.[36] The Conservative administration under the Viceroy Lord Lytton and the Liberal administration under the Viceroy Lord Ripon each devised their own systems of implementing that policy, and each found Syed Mahmood a suitable candidate to appoint to judicial posts.

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[32] "Queen Victoria's Proclamation, 1 November 1858," in C. H. Phillips, *The Evolution of India and Pakistan, 1858-1947: Select Documents*, Select Documents on the History of India and Pakistan, 4, ed. C. H. Phillips (London: Oxford University Press, 1962), 10-11.

[33] Letter from Syed Mahmood, Calcutta, to H. W. Primrose, 7 Feb. 1882, No. 88a, Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.

[34] "Appointment of Indians, 25 March 1870," in Phillips, *Evolution of India*, 541-542. The East India Company had lost their exclusive privilege to nominate candidates to the civil service through patronage arrangements in 1853, and competitive examinations were introduced shortly thereafter.

[35] Briton Martin, Jr., *New India, 1885: British Official Policy and the Emergence of the Indian National Congress*, Publications of the Center for South and Southeast Asia Studies (Berkeley: University of California Press, 1969), 4.

[36] Ibid. The Indian Civil Service was known as "covenanted civil service" because its members entered into covenants with East India Company and later, with the Secretary of State for India, when the Company lost its exclusive right to nominate candidates. See: H. Verney Lovett, "The Development of the Services, 1858-1918," in *The Cambridge History of India*, ed. H. H. Dodwell and R. R. Sethi, vol. 6, The Indian Empire 1858-1918, and the Last Phase 1919-1947 (Delhi: S. Chand, 1964), 357.

2.2a Mahmood's appointment as District Judge by Lytton

The opportunity to appoint Syed Mahmood as District Judge at Rai Bareli in 1879 came as a result of a decision by the Government of India to separate the administrative and judicial branches of the service in Awadh. The First Earl of Lytton, Viceroy of India from 1876 to 1880, insisted that native judges be appointed to the new positions where possible, although he recognized that at first some of the positions would have to be filled by the Europeans whose positions had been abolished with the reorganization. The insistence was based partly on an effort to reduce expenditure, and partly on a related political commitment to have more Indians involved in the administration. The government secretary communicating this directive noted, "Natives cost the Government much less in absentee allowances and pensions than Europeans do. They hardly ever take furlough; they never take long furlough; and they hold on to the service much longer than Europeans do. Therefore it may well be questioned whether the increased burden on account of pensions and absentee allowances will be at all considerable."[37]

The ideological underpinning to this directive was Lord Lytton's view of what role an Indian should have in the civil service. In an 1877 minute on the issue, he stated:

> As our reasons for employing Natives at all in the service of the Government have, as I understand them, have their origin in motives of political and financial expediency, the Government of India must now, I conceive, in devising a practical scheme for the employment of the Natives, begin by laying down the following axioms and their corollaries:—
>
> (a)—No system of Native employment is sound which does not offer inducements to the better and more influential classes of the Native community to enter our service.
>
> (b)—To attain this object, the number of highly paid European agents must be reduced to the minimum sanctioned by safety and convenience.
>
> (c)—The salary of the Native service must be on a scale proportionally lower than that of the European service.[38]

Earlier that same month, he had outlined his plan in a letter to the Secretary of State, Lord Salisbury, in which he proposed to reserve the Covenanted Civil Service for Europeans who would continue to gain admission by competitive exams held in England, and then to

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[37] C. Bernard, Offg. Secretary to the Govt. of India, to C. E. Buckland, Offg. Under Secretary to the Govt. of India, 11 Sept. 1878, GOI, Home Judicial (A), March 1879, Nos. 105-116, National Archives of India.
[38] "Lord Lytton's Minute on the Admission of Indians to the Covenanted Service, 30 May 1877," in Phillips, *Evolution of India*, 546-547.

establish a separate Native Civil Service for Indians who would be admitted only on the basis of selection by the Government. This was to be an institution parallel to the Covenanted Civil Service, and a step up from the Uncovenanted Civil Service in which most of the Indians in the administration were currently employed. The reason for Lytton's above-stated intention to offer the posts to "better and more influential classes of the Native community" was that "if you get hold of young men of good family, you will secure along with them all the members, and all of the influence, of their families."[39] In another letter written a year later, Lord Lytton reiterated the same point:

> We attach great importance to the obvious political expediency of endeavouring to strengthen our administration by attracting to it that class of Natives whose social position or connexions give to them a commanding influence over their own countrymen. The qualifications of such persons for administrative employment are partly inherited, partly developed by early habits of command, partly proved by the readiness with which their right to command is recognised by large numbers of their native fellow-subjects.[40]

While the Secretary of State rejected Lytton's suggestion to reserve the Covenanted Civil Service for Europeans, he stated that the formation of a separate Native Civil Service would be well within the discretionary appointments decreed in previous legislation. The Statutory Civil Service, as it was termed, came into existence the following year in 1879.[41] The Statutory Civil Service proved to be a failure, despised as it was by the covenanted civil servants and not attractive to the educated Indians.[42] Syed Mahmood's criticism of this institution will be dealt with later.

Syed Mahmood appointed at this time to the position of District Judge in Awadh by Lord Lytton, nevertheless received his appointment under the old rules of the Uncovenanted Civil Service. Syed Mahmood's selection for the post was based on the influence of his father, even though his family may not have belonged to that aristocratic and wealthy class the government wished to woo. His father had been serving on the Viceroy's legislative council where his opinion was well respected by government leaders. The influence of his father is reflected in a comment by the officiating Secretary to the

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[39] "Lord Lytton to Lord Salisbury, 10 May 1877," in Ibid., 545-546.
[40] "The Government of India to the Secretary of State, 2 May 1878, in Ibid., 548.
[41] Robin J. Moore, *Liberalism and Indian Politics, 1872-1922*, Foundations of Modern History (London: Edwin Arnold, 1966), 21.
[42] S. Gopal, *British Policy in India, 1858-1905*, Cambridge South Asian Studies (Cambridge, UK: Cambridge University Press, 1965), 117-118.

Government, in response to the controversy provoked by Syed Mahmood's appointment, noting that in addition to having been a successful barrister and having a good English education and ability in the language, "more than all, he is the son of the Honourable Syed Ahmed, C. S. I., who is foremost and the most loyal of enlightened Muhammadans in Upper India."[43] As Syed Mahmood continued his rapid advance through his subsequent appointment as officiating judge of the High Court in Allahabad, his critics would frequently denigrate his promotion by claiming it was merely due to just such paternal influence and not to his own abilities.

There was some resistance on the part of other civil servants to the reserving even one of the four civil judgeships for natives, because a block on promotions in the civil service had created a scarcity of such senior posts. Four members of the civil service working as Assistant Commissioners in Awadh wrote memorials to the Viceroy protesting Syed Mahmood's appointment, arguing that it would adversely affect their own prospects of promotion. One of the memorialists went on to comment that Syed Mahmood had limited experience even as a barrister, and none at all in the province of Awadh, and that he should be required to work his way up through the ranks of civil service after entering Government service "on the same terms which Europeans of the same class in society and with the same liberal education [were] compelled to accept."[44] The government rejected the complaint and affirmed its commitment to appoint more natives, pointing out that although its intention had been to reserve more of the judgeships at the highest level for natives, Syed Mahmood was to be the only one appointed at this time.

The *Pioneer* of Allahabad, who regularly championed the cause of the civil servants, recognized that established civil servants in Awadh might not be receiving their due, but felt that that should in no way detract from Syed Mahmood's fitness for the task. The editors of the *Pioneer* described that fitness in terms of his being "a man of advanced western culture; a European by habit and manner and of high descent as a native of In-

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[43] C. Bernard, Officiating Secretary to the Govt. of India, Simla, to Secretary to the Government of the North-Western Provinces and Oudh, 5 June 1879, GOI, Home Judicial (A), Oct. 1879, Nos. 67-78, National Archives of India.

[44] Charles S. Noble, an Assistant Commissioner in Oudh, Rae Bareli, to the Viceroy and Governor General of India in Council, 19 Apr. 1879, GOI, Home Judicial (A), Oct. 1879, Nos. 67-78, National Archives of India.

dia."[45] They agreed with the Government that for political reasons it was desirable that the natives of India be given a larger share in the administration of their country than they had till then under the British. Letters responding to the editorial did not dispute the political necessity, but strongly advocated that natives be required to compete for a place on the civil service and then progress up its ranks according to the established rules just as non-natives were.[46]

Syed Mahmood was in England on private matters when the debate over his pending appointment spilled over into the newspapers.[47] On the occasion of a dinner held in his honour two years later, in 1881, as he was preparing to leave for Hyderabad, he reflected back on his appointment and mentioned that he had heard about the English opposition to his appointment through the papers. But he was of the opinion that when he had eventually arrived to take up his post in Awadh, he had experienced only respect, helpfulness, love and friendship from the Europeans.[48] In that speech, he also addressed the objections some had to his social manners and lifestyle patterned after the British customs, saying that such objections generally came from people who did not know him well; he had found that his people (*qaum*) were quite happy with him, making it possible to carry out his judicial duties with fairness.

2.2b Mahmood's critique of the Indian Civil Service

When the Liberals under Gladstone soundly beat the Conservatives in the parliamentary elections in England in 1880, Lord Lytton resigned his post as Viceroy immediately. The election had been fought to some extent on competing visions on how India was to be ruled.[49] Prime Minister Gladstone chose the 1st Marquess of Ripon to serve as Viceroy from 1880 to 1884. From the start, Lord Ripon sought to reverse the priorities of Lytton, his predecessor, and work towards the material and moral progress of the people

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[45] *The Pioneer*, 22 Mar. 1879, 1.
[46] Ibid., 2 Apr., 4-5.
[47] Ibid., 22 Mar., 1. It appears however that he had been in correspondence with Viceroy Lytton who assured him that his short absence from India would not affect his chance of being recommended for one of these judgeships. See letter from Sir John Strachey, to Lytton, 27 Feb. 1879, Lytton Collection, India Office Library, Eur. E. 218/519/10, Correspondence in India 1876-80, mflm. no. 1904, roll no. 16, Lytton Papers, National Archives of India.
[48] *Aligarh Institute Gazette*, 16 (23 July 1881): 829. The only Aligarh Muslim University copy is missing the beginning of this article.
[49] Moore, *Liberalism*, 22-27.

of India rather than towards furthering ambitious imperial schemes in Central Asia. He complained that the whole effect of Lytton's administration "was to give an impression, right or wrong, that in all ways—in foreign policy, in finance, in such matters as the Vernacular Press Act and the Arms Act—the interests of the natives of India were sacrificed to those of England."[50] To restore the Indians' confidence in British rule, Ripon sought the opinion of educated Indians such Syed Mahmood, Syed Ameer Ali and others who, he thought, were exerting an appreciable influence on their fellow-countrymen.[51] Both Mahmood and Ameer Ali, for example, were asked to comment on a draft form of a "pilgrim's passport" which the government proposed to introduce to regulate the pilgrimage of Muslims to Mecca.[52]

2.2b (1) Mahmood's letters on Muslim unrest

Lord Ripon encountered Syed Mahmood's perceptive analyses early in his tenure in the form of letters Mahmood had written to the head of the British Secret Police, Lt.-Col. Henderson (1840-1918), on issues of security regarding which the latter had sought Mahmood's advice. Early in 1881, Mahmood expressed his opinion on the attitude and response of Indian Muslims to the claims of the Ottoman Sultan to be the *khalīfah* of all Muslims. He pointed out that the chief opportunity for politically subversive material to enter India would be by the hand of pilgrims returning from Mecca, emphasizing that the British regime in India would do well to provide more overt assistance to these pilgrims in order insure their political loyalty.[53] In another letter a few months later, he gave more details regarding certain Muslims in Delhi whom the government suspected of publishing and distributing seditious writings and regarding funds being raised in Bombay to assist in relief efforts directed towards Turks during their war with Russia.

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[50] Quoted in Martin, *New India*, 11.
[51] Ibid., 11-12.
[52] "Memorandum on the Form of Pilgrim's Passport," enclosed with a letter from Syed Mahmood, Allahabad, to H. W. Primrose, 13 June 1882, no. 394a; letter from Ameer Ali, Barrister-at-law, Calcutta, to H. W. Primrose, 6 Jun. 1882, no. 379, Letters from Persons in India, commencing from January 1882, the Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.
[53] Letter from Syud Mahmood, District Judge, Bareli, to Lt.-Col. P. D. Henderson, Genl. Supdt. of Operations for the Suppression of Thuggee & Dacoity, 30 Apr. 1881, included as an enclosure in Letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 12 May 1881, No. 26 of Letters from the Secretary of State for India to the Viceroy, Commencing from January 1881, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3, 1881, British Library. I am indebted to Prof. David Lelyveld for this reference.

In this second letter, Mahmood addressed the problems of the Indian Muslim community more fully, and argued for their greater participation on the Indian Civil Service. He presented a protracted plea to the Government to remedy the depressed socio-political conditions of Indian Muslims. He argued that Muslims were very conscious of their glorious past as warriors and rulers and increasingly discontent with their current circumstances.

> People, looking upon their race as the late rulers of India, go to foreign countries, where they see their co-religionists in the position of rulers of vast tracts and leaders of large armies. They come back to India and find that, as time goes on, their race is going down in power, wealth, and prestige. Blind to the real politico-economical causes which produce these deplorable results, they attribute their misfortunes to the British rule, a circumstance, however unjust and unreasonable it may be, deserves consideration.[54]

Because of their reluctance to learn English and participate in the British administration in India, the Muslim community was being reduced to abject poverty and ignorance, which could lead them to look to foreign co-religionists for self-preservation and support—a contingency the government should not ignore. "By encouraging education among the Mussulmans in the English language and Western sciences," Syed Mahmood wrote, "you will succeed not only in removing their fanaticism, but in winning their sympathies, and in making them loyal and useful subjects of the British Crown. The race which was capable of conquering a vast continent like India, and of keeping it for centuries, is also capable of supplying you with honest, efficient, and loyal officers for the public administration, if you only give them the requisite education under such conditions as would suit them."[55] Clearly at this point, Syed Mahmood was following his father's philosophy of reassuring the British rulers that not only did they have nothing to fear from the Muslim community, but also the best guarantee of the community's continuing loyalty was to encourage their greater participation in the administration.

Henderson had passed Mahmood's letters on to the Secretary of the Foreign Department, Alfred Comyn Lyall (1835-1911), later to become the Lt.-Gov. of the North-

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[54] Letter from Syud Mahmood, District Judge, Bareli, to Lt.-Col. P. D. Henderson, Genl. Supdt. of Operations for the Suppression of Thuggee & Dacoity, 15 Jun. 1881, included as an enclosure in Letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 15 Jul. 1881, No. 35 of Letters from the Secretary of State for India to the Viceroy, Commencing from January 1881, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3, 1881, British Library.
[55] Ibid.

Western Provinces where he played a key role in appointing Mahmood to the High Court in Allahabad. Lyall in turn passed a copy of the letters on to Viceroy Ripon, commenting that he was sorry to see Syed Mahmood contemplating leaving the civil service to join the Niẓām's administration in Hyderabad. "We must, I think, make real exertions to keep such men," he wrote.[56] Ripon responded that, "his presence at Hyderabad for a time might not be without its advantages," and asked if Henderson would have any objection to having Mahmood's letter printed up confidentially and sent on to the Secretary of State in England.[57] In addition to having this exposure to Mahmood's incisive writings, Lord Ripon had a private interview with him at the government's summer hill station at Simla, presumably just before Mahmood went on to serve at Hyderabad.[58] In their discussion, Ripon asked Mahmood to write out his views on the subject of the Native Civil Service which had been instituted by Lytton.

2.2b (2) Mahmood's letters on the Civil Service

Syed Mahmood's father, Sir Sayyid Aḥmad Khān, had participated in several campaigns against the Lytton reforms which restricted the access of educated Indians to the Covenanted Civil Service. An assembly at Aligarh in 1877, chaired by Sir Sayyid and addressed by leaders of both the Hindu and Muslim communities, passed resolutions denouncing the change in age limit for admission to this branch of the civil service which discriminated against Indians, and called on the government to facilitate the admission of Indians by holding entrance exams in India in addition to those in England.[59] While the agitation seemingly had no impact on Lord Lytton's implementation of his scheme to reform the civil service, his successor, Lord Ripon, pressed for changes in the age limit in

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[56] Letter from A. C. Lyall, Secy. to Govt., Foreign Dept., Simla, to the Marquis of Ripon, 10 May, 1881, no. 267 of Letters from Persons in India, Commencing from January 1881, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1881, British Library.

[57] Letter from the Marquis of Ripon, to A. C. Lyall, 10 May, 1881, no. 238 of Letters from Persons in India, Commencing to January 1881, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1881, British Library. For an analysis of Ripon's policy regarding Hyderabad, see: Ray Bharati, "The Politics of Indirect Rule: Lord Ripon and Hyderabad State, 1880-1884," *The Quarterly Review of Historical Studies* 25, no. 1 (1985-86).

[58] Letter from Syed Mahmood, Calcutta, to H. W. Primrose, 7 Feb. 1882, no. 88a, Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.

[59] Abbasi, *Muslim Politics*, 74-75.

accordance with the demands of the Indians.[60] Aḥmad Khān continued to involve himself in the civil service agitation until he was appointed as one of two Muslim members of the Public Service Commission constituted by Viceroy Dufferin in 1886 to examine all aspects of the employment of Indians in all branches of the civil service.[61]

In his two letters to Lord Ripon on the Indian Civil Service, Syed Mahmood drew on that heritage as he sought to give voice to the grievances and aspirations of educated Indians with reference to the government employment. After listing the difficulties faced by Indians seeking to compete for appointments to the Covenanted Civil Service through the examination process in England, he turned his attention to the "Native" or Statutory Civil Service established by Lytton. He addressed himself to the political and economic factors which he thought had motivated the establishment of the institution. As discussed in an earlier section, the principle of equality continued to be the basis for his arguments:

> Under the immediate supervision of European officers [the native] can, on the whole, make an honest, enduring, hard-working, and efficient screw in the machinery of government, and, if nobler considerations are put aside, there is no need for employing him in the higher branches of administration; but the long-sighted sense of justice, which natives of India are taught to regard as the characteristic of the British rule, points to the conviction that distinctions of race and creed, if allowed to prevail over the equality of rights and privileges guaranteed by the constitution, are unfair, and that in them lies the real, though remote, political danger to the commonwealth.[62]

To hire them at a lower rate of pay even though they were performing the same type of work and fulfilled the same responsibilities also violated the principle of equality regardless of race. Furthermore, the lower rates of pay and pension given to the nominees of the Statutory Civil Service led the people to believe that Government considered them less fit to be entrusted with the work of administration than those of the Covenanted Civil Service.[63]

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[60] "Lord Ripon's Minute of 10 September 1884," in Phillips, *Evolution of India*, 552-554.
[61] Abbasi, *Muslim Politics*, 75-91.
[62] "Employment of Natives in the Higher Branches of the Administration under the New Native Civil Service Rules," enclosed with a letter from Syed Mahmood, Calcutta, to H. W. Primrose, 7 Feb. 1882, no. 88a, Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.
[63] Ibid. pp. 80h.

Syed Mahmood went on to criticize what he saw as Lytton's fundamental motivation for establishing the Statutory Civil Service—that of seeking to secure young Indian men from families of wealth and position. Mahmood acknowledged that "affluence of wealth may place them above the pecuniary temptations of bribery and embezzlement," and that "their position may bring to them a certain amount of social influence." "But beyond these two qualities," he wrote, "I have no hesitation in saying that the wealthy classes in India, in the *absence* of sound preparatory education and training, are the worst for recruiting any Government service, or for expecting any administrative efficiency."[64] Wealth and position in India, he insisted, were synonymous with "licentiousness and sensuality, disregard of public opinion, and almost total absence of the sense of duty and responsibility." So while he strongly endorsed the need for the employment of more Indians in the higher levels of the civil service, he did not subscribe to the view promoted earlier by Lytton's administration that members of the higher strata of Indian society had inherent qualifications to rule over their fellow Indians. Nor did he want to see such appointments made at the expense of the efficiency and morality of the administration.

The class which Mahmood recommended as a source for the ideal candidates for the Civil Service was that which had traditionally served in the Mughal administration and which was suffering financially as a result of exile of the Mughal ruler after the 1857 Revolt. He argued that an Indian youth possessing independent means would not devote himself to the work and would not be willing to undergo the hardships and loss of liberty that official life would involve. The type of recruits that the government should be seeking were men from "good families, having sufficiently limited private means to make it worth their while to stay in Government service for the sake of the emoluments, dignity, and position it brings," men from families "that are in need of a career for their sons to maintain their ancestral position in life in the absence of adequate private means."[65] The class of families that Mahmood recommended sounds suspiciously like his own.

Syed Mahmood concluded his paper by outlining a system that combined nomination with competitive exams; the element of nomination was to insure that the candidates belonged to "good families" of good social position, and the element of competition was

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[64] Ibid., p. 80f.
[65] Ibid., p. 80k.

to inspire the young men to strive for excellence in their educational preparation.[66] The results of the competitive exams would also enable the government to weed out those who were bound to fail, at an earlier stage in the process and avoid causing the shame of being dismissed from the civil service. With the encouragement of the Viceroy, Mahmood followed this letter with another in which he outlined a scheme for the education of candidates nominated for the civil service. To those British officers who spoke disparagingly about the "educated native," he had this to say, "Greatly deluded are those—(and such men, I am sorry to think, are still to be found, here and there, among Englishmen holding administrative power in India)—who think that the education of natives, and especially of the influential classes, is a step which will tend to endanger the British supremacy in India. The danger to the British rule lies not in the enlightenment of the people, but in their ignorance."[67] Lord Ripon's correspondence indicates that he was impressed with Syed Mahmood's submissions; and though he worked towards reforming the civil service during his tenure, resistance from the Home Office as well opposition from British residents in India limited the effectiveness of his efforts.

In his testimony before the Public Service Commission five years later, Syed Mahmood was even more direct in his criticism of the Statutory Civil Service. "As a member of the Uncovenanted Service myself I regard the Statutory system of enlisting officers as inferior to the system by which the higher grades of my own service are recruited. The reason is that in the Uncovenanted Service the rule of merit prevails, on the whole, whilst in the Statutory system favor is the predominating element, so far as I have means of judging."[68] He answered with an emphatic "Certainly not," to the question whether the Statutory system had been successful in recruiting men who in education or natural ability were superior to those promoted or appointed to the higher ranks of the Uncovenanted Service. In his testimony he repeated many of the same arguments he had stated in his letters to Ripon, even quoting at length from sections of those letters.

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[66] Ibid., pp. 80m -80q.
[67] "A Scheme for Establishing Colleges for the Education and Training of Candidates Nominated for the Native Civil Service," included in a letter from Syed Mahmood, Calcutta, to H. W. Primrose, 25 Feb. 1882, no. 106, Letters from Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.
[68] "Examination of Syed Mahmud, of the Uncovenanted Service, District Judge, Rai Bareilly," in India. Public Service Commission, *Public Service Commission, N.-W. P.*, 121.

2.2b (3) Mahmood's letters on political change

Syed Mahmood kept himself aloof from the political currents in England that brought changes of administration to India, not aligning himself openly with any particular party. He wrote in the *Calcutta Review* that politics had become the new religion of Europe.

> Persons of the same race and language, living under the same laws and constitution, take diametrically opposite views of identical questions; political dissensions have, in a great measure, taken the place in modern Europe which in the Middle Ages was occupied by religious controversy. But in succeeding to religion, politics have not only inherited its vagueness, but also its blind enthusiasm and sanguinary spirit.[69]

He felt that difficulties in political discussions in India were compounded by matters of race and feeling, making it exceedingly difficult for an Indian to address the issues of the British presence in India without being misunderstood. When the Conservatives under Salisbury once again replaced Gladstone's Liberals in England in 1885, Syed Mahmood wrote to the new Secretary of State for India, Lord Randolph Churchill, whom he had met earlier on the latter's tour to India. He commented on the Indian people's appreciation for the reforms Ripon had attempted to introduce for the benefit of India and how that had been reflected in the outpouring affection Ripon had received upon his departure from India.[70] The Conservative party, therefore, was in disfavour with the Indians.

> As a consequence of the recent tendency to make the affairs of India party questions in Parliament, the people of India are learning to mix themselves up with party questions in English politics. The policy of the late Ministry as represented by Lord Ripon's administration has made this most thinking part of the population partisans of the Liberal party in England, and they regard the conservative policy as opposed to all that India claims in the way of national progress. Whatever the merits of this opinion may be, I do not think, India can afford to ally itself completely with either of the two political parties in Parliament. Neither party can always remain in power, and whilst India can do nothing to affect elections in England, it would be a serious evil if the popularity of the British rule, entirely depended upon what party happened to be in power in England.[71]

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[69] Mahmood, "British Rule," 9.
[70] On the departure of Ripon, see: Martin, *New India*, 20-23.
[71] Letter from Syed Mahmood, Aligarh, to Lord Randolph Churchill, 17 July 1885, Add MS. 9248/6/702, Papers of Lord Randolph Churchill, Cambridge Library.

The fact that the people of India had no direct representation in the English parliament led Syed Mahmood to decry the transformation of Indian affairs into matters debated in England on the basis of political affiliation.

> In the absence of a representative system any concessions made to India must be initiated by the Government for the time being, and whether the Conservatives or the Liberals are in power, the opposition by taking part in Indian affairs can only retard the progress of the Indian people. Of course in England the Opposition represents the opinions of a section of the English people; but in the case of India the Opposition can have no such claim. It is on this account that many current thinkers among my countrymen think the Govt. for the time being should be regarded as the only representative of India in Parliament.[72]

This being his conviction, he continued to seek advancement in the British administration in India without reference to which political power was in control, and continued equally to offer his constructive criticism on matters concerning the judicial system and the civil service in general.

2.2c Political context of Mahmood's appointment to the High Court

As with his appointment as District Judge in the province of Awadh, Mahmood's appointment to the High Court in Allahabad was considerably influenced by the political shifts occurring in India.[73] His name had come up the previous year in 1881 in discussions regarding candidates for two vacancies at the High Court. Chief Justice Stuart had written disparagingly of Syed Mahmood, while the Viceroy Ripon, who claimed to know him personally, had a completely different estimate of his character and attainments. Ripon was of the opinion, however, that that was not the time to appoint Mahmood to the vacancy.[74] The following year, when it seemed the government was determined to appoint a native to the High Court bench, the other judges of the court submitted a letter to the government conceding in principle the claim of Indian judges to the appointment,

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[72] Ibid.

[73] One brief biography of Mahmood seems to imply that the initiative that led to his appointment as Puisne Judge originated in England. It states that Lord Phillimore had recommended to the Viceroy of India that Syed Mahmood be appointed as the first Indian Judge of the North-West Provinces High Court, apparently in recognition of the excellence of judgements given by Mahmood as District Judge in Rae Bareli which came before the Privy Council when Phillimore was sitting as part of that council. See: Hidayatullah, "Justice Syed Mahmood," 107.

[74] Letter by Ripon, Viceroy of India, to the Marquis of Hartington, Secretary of State, 19 May 1881, Ripon Papers, B. P. 7/3, vol. for 1881, no. 27, Rare Books, British Library, London. I am indebted to Prof. David Lelyveld for this reference and his notes on this letter.

since they saw such appointments occurring in the High Courts of Calcutta, Madras, and Bombay. However, they could see no qualified candidate available. "It is obvious," they wrote, "that the person chosen for such a position must not only possess qualifications of temper and legal knowledge, but most be one whose social standing and character will not only render his presence on the Bench a source of satisfaction to the native Bar and community, but is such as to inspire in his brother Judges the most perfect confidence and implicit reliance."[75] They urged that when such a selection was made, it be from among the subordinate judges of the province or from among the pleaders practicing in the High Court. Although Syed Mahmood was not mentioned in the letter, these qualifications seem to have been proposed to deliberately exclude him. The judges did suggest several names including two Bengali subordinate judges, Kashi Nath Biswas and Ram Kali Chaudhuri, and two local judges, Samī'ullah Khān and Maulawi Farīd ud-Dīn, but noted that both of the latter did not speak English.[76] As Ripon nevertheless continued to press for the appointment of Mahmood, Chief Justice Stuart once again advised against the appointment of Syed Mahmood, suggesting that another native, Dwarkanath Banerjee, was the fittest man for the post.[77] His preference, however, was overridden, and Syed Mahmood was appointed on 26 April 1882.

In their Memorial of 6 February 1882 outlining their grievances as a community, the National Muhammadan Association of Calcutta had pressed for the appointment of more Muslim judges in the High Courts as well as in the lower courts.[78] They felt Muslim judges were needed "to assist the European and Hindu Judges in administering properly the Mussulman law."[79] The considered themselves aggrieved by the fact that to that point no Muslim had obtained a seat in the higher tribunals, while Hindu judges had already

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[75] Letter from S. Harvey James, Registrar, High Court of Judicature, N.-W.P, Allahabad, to Secretary to Gov't., N.-W.P & Oudh, 14 Jan. 1882, Judicial (Civil) Dept. N.-W.P. & Oudh, Feb., 1882, Proceedings Nos. 17-19, U. P. State Archives, Lucknow.
[76] Ibid.
[77] Letter from the Marquis of Ripon, Simla, to J. Gibbs, Member of the Viceroy's Council, 19 Apr. 1882, no. 209, Letters to Persons in India, Commencing from January 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 1, British Library.
[78] Government of India, *Selections from the Records of the Government of India, Home Department. No. 205, Home Department Serial No. 2. Correspondence on the Subject of the Education of the Muhammadan Community in British India and their Employment in the Public Service generally* (Calcutta: Office of Superintendent of Government Printing, 1886), 237-244. Ameer Ali, the Secretary of the association, was one of the main authors of the Memorial.
[79] Ibid., 244.

been appointed in Madras, Bombay and Calcutta. The Memorial was circulated to officials and judges around India to obtain their response. Chief Justice Stuart and the other judges of the Allahabad High Court were of the opinion that in the North-Western Provinces there was no foundation for the association's complaints that the administration of Muslim law was of inferior quality.

> It has not been found that justice has miscarried from the want of acquaintance of the Judges with Muhammadan law. More than half the Subordinate Judges and Munsifs in these Provinces are Muhammadans, and the Bar in all the courts is largely composed of Muhammdans, so that Muhammadan exponents of that law are always to be found, and, as a matter of fact, the decisions of English and Hindu Judges, even in cases to which Muahmmadan law is peculiarly applicable, compare well with decisions of Muhammadan Judges.[80]

The judges also rejected the complaint of numerical inferiority of Muslims in the subordinate judicial service, pointing out that of the 84 Subordinate Judges and Munsifs in the Provinces, 47 were Muslim and 37 were Hindu. This ratio continued to be reflected in the appointment in the previous five years, when more than half of the new appointments were Muslims.[81] They did not, however, address the complete absence of Muslims in the High Court, because, as was shown earlier, they were averse to the possibility of Syed Mahmood's appointment. But the decision had been made by the government, and Mahmood's time had come.

Syed Mahmood was initially appointed as acting Puisne Judge to the High Court in Allahabad for six months, during the furlough of Justice Oldfield. It turned out, however, that Oldfield's appointment as the fifth judge on the Allahabad High Court itself had initially been intended to be of a temporary nature in order to clear off the arrears that had accumulated. Syed Mahmood's appointment then perpetuated a situation which the Secretary of State had not sanctioned, and further complicated matters by upsetting the balance on the court between civilians and barristers.[82] The required minimum of 1/3 of the judges to be barristers trained in the English or Irish bars or advocates of the Scottish Signet was instituted with aim of "raising the standard of the law administered in the new

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[80] Letter from Registrar, High Court of Judicature, N.-W. Provinces, to Secretary to Government, N.-W. Provinces and Oudh, 11 Apr. 1882, in Ibid., 290.
[81] Ibid.
[82] Letter by J. R. Reid, Offg. Secretary to the Government of the North-Western Provinces and Oudh, Naini Tal, to the Secretary of the Government of India, Home Department, 8th May 1882, India Office Records, Public and Judicial Department Records, L/PJ/6/76, File 1021, date 14 Jun 1882, British Library, London.

courts, as the Indian codes of law and procedure concurrently in process of promulgation drew much of their inspiration from English patterns."[83] Another third of the remaining judges had to be members of the Indian Civil Service, who though they knew the Indian context much better than the British barristers, had less legal training. In addition to these two main sources, judges could also be drawn from men who had practiced at a high court bar for more than 10 years, or had served as senior district and sessions judges for not less than five years. It was decided to appoint Syed Mahmood from the last category and not on the basis of his qualifications as a barrister, since the number of barrister judges and ICS judges were balanced at the moment. Also, it was seen as "specially desirable" that Mahmood be appointed "not *qua* Barrister but as being a Native and a distinguished member of the Native Uncovenanted Service."[84] Nevertheless, Syed Mahmood's appointment was still the first of a barrister—whether English or Indian—being appointed from the local bar rather than directly from England or from another High Court bench in India.

Once Syed Mahmood was appointed, the Government of India was anxious not to disturb the arrangement, whether it had been rightly made or not. Viceroy Ripon actively lobbied to have Syed Mahmood appointed to a permanent post as soon as possible. In August of 1882 he wrote two letters to the Secretary of State arguing for the inclusion of a native judge at Allahabad, and giving his preference of Mahmood for the post.[85] Ripon quoted a favourable assessment of Mahmood by one of his fellow judges and added his own assessment:

> Syud Mahmood is, I believe, the first Mahometan who has ever sat on the Bench of a High Court in this country, and I have received several addresses from Mahometan Associations thanking me for his appointment. It is, no doubt, quite true that he is too much Europeanised for the taste of the stricter followers of the Prophet; but his selection has, nevertheless, been taken as a compliment by the Mahometan community, and his supersession by a Hindu Bengali Pleader, which

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[83] Buckee, "Examination", 34, 42-43.
[84] Letter by A. C. Macpherson, 28 Mar. 1887, India Office Records, Public and Judicial Department Records, L/PJ/6/198, File 548, date 8 Mar 1887, British Library, London.
[85] Letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 25 Aug. 1882; Letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 31 Aug. 1882, nos. 52 and 53 of Letters to the Secretary of State for India, Commencing from January 1882, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3, 1882, British Library.

is the alternative, would be very ill-received by his co-religionists. This is certainly not a moment at which to give the Mahometans cause for grumbling.[86]

The mention of not wanting to upset the Muslims at that time was made with reference to the recent invasion of Egypt by the British, which Ripon had discussed earlier in his letter. While other considerations led the Secretary of State to pass over Syed Mahmood that year, he authorized Ripon to inform Mahmood to "hope for the next vacancy."[87] The succeeding Secretary of State met Mahmood who was visiting England in 1883 and was favourably impressed, promising to consider him when the next vacancy on the Bench occurred.[88] Other officials shared his opinion that it was "most desirable that at least one of the Judges of the Court should be a Native of India," in spite of the fact that the judges of the High Court, with the agreement of the provincial Lt.-Governor, Sir George Couper, "were opposed to the appointment of a Native as a inopportune."[89]

2.2d Mahmood's fight for equality in pay and employment benefits

2.2d (1) Support from A. C. Lyall

A. C. Lyall, who succeeded Couper and was appointed to the position of Lt. Governor of the North-Western Provinces and Oudh (henceforth N.-W. P. & Oudh) only 9 days before Syed Mahmood received his first officiating appointment, was much more eager to have Mahmood as a judge, because he saw the involvement of Indians in the administration as strengthening British imperial power in India. He wrote concerning Mahmood, "I have just appointed a native judge to the Allahabad High Court, the first who has ever been sent there. I want to push on the native wherever I can, — our only chance of placing Government here upon a broad and permanent basis."[90] Lyall was, however, opposed to transferring the majority of judicial offices to Indians too soon, because that would weaken the British government's position since the courts defined the limits of

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[86] Letter Ripon to Hartington, 31 Aug. 1882.
[87] Letter from the Marquis of Ripon, Simla, to the Earl of Kimberly, 21 Sept. 1883, no. 67 of Letters to the Secretary of State for India, Commencing from January 1883, The Marquis of Ripon, Correspondence with the Secretary of State for India in England, Ripon Collection, B.P. 7/3 vol. 3, 1883, British Library.
[88] Kimberly to Ripon, 24 Oct. 1883.
[89] Letter by Baron Arthur Hobhouse, to Lord Randolph Churchill, Aug. 1885, Add MS 9284/7/812, Papers of Lord Randolph Churchill, Cambridge University Library.
[90] Mortimer Durand, *Life of the Right Hon. Sir Alfred Comyn Lyall P.C., K.C.B., G.C.I.E., D.C.L., LL.D.* (Edinburgh: William Blackwood and Sons, 1913), 261-262.

power of all executive officers.[91] Rather, he promoted Ripon's measures to establish local self-government, believing that political institutions needed to be introduced at the lowest level before there could be any discussion of a wholesale transfer of power at the higher levels.[92] His wariness of the authority of the courts in India over the executive and legislative control of the government was stated even more forcefully in a Note by Lyall:

> The position of the judicial courts in British India is exceptionally strong, far stronger, in their relation to the executive Government, than in any State upon the European Continent. No sovereignty resides in the Government of India, and its Legislative Council bears all the marks of a subordinate and limited institution. Our courts of justice can exercise control over both the legislative and executive authority of the Government ... In the matter, again, of internal administration, the superior courts have almost unlimited power of controlling the exercise of executive functions; they can place their own construction on the law which creates those functions, and they can give it a decided twist in the direction of their own particular views or prepossessions.[93]

At this point in the note, he gave as an example a criminal case appearing before the Allahabad High Court in which Syed Mahmood as one of the judges, successfully argued that clause of the Criminal Procedures Code be overturned in order to secure an acquittal of the suspect. Lyall's comment was: "I must say that this instance has not re-assured me as to the manner in which the best native Judges may be tempted to handle the law."[94] But in spite of his wariness of the growing power of the High Courts in India, and his reluctance to hand over that authority to Indian judges too quickly or too soon, Lyall still supported and lobbied for the appointment of Syed Mahmood to a permanent place on the Allahabad Bench, and for equality of pay and benefits on Mahmood's behalf.

Power to appoint the judges to the high court lay with the British Crown, while the judges of subordinate courts were chosen by the Governor General in Council on advice of the local government. In practice, however, the government of the N.-W. P. & Oudh played a principal role in selecting the judges for both the High Court at Allahabad and its subordinate courts, tending to be influenced more by its own political considerations than

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[91] Lyall, "Government," 21.
[92] Ibid.: 21-40.
[93] A. C. Lyall, "Note by Sir Alfred Lyall (1886)" India Office Records, MSS EUR F/132/50, British Library, London.
[94] Ibid.

by the need to build up an efficient and dignified judiciary.[95] As Lt.-Governor of the N.-W. P. & Oudh from 1882 to 1887, A. C. Lyall was generally a strong supporter of Syed Mahmood and sought to have him appointed permanently to the anticipated vacancy in the High Court at Allahabad. He acknowledged that Mahmood might not have been "the best imaginable representative of the Native element," but that there was "certainly no native with equal claims and qualifications" in those provinces.[96] He, too, recognized that Chief Justice Petheram who had replaced Stuart might be resistant to the idea, because his differences with Syed Mahmood over matters pertaining to the court "may have led to a less charitable view of Syud Mahmud's minor imperfections."[97] Petheram, who was in London at the time these suggestions were being made, responded as anticipated and opposed the possible appointment of Syed Mahmood. In addition to his inefficiency, Petheram added that Syed Mahmood had a drinking problem as well as fits of ill-temper while on the Bench, the former complaint being verified by even as close a friend of Mahmood's as Arthur Strachey, son of Sir John Strachey, and later Chief Justice of the Allahabad High Court.[98] It is significant to note that complaints about his drinking also figured prominently in his departure from the Bench in 1893.

A. C. Lyall actively lobbied for Syed Mahmood to secure for him a wider range of judicial experience and equality in pay. When the availability of the high court post was delayed, Lyall promoted the idea of having Syed Mahmood appointed as District and Sessions Judge in the N.-W. Provinces, rather than once again reverting to the comparatively subordinate position of District Judge, 3rd Grade, in Awadh.[99] Syed Mahmood was likely to be re-appointed to officiate in the High Court, he argued, and needed the additional experience in the trial of criminal cases. In addition, A. C. Lyall recommended that he receive the full pay of a Civil Servant. Subsequently when Syed Mahmood did receive the

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[95] Buckee, "Examination", 56-57.

[96] A. C. Lyall, Naini Tal, to H. C. Maine, 21 Aug. 1885, Mss Eur F132/45, European Manuscripts, Lyall Collection – papers of Sir Alfred Comyn Lyall (1835-1011), British Library.

[97] Ibid.

[98] H. C. Maine, London, to A. C. Lyall, 16 Sept. 1885, Mss Eur F132/45, European Manuscripts, Lyall Collection – papers of Sir Alfred Comyn Lyall (1835-1011), British Library. Sir Maine also discussed this with the Secretary of State, see also Letter from Lord Randolph S. Churchill, Secretary of State for India, India Office, to the Earl of Dufferin, 2 Sept. 1885, Letters from the Secretary of State for India to the Viceroy, Dufferin Collection Mss Eur F130/3 1884, no. 68, British Library.

[99] "Proposal to appoint Mr. Saiyid Mahmud, District and Sessions Judge in NWP at full rates of pay," India Office Records, Public and Judicial Department Records, L/PJ/6/182, File 1227, date 31 Jul 1886, British Library.

full appointment, Lyall argued for full pension benefits as well. He pointed out that the proposal to appoint Mahmood on the basis of his being a member of the Native Uncovenanted Service, rather than on the basis of his qualifications as a barrister (so as not to disturb the balance between the Civil Servants and barristers on the Bench), while not affecting his pay, would affect his pension benefits—a matter Syed Mahmood would himself fight a few years later.[100] As early as 1882, A. C. Lyall had received from Viceroy Ripon a copy of Mahmood's proposals regarding pay equity between Indians and Europeans in the Civil Service, and had declared:

> I cannot think it wise or politic to maintain any such difference in the pay of the superior appointments, such as imply possession of much power and influence, and involve high duties and responsibilities. It seems to me that since for such posts we want men who must be up to the level of a very high European standard of ability and integrity, and since such men are much more rare among the natives of India than among Europeans, we shall not be making a bad bargain, or offering too high terms, if we give them European salaries.[101]

Lyall had not however agreed with all of Mahmood's proposals at that time, stating that he felt Syed Mahmood had not fully appreciated the political motives of the government in seeking to secure the support of influential families in India. With the essential elements of the scheme, he had nevertheless found himself in agreement.

2.2d (2) Mahmood's arguments

Syed Mahmood himself addressed the issue of wage disparity before the Public Service Commission in January of 1887. In his testimony he declared:

> I maintain that salary, leave and other privileges are nothing more than what might be called wages for certain work done for the public by a particular individual. I believe that the rate of such wages ought not, as a matter of political economy, to vary according to the nationality of the worker when his services are employed in the common labor market. Therefore I hold that distinctions in pay are wrong from political and economical points of view.[102]

After receiving his full appointment as a Puisne Judge of the High Court, Syed Mahmood continued to tackle the issue of the disparity in furlough and pension benefits between

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[100] See marginal note, Judicial Despatch by A. G. Macpherson, dated 28 Mar. 1887, India Office Records, Public and Judicial Department Records, L/PJ/6/198, File 548, date 8 Mar 1887, British Library.
[101] Letter from A. C. Lyall, Lt.-Gov. of the N. W. P. and Oudh, to the Marquis of Ripon, 25 Jul. 1882, no. 88, Letters from Persons in India, July to December, 1882, The Marquis of Ripon, Correspondence with Persons in India, Ripon Collection, B.P. 7/6 1882, vol. 2, British Library.
[102] India. Public Service Commission, *Public Service Commission, N.-W. P.*, 135.

foreigners and natives in the Civil Service. He addressed himself to the objections put forward by the Secretary of State who had argued that distinctions between the natives of India and the English should remain because the English civil servants would normally reside in England during furlough and retirement and also because they served "many thousands of miles away from their native land and under specially unfavourable climatic conditions" than those who served in their native land.[103] Mahmood rejected this argument, pointing out that the distinction was invalid in the case of natives who went to England to compete for the Indian Civil Service and therefore might "reasonably be presumed to have become anglicised in the sense of acquiring European t[a]stes and an inclination for European society, to an extent which makes his temporary residence in England during furlough, or his permanent residence there after retirement, not impossible or improbable."[104] The Government had now removed all disparity between the furlough and retirement benefits of natives and non-natives of the ICS—rightly in Mahmood's view. But, he argued, that equality should also include those natives *not* of the ICS, such as himself who were also serving as judges at various levels. He felt that his three years of studying for the bar in London and his period of residential studies at the university at Cambridge, in fact, provided him with a fuller experience of English social life than if he had merely been studying with a tutor for two years in preparation for the civil service examination. The impact that experience had on him was considerable.

> Since my return to India, I have taken every opportunity in my power to visit England, and have indeed visited it about every fourth year, sometimes even taking leave without pay for the purpose. At the end of my tenure of office I intend, and have always intended, to spend the greater part, if not the whole, of my retirement in England or on the Continent of Europe. In all probability my children will be brought up there, and the funds necessary for their bringing up will have to be drawn in England. I cannot imagine that the connection between me and England, or my inclination for an English residence, could have been stronger if I had chosen the Covenanted Civil Service rather than the Bar for my profession or had spent the larger portion of my time with a private tutor instead of a the University.[105]

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[103] "Memorial from Mr. Saiyid Mahmud, Pusine Judge, NWP High Court, as to furlough, pension, etc.," India Office Records, Public and Judicial Department Records, L/PJ/6/242, File 25, date 18 Dec 1888."
[104] Ibid.
[105] Ibid.

He buttressed his arguments with references to the findings of the Public Service Commission which had recently been completed. The key point which Syed Mahmood felt had not been adequately considered was that there was no basis for a distinction between the Native and European barristers who had been raised to the high court after practicing as advocates of the high court, and that the equality now in place with regards to salary needed to be extended to lengths of furloughs, furlough allowances and pensions.

The Secretary of State, Viscount Cross, was eventually persuaded by the findings of the Public Service Commission to adopt a policy of parity which met the demands Syed Mahmood had been making. He noted that the changes made in the rules governing civil servants would now remove disparities between Indians and Europeans, and so felt these rules should also extend to High Court judges and other cases where non-ICS Indians were appointed directly by Her Majesty. In a minute that became the reference point in any future controversy over wages and benefits, he wrote, "When, in both these branches of the administration, all distinctions in the conditions of service based on difference of nationality are abolished, it will be impossible to apply another principle in the High Courts, and to say that Judges who are Natives of India shall, because of their nationality, be treated differently from Judges who are Europeans."[106]

2.2e Controversy over Syed Mahmood's appointments

Syed Mahmood's appointment to officiate at the High Court was not without controversy of another nature apart from the official aspects. Vernacular language newspapers had been insisting for some time that the person to replace the retiring Justice Pearson should be a native, while the English language newspaper of Allahabad, the *Pioneer* had opposed the idea. Several petitions requesting the appointment of a native had been signed by numerous pleaders and other native officers of the court, along with letters from individuals, persuasively arguing the same point, appealing to the express will of the British Parliament.[107] The Viceroy, Lord Ripon, keenly promoted the idea that a native be appointed, and suggested that if a competent candidate could not be found locally, he would send an able barrister from Calcutta, prompting the local administration to forward

[106] Despatch from the Secretary of State, Vincent Cross, Home Public, No. 104, dated 12 Sept. 1889, paragraph 35, GOI, Home Public (A), Feb. 1890, Nos. 130-137, National Archives of India, Delhi.
[107] GOI, Home Judicial (A), May, 1882, Nos. 272-277, National Archives of India.

its own list of eligible native candidates.[108] As the possibility of the appointment of a native to officiate during the furlough of Justice Oldfield became more likely, the question of communal affiliation arose, with the newspaper *Shamīm-i Allahabad* arguing that a Hindu should be appointed since the Hindu population exceeded that of the Muslim one in those provinces.[109] The announcement that Syed Mahmood had been selected, therefore, met with disapproval from both some Hindus and some Muslims. He was described as an "Anglicized native" who "knows little of native customs and manners."[110] The *Nūr al-Anwār* complained:

> He is not a native in the proper sense of the term. True, he was born in India, but he was educated in England and has adopted the customs and manners of Europeans. He has as much right to be called a native as a European born in India. He is generally regarded both by Hindus and Musalmans as a European, or at all events as a Christian. He has obtained the post through the influence of his father, who is a Member of the Viceroy's Legislative Council. Obviously the Government of India has not properly carried out the orders of the Home Government about the appointment of a Native Judge to the High Court.[111]

An Allahabad paper, the *Hindi Pradīp*, also expressed its displeasure and commented that because he was not a Hindu, Syed Mahmood could have no sympathy with the Hindus; moreover, even the Muslims did not regard him as representative of their community because he did not follow the dictates of their religion and had adopted European customs and manners. "He belongs to the Anglicized school of Musulmans who form a separate class by themselves and are hated by their more orthodox co-religionists. As he is not a good Arabic scholar, he cannot be thoroughly well versed even in the Muhammadan law."[112] His young age of 32 years, and his lack of experience was also cited by his critics as reasons against his appointment.[113] Other papers, however, were quick to voice their disagreement with the criticism and to express their approval of Syed Mahmood's appointment, the *Riyāz-ul-Akhbār* of Gorakhpur even regarding it as "a sign of the near return of the former greatness and honour of the Musalmans."[114] The *Mittr Vilās* of Lahore took a more non-partisan approach, arguing that the Hindus had no reason for dissatisfac-

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[108] India, *Selections from the Vernacular Newspapers, 1882*, 212.
[109] Ibid., 272.
[110] Ibid., 302.
[111] Ibid., 321.
[112] Ibid., 369.
[113] Ibid., 334, 369.
[114] Ibid., 322.

tion with the appointment because no *educated* Muslim would be prejudiced against Hindus just as no *educated* Hindu would be prejudiced against Muslims.[115]

This examination of circumstances of Syed Mahmood's appointment to the High Court uncovers some of the political differences and conflicting motivations among the British officials in India. A distinct division between the judiciary and the political leaders such as Ripon and Lyall becomes manifest. The judges, concerned with maintaining an efficient court and resisting any diminishing of their authority over the Indians tended to oppose Mahmood's advancement. The governors, concerned more with keeping the Indian population pacified and happy in order to insure the stability of the empire, pushed ahead with their plan to appoint a native to the Bench, Mahmood being the best qualified at that place and time. These political aims were also tinged with particular ideals of equality and self-government that Ripon in particular sought to implement during his rule. Lyall tended more to policies that strengthened the empire, and argued that self-government was still many years down the road.[116] These differences between the judiciary and political leaders demonstrate a struggle for power between those with the responsibility to adjudicate and those with the responsibility to legislate. Both fiercely defended their territory, and Syed Mahmood to some extent was caught in the middle. As will be discussed in chapter five, he sought a balance between the two, utilizing his position as a judge to interpret law in a form of judicial activism, while at the same time strongly supporting the codification movement and assisting in the drafting of legislation.

2.3 Disillusionment and resignation from the High Court

After serving eleven years as a judge at the Allahabad High Court, Syed Mahmood took his final leave from work in the form of a year's furlough beginning 25 November 1892. Then upon returning towards the end of 1893, he officially resigned from the court. The reasons for his resignation are given in his correspondence with the Government of the N.-W. P. and Oudh, in the person of J. D. LaTouche, its Chief Secretary. In two very lengthy letters, each accompanied by a multitude of appendices providing support for his arguments, Syed Mahmood gave detailed responses to the charges laid

[115] Ibid., 334, see also 339-340.
[116] See especially: Lyall, "Government," 39-40.

against him by the Chief Justice of the court, Sir John Edge.[117] Although at times repetitious and redundant, this lengthy correspondence is a valuable archive revealing the inner workings of the court, Syed Mahmood's role in it, and the unique difficulties he faced as the first Indian judge in the High Court at Allahabad, and the first Muslim judge in any of the High Courts in India.

2.3a Controversy over Muslim holidays

The tension that had been building between Edge and Mahmood became a public matter when Syed Mahmood read out a "judgment" in court over two days, 25-26 July, 1892.[118] In it, he declared his objection to having cases put on his "Day's List" without being consulted. Though he had agreed to the rule that the Chief Justice could order such a Day's List to be prepared, he thought courtesy made it necessary that the judge who received such a list should first be asked whether he desired to sit that particular day. The objection stemmed from a dispute over the setting of holidays during the first ten days of Muḥarram, the first month of the Muslim calendar when the martyrdom of Ḥusayn is commemorated, which extended from 28 July to 6 August of that year. However, as his concluding statement indicated, Syed Mahmood saw the problem not in terms of an attack on his religious beliefs and practice, but as a challenge to his status as a judge of the High Court and as an insult and a lack of courtesy between gentlemen. He summed up his complaint thus:

> I desire, not with reference to any declaration as to my religious prejudices or as to my superstitions if I have any, that by dint of the authority which I possess as one of Her Majesty's Judges and as a matter of social propriety as I understand it among gentlemen of my race and creed, I decline the power of any one in this Court, whether the learned Chief Justice (for whom I entertain high respect) or the

[117] Minute by John Edge, 5 Aug. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/340, File 360, date 1 Feb 1893, British Library, London; Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London; Letter by Sir John Edge to J. D. LaTouche, 7 July, 1893, ibid.; Letter from Syed Mahmood, Aligarh to J. D. LaTouche, 9 Sept. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London. The last letter has been edited and published in the *Aligarh Law Journal*, see Rashid, "Justice Mahmood's Resignation."

[118] "High Court, N.-W. P.: The High Court Cause List." *The Pioneer*, 28 July 1892, p. 3.

> Registrar or the Deputy Registrar or the Assistant Registrar, to force me to sit during the Ashra-i-Muharram in this Court without my being first consulted.[119]

John Edge considered this public challenge to his authority to be not only unjustified, but also "a breach of all judicial decorum and an outrage upon the Court," and consequently wrote a lengthy letter to the government a few days later detailing his complaints against Syed Mahmood, appending 36 pages of documentation.[120] This set in motion the process of accusations, defences, and counter-accusations by the two men in correspondence directed to the government who acted as arbitrator, with the end result being Syed Mahmood's resignation the following year.

Although both men considered the precipitating event, the dispute over Muslim holidays, simply indicative of deeper problems, the dispute does elucidate the attitude of both towards Islam and Muslim practice in India. Till that year, the practice had been to close the court for the first ten days of the month of Muḥarram to permit the Muslims to participate in the rituals practiced those days. For the previous several years this extended period of closure had not been noticeable because it had fallen during the court's "Long Vacation." Citing the pressure of a severe backlog of cases, Chief Justice Edge sought to mitigate the inconvenience of this holiday in 1892 by introducing several changes. He decided to keep the court open for the first six days of Muḥarram (July 26-31) to handle both civil and criminal cases, and then only for criminal cases during the last four days (August 1-4).[121] He stated as justification for these measures that Syed Mahmood had informed him that the last four of the ten days were the most important days and that there could be no objection for keeping the court open for the first six. In addition to Syed Mahmood's statement, he supported the change by citing Maulavi Amjad 'Alī, professor of Arabic at the Muir Central College in Allahabad, confirming Mahmood's opinion, and by pointing out that other lower courts and government departments only permitted the four days of holidays. He went on to state that since no criminal cases were being given to Syed Mahmood, the court could remain open even during the last four days, the other judges having agreed to continue hearing cases during those days. Any Muslim advocate

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[119] "Syed Mahmood's 'First Appeal No. 134 of 1890' dated 25 July 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/340, File 360, date 1 Feb 1893, British Library, London.
[120] Minute by John Edge, 5 Aug. 1892.
[121] Ibid.: p. 18.

or vakīl could apply to have his cases kept out of the Day's List if he stated that he had conscientious objections to working during those holidays.

With regard to the sectarian affiliation of Syed Mahmood and of the majority of the lawyers working at the Allahabad High Court, and how that affiliation affected their observation of the holiday, he had this to say:

> Mr. Justice Mahmood is a Sunni Muhammadan. All of the Muhammadan Advocates and Vakils resident in Allahabad and practising in this Court are, I believe, Sunni Muhammadans. I had gained the information from reading or otherwise that although the first 10 days of the Moharram are by Shia Muhammadans considered as days of importance in their religion, the Sunni Muhammadans regard the day which happens to be the tenth day of the Moharram as the only one of the days of the Moharram which is of importance as a festival in their religion, and that day is regarded by them as of importance, not from anything which is connected with the origin or the necessity for the observance by Shias of the Moharram, but from other reasons entirely.[122]

Chief Justice Edge called a meeting of his fellow judges on July 18th to discuss the matter of the court remaining open to some extent during the holidays. Evidently he anticipated some opposition from Syed Mahmood, and advised him not to provoke "a controversy as to the validity or reasonableness of the religious dogmas of any 'sect'."[123] Syed Mahmood later commented that such advice was wholly uncalled for because it certainly had not been his intention to provoke such a controversy; it was his only concern that he explain clearly to his colleagues on the bench the importance of Muḥarram in Muslim religious and national history. In contrast to Edge, he did not consider the Muḥarram holiday to be limited to Shi'i Muslims.

> It is enough to say that those who are familiar with the state of things such as even junior Magistrates in the Civil Service, whether Europeans or Hindus, and of course my co-religionists, will bear me out when I say that during the *Muharram* by far the vast majority of those who make *tazias* and take part in the ceremonies of mourning processions during the Muharram are *Sunnis* and not *Shias*, and that both of them are equally devout and earnest in mourning for the sufferings and martyrdom of Imam Husain. Many of them fast during the *Ashra*, and I can safely say as an approximate calculation that at least 85 per cent. of those who take part in the Muharram are *Sunnis*. I am myself a *Sunni*, but I have relatives and friends who are *Shias*.[124]

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[122] Ibid.
[123] Letter from Syed Mahmood, 30 Oct. 1892, p. 51.
[124] Ibid.: 49

At the same meeting, a letter from the Muslim lawyers of the court was also presented, causing the meeting to be extended to the next day to which the lawyers were invited to express their complaint.

Muslim advocates and vakīls had responded to the cancellation of the holidays with a letter requesting that the judges reconsider their decision. They stated that the practice of closing the court for the ten days of the Muḥarram holiday was long-standing from the time of the Sadr Court at Agra, and that departure from the practice would create hardships for those Muslims desiring to participate in the ceremonies connected with the event. They did not make any reference to sectarian differences, but emphasized that the holiday was not one of rejoicing and indulging in pleasures, but "a sacred obligation to celebrate with appropriate sorrow and lamentations the anniversary of events of a melancholy character which occurred several centuries ago."[125] At the meeting to which the lawyers were invited, Edge emphasized that it was on information received from Syed Mahmood that he had decided to reduce the holidays to the final four, rather than the full ten.

This statement angered Mahmood; he considered it "an improper thing to have done and an outrage" upon him personally to publicly tell his fellow-Muslims that he had expressed views against the object of their deputation, especially since those views were extracted from a private minute written more than two years previously—the context being a plea, not to *eliminate* Muslim holidays, but to *substitute* other unobserved holidays for the first few days of Muḥarram.[126] He was further displeased with the requirement that any Muslim advocate or vakīl declare that his "conscientious objection" to presenting his case on one of the holidays in order to have it postponed. That the Muslims should be singled out in having to defend their desire to celebrate their holidays when those of other affiliations did not was offensive. That Edge should go even further and suggest that Mahmood himself should state if he had any objection to sitting on the bench during Muḥarram was, to Syed Mahmood, "nothing other than an outrage to propriety of behav-

[125] Letter to the Registrar, High Court of Judicature, N-W. P., Allahabad. 18 Aug. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/340, File 360, date 1 Feb 1893, British Library, London; signatories included M. Hamid Ullah, son of Samī'ullah Khān.
[126] Letter from Syed Mahmood, 30 Oct. 1892, p. 52.

iour towards me and an indignity which I trust I shall not live to suffer again, not only from Sir John Edge, but also from any gentleman or nobleman of a higher rank."[127]

Mahmood felt that Edge had completely misunderstood the significance of Muḥarram and the commemoration of Ḥusayn's martyrdom for the Muslims, by both Sunni or Shi'i, and its integration into Muslim history, traditions and beliefs, and its personal significance for one such as Mahmood who considered himself as coming from the lineage of Imām Ḥusayn. Asking a Muslim, therefore, to declare his conscientious objection to working at the court during those days would be comparable, he said, to asking an English gentleman serving as judge whether he had any "conscientious objection" to inviting friends to a dance on a Good Friday, or to holding a sitting on the Bench on a Sunday or on Christmas day, or even to questioning his belief in the virgin birth of Christ.[128] Syed Mahmood was also upset that the suggestion had been given that the initiative to reduce the Muslim holidays had come from him, negatively affecting his relationship with the Muslim community.

When Syed Mahmood then gave vent to his outrage in the "judgment" read out in court a few days later, declaring his intention not to sit as a judge during *any* of the 10 days of the Muḥarram celebration, newspapers quickly picked up on the dispute. Some of the English papers such as the *Pioneer* sided with Sir John Edge, while others such as *The Indian Mirror*, *The Morning Post*, *The Mohammadan Observer*, *The Musalman of India*, and *The National Guardian*, picked up on Mahmood's sense of outrage and condemned the government's insensitivity to the religious feeling of its Muslim subjects, and its attempts to divide them by emphasizing sectarian differences.[129] One also commented that it was Syed Mahmood's show of independence, as an Indian judge, that his British col-

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[127] Ibid.: 53.
[128] Ibid.: 53.
[129] Clippings from these papers were included by Syed Mahmood in his second letter of defence, see "Sir John Edge and the Strike of the Mahomedan Bar of the Allahabad Court," *The Indian Mirror*, Wednesday, 3 Aug. 1892; "Mr Justice Mahmood and the N.-W.P. High Court," *The Morning Post*, Wednesday, 3 Aug. 1892; "Mr. Justice Mahmud and the Allahabad Court," *The Mohammadan Observer*, 13 Aug. 1892, pp. 384-385; ibid., 20 Aug. 1892, pp. 396, 401-403; Appendices D-I, Letter from Syed Mahmood, Aligarh to J. D. LaTouche, 9 Sept. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London.

leagues on the bench found so galling, and suggested that all Indian judges should be grateful to Mahmood for "this bold assertion of their rights."[130]

2.3b Differences over court procedures and legal judgments

2.3b (1) Edge's complaints

In his letter written on 5 August 1892, Sir John Edge listed his complaints against Syed Mahmood which dealt more with the administration of the high court than with Mahmood's religious affiliations. He considered Mahmood's latest actions to be a contemptuous treatment of Court rules and an act of defiance challenging his authority as Chief Justice of that court. He described how Syed Mahmood had persistently questioned the rules governing the functioning of the court, and now was deliberately transgressing a set of rules that he, Edge, had drawn up towards the end of 1889 partially in response to those repeated questions—rules to which Mahmood had given his assent. This latest refusal to abide by the Day's List of work prepared for him was just another example of Mahmood's habit of keeping irregular hours and causing a disruption to the smooth functioning of the court. Edge further complained that he was dilatory in completing his reserved judgments and in initialling and returning judgments sent to him for final revisions before publication. For this work, Mahmood was continually requesting that time be allocated from his regular court schedule, rather than doing it on his own time as the other judges did, and was then not accomplishing the work he promised when such time was given. Edge's criticism of his handling of criminal cases and original civil suits where evidence had to be taken centred on their disagreement as to fundamental rules of procedure.

In other areas of Mahmood's performance, however, Edge acknowledged, "So far as legal knowledge, the power of applying it, and knowledge of the country and its people are concerned, Mr. Justice Mahmood has been capable of being a most useful Judge when he was disposed so to be."[131] Edge considered him to be specially suited for working as a single judge on the bench rather than with other judges where, in Edge's opinion, he tended to be inattentive to the evidence given, though he could be of great assistance in

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[130] *The Morning Post*, ibid.
[131] Minute by John Edge, 5 Aug. 1892, p. 1.

such cases "when so inclined."[132] Edge readily admitted that when working on a single bench, the rulings handed down by Syed Mahmood tended to be thorough, seldom returning on appeals. Although he had at times confronted Mahmood about his performance, Edge felt that he had been more than lenient. "Mr. Justice Mahmood has, owing to his being a Native of this country, been treated by me and his Brother Judges throughout with a courtesy, consideration and forbearance which his conduct did not deserve. Had he been an Englishman I would long since have officially reported to Government what I can only describe as his persistent neglect of duty in, and unfitness for, his office."[133] Having, in his opinion, exhausted all other means, Edge was now appealing to the Government to act.

2.3b (2) Mahmood's rebuttal

The letter by Chief Justice Edge was sent to Syed Mahmood, and he was invited to respond by the Government. Mahmood began his extensive, 68-page printed reply towards the end of October, just before he began his final furlough, but did not complete it until May, 1893, after repeated requests for his response. In it, he countered Edge's accusations with detailed arguments buttressed with abundant additional information and documentation, and counter attacked Edge with accusations of his own. He was deeply hurt by this "premeditated attack" or "impeachment." Repeatedly in his reply he expressed his conviction that the differences between Edge and him could have been resolved amicably if only Edge had come to him and asked him regarding the issues addressed.[134] He felt the acrimonious accusations and insulting behaviour to which had been subjected was not befitting the discourse of gentlemen.[135]

Syed Mahmood summarized his perceived differences with Chief Justice Edge under the two broad headings of differences over the running of the court and differences over specific legal judgments. With respect to the functioning of the court, he sensed that Edge as the Chief Justice considered himself to be superior to the other Puisne Judges, and would arbitrarily arrogate powers to make decisions regarding the rules. He described

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[132] Ibid.: p. 26.
[133] Ibid.
[134] Letter by Syed Mahmood, 30 Oct. 1892, pp. 1, 17, 21, 46.
[135] Ibid.: 25, 55.

Edge's attitude as akin to the feeling "I am the monarch of all I survey," and commented that a Chief Justice was not entitled to treat his fellow judges with such an attitude.[136] Mahmood, conversely, insisted on his own independence and equality as one judge among equals, while still recognizing certain responsibilities as adhering to the office of Chief Justice.

> Now whatever views Sir John Edge may entertain with regard to this matter, I, in the exercise of my discretion as a Judge in revision, am surely entitled to have my separate mind and a separate conscience, and I am not bound to surrender either of them to the good wishes of the Chief Justice, who may entertain other views in regard to the exercise of such discretionary power. He has no more authority to interfere with my discretionary power in this respect than I have to interfere with his; and it can only be due to an exaggerated sense of self-importance that any Judge, whether Chief Justice or a Puisne Judge, would even attempt to interfere with his colleague's method of work.[137]

He felt Edge had transgressed his authority in depriving him of his jurisdiction in criminal cases, in first appeals and in original trials.[138]

Syed Mahmood was of the opinion that underlying the disagreements regarding how the court should be run was Edge's perception that his authority was under threat. Throughout his years on the bench, Mahmood had frequently objected to procedures which he considered unjust or inequitable, and had written minutes suggesting revision to those procedures, as has already been discussed in chapter one. Regarding Edge's responses to those criticisms and suggestions he now wrote, "Almost every suggestion made by me with reference to the working of the Court is liable to be taken by him as due to some motive, or as an attempt to trench upon the authority of the Chief Justice, and almost always as a piece of officiousness on my part dictated by a desire to make myself too prominent in the Court."[139] Syed Mahmood took pains to explain that he had no desire to usurp the authority of the Chief Justice, and that he too was vitally concerned about the smooth functioning of the court, but not at the expense of justice and equality.

In addition to addressing Edge's perception of a challenge to his authority, Syed Mahmood also commented on Edge's desire to control and dominate those around him. In

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[136] Ibid.: 11.
[137] Ibid.: 47.
[138] Ibid.: 56.
[139] Ibid.: 63.

his list of complaints against Mahmood's performance as a judge, Edge had noted, "He has got completely from under the influence and control of myself and the other Judges of the Court, and, unless some superior authority interferes, it will be useless to expect any material assistance from in the disposal of work."[140] In his response, Mahmood discerned an element of racial superiority. He believed that when Edge came to India from England, he was not fully aware of the exact status and power which his office as Chief Justice implied, and was probably under the impression that a Chief Justice was "a kind of autocrat, even in reference to his Puisne Judges, specially those who happen to be natives of India."[141] Mahmood interpreted Edge's conduct with regard to the posting of the Day's List as one expression of that tendency to control. He wrote, "What [Edge] evidently preferred was to keep to *himself* the power of moving me from one Bench to another without even a moment's notice and without my having any knowledge of what I had to do the next day."[142] Again, Mahmood appealed to his conviction that the judges were equal in their authority, and insisted that Edge had no justification for his aspersions.

The second major area of contention, differences over specific legal judgments, was surmised by Syed Mahmood to be another fundamental motivation for Sir John Edge's charge sheet. He stated:

> So far as I can judge, it seems to have left an impression upon his mind that I have not adequate respect and veneration for his knowledge of law and jurisprudence; for otherwise (as he probably thinks) I would almost always agree with him as often as his other colleagues, the Puisne Judges. I have been led to this surmise principally by the fact of the number of cases in which, not being able to accept his view of the law, I have had to deliver dissentient judgments, followed, as they generally have been, by strained relations between him and me shown by his coldness of manner and words in his official intercourse with me.[143]

In this area, he concluded that Edge felt threatened—not in his authority as Chief Justice, but in his competence as a judge. Here, too, Syed Mahmood insisted on his independence and his equality with all the other judges. He claimed for himself the "same judicial pow-

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[140] Ibid.: 9.
[141] Ibid.: 59. He makes another allusion to Edge's imperialism later in the letter when he says, "If John Edge had only allowed himself enough time to understand the Indian laws and the facts of Indian life, before assuming the position of '*Veni, vidi, vici*,' he might have made even a better Chief Justice of a Court than he is now." Ibid.: 64.
[142] Ibid.: 11.
[143] Ibid.: 7.

ers for purposes of the administration of justice in the High Court as Sir John Edge."[144] He especially disliked the idea of being patronized by Edge or by any other British judge because he was a native of India. He saw the office of Puisne Judge to be held by Her Majesty's pleasure, not dependent upon the Chief Justice's "frowns or smiles." If it was dependent upon those, he wrote, that office "is not suitable for a man of my temperament and views of life and duties as one of Her Majesty's Judges of this Court."[145]

Unlike his response to Edge's perceived threat to his authority, in this case Mahmood did not rush to assure him that his suspicions were groundless. Syed Mahmood did question Chief Justice Edge's competence as a judge, at least as a judge in a court in India, though admittedly, this questioning was in large measure a reaction to Edge's own attacks on Mahmood's abilities. In his defence, Syed Mahmood repeatedly contrasted his own experience, both as a barrister working in the Allahabad High Court, and as a District Judge in Awadh, with Edge's complete lack of any experience in any other level of the Indian judiciary or even the Indian Civil Service until he arrived in India to serve as Chief Justice. Mahmood rejected, therefore, any attempt by Edge to lecture him on his actions and how they might impinge on the convenience of the other court officials.[146]

Mahmood continued his self-defence by stating that rather than being less able as a judge, he frequently had to compensate for Edge's lack of ability and knowledge of the Indian context. He had frequently found it necessary to help Edge by explaining to him the "facts of native life," especially in helping him "to appreciate the weight of the evidence of native witnesses as to allegations resting entirely on oral evidence or as to the genuineness of contested vernacular documents."[147] He questioned whether Edge could competently conduct an original civil trial in that province without some help. Even in connection with criminal trials (which Edge had particularly removed from Mahmood's jurisdiction), Mahmood declared that in such cases, involving "minute details of *Indian life*, both as to the motive of the offence and as to the facts justifying or preventing a sen-

[144] Ibid.: 25.
[145] Ibid.: 60.
[146] Ibid.: 9-10, 45.
[147] Ibid.: 30.

tence of punishment, I claim to be a better judge of fact than Sir John Edge can ever claim to be."[148]

In addition to understanding Indian customs better, Mahmood also noted that he knew the rules of law—the law of evidence in particular—as good as or better than Edge. Although the law of evidence as it had been codified in India was based mainly on the rules of the English law of evidence, there *were* significant differences of which Edge might not have been fully aware because of his lack of experience in Indian courts generally.[149] He extended this comparison to other branches of law and stated that Edge did not have full familiarity with those branches which formed the basis of most of the cases appearing before them in court, namely Hindu law, Muhammadan law, law of mortgage, rules of equity, and the law of tenure as practiced in that part of the country, and that he needed the help of his colleagues including Mahmood in preparing his decisions.[150]

Syed Mahmood responded decisively to the charge that he disrupted the efficiency of the court by taking too much time to write his judgments. He did not deny that he frequently submitted a dissenting judgment when sitting with other judges on a bench, but he did reject that accusation that he had dissented for the purpose of obstructing the functioning of the court. Instead he took seriously his responsibility in preparing judgments in accordance with his understanding of the law and the evidence presented. His dissentient judgments were thoroughly researched, and he felt hurt that they were met with displeasure and disapprobation.[151] Because he wanted to be thorough in preparing his decisions in which at times he dissented from his fellow judges, Syed Mahmood frequently "reserved" his judgments rather than delivering them immediately upon the conclusion of the cases.

In his letter of complaint, Chief Justice Edge had accused of him of dilatoriness because he took an inordinate amount of time to complete his decisions. Mahmood dealt with this charge at length. He said that careful preparation of a judgment in difficult cases required extra thought; a judge who seldom reserved his judgment and acted upon his first thought ran the risk of "laying down a rule of law in opposition to an earlier ruling of the

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[148] Ibid.: 56.
[149] Ibid.: 57-58.
[150] Ibid.: 26.
[151] Ibid.: 7-8.

court without even knowing of its existence in the published reports."[152] Mahmood stated that in recent years almost all the volumes of the Allahabad series of the Indian Law Reports contained contradictory rulings resulting from the absence of such careful reflection and research. Syed Mahmood recognized that his dissentient judgments hurt Sir John Edge's vanity as he probably thought that Mahmood did not entertain enough respect for him as a jurist and a lawyer to adopt his judgment. Mahmood's response was to list 14 other judges of other high courts in India with whom he did express agreement in one such dissenting judgment, adding with regard to the extra time he had taken to write it: "For writing a judgment is not like grinding corn, and the labour of writing a judgment increases when a Judge has to justify a dissent from the majority of his colleagues."[153]

Syed Mahmood noted that frequently his lengthy judgments were written for the purpose of assisting his colleagues. To buttress his argument, he gave several examples of decisions he had given which were *not* dissentient judgments, but were adopted without much further commentary by the other judges.[154] In many cases when sitting with other judges, he would not only deliver his own judgment but also deliver one on behalf of the others at their request. In cases involving questions of native customary law or Muslim law in particular, Mahmood felt a special responsibility to do extra work in preparing a comprehensive decision, bringing a full understanding of Muslim law to bear upon the questions presented. Because of the need to research numerous Arabic and Persian law texts, such cases naturally demanded more time than others. He described how he had needed to consult rare texts unavailable in the court's library when dealing with difficult questions of Shi'i law, and transcribe lengthy passages in Arabic which were subsequently printed in the published report.[155] He considered it his duty to help to maintain the position the Allahabad High Court had inherited from its predecessor, the Sadr Adālat of Agra, of being "the most authoritative Court in the administration of the Muhammadan law," and this could only be done by taking the extra time such judicial work required.[156]

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[152] Ibid.: 11-12.
[153] Ibid.: 23.
[154] Ibid.: 26-27.
[155] Ibid.: 22-23, 37, 44.
[156] Ibid.: 12.

In addition to appealing to the need for extra time in preparing dissentient judgments and in preparing judgments on difficult questions of Muslim law, Syed Mahmood justified his taking extra time on reserved decisions by appealing to the benefit it was for the litigants. He saw it as his duty to deal clearly with every point in a case and dispose of it individually if it had not been addressed specifically in a previous ruling. He wrote:

> I have both as a District Judge and as a Judge of this Court uniformly held it true as a principle which should guide a Judge in delivering his judgment that it is *not* intended *only* to satisfy his own mind and to be intelligible only to lawyers engaged in the case, but that it should convey to the litigant parties the assurance that the dispute between them has been understood by the Judge and disposed of by him for the reasons mentioned by him in his judgment.[157]

When the client was satisfied that he had been fully heard and that the judgment had answered all the questions of the case, there would also be less likelihood of appeal, thereby reducing the work of the court and the expense for the parties involved. Thus, Mahmood was convinced that his method of delivering full judgments had apparently succeeded in achieving such a result. When he did protest the delivery of "laconic and unintelligible judgments" by his colleagues, he incurred "unpleasantness" from them.[158]

Towards the end of the letter, Syed Mahmood gave his first hint that he was contemplating resigning from the court. He commented that "if the position of a Puisne Judge of a High Court was reduced to a condition of depending for the tenure of his office upon the frowns and smiles of the Chief Justice, according as he agrees or dissents from the Chief Justice's views," it would be impossible for him to continue in that capacity for the sake of his conscience.[159] That the experience had disillusioned him is revealed in that he appears to acknowledge that the equality, friendship and understanding between the British and Indian subjects of the Queen he had persistently proclaimed throughout his career, was not possible after all. In a letter he had written to Sir John Edge but not delivered, he stated, "...you and I do not belong to the same nationality and creed and it is natural to suppose that notions of propriety and courtesy differ among people of different races and

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[157] Ibid.: 28.
[158] Ibid.: 34-35.
[159] Ibid.: 60.

creeds."[160] For his father, too, Syed Mahmood's eventual resignation proved to be the death of his longstanding dream of friendship with the British.[161]

2.3c Charge of intemperance

2.3c (1) Edge's defence and counter-charges

Chief Justice Edge's reply to Syed Mahmood's lengthy missive was brief. He addressed himself to what he considered Mahmood's main assumptions, namely that he, Edge, considered him less capable than other Judges or himself in dealing with evidence and arguments and that the cause of the official tension was displeasure on his part at Mahmood's dissentient judgments. Both assumptions, he contended, were unfounded. He wrote, "I have never thought or suggested that Mr. Justice Mahmood, when not suffering from temporary incapacity, was not as fully capable of considering the relevancy of evidence, estimating the value of evidence and arguments and correctly applying the law to facts as any Judge of the Court, including myself."[162] He then went on to state explicitly that this "temporary incapacity," to which he had referred only very obliquely in his first letter, was a recurring problem with drunkenness. "The cause why Mr. Justice Mahmood was some times incapable of attending to the evidence or arguments as a case proceeded, necessitating a repetition of such evidence or arguments, was that on such occasions, Mr. Justice Mahmood came to Court suffering, obviously, from the results of intemperance overnight."[163] Edge considered these intemperate habits, combined with excessive smoking and possibly the keeping of late hours, the main cause of Justice Mahmood's not attending to his work in and out of court, and making the transaction of business with him in court and at meetings irksome and difficult. He had hoped that Mahmood would amend his ways, but felt compelled by his letter to speak plainly on the subject and request the government's intervention. Edge went on to deny that he was ever influenced by Syed Mahmood disagreeing with him in his judgments.

Syed Mahmood's drinking habits had been commented on previously, but only in private correspondence. Mention has already been made of Chief Justice Petheram's ob-

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[160] Ibid.: 25.
[161] Lelyveld, "Macaulay's Curse," 210-213.
[162] Letter by Sir John Edge to J. D. LaTouche, 7 July, 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, p. 1.
[163] Ibid.: 2.

jections to Syed Mahmood's appointment as puisne judge as early as 1885, in which his drinking habits had been a major complaint.[164] Before Sir John Edge had made his accusation officially in the letter, he had already informed the Lt.-Governor regarding Mahmood's intemperance, who in turn commented on the matter to Viceroy Lansdowne in a letter regarding the need for qualified natives for the Viceroy's Legislative Council. "It is unfortunate that Sayyid Mahmud has turned out so badly in the High Court. The real truth is that he is drinking himself to death, and can not work for any time. Sir John Edge tells me that he has been drunk on the bench. But unfortunately he is not the only Judge who is given to this weakness, and this part of the case has been kept out of view."[165] But with Mahmood's stinging rejoinder, Edge apparently felt that the matter could no longer be kept out of view, and made the accusation official.

2.3c (2) Syed Mahmood's rebuttal

In his own defence, Syed Mahmood responded with another lengthy letter, consisting of 105 hand-written pages.[166] In it Syed Mahmood did not address Edge's charge of intemperance until the last quarter of the letter, where he denied it completely and tried to account for the lapses of attention which Edge had offered as evidence of inebriation:

> I entirely deny that I indulged in intemperate habits of private life or that such habits or any other kind of immorality has prevented my giving due attention and reasonable time at home to my official work, and considering that beyond the study of books and authorship I have no personal taste whatsoever for games or sports, I can confidently say that I devote more time to my official work than Sir John Edge or Mr. Justice Tyrell, those two gentlemen being the only remaining Judges of the Court who held office during the period to which the discussion relates.[167]

In suggesting possible reasons for his apparent inattentiveness, Syed Mahmood blamed the schedule set by the Chief Justice requiring him to be present in court when he was overly tired from sitting up all night preparing his lengthy judgments. "In such cases the

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[164] H. C. Maine, London, to A. C. Lyall, 16 Sept. 1885, Mss Eur F132/45, European Manuscripts, Lyall Collection – papers of Sir Alfred Comyn Lyall (1835-1011), British Library.

[165] Letter by Sir C. H. T. Crosthwaite, Lt.-Gov. of the N.-W.P & Oudh, Allahabad, to the Marquess of Landsdowne, 21 Dec. 1892, European Manuscripts, Landsdowne Collection, Papers of the 5th Marquess of Landsdowne as Viceroy 1888-94, Mss Eur D 558/23.

[166] Letter by Syed Mahmood, Aligarh to J. D. LaTouche, 9 Sept. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London. Whereas the previous letter had been typeset at the government's expense, this one was not done so, perhaps indicating the government's dissatisfaction with his response which basically covered the same ground as his 30 Oct. 1892 letter.

[167] Ibid.: 81-82. He had prepared tables to demonstrate the amount of time each judge had spent at court.

fatigue, to say nothing as to the irksomeness of the work, is very exhausting especially during the four months of the hot weather and during the three or four months of the rainy season which has been somewhere very aptly described by Lord Macaulay as the climate of a Turkish bath."[168] Another possible reason for the apparent suspicions, he ventured, might have been his practice of submitting his lengthy decisions in written form rather than reading them. The Chief Justice may have wrongly concluded that he was not well enough to do so, when his intention was simply not to waste the time of those in court. Mahmood wrote that this charge of intemperance had taken him completely by surprise, and felt that it would never have been made had the disagreement over the Muḥarram holidays not taken place; and his remarks on Edge's first letter had only increased Edge's indignation.[169]

In his letter Syed Mahmood returned to the issue of his dissentient judgments and his conviction that they lay at the heart of Sir John Edge's complaints. In supporting his contention, he covered much of the same ground he had already traversed in his first reply. He defended his insistence that he had the right to contribute to all the administrative matters of the court—a demand with which Edge disagreed and for which he accused Mahmood of obstructing the functioning of the court.[170] On the contrary, Mahmood argued, his complaint and subsequent actions had led to the formation of definitive rules for the functioning of the court. In effect, his contribution had been the unpleasant task of highlighting the confusion created by the absence of such rules and the beneficial result of prompting their production. Additionally, his agitation over the matter of the *Chahlam* holidays had led to their being recognized officially. He described his efforts to enlighten his fellow judges as to the significance of the various Muslim holidays, continuing his narrative of his first letter.[171] In fact, much of this second letter was a reiteration of his earlier arguments, elaborating his defence against the charges by Edge in his first letter, which he felt had cast aspersion on his character and career as a judge, with no other object than seeking to remove him from the bench. He went on to address a lengthy criticism of his work made by Chief Justice Edge in a ruling on the case Wali Ahmad Khan v.

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[168] Ibid.: 78.
[169] Ibid.: 93.
[170] Ibid.: 4-32.
[171] Ibid.: 36-47.

Ajudhi Kandu, which Mahmood took to be a veiled accusation that he had shown partiality to the Muslims who were trying to prevent the demolition of a *masjid* (mosque) by the Hindu owner of the land where it was located.[172] Mahmood contended that whether his view of the case was right or wrong, it was neither frivolous nor contemptible, and most certainly did not justify Sir John Edge suspecting him of base and dishonestly partial motives.[173]

At the time of writing, Syed Mahmood had been contemplating various courses of action against Edge including criminal prosecution for defamation, civil suit for recovery of damages for slander and libel, and an enquiry under the Public Servants Act, none of which he decided to pursue upon further consideration.[174] Instead, he decided to submit an application for retirement and pension, leaving the matter entirely in the hands of the government as to how they wished to respond. In a separate letter, he outlined his years of service in various government departments beginning with his appointment as a District Judge in Rae Bareli in 1879. Despite the ill-treatment he had received, his letter to the government still professed his undying loyalty to the British regime, though his bitterness and hurt is apparent.

> "If my services to Government ever since the 1st of August 1879, now exceeding 14 years, are not considered worthy of deserving any recompense by way of pension, I shall consider myself under the lamentable necessity of asking permission to be allowed to retire without any pension, as I am convinced that matters relating to pension are matters of favour rather than of any legal right. In any event my feelings of sincere loyalty and devotion to Her Majesty the Queen-Empress and sense of gratitude to Her beneficent rule in India, which have animated my family ever since the British rule reached my native city of Delhi, and whose devotion remained steadfast even during the most disastrous and trying circumstances of the Mutiny of 1857, will continue unabated in me, and so long as I live I shall always be ready to render any service in my power which I may be called upon to render to the British rule in an unpaid and merely honorary position."[175]

In the correspondence among various levels of government that followed, Sir John Edge's version of the events were generally accepted as more accurate, and his com-

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[172] *The Indian Law Reports*, 13 All. 537 (18 Mar. 1891) Wali Ahmad Khan v. Ajudhia Kandu.
[173] Letter by Mahmood, 9 Sept. 1893, pp. 98-102.
[174] Ibid., pp. 113-121.
[175] Letter by Syed Mahmud, Aligarh, to the Chief Secretary to the Government of the North-Western Provinces and Oudh, 9 Sept.1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London.

plaints against Mahmood's working habits as valid, even though it was recognized that there had been misunderstandings on both sides. In seeking to explain Mahmood's outburst in the summer of 1892 that led to the acrimonious exchange, Sir Charles H. T. Crosthwaite, the Lt.-Governor of the N.-W. P. and Oudh, concluded that "his annoyance was caused by the action of the Chief Justice in mentioning to the members of the Bar deputation Mr. Mahmud's views regarding the Muharram holidays," placing him in an unpleasant position towards his co-religionists, and provoking him to act as he did to set himself right with the Muslim community.[176] After the first exchange of letters, the government admitted that it was difficult for anyone outside the court to give an opinion on the controversy. The question that had to be addressed, however, was what was to be done when Syed Mahmood returned from furlough towards the end of 1893. The question was solved with Mahmood submitting his application for retirement after the second letter of accusations by Chief Justice Edge. In a letter to the Secretary of State, the Earl of Kimberly, the Government of India recommended that the controversy should be closed without further comment on Edge's charge of intemperance and Mahmood's denial, that Mahmood's resignation be accepted, and that a pension of £600 a year be granted to him even though he might not be entitled to it according to a strict interpretation of the rules.[177] Syed Mahmood accepted the pension, expressing his gratitude, and requesting that his gratitude be passed on to the Queen.[178]

2.3d Interpreting the conflict

2.3d (1) Clash of personalities

One way to interpret the conflict between John Edge and Syed Mahmood is to see it as purely a clash of personalities. The *Pioneer*, which had taken the Chief Justice's side throughout the initial conflict in 1892, blamed Syed Mahmood's obstinacy for the falling out when it reviewed his career upon his eventual retirement a year later. The paper felt he lacked tact and the capacity to accommodate himself to the circumstances around him,

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[176] Letter by the Chief Secretary to Government, N.-W. P. and Oudh, Naini Tal, to the Secretary to the Government of India, Home Department, 11 Jul. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London.

[177] Letter 341 from Government to Secretary of State, Earl of Kimberly, dated 18 Oct. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/361, File 2195, date 18 Oct 1893, British Library, London.

[178] India Office Records, Public and Judicial Department Records, L/PJ/6/366, File 184, date 17 Jan 1894.

and that he had a passion for "pedantic love of intellectual display," that made it difficult for others to work with him.[179] These traits, then, were also the ones that cause the irreparable rift between Mahmood and Edge.

> He wanted tact and moderation to a degree and his differences both the late Chief Justice of the Allahabad High Court and the present Chief Justice have been deplorable. Full of crotchets and idiosyncrasies, he has always taken a pleasure in being in the minority. Loyalty to his colleagues he had none, and especially in later years he rather sought friction than avoided it. With all this, however, there is no doubt that some of his judgments will have a permanent place in legal literature.[180]

Mahmood's later troubles with his father and the officials of the MAOC indicate that there was some truth to these propositions. The Calcutta paper, *The Moslem Chronicle and the Muhammadan Observer*, also commented on Mahmood's independent streak and what it cost him in his chosen profession as a government servant. "Too much of that self-assertive individuality, of that wild almost sporting, independence which while it might have been a faithful ally to many a man whose deeds stamped the times with their characteristics or whose exploits, with dramatic suddenness, turned an epoch in history, in the late Mr. Mahmood's case yoked as he was to service it proved his ultimate ruin."[181] But in the clash of personalities, the fault did not lie with Mahmood alone; Sir John Edge displayed a considerable amount of intransigence and arrogance in his dealings with Mahmood. Mahmood repeatedly commented on what he saw as Edge's vanity leading him to oppose Mahmood's independence. To some extent, then, the conflict did arise from the disagreements between two individuals with incompatible personalities. But there are strong indications that the roots of the conflict lay deeper.

2.3d (2) Striving for equality and rights

Beyond the personalities of Edge and Mahmood, the conflict was indicative of the broader tension the British and the Indians with regard to equality and religious identity. Beginning with the flashpoint at the end of July 1892 involving the Muḥarram holidays, Mahmood together with the Indian lawyers resisted the efforts of Chief Justice Edge to

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[179] As quoted in: "The Hon'ble Mr. Justice Syed Mahmud," *The Aligarh Institute Gazette*, 28, no. 78, 29 Sept. 1893, p. 969.
[180] Ibid., p. 972.
[181] "The Late Mr. Syed Mahmood," *The Moslem Chronicle and the Muhammadan Observer: Weekly Newspaper of Politics, Literature and Society*, 16 May 1903, 149.

restrict the enjoyment of the holidays to those who would declare themselves to have conscientious objections to working during those days. A major emphasis of Syed Mahmood's *obiter dictum* delivered publicly in court was that his equality with Edge as a judge of the High Court demanded the courtesy of consultation before being assigned to work during the Muḥarram holidays, *without* having to take refuge behind religion or religious identity. He stated, "I decline to hold that in regard to matters of holidays of any particular creed or nation any such requisition should be made necessary."[182] The authority to which he appealed to sanction his decision not to work during those days was his authority as a judge holding his appointment at the pleasure of the Queen, not of any British official in India including the Chief Justice.

The Muslim members of the Allahabad Bar followed Syed Mahmood's lead, and declared their intention to reschedule their work until after the Muḥarram holidays. When asked if their intention was based on conscientious scruples, they responded, "Our conscience has nothing to do with it. We have the right that this holiday should be allowed without any conditions."[183] The English press took the side of the Chief Justice with the *Pioneer* declaring, "If the Mahomedans of the High Court refuse special treatment on the ground of their religion, they *ipso facto* destroy any claim for special treatment at all."[184] The *Times of India* likewise declared, "The attitude of the Mahomedan Judge and of his co-religionists at the Bar was, indeed the attitude rather of punctilious agnostics than of zealots doing battle by protest against an infringement of the dignity and liberty of their creed, and as such it claims no special sympathy from their co-religionists."[185] Apparently, objections on religious grounds were to be tolerated, but claims to equality were not. One Muslim barrister responding to the reporting of the matter in the *Pioneer*, cut to the heart of the issue when he questioned why the Muḥarram holidays were chosen to be curtailed, and not the Christmas or Easter ones, or even the "Long Holiday" that lasted several months every year.[186] Rather than treating all the members of the Bar with equality regardless of creed or nationality, the British preferred to enforce communal identities

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[182] "High Court, N.-W. P.: The High Court Cause List." *The Pioneer*, 28 July 1892, p. 3.
[183] Ibid.
[184] *The Pioneer*, 2 Aug. 1892, p. 1.
[185] As quoted in *The Pioneer*, 9 Aug. 1892.
[186] "The Mahomedan Barristers *vs.* the High Court and the Pioneer." *The Pioneer*, 11 Aug. 1892, p. 6. The letter to the editor is signed, "Lex."

and convert "rights" into "privileges" to be enjoyed contingent upon a self-identification with a specific communal grouping.[187]

2.3d (3) Defining religion

The emphasis on the religious aspects of the controversy by some of the British commenting on it reveals an essentialist understanding of "orthodox" Islam. One letter to the editor of the *Pioneer* expressed his perplexity at Sunni Muslims expressing such respect for the Muḥarram holiday, which he described as full of Hindu and even pre-Islamic influences. He then insisted that the only measure for "orthodoxy" in Islam could be the Qur'ān.

> How it happens that events concerning which the Sacred Book of the Faith contains not a single word, and concerning which the founder of the faith said absolutely nothing, can be elevated into an affair of "conscience," it is impossible to understand... For there is but one document which all Mahomedans are supposed to accept as authoritative, and that is the Qoran. Were a Mahomedan to cite a passage from that book as the ground of his conscientious difficulty, I should admint the validity of the plea, and should honour the man who should show such regard for the Qoran. But that Sunnis should now at length frame their conscientious scruples on Shia literature and mere Shia-ite observances, is surely a "new thing under the sun."[188]

This discourse of orthodoxy was replacing internal definitions of the Muslim groups themselves, and insisted on the idea that the religious community had "fixed beliefs determined at the time of its origins and which were discoverable by an inquiry of objective experts."[189]

Similarly, a personal letter written by W. E. Neale, a long-time civil servant saw Syed Mahmood as heading up the "Musulman Bar" and leading them in opposition to the British. "A prominent Musalman holds up his finger, and in a second all his co-religionists gather round him," he wrote, in his complaint to the Viceroy.[190] He went on to describe how Mahmood had been treated as one of the most favoured Muslims in India,

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[187] Amirita Shodhan has explored the formation of "religious community" as a legal concept in British colonial law in the 19th century; see: Amrita Shodhan, *A Question of Community: Religious Groups and Colonial Law* (Calcutta: SAMYA, 2001).

[188] "Mahomedan Orthodoxy," *The Pioneer*, 16 Aug. 1892, p. 6. The letter to the editor is signed, "X."

[189] Shodhan, *Question of Community*, 4.

[190] Letter by W. E. Neale, Commissioner, Agra, to Marquess of Landsdowne, 2 Aug. 1892, accompanied by "Confidential Memo," European Manuscripts, Landsdowne Collection, Mss Eur D 558/23, British Library, London.

had received special honours in England, had been promoted than was his due in India, and had received quick responses to his demands for parity in pensions. That one so favoured could then demonstrate such opposition to the regime, was for Neale a warning the government should heed.

> Here is a very able man, a thoroughly well educated man, who has spent his youth in England, where he was most kindly received, a man who is not a bigot (probably, indeed, of no specific religion), a man who has been given all the rank and pay that could be given to a person of his profession, and yet he is ready to league with his brother Musalmans, though he is known to be an alien from their creed, against the English at a moment's notice. If these are the feelings of such a man with such advantages, what must be the feelings of the mass of uneducated and unbeneficed Musalmans? Personally, I may add I like Mr. Mahmud. He is a most interesting person to talk to, with certain allowances, and no doubt he is a great lawyer, so that I can have no personal bias against him. But I think, as a typical specimen of his class, he is worth studying.[191]

Such a letter demonstrates the lingering suspicion of Muslims that Englishmen living in India continued to harbour from the time of the Revolt of 1857. Any evidence that Muslims were rallying together in the name of religion immediately raised fears that British rule was under threat.

Paradoxically, though he presented Mahmood as a prominent Muslim with the power to gather his co-religionists to him, Neale then described Mahmood as alienated from his creed. This reveals another ingrained perception regarding the Muslim community and their religious beliefs. Islam was seen by many Europeans as rigid, incapable of modernizing; anyone such as Mahmood who sought to be a Muslim while adopting modernist attitudes and European habits was therefore to be classified as having left his religion. This construction of Islam permitted only the traditional *'ulamā* and a strict interpretation of the Qur'ān to define what a true Muslim looked like. Muslims such as Mahmood who did not fit that mould were denied the right to define themselves as Muslim. Syed Mahmood's efforts to bring Islam into conformity with the modernist ideas he had adopted were decidedly evident in his understanding of Muslim law and the transformation it had undergone under British rule, as is examined in the following chapters.

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[191] Ibid.

Chapter 3: Syed Mahmood's understanding of Muslim law

Syed Mahmood was one of the first Indian Muslims to adopt the framework of English law and to reformulate Muslim law according to that idiom. One who had preceded him was his contemporary, Syed Ameer Ali, who, in 1880, published a volume on the Muslim laws concerning marriage, divorce, succession, and status—the first such endeavour in the English language by an Indian Muslim.[1] The volume embodied a series of lectures Ameer Ali had delivered as lecturer on Muslim law at the Presidency College of Calcutta. In 1885, he followed that publication with another on the Muslim law relating to gifts, trusts, and wills, based on his 1884 Tagore Law Lectures at the Calcutta University.[2] His writings and Syed Mahmood's judgments in the Allahabad High Court set a new pattern for Muslims to follow in understanding their law.

Whereas earlier Muslims had co-operated with their British rulers in the processes of translation and adjudication to transform Muslim law since 1772, the power of education to transform the way Muslims thought about their law now became startlingly clear. Young Muslim men such Ameer Ali and Syed Mahmood returned to India after receiving their legal education in the Inns of Court in London and climbed to new levels of influence in the civil service. There they were prepared to define Muslim law in the terminology and constructs of English jurisprudence demonstrating the transformation that had occurred. After Ameer Ali published his two volumes on Muslim law, other Muslim jurists followed his pattern of systematically organizing those parts of Muslim law that the British government ruled as valid in India. Two such writers were Muhammad Yusuf Khan Bahadur,[3] and A. F. M. Abdur Rahman (Inner Temple, 1880), who published di-

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[1] Syed Ameer Ali, *The Personal Law of the Mahommedans, according to all the Schools, together with a Comparative Sketch of the Law of Inheritance among the Sunnis and the Shiahs* (London: W. H. Allen, 1880).

[2] Syed Ameer Ali, *The Law relating to Gifts, Trusts, and Testamentary Dispositions among the Mahommedans, according to the Hanafi, Maliki, Shafei, and Shiah Schools, compiled from Authorities in the Original Arabic with Explanatory Notes and References to Decided Cases, and an Introduction on the Growth and Development of Mahommedan Jurisprudence*, Tagore Law Lectures, 1884 (Calcutta: Thacker, Spink & Co., 1885). Revised editions of these two volumes were published repeatedly, both during Ameer Ali's lifetime and after, as volumes two and one respectively of his *Muhammadan Law*.

[3] Muhammad Yusuf Khan Bahadur, *Mohamedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors, according to the Soonees*, 3 vols. (Calcutta: Thacker, Spink & Co., 1895, 1898).

gests of Muslim law.[4] While these digests focused on presenting Muslim laws applicable in Anglo-Indian courts in a systematic framework, other writers from that same period sought to analyze the transformation of Muslim law in more depth. Notable among these works were those by Syed Karamat Husein (Middle Temple, 1889),[5] Abdur Rahim (Middle Temple, 1890),[6] and Faiz Hassan Badruddin Tyabji (Middle Temple).[7] Still others such as S. Khuda Bukhsh,[8] and Syed H. R. Abdul Majid (Gray's Inn, 1906)[9] published their shorter writings in journals.

In examining Syed Mahmood's perspective of Muslim law, it must be kept in mind that much of this writing was done for a British audience in the form of law reports and minutes on bills proposed by the government. Syed Mahmood accordingly discussed Muslim law in an idiom that would be understandable in that context, framing his discourse in the language of the British judicial and administrative system. Furthermore, since it was always his intention to promote the understanding of that idiom among his fellow Indians and to bridge the differences between the British and the Indians, even those writings or speeches directed at his fellow Muslims were not confined to the traditional discourse of Muslim law.

3.1 Origin of the law: the Prophet and the Qur'ān

Syed Mahmood considered Muslim law to have been founded by the Prophet Muhammad whose political administration he described as republican. He stated of the Muslim law of pre-emption in particular, that it "was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe."[10] Such a designation of the early Muslim state as "republican" was not unique to Syed Mahmood, since one of his father's close associates, Chirāgh 'Alī (1844-1895) had published a work two years previously in which he argued a similar idea.

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[4] Abdur Rahman, *Institutes of Mussalman Law*. Abel Fazl M. Abdur Rahman was the eldest son of Maulavi Abdul Latif Khan Bahadur.
[5] Husein, *Treatise on Right and Duty*.
[6] Rahim, *Principles of Muhammadan Jurisprudence*.
[7] Tyabji, *Principles of Muhammadan Law*.
[8] Khuda Bukhsh, "Origin and Development."
[9] Abdul Majid, "Historical Study." Abdul Majid, "Historical Study, II." Abdul Majid, "Moslem." Abdul Majid, West, and Wilson, "Wakf."
[10] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 782.

> The Mohammadan States are not theocratic in their system of government, and the Mohammadan law being based on the principles of democracy is on this account a great check on Moslem tyrants. The first four or five Khalifates were purely republican in all their features. The law, when originally framed, did not recognize the existence of a king, of a nobility, or even of a gentry in the sense in which the term was at first understood.[11]

At the time he wrote the book, Chirāgh 'Alī was working in the Hyderabad administration, and would have had opportunities to discuss his ideas with Syed Mahmood during his service there in 1881.[12]

According to Syed Mahmood, the genesis of Muslim law in this type of political context had a definite impact on its content. This is demonstrated in comments made on a bill regarding the Muslim laws of inheritance. While his father was sitting as a member of the Viceroy's Legislative Council in 1879, Syed Mahmood assisted him in preparing the Muslim Family Waqf Bill, the aim of which was to enable Muslims owning landed estates to prevent the disintegration of their property through the Muslim rules of inheritance being enforced by the British, by voluntarily placing their estates under the operation of the proposed law.[13] In reviewing the historical development of the rules of inheritance under Muslim law, Aḥmad Khān described how the republican nature of the system of government under the Prophet Muhammad and his immediate successors, the *khalīfahs*, shaped the early Muslims' understanding of property and inheritance.

> The son of a *Khalifa* did not necessarily succeed him; each successor was chosen from amongst the people by election. Under a system of government so essentially republican, society recognized no distinctions of rank or position; and to a society such as the Mohammadan community then was, the Mohammadan law of inheritance is perfectly suited. It prevents the accumulation of property in individual hands, and provides for its distribution on a scale larger than, I believe, is provided by any other law.[14]

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[11] Chiragh 'Ali, *The Proposed Political, Legal, and Social Reforms in the Ottoman Empire and Other Mohammadan States* (Bombay: The Education Society's Press, 1883), iii.

[12] On Chirāgh 'Alī and his writings, see: Wahidur-Rahman, "The Religious Thought of Moulvie Chiragh 'Ali" (M.A. thesis, McGill University, 1982), 57-67.

[13] Letter from Syud Mahmood, District Judge Rai Bareli, Oudh, to Lt.-Col. P. D. Henderson, 15 Jun. 1881, enclosed in a letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 15 Jul. 1881, no. 35 of Letters to the Secretary of State for India, Commencing from January 1881, The Marquis of Ripon Papers: Correspondence with the Secretary of State for India, 1881, B. P. 7/3, British Library. For further discussion of the proposed bill, see: Lucy Carroll, "Life Interests and Inter-Generational Transfer of Property avoiding the Law of Succession," *Islamic Law and Society* 8, no. 2 (2001): 258-262.

[14] "Remarks on the Necessity of a Law to Provide Facilities for Mohammadan Family Wakfs," contained in a Letter from Syed Ahmed, Dover Hall, 19 Balligunge, Calcutta, to the Secretary to the Government of In-

In the changed situation in British India, however, even the wealthiest of families would be reduced to indigence as the land was divided amongst all the children as well as the parents and wives of deceased Muslim, if the heirs did nothing to accumulate wealth themselves. In a system that was no longer as egalitarian as previously, the rules of inheritance as prescribed by Muslim law were causing damage to Muslim society that Aḥmad Khān and Syed Mahmood sought to repair by introducing an act incorporating the equally venerable tradition of designating heirs through the institution of *waqf* (pious endowments).[15]

By describing the Muslim law as having been formed in this "republican" environment, however, Syed Mahmood and his father were not implying that the law was purely a secular production. They demonstrated that the rulers who followed the four *khalīfahs* adopted a monarchical form of government, but retained the Muslim law of inheritance because of their belief in its divine origin as revealed in the Qur'ān.

> The Caliphs of Baghdad succeeded each other not under the rules of the Mohammadan law such as it was understood in the time of the founder, but according to the rule of succession which was thus established. But notwithstanding this sudden change in the form of government, the law of inheritance, which was regulated by the express words of the Koran, remained intact, and, with the exception of succession to the throne, the rules of inheritance suited to a republican form of government and society, continued to be in full operation under an absolute monarchy, and in a society which was no longer republican. Mohammadan monarchs, whilst fully alive to the necessity of keeping up a nobility around the throne, felt themselves unable to alter the law of inheritance, which had its origin in the Koran itself and in the doctrines of a religion which the public looked upon as immutable.[16]

In his 1885 ruling referred to earlier, Syed Mahmood again described Muslim law in its textual form as having evolved from the Qur'ān and the sayings of the Prophet as contained in the Ḥadīth.[17] This evolution was effected by the jurists who derived law from these sources to meet the needs of the Muslim society.

Syed Ameer Ali was more systematic in his description of the origins of Muslim law than Syed Mahmood was. He maintained that it was "founded essentially on the Ko-

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dia, Legislative Department, 3 Feb. 1879, GOI, Home Judicial (B), Oct. 1879, Nos. 44-45, National Archives of India, New Delhi.

[15] Kozlowski, *Muslim Endowments*, 156-160.

[16] "Remarks on the Necessity of a Law to Provide Facilities for Mohammadan Family Wakfs."

[17] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 805.

ran," which contained the fundamental principles to regulate the various relations of life.[18] The absence of a systematic arrangement of the Qur'ān as well as its silence on many points of law was because its legal rules were enunciated "in accordance with the exigencies of the moment and the requirements of each special case," throughout the life-time of the Prophet Muḥammad. Thus the rules contained in the Qur'ān were supplemented by authoritative traditions of oral precepts delivered by the Prophet and of accounts of his daily mode of life. These traditions, or *aḥadīth*, were collected by the order of subsequent *khalīfahs*, and became another source for Muslim law. Ameer Ali reveals his Shi'i bias in his discussion of the 'Uthmān, 'Alī, and the division of the Muslim community after 'Alī's death. 'Alī, the son-in-law of the Prophet, is represented as declaring that "in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment."[19] Because of this position, he initially declined the position of *khalīfah*, which was then offered to 'Uthmān who agreed to follow the precedents of the preceding two *khalīfahs*. "The willingness of Osmān to follow implicitly the precedents established by Abū Bakr and Omar, without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines."[20] Ameer Ali felt the Shi'ahs, the party of 'Alī, were more flexible in their approach to law, and more discriminatory in their evaluation of the Ḥadīth than were the Sunnis who accepted the traditions as almost equal in authority to the Qur'ān in providing rules and regulations.[21]

3.2 Legal Developments in the early centuries of Islam

3.2a Jurists' use of Greek logic

In December of 1884, just a few months prior to the leave of absence he took in which he intended to write a work on Muslim law, Syed Mahmood wrote a judgment in which he presented some aspects of his perspective of the history of the development of Muslim law. In *Mazhar Ali v. Budh Singh* he stated:

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[18] Ameer Ali, *Personal Law of the Mahommedans*, 4-5.
[19] Ibid., 6.
[20] Ibid.
[21] Ibid., 9.

> It is a matter of the history of Muhammadan Law that when the Republic founded by the Prophet became an empire under the Khalifas of Baghdad, the exigencies of administration necessitated the establishment of Courts of Justice, for decision of disputes, and it was about that time that the jurists and doctors of the law endeavoured to frame a system of jurisprudence by supporting it with reasons deduced from those logical methods which the Arabian schoolmen had borrowed from the ancient philosophers of Greece. It was in consequence of this that the earliest systematized textbooks of Muhammadan jurisprudence were written, and by the concurrence of generations of jurists, principles and maxims were formulated and accepted as guides for judicial decision.[22]

It is evident from this quotation that Syed Mahmood considered the beginning of the Muslim system of jurisprudence to be the administrative necessity resulting from the expansion of the Muslim community and the transition of its political form from a republic under the Prophet Muḥammad to an empire under the *khalīfahs*.

The foundation of logic and reason that supported its methodology was the Greek philosophy adapted and internalized by the early generations of Muslim jurists. The numerous treatises on jurisprudence that followed were attempts to systematize this methodology. The unifying element in the diverse interpretations and applications of law, according to Mahmood, was the *ijmā'* or "concurrence of generations of jurists"; and central to that unity was the distillation of their jurisprudence into principles and maxims that were recognized as authoritative. Syed Mahmood used this recitation of the history of Muslim law to introduce one such maxim, *al-yaqīn la yazūl bilshakk* ("Certainty is not over-ridden by doubt")[23] in arguing that "the rule of the Muhammadan Law as to missing persons has arisen from a maxim relating to the subject of evidence, and the rule of *istishāb*, which is the outcome of that maxim, cannot be regarded as a rule of succession, inheritance, or marriage," and therefore not the rule which judges in British India were bound to implement.[24] His premise that the Law of Evidence abrogated the Muslim laws of evidence will be discussed later.

Syed Ameer Ali likewise recognized that the early jurists made use of non-qur'ānic material and methodology in the initial shaping of Muslim law. In his view, the presence of Jews in Arabia at the time of the Prophet accounted for the similarity of the

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[22] *The Indian Law Reports*, 7 All. 297 (6 Dec. 1884) Mazhar Ali v. Budh Singh, pp. 303-304.
[23] Ibid., p. 304.
[24] Ibid., p. 310.

personal laws of the Muslims to the Jewish domestic regulations, though he rejected any idea that the Prophet Muḥammad was guilty of plagiarism. The Prophet had simply recognized that the Jews were probably "the only people inhabiting the Arabian peninsula who possessed any organic institutions"; and considering the historic connection between the Jews and the Arabs, it was natural for Muḥammad to look to their institutions for guidance.[25] Ameer Ali recognized elements of Roman jurisprudence in Muslim law, in addition to the influences of Jewish law.

> The Abbasside sovereigns were, no doubt, surrounded by men versed in "Greek and Roman literature and science. It is not unlikely that the influence of these scholars and philosophers extended to the jealous circle of legists. It is also possible that the remains of Byzantine learning in Syria and Egypt may have affected the juridical conceptions of the men who, in the second and third centuries of the Mussulman era, built up the Sunni system of law.[26]

This influence, however, could not be verified "with any approach to historical accuracy," according to Ameer Ali, and may have been more accidental than deliberate. While these outside influences of Greek logic, Jewish family laws, and Roman jurisprudence formed the milieu in which Muslim law was initially shaped, both Syed Mahmood and Syed Ameer Ali insisted that the primary materials used the formation of the law were the Qur'ān and the Ḥadīth.

3.2b Jurists' use of the Qur'ān

While the method of reasoning in Muslim jurisprudence may have been adopted, and adapted, from Greek philosophy, the raw material from which the resulting rules were derived was the Qur'ān. In his ruling on a question of inheritance, Syed Mahmood stated, "It is well known that the Muhammadan law of inheritance is based upon a passage in the fourth chapter of the Koran..."[27] He went on to describe how the ambiguity of a phrase, "after the legacies which he shall bequeath and his debts be paid," repeated four times in the passage, presented the early Muslim jurists with specific problems relating to the respective priority of the devolution of the inheritance and the payment of debts. These problems, then, gave rise to much learned discussion on the issues, with the end

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[25] Ameer Ali, *Personal Law of the Mahommedans*, 2.
[26] Ibid., 3.
[27] *The Indian Law Reports*, 7 All. 822 (10 Feb. 1885), Jafri Begam v. Amir Muhammad Khan, p. 831. Surah an-nisā', 11-12.

result that one view became authoritative by its widespread adoption by jurists. In this instance he quoted Bayḍāwī (d. 1286), a chief *qāḍī* in Shīrāz in the 13th century, referring to him as "one of the greatest commentators on the Koran," whose views on the question "have been universally adopted by Muhammadan jurists."[28] Bayḍāwī interpreted the phrase to mean that what remained after the debts were paid was to be divided among the heirs, leading Mahmood to the conclusion that the reference "after" was not meant to determine the *timing* of the devolution of the legacies, only their content. Mahmood supported his claim to the broad acceptance of Bayḍāwī's interpretation of the Quranic passage by quoting the section of Sir William Jones' translation of al-Sajāwandī's (d. end of 12th century) *Sirājiyyah,* which he considered the "highest authority" on the Muslim law of inheritance, and which supported his interpretation. For Syed Mahmood, then, the initial source of the subsequent law was the Qur'ān. The transformation of its dictates to positive law involved early Muslim jurists grappling with the practical application of those dictates, a particular view coming to dominate by virtue of its universal acceptance.

One of Syed Mahmood's contemporaries, Chirāgh 'Alī, proposed a more radical departure from the traditional view of Muslim law.[29] He maintained that the *sharī'ah* was the "common law" of Islam, not the "pure Islam as taught by Mohammad in the Korān."[30] In his view, very few points of the civil and canon law of the *sharī'ah* were based upon the Qur'ān, having rather general and particular Arab customs as their basis. As such it was not infallible, whereas the Qur'ān in his opinion was. Islam as taught by the Prophet and as revealed in the Qur'ān inherently contained the principles of development, progress, rationalism, and adaptability to new circumstances. "Had the Prophet thought it incumbent on him to frame a civil and canon law, other than the Revealed one, he would have done so, but in fact he did not accomplish any such thing."[31] From this Chirāgh 'Alī deduced that the Prophet intended his followers to "frame any code, civil or canon law, and to found systems which would harmonize with the times, and suit the political and social changes going on around them."[32] The *sharī'ah* was just such a construction, then,

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[28] Ibid., p. 832.
[29] On the modernism of Chirāgh 'Alī, see: Aziz Ahmad, *Islamic Modernism in India and Pakistan, 1857-1964* (London: Oxford University Press, 1967), 57-64.
[30] 'Ali, *Proposed Political Reforms*, 10.
[31] Ibid., 11.
[32] Ibid.

composed of established Arabic institutions to meet the needs of the time, and, by implication, open to amendments as dictated by the changing needs of a society. Chirāgh 'Alī's insistence that Muslim law as presented in the *sharī'ah* comprised a common law, not an infallible revealed law led him to view the body of *fiqh* or Muslim jurisprudence somewhat dismissively and not with the authority of a code of law to regulate the behaviour of contemporary Muslims. As an example, he argued that the *Multaqā al-Abḥur* of Ibrāhīm al-Ḥalabī (d. 1549) was not to be considered the legal code of Turkey despite the high respect that work received by the *'ulamā* of that country. Rather, he wrote, "it is one of the several treatises compiled by different authors in every age, and in every Mohammadan country, comprising the Mohammadan Common Law. Such compilations are generally mere transcripts of one another, without possessing anything new or original in themselves."[33] Furthermore, these books were divided into the sections on *'ibādāt* (matters relating to worship) and *mu'amalāt* (civil matters), and though read in all Muslim countries, were seldom acted upon with regard to the civil portion.

> The devotional part of the law books, and sometimes the legal one relating to civil condition, as marriage, divorce, inheritance, and contracts are frequently consulted by a Mussulman who vainly searches there to arrive at any definite result as to his doubts, for to his great disappointment everywhere he comes across discrepancies and diversities of opinions on the same subject, and all left unsettled as before.[34]

Syed Mahmood never articulated such a radical departure from the traditional view of the Muslim law being based primarily on the Qur'ān, though his views on the necessity of adapting Muslim law to the current needs of society, and on the non-binding nature of the civil matters of Muslim law, certainly resonates with those of Chirāgh 'Alī.

Another modernist who proposed initiatives equally as radical as those of Chirāgh 'Alī was Delawarr Hosaen Ahmad (1840-1913) of Bengal. In an article published in the *Aligarh Institute Gazette* as early as 1877, he advocated the separation of laws pertaining to religious matters from laws pertaining to matters of social and political economy. In particular, he advocated that the British government pass laws permitting the taking of interest on loans, arguing that its prohibition in Muslim law was injurious to Muslim socieity in India. With regard to the Muslim law forbidding interest, he wrote:

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[33] Ibid., 95.
[34] Ibid., 197.

> These and all other similar laws have been taken out of the domain of progress by being improperly connected with Religion. They have been made part and parcel of Revealed Religion and are believed on the authority of an ignorant, superstitious, and intolerant priesthood [Urdu parallel translation has "*maulavis*"] to lie beyond the limits of progress. In truth however there is no real connection between Religion and the laws, social civil, or political, under which a community lives. Religious truths transcend the powers of the human understanding; while laws being phenomenal relations are amenable to experience.[35]

On this basis, then, he declared the laws of a society capable of modification and improvement. Unless such laws were modified and improved, a society was sure to decline, to disappear, and to be replaced by another whose substantive civil laws were constantly altered and remodelled in conformity to the increasing knowledge of the laws of living.[36] Again, Syed Mahmood was never so categorical in his denunciation of Muslim law, though he did share Delawarr Hosaen's understanding of a separation between those laws which pertained to civil matters and those pertaining to matter related to religious worship.

2.2c Jurists' use of the Ḥadīth

Another source for Muslim law for both Ameer Ali and Syed Mahmood was the Ḥadīth, or collections of authoritative traditions as used by earlier generations of Muslim jurists. In the introduction to his first volume, Ameer Ali delineated the various sources of Muslim law that had traditionally been accepted as authoritative. He noted that since the Qur'ān was silent on many points both legal and doctrinal, the early followers of the Prophet had supplemented that source with the oral precepts the Prophet Muḥammad had delivered. Ameer Ali argued that one of the chief differences between the Shi'ahs and the Sunnis was the differing weight of authority given to collections of these traditions. He stated that according to Shi'i doctrines, the oral precepts of the Prophet were in their nature supplementary to the Qur'ānic ordinances, and their binding effect depended on the degree of harmony existing between them and the laws of the Koran. Traditions found to

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[35] Delawarr Hosaen Ahmad Meerza, *Muslim Modernism in Bengal: Selected Writings of Delawarr Hosaen Ahamed Meerza (1840-1913)*, ed. Sultan Jahan Salik, vol. 1 (Dacca: Centre for Social Studies, 1980), 13. This article was first published with a parallel Urdu translation in the *Aligarh Institute Gazette*, (27 Nov. - 18 Dec. 1877): 1051-1052. The author was simply identified as "A Mu'tazli Musalman." I am grateful to Prof. Avril Powell with helping with the identification of this writer and directing me to the reprinted edition of his works.

[36] Ibid., 19-20.

be in conflict with the Qur'ān were eliminated, a process which was conducted upon "certain recognized principles founded upon logical rules and definite data."[37] He went further to claim for the *mu'tazilah* faction (of which he claimed to be a member) the distinctive of eliminating from the Ḥadīth all those traditions as were incompatible or out of harmony with the Prophet's teachings as explained by the philosophers and jurists of the Shi'ahs.[38] The Sunnis, on the other hand, he accused of basing their doctrines entirely on the Ḥadīth and regarding the traditions as equal in authority to the Qur'ān if they were proven to be genuine by tests framed by "certain arbitrary conditions."[39]

In explicating the various personal laws of the Muslims in the rest of the volume, however, Ameer Ali did not demonstrate how this divergent approach to the Ḥadīth affected the development of those laws. Rather, he extensively surveyed the legal literature to present the rulings of the Shi'i and the four Sunni schools, showing where they converged and where they differed, but without discussing the historical process that led to the differences. The historical component he did include was a description of pre-Islamic practice in Arabia and the positive changes wrought by the Prophet Muḥammad. He also dealt with the changes to Muslim law that had occurred in the British courts in India, but of the process of change in the intervening years between early Islam and the British colonial rule in India he had little to write.

Although Syed Mahmood did not provide a systematic outline of the various sources of Muslim law as did Ameer Ali, he did reveal more of his thinking on the dynamics of the changes that occurred. In particular, Mahmood's concept of the Ḥadīth is revealed in his handling of the question of different Muslim sects praying in the same *masjids*. In a criminal case decided by a Full Bench of the Allahabad High Court, Mahmood defended the right of Muslims of the Muḥammadiyya sect, also known as the Ahl-i Ḥadīth (or Wahhabis by their detractors) to pray in the same *masjids* as those following the Ḥanafī school more strictly, and to pronounce "*āmīn*" loudly during their prayers. He argued that the diversity of rules among the major schools of Muslim law as to the manner of pronouncing "*āmīn*" during the prayers stemmed from the diversity of the *aḥadīth*

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[37] Ameer Ali, *Personal Law of the Mahommedans*, 8-9.
[38] Ibid., 9. The *mu'tazilah* sect embraced Greek rationalism and stressed human free will and the unity and justice of God.
[39] Ibid., 9-10.

or traditions that had been transmitted and collected by earlier generations of Muslims. The Ḥanafī position that "*āmīn*" must be pronounced softly was presented in Marghīnānī's (d. 1196) *Hidāyah*, but that the doctrine was the result of weighing the authority of conflicting traditions was apparent from the commentary on that passage in the *Hidāyah* by Ibn al-Ḥumām (d. 1282).[40]

Returning to the same issue in a civil suit several years later, Syed Mahmood cited his previous ruling and expanded on it with copious quotations from Muslim works of *fiqh*, with the original Arabic being provided in the footnotes in the printed reports. He pointed out that Ibn al Ḥumām, after stating that the practice of prayers was not as uniform among Muslims as the *Hidāyah* implied, mentioned "the names of various traditionists who have differed as to whether the word *āmīn* should be pronounced aloud, and finally points out that the author of the *Hedaya* has only preferred the tradition as to its being pronounced in a low voice."[41] Ibn al- Ḥumām did not state, however, that the other traditions were untrustworthy or should be absolutely rejected, nor could he say so since those traditions were to be found in the most authoritative and celebrated collections of Bukhārī (d. 870) and Muslim (d. 875) who were "both equally acknowledged as accurate traditionists by all the schools of the *Sunni* Muhammadans."[42] Syed Mahmood went on to enter into the legal record the relevant traditions from Bukhārī and Muslim—again in English and Arabic. From those same collections, then, the followers of the other *īmāms*, al-Shāfi'ī (d. 820), Mālik ibn Anas (d. 796), and Aḥmad ibn Ḥanbal (d. 855), had evolved the opposite doctrine that "*āmīn*" should be pronounced aloud. Those who had been accused of "disturbing a religious assembly" by choosing to pronounce their "*āmīn*" aloud could therefore not be considered heterodox from a Sunni point of view, since the doctrines of all four *imāms* were regarded by Sunni Muslims as orthodox.[43] Syed Mahmood quoted Nawāwī's (d. 1277) commentary on Muslim's collection as an example of the Shāfi'ī ruling on the matter, and remarked that although the commentary was according to the Shāfi'ī school, it was nonetheless considered orthodox and authoritative by all Sunni Muslims, including both parties to the suit before him. The common source of all these

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[40] *The Indian Law Reports*, 7 All. 461 (7 Mar. 1885), Queen Empress v. Ramzan, p. 471.
[41] *The Indian Law Reports*, 13 All. 419 (4 Nov. 1889), Jangu v. Ahmadullah, p. 425.
[42] Ibid.
[43] *The Indian Law Reports*, 7 All. 461 (7 Mar. 1885), Queen Empress v. Ramzan, p. 472.

diverse rulings was the Ḥadīth, and the cause of their diversity was that the authoritative collections of the Ḥadīth themselves contained conflicting accounts in the traditions from which jurists had deduced conflicting legal rulings.

2.2d Jurist's focus on the current needs of the community

In *Jafri Begam v. Amir Muhammad Khan*, Syed Mahmood described the history of the development of Muslim law in terms of jurists producing laws—in particular, laws of procedure—which were adapted to fit a particular time. Reasons arising from the "exigencies of life" such as the difficulties of communication and travel induced Muslim jurists to frame rules of procedure which he saw as anachronistic in British India where those particular difficulties had been reduced through the introduction of modern technology.[44] Hence, he insisted that those laws were no longer to be considered binding, with preference being given to the Civil Procedure Code enacted by the British Government. Clearly, for Syed Mahmood, the human involvement of the jurists in production of the rules of Muslim law indicated both their adaptability to the existing material and social conditions of a particular region in a particular age, and their lack of rigid and universal application to all other regions and ages.

Syed Ameer Ali, likewise, found an important role for the judges to apply the dictates of Muslim law as was best suited for the times. In describing the respective authority of the "founders" of the Ḥanafī school, he quoted lengthy portions of legal texts which decreed that when a judge differences of opinion among the founders on an issue he was adjudicating, he should take note if the divergence arose from changes of circumstances in human affairs, in which case the opinion should be adopted which kept in view the changed conditions of the people. Ameer Ali emphasized that there was latitude left to a Muslim judge to choose between the opinions of the three masters in following the rule which was "most consistent with justice, the changed conditions of society, the requirements of particular localities and the needs of the inhabitants."[45] That this was a position that had a long history in Muslim jurisprudence is demonstrated by the authors he quoted. Authors who wrote works of jurisprudence focused on collecting *fatwās* from cases

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[44] *The Indian Law Reports*, 7 All. 822 (10 Feb. 1885), Jafri Begam v. Amir Muhammad Khan, p. 845.
[45] Ameer Ali, *Mahomedan Law, I*, 17.

"deemed relevant and necessary to the age in which they were writing," and were careful to exclude those "of little or no relevance to the community and its needs."[46] How Syed Mahmood extended that concept in accepting British rules of evidence is examined later in the following chapter.

3.3 Dealing with differences within the Ḥanafī legal tradition

3.3a Preference for Abū Yūsuf as a practicing jurist

Another factor which, in Syed Mahmood's opinion, had given the early jurists some flexibility in determining and applying laws was the existence of various interpretations of the relevant traditions. In the matter of pre-emption, two recensions of a tradition differed at a crucial point—one stating that it was not lawful (*lā yaḥillu*) for a vendor to sell his property until he had informed the one who would have a right to pre-empt the sale, while the other simply stated that it was not proper (*lā yaṣluḥu*) to do so—created the difficulty of distinguishing *legal* from *moral* obligations in administering the Muslim law.[47] Muslim jurists took notice of the discrepancy, and by means of syllogistic reasoning concluded that the law did not oblige the vendor to give notice of the projected sale. "The ultimate reason which prevented [the Muslim jurists] from interpreting these traditions in the sense of creating a *legal* obligation imposed upon the vendor was, that the language of the tradition being capable of two interpretations, they adopted the more lenient one, acting upon the presumption that a *legal* obligation does not exist till expressly provided, and that all contracts are lawful unless expressly prohibited by law."[48]

Interestingly, Syed Mahmood immediately followed this discussion of the medieval jurists with the acknowledgement, "I am not at liberty to interpret the sayings of the Prophet in a sense other than that adopted by the recognized authorities on Muhammadan jurisprudence."[49] This would seem at variance with the rejection of *taqlīd* by his father and other modernists such as Muḥsin ul-Mulk and Chirāgh ʻAlī, with whom Mahmood was closely associated, but other statements which will be discussed later indicate that he did feel free to employ his own reasoning in interpreting Muslim law. Syed Mahmood

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[46] Hallaq, *Authority, Continuity and Change*, 188.
[47] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, pp. 805-806.
[48] Ibid., pp. 807-808.
[49] Ibid., p. 808.

found further flexibility in Muslim law in the differences of opinion found within the same school of law. In the matter of when the consent of heirs should be given to render effective a will which exceeded the limitations imposed by Muslim law, he quoted Fakhr al-Dīn Qāḍīkhān (d. 1196) to show that jurists ascribing to the same Ḥanafī school of jurisprudence could adopt diverse methods of reasoning to reach their conclusion.[50]

In a ruling whether a wife was required under Muslim law to return to her husband if she had not received her dowry, Syed Mahmood addressed the issue of differences of opinion within the Ḥanafī school more thoroughly.[51] To elucidate what constitutes marriage and its legal consequences in Muslim law, he first cited the standard English texts used by the courts in British India, namely the 1873 Tagore Law Lectures delivered by Shama Churn Sircar, Neil B. E. Baillie's *Digest of Moohammadan Law* in which he translated those portions of the *Fatāwá-yi 'Ālamgīrī* and its commentaries that were administered as the personal law of Muslims in British India, and Charles Hamilton's translation of the *Hidāyah*.[52] Syed Mahmood, however, felt the standard translations were somewhat inadequate, and chose to give a more literal version of a couple of the passages, including the original Arabic in the footnotes for comparison. In addition to these authorities, he went on to invoke other Ḥanafī authorities such as *al-Durr al-Mukhtār* of Ḥaṣkafī (d. 1677) and *al-Fatāwá Qāḍīkhān* in similar fashion. These numerous authorities revealed some discrepancies between the ways in which the law was handled by those considered to be the founders of the Ḥanafī school, namely Abū Ḥanīfah (d. 767) and his disciples Abū Yūsuf (d. 798) and Muḥammad al-Shaybānī (d. 805). Syed Mahmood indicated that in such cases where Abū Ḥanīfah's opinion differed with the concurrent opinion of his disciples, his preference would be for that of the latter, particularly the opinion of Abū Yūsuf. The reason he gave for his preference illuminates not only his perception of Muslim law, but also his perception of himself within that tradition.

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[50] *The Indian Law Reports*, 7 All. 822 (10 Feb. 1885), Jafri Begam v. Amir Muhammad Khan, pp. 837-838.
[51] *The Indian Law Reports*, 8 All. 149 (21 Jan. 1886), Abdul Kadir v. Salima, pp. 154-160.
[52] Sircar, *Muhammadan Law*. Neil B. E. Baillie, *A Digest of Moohummudan Law on the Subjects to which it is usually applied by British Courts of Justice in India, Compiled and Translated from Authorities in the Original Arabic, with an Introduction and Explanatory Notes* (London: Smith, Elder and Co., 1865). Charles Hamilton, *The Hedáya, or Guide; A Commentary on the Mussulman Laws: Translated by Order of the Governor-General and Council of Bengal*, 4 vols. (London: T. Bensley, 1791).

> Both Imam Abu Hanifa and Imam Muhammad were purely speculative jurisconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Qazi Abu Yusaf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the *Khalifa* Harun-ul-Rashid, the advantage of applying legal principles to the actual conditions of human life, and his *dicta* (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muahmmad agrees with him, his opinion is accepted by a well-understood rule of construction.[53]

From this process of weighing the authorities, Mahmood adopted the opinion of the two disciples as representing the majority of the "three masters," and held that once a marriage had been consummated, a wife could not claim the non-payment of dower as a defence in a suit by her husband for the restitution of conjugal rights.[54]

Syed Mahmood's argument that Abū Yūsuf's opinion was to be preferred because his practical experience in applying the law does not conform to such Ḥanafī texts on rules for the *qāḍīs* as the *Sharḥ Adab al-Qāḍī* of Ibn Māza (d. 1141) who directs that when the three masters disagree, Abū Ḥanīfah's opinion is to be followed, since he was engaged in legal activity at the time of the Followers.[55] That Mahmood considered *official* practice of law as weightier than the private issuing of *fatwās* gives some indication that he saw his work as a judge of a high court in the British administration giving him an authority equal to or exceeding that of those scholars of Muslim law who withdrew from any involvement with the British to establish private *fatwā*-granting institutions. Syed Mahmood's conception of the development of the schools of Muslim law, then, was no mere abstraction of history, but a reality that had practical implications for the practice of jurisprudence in 19th century British India.

Ameer Ali seemed to take a similar position in his description of the development of Muslim law in his second volume. He preceded his discussion of the Ḥanafī school with a brief history of early Shi'i jurisprudence and its influence on the education of Abū Ḥanīfah. Although he seceded from the Shi'i school of law and founded a system that di-

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[53] *The Indian Law Reports*, 8 All. 149 (21 Jan. 1886), Abdul Kadir v. Salima, p. 162.
[54] Ibid., p. 167. When still a barrister, Syed Mahmood had argued on behalf of another husband in a similar case, where the judges ruled that a wife did have the right to refuse to cohabit with her husband until he had paid the dower. *The Indian Law Reports*, 1 All. 483 (14 Aug. 1877), Eidan v. Mazhar Husain. See also the comments on the earlier case by Ameer Ali: Ameer Ali, *Personal Law of the Mahommedans*, 318.
[55] Hallaq, *Authority, Continuity and Change*, 80.

verged from it on many points, Abū Ḥanīfah's exposition of the law resembled that of the Shi'ahs, leading Ameer Ali to conclude that they were the source of his original inspiration.[56] However, when it came to the matter of choosing between the opinions of Abū Ḥanīfah and his two disciples, Ameer Ali suggested that there was a general consensus of opinion among modern lawyers that Abū Ḥanīfah's dicta should be followed only in religious matters, while in judicial decrees preference be given to the doctrine of Abū Yūsuf who was an "eminent judge."[57] Although in doctrinal matters and rules relating to religious duties, the opinion of Abū Ḥanīfah reigned supreme, he considered there to be no hard and fast rule guiding the choice between the three in matters regarding secular questions. His ambivalence on this question will be noted shortly on an issue in which he opposed Mahmood's stated principle for following the opinion of two of the masters against the third, whoever they might be.

Ameer Ali's tendency to value the rulings as put into practice by judges over what he considered the theoretical writings of private individuals is also seen in his comment on the *Fatāwá-yi 'Ālamgīrī.*

> [The *Fatāwá-yi 'Ālamgīrī*] is a Digest of the Hanafi Law compiled under the authority of the Emperor Aurungzeb 'Alamgir by a selected body of jurists and judges, and embodies the rules and principles which were recognised and enforced in the Musulman Courts of justice under the Mogul rule; whilst other works, however learned and valuable or useful in elucidating the law, were after all the works of legists and jurisconsults who wrote or commentated as private individuals without the official imprimatur which gives the *Fatawi 'Alamgiri* its importance and value.[58]

The justification for this distinction is weak. First of all, the *Fatāwá-yi 'Ālamgīrī* as prepared by the Mughal *'ulamā* did not become the law of the land as administered by the emperor; rather it played a role identical to the role played by other juridical texts in Muslim history—that of a source book to provide guidance to *qāḍīs* and *muftīs* in their judgments.[59] Second, to consider the author-jurists inferior in any way to state-appointed

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[56] Ameer Ali, *Law relating to Gifts*, 16, 25-26.
[57] Ibid., 18-19. To support this position, Ameer Ali quoted the *Fatāwá Ḥammādiyah* compiled by Abū al-Fatḥ Rukn ad-Dīn bin Ḥussām an-Nāgūrī (16th or 17th century).
[58] Ameer Ali, *Mahomedan Law, II*, 295.
[59] On the *Fatāwá-yi 'Ālamgīrī* see: Alan M. Guenther, "Hanafi *Fiqh* in Mughal India: The *Fatawá-i 'Alamgiri*," in *India's Islamic Traditions, 711-1750*, ed. Richard Eaton, Themes in Indian History (Delhi: Oxford University Press, 2003), 209-230.

qāḍīs is to invert the traditional ranking of juristic roles in Muslim history. To be appointed as a judge was not seen as the culmination of a successful legal career, since a judge, "by virtue of the nature of, and limitations imposed upon, his function, was of little consequence as an agent of legal change in the post-formative period."[60] It was the author-jurists (who could also serve in the role as *qāḍīs*) who collected their own rulings or modified rulings by others, and organized them into comprehensive texts that gained authority through their subsequent use, and gathered renown for their authors.[61]

3.3b Preference for the two disciples over Abū Ḥanīfah

In spite of his stated preference for Abū Yūsuf as a practicing judge, Syed Mahmood enunciated a different principle, in his ruling on Abdul Kadir v. Salima, for choosing between conflicting opinions of the three "founders" of the school. He wrote, "Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan law as "the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third."[62] He repeated the same principle in another ruling six years later, demonstrating from the *Fatāwá-yi 'Ālamgīrī* that in determining that nature, effect, and constitution of *waqf*, "the opinion of the two disciples is the one which has been adopted and prevails."[63]

This view of legal interpretation was sharply opposed by two of Syed Mahmood's contemporaries, Maulavi Samī'ullah Khān and Syed Ameer Ali. Maulavi Samī'ullah Khān, who had actively participated with Sayyid Aḥmad Khān in establishing the MAOC, and later opposed the selection of Syed Mahmood as Life Honorary Joint Secretary of the college, had also succeeded Syed Mahmood to the position of District Judge in Rai Bareli. In a ruling in 1891, he wrote a critique of Syed Mahmood's ruling, and quoted

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[60] Hallaq, *Authority, Continuity and Change*, 169-170.
[61] Ibid., 183-194.
[62] *The Indian Law Reports*, 8 All. 149 (21 Jan. 1886), Abdul Kadir v. Salima,, pp. 166-167.
[63] *The Indian Law Reports*, 14 All. 429 (9 May 1892), Agha Ali Khan v. Altaf Hasan Khan, pp. 448-449. This opinion was delivered *after* Samī'ullah Khān had delivered his detailed ruling in which he had refuted Mahmood's position [see below], but Mahmood makes no reference to it in his judgment.

numerous authorities of Ḥanafī law to argue that the opinion of Abū Ḥanīfah exceeded that of his disciples either singly or together.[64]

> It is the principle of the learned writers of the Hanafi sect, that when the opinion of Abu Hanifa is on one side and the concurrent or dissentient opinions of his pupils on the other, then if the Mufti or the Kazi is not a Mujtahid, he should pass an order or give his Fatwa according to the opinion of Abu Hanifa. Abu Hanifa alone is recognized as the supreme master and not his pupils. In the books on Muhammadan Law there are sayings of Abu Yousuf, Muhammad, Zafar and Hasan Ibn Ziad wherein they themselves acknowledge that they have not originated any principle, that whatever they have said was derived from the sayings of Abu Hanifa, and they say so with a solemn oath.[65]

Ameer Ali had been appointed to serve as a judge of the High Court at Calcutta in 1890, and two years later issued a second edition of his volumes on Muslim law. In his chapter on *mahr* or dowry, he joined Samī'ullah in taking issue with Syed Mahmood's principle of following the majority of the disciples when they disagreed with their master. Ameer Ali stated that there was no authority in Muslim law for such a principle of interpretation, and cited Samīullah's ruling in support.[66] A recent study comparing the handling of Muslim law by Syed Mahmood and Syed Ameer Ali seeks to justify Mahmood's position by highlighting the weaknesses of Ameer Ali's arguments, but it too acknowledges that Mahmood failed to provide quotations from original texts to support his general principle.[67]

Subsequent Muslim jurists provided alternative rules for guidance in cases of differences of opinion among Abū Ḥanīfah and his two disciples, often stating more explicitly the reliance of this new generation of Muslim jurists in India on independent reasoning. Abdur Rahim (1867-1947), who had completed his training for the Bar at Middle Temple in London in 1890, served as a Barrister in Calcutta and eventually as a judge of the High Court at Madras. In 1907 he gave the Tagore Law Lectures on Muslim jurisprudence which became the basis for his book on the subject published in 1911. After dealing with the classification of jurists, Abdur Rahim dealt with differences of opinion

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[64] Samiullah Khan, *A Judgment containing an Exposition of the Muahmmadan Matrimonial Law* (Allahabad: Indian Press, 1891), 2-9.
[65] Ibid., 6.
[66] Ameer Ali, *Mahomedan Law, II*, 420-421.
[67] Mahavir Singh, "Mahmood and Ameer Ali on Muslim Law: A Comparison," *Aligarh Law Journal* 5, Mahmood Number (1973): 181-186.

among them by giving various views found in books of Ḥanafī *fiqh*, concluding with the rule from *Durr al-Mukhtār* which he considered correct: "Al-Ḥāwi lays down as the correct rule that in such cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed: and this is undoubtedly in strict accord with the principles of Muḥammadan jurisprudence apart from the great weight which attaches to that eminent authority."[68] Clearly he preferred a practical solution to an abstract rule ranking the authorities. He also justified his choice of reason as the arbitrator by an appeal to the general principles of Muslim jurisprudence in addition to textual support.

Another younger contemporary of Syed Mahmood's was Faiz Badruddin Tyabji who, as well as his father, Badruddin Tyabji (1844-1906), had been also been appointed as a judge of the Bombay High Court. The younger Tyabji wrote a text on the principles of Muslim law in 1913 in which he introduced another element into the question of handling the disagreements of the early jurists. After noting the traditional rules for choosing between the opinions, he stated that the traditional rules had been superseded by the British authorities in India. He wrote, "These rules ... are not sufficiently clear and precise to be an authoritative guide to the Judge in British India, and the British Indian Courts have therefore assumed the right of deciding for themselves which opinion they will prefer."[69] He went on to describe how this was in accordance with the duties of a *qāḍī* which the British courts had arrogated to themselves. The real role of the British in transforming Muslim law became increasingly recognized as the twentieth century progressed.[70]

3.4 Dealing with disputes between the Ahl-i Ḥadīth and the Ḥanafīs

3.4a Conflict over the manner of prayer

Since the cases on the question of pronouncing "*āmīn*" had brought the matter of divisions within the Indian Muslim community into the British courts, Syed Mahmood had the opportunity to contribute his opinion to the debate which, ultimately, centred on

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[68] Rahim, *Principles of Muhammadan Jurisprudence*, 187-188.
[69] Tyabji, *Principles of Muhammadan Law*, 26-27.
[70] For a more detailed analysis of Tyabji's analysis of the British role, see: Kugle, "Framed, Blamed and Renamed," 304-307.

the question on how to deal with differing interpretations of Muslim law by Muslims. In 1884, four cases were initiated that over the next 7 years worked their way through various courts and courts of appeal, one reaching even the Privy Council in England. In September of 1884, three Muslims were convicted by a magistrate in Benares of "disturbing a religious assembly," an offence punishable under s. 296 of the Indian Penal Code.[71] They had performed their prayers in a large *masjid* in the *maḥallah* (quarter or part of town) of Maddanpura in Benares, and pronounced "*āmīn*" at the end of their prayer in a loud voice, at variance with the practice of the others which was to utter "*āmīn*" in a low voice. The accused appealed their case to the High Court in Allahabad where it was heard within 5 months. Another case also in Benares was initiated by members of the Ahl-i Ḥadīth who sued for a declaration that a certain mosque in the *maḥallah* of Jalalipura was a place in which they were, as Muslims, entitled to pray and perform other religious devotions.[72] A third case, originating in Meerut, was likewise launched that same year by the Ahl-i Ḥadīth for the same purpose of having the court declare that they were entitled to pray in a certain mosque.[73] These two cases were tried consecutively by the High Court in Allahabad at the beginning of November, 1889, after rulings had been given in lower courts. A fourth case which also dealt with the right of Muslims of the Ahl-i Ḥadīth to pray according to their custom in a *masjid* alongside other Muslims who objected to their practice, was first heard in a court in Muzzaffarpore in December of 1884. It was eventually appealed to the High Court in Calcutta and then to the Privy Council in England which delivered its judgment on 21 Feb. 1891.[74] Although other cases connected with this dispute between the Ahl-i Ḥadīth and those who followed the Ḥanafī school of law more closely continued to be brought into court,[75] these four cases were seen as definitive and influenced subsequent judgments, as the district judge of Ghazipur indicated in his ruling 5 November, 1894.[76]

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[71] *Indian Law Reports*, 7 All. 461 (7 Mar. 1885) Queen-Empress v. Ramzan, pp. 462-464.
[72] *Indian Law Reports*, 12 All. 494 (5 Nov. 1889) Ata-ullah v. Azim-ullah.
[73] *Indian Law Reports*, 13 All. 419 (4 Nov. 1889) Jangu v. Ahmad ullah.
[74] *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 18 IA. 59 (1891).
[75] Metcalf, *Islamic Revival*, 287-288.
[76] Sudhindra Nath Bose, *Two Decisions on the Right of Ahl-i-Hadis (Wahabis) to Pray in the Same Mosque with the Sunnis* (Allahabad: Panini Office, 1907), 91.

3.4b Syed Mahmood's judgment

3.4b (1) Right to interpret Muslim law apart from Ḥanafī fiqh

In his rulings on these cases, Syed Mahmood consistently upheld the right of the Ahl-i Ḥadīth to interpret Muslim law in their own manner, even though they did not rigidly hold to one of the four recognized schools of Sunni *fiqh*. The prosecutor in the criminal case, *Queen Empress v. Ramzan*, had argued that had the defendants been followers of any of the four *īmāms*, the Ḥanafīs would not have objected to associating with them; but because they were not, and because they intended "to set up a new form of worship for themselves," they could no longer be considered Muslims.[77] Syed Mahmood opposed that ruling and argued that the defendants had the right to enter into and worship in the mosque with the congregation according to their own tenets.

Mahmood stated that there was absolutely no evidence in the case to substantiate the accusation that they were no longer Muslims, pointing out that although they had been branded "Wahhabis" by their accusers, they called themselves by the name "Muhammadi which clearly indicated their self-identification as Muslims."[78] In the case of *Jangu v. Ahmad-ullah*, the terms *ghayr muqallid* and *muqallid* were introduced for the Ahl-i Ḥadīth and the Ḥanafīs respectively, pointing to the rejection of the practice of *taqlīd*[79] by the former in matters pertaining to law.[80] In *Ata-ullah v. Azim-ullah*, the ruling of the lower appellate court spelled out what the differences between the two were.

> The Mu[h]ammadis do not look upon *Ijmaa*, or the consensus of opinion of what we may call the fathers of the Church, or *Kiyas*, analogical deductions by certain expounders of the law, as of obligatory authority, while, on the other hand, the Hanafis consider the authority of *Ijmaa* and *Kiyas* as beyond question or dispute... The Muhammadis reject the principle of *taklid*, *i.e.*, refuse to addict themselves to the doctrines of any of the four Imam Mujtahids, while the Hanafis follow Abu Hanifa and his disciples.[81]

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[77] *Indian Law Reports*, 7 All. 461 (7 Mar. 1885) Queen Empress v. Ramzan, p. 472.
[78] Ibid., p. 473.
[79] On *taqlid* as "the reasoned and highly calculated insistence on abiding by a particular authoritative legal doctrine" rather than "blind or mindless acquiescence to the opinions of others" see: Hallaq, *Authority, Continuity and Change*, ix, 86-120. On the rejection of *taqlid* by the Ahl-i Ḥadīth, see: Daniel Brown, *Rethinking Tradition in Modern Islamic Thought*, Cambridge Middle East Studies, 5, ed. Charles Tripp (Cambridge, UK: Cambridge University Press, 1996), 27-29.
[80] *Indian Law Reports*, 13 All. 419 (4 Nov. 1889) Jangu v. Ahmad-ullah, p. 420.
[81] *Indian Law Reports*, 12 All. 494 (5 Nov. 1889) Ata-ullah v. Azim-ullah, pp. 495-496.

In his judgments, Syed Mahmood insisted that the questions under consideration could only be dealt with according to Muslim law (not British criminal law, as will be discussed in the following chapter). He pointed out that the existence of four schools of law equally recognized as orthodox by all Sunnis made the presence of diversity inherent in Muslim law, and that mere deviation in details of worship could not lead to the charge of heterodoxy if even one of the schools allowed the practice. He showed from various works of Ḥanafī *fiqh* that even within that school there was not an unequivocal rule establishing the octave at which the "*āmīn*" was to be pronounced.[82]

When the second case had been argued before him, he commented that he had expected that counsel for the appellants would have challenged his previous judgment in which he had declared "that according to the tenets of *Imām Azam*, that is, *Imām Abu Hanifa* himself, there is no such rule in the Muhammadan ecclesiastical law as would render it illegal to pronounce the word '*āmīn*' at the top of the voice or in any other note in the octave of the human voice."[83] He said that if it had been demonstrated that according to Ḥanafī law that pronouncing "*āmīn*" in such a way would vitiate the prayers of the person or of those around him, he would have been inclined to have the court to issue a decree limiting such a practice. But since such a demonstration was not forthcoming, he maintained his conclusion that the right of the Ahl-i Ḥadīth to pray in their own manner in whatever *masjid* they chose could not be restricted.

3.4b (2) Right to worship in any mosque

Syed Mahmood was also adamant that according to Muslim law, a mosque could not be restricted to one sect. "In the eye of the Muahmmadan law, a mosque is the property of God, it must be recognized as such, and subject only to such limitations as the Muhammadan ecclesiastical law itself provides, it is public property, being the property of God for the use of his servants, and every human being is entitled to go and worship there so long as he conforms to the rules of the Muhammadan ecclesiastical ritual of worship."[84] During the trial, he repeatedly challenged the lawyer for the appellants who was calling the *masjid* in dispute a "Ḥanafī mosque," stating, "There is absolutely no such

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[82] *Indian Law Reports*, 7 All. 461 (7 Mar. 1885) Queen Empress v. Ramzan, pp. 472-473.
[83] *Indian Law Reports*, 13 All. 419 (4 Nov. 1889) Jangu v. Ahmad-ullah, p. 431.
[84] Ibid. p. 430.

term as Hanafi mosque in the Mahomedan ecclesiastical law. A mosque is dedicated to God, and everybody who is a servant of God is entitled to go into it and to perform what are recognised, or according to their beliefs are the recognised, forms of prayer."[85]

Syed Mahmood's judgments became an important source for future rulings on the matter of the use of *masjids*, in the absence of adequate translations of texts related to the subject. When the Privy Council in England heard a case in which an *imām* was defending his right to lead the prayers in a *masjid* according to the practice of the *ghayr mukallids*, the judges pointed out that they had not been referred to any authoritative code of ritual for Sunnis comparable to the statutory rubric of the Church of England; the section on prayer in the *Hidāyah* had not been translated by Hamilton "because it seemed to him that it could not afford any manner of assistance in decisions concerning matters of property."[86] They referred to Syed Mahmood's judgments in two of the above cases to support their conclusion that there was no general law to prescribe a particular way of saying "*āmīn*." In the defence of his work as a Puisne Judge of the High Court, Syed Mahmood considered his judgments in these cases to be a valuable contribution to the administration of Muslim law in India, and felt that the Privy Council's approval and adoption of his judgments vindicated the extra time he expended in preparing those judgments.[87] Mahmood's judgments forbidding the restriction of a *masjid* to a particular school or *madhhab* continued to be seen as authoritative throughout the twentieth century.[88]

3.4b (3) Right to exercise ijtihād

Syed Mahmood's defence of the rights of the Ahl-i Ḥadīth to practice their prayers in their particular manner in these cases demonstrate that he did not see himself bound by *taqlīd* to administer matters of Muslim law only according to Ḥanafī jurisprudence. His statement that he did not feel at liberty to interpret the rules given by the Prophet in any sense other than that which had been adopted by recognized authorities of

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[85] "A Mahomedan Sect Dispute," *The Pioneer* n.s. 80, no. 8045 (6 Nov. 1889): 3

[86] *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 18 IA. 59 (1891), p. 70.

[87] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, p. 12, India Office Records, Public and Judicial Department Records, L/PJ/6/355, file 1680, date 15 Aug. 1893, British Library London.

[88] Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 4th ed., Law in India Series (Delhi: Oxford University Press, 1999), 319-320. See also M. A. Qureshi, *Waqfs in India: A Study of Administrative and Legislative Control* (New Delhi: Gian Publishing House, 1990), 142-145.

Muslim law was noted earlier. But his explication of the law in these cases shows that he did not feel his legal deductions were limited to only *Ḥanafī* authorities, especially when dealing with Muslim communities in India who had consciously rejected *taqlīd* in their interpretation of the law. While he jealously protected the right of Muslims to employ Muslim law in these matters, he was not about to restrict arbitrarily the range of sources that could be implemented.

In supporting the Ahl-i Ḥadīth in their struggle, Syed Mahmood was following his father's footsteps. In 1871 at the start of the furor over the question of whether *jihād* was lawful for Muslims in India, Aḥmad Khān had written a letter to the editor of the English daily in Allahabad, the *Pioneer*, stating that he was a "well-wisher to true Wahabeesim," the term applied to the Ahl-i Ḥadīth by their detractors.[89] Aḥmad Khān later argued in the pages of his magazine, *Tahzīb ul-Akhlāq*, that it was an error for the Muslim community to consider that the age of *ijtihād* had ended and that *taqlīd* was obligatory for all—a doctrine the Ahl-i Ḥadīth also strongly advocated, though not following the same assumptions as Aḥmad Khān to reach that conclusion.[90] Two of Aḥmad Khān's close companions, Muḥsin ul-Mulk and Chirāgh 'Alī, also wrote strongly in favour of the exercise of *ijtihād*. In his book on proposed reform in Muslim states, Chirāgh 'Alī declared that there was no legal or religious authority for the belief that no *mujtahid* had risen since the four *īmāms*, and that the opinions of those *muqallids* who argued thus were not to be regarded; *ijtihād* was not extinct and was capable of producing reform in the Muslim world.[91] These reformers were following in the path of the 18th century Delhi scholar, Shāh Walī Ullāh (1703-1762) who likewise opposed the strict adherence to *taqlīd*.[92] Syed Mahmood, was therefore upholding the doctrine of other modernist Muslims in his rulings permitting the Ahl-i Ḥadīth to practice their form of prayer distinct from that of other Ḥanafī Muslims.

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[89] Syed Ahmed, "Wahabeesim," *The Pioneer* 4 Apr. 1871, p. 4. In the following issue, he clarified that he himself was not a "Wahabee," but a liberal Muslim who was a *friend* of "true Wahabeeism."

[90] Mohammad Mujeeb, *The Indian Muslims*, new ed. (New Delhi: Munshiram Manoharlal Publishers, 1995), 449-450. For the position of the Ahl-i Ḥadīth, see: Metcalf, *Islamic Revival*, 271-272.

[91] 'Ali, *Proposed Political Reforms*, iv-vi. For the views of Muḥsin ul-Mulk, see his book, *Taqlīd awr 'amal bi'l-Ḥadīs*, (Lahore: Maṭbu'a Nawal Kishōr Stīm Press, 1909.

[92] Daud Rahbar, "Shah Wali Ullah and Ijtihad," *The Muslim World* 45 (1955): 346-358. For Shāh Walī Ullah's influence on subsequent generations of reformers, see: Brown, *Rethinking Tradition*, 22-33.

Syed Ameer Ali likewise was a strong opponent of the idea that *ijtihād*, the "authoritative exposition of law by analogical deductions or the exercise of judgment," had ceased.[93] He argued that the stagnation found in both the Sunni and Shi'i communities was due to the belief that no person who had not attained to the heights of juridical knowledge of the *mujtahids* of the first three centuries could aspire to make rulings on the basis of his own judgment. He noted with approval that such "suppression of the human mind" had produced a reaction among Muslims to resist such suppression, and work for the moral regeneration and legal reform in Islam.[94] Neither Syed Ameer Ali nor Syed Mahmood ever claimed to be *mujtahids* nor claimed their work as judges in the British judicial system to be equivalent to *ijtihād* as practiced by the *'ulamā* in Muslim history. But their endorsement of *ijtihād* as the employment of reason in adapting Muslim law to meet the needs of contemporary society can be seen as an attempt to legitimize their own involvement in the changes to Muslim law that the British regime had introduced.

3.5 Administration of the Muslim law in India by Muslims

Although Syed Mahmood had painted a very bleak picture of the Muslim rule of India, in a paper written before he was appointed as a judge, he later presented the administration of Muslim law in India in a more favourable light. In his paper on British rule for the *Calcutta Review*, he had described the history of the Muslim rule in India as "one long narrative of assassinations and cold-blooded butcheries, of religious fanaticism and anarchical despotism, of rebellious wars and cruel persecutions," interrupted by brief "intervals of comparative peace and order."[95] The period directly preceding the British supremacy was characterized by "constant bloodshed and warfare, kept up by rival tyrants and petty chiefs, villainous intrigues of courtiers, merciless rapacity of officials, internal broils and foreign inroads of plunderers from beyond the limits of India, massacres of unresisting citizens and slaughters of helpless prisoners."[96] The arrival of the British rule which "held the balance of justice in one hand and the sword of strength in the other," was an answer, then, to the prayers of the people of India. Such a negative perception of the history of Muslim rule in India is completely absent from his recorded rulings

[93] Ameer Ali, *Law relating to Gifts*, 28.
[94] Ibid., 30.
[95] Mahmood, "British Rule," 10.
[96] Ibid.

as judge of the high court. In one judgment concerning the Muslim rules of evidence, Mahmood prefaced a quotation from the *Fatāwá-yi Ālamgīrī* with a description of the compendium as "a monument of the industry of the Muhammadan lawyers, ... prepared under the orders of the Emperor Aurangzeb, and ... promulgated in India as the great Code of Muhammadan Law regulating the decision of disputes in India."[97] He noted that it was regarded as an authoritative work of Muslim jurisprudence in other Muslim countries such as Turkey, Egypt, and Arabia.[98] That he regarded the work as a "code" is significant in light of his consistent support of the codification of law in India.

A fuller picture of Syed Mahmood's description of the administration of Muslim law in India by successive Muslim rulers, and the transition to British rule, comes from his Minute on proposed reforms to the judicial administration of the province of Awadh.[99] His familiarity with judicial work there was based on his years of experience in that region both as a barrister and as a District Judge. For centuries, the people of the province, both Hindus and Muslims, had been subject to the system of justice according to the Ḥanafī school of Muslim law, and all title-deeds were drawn up according to pattern prevailing under that system. Even during the rule of the Mughal Emperor Aurangzeb when the *vazīrs* of Awadh were Shi'ahs, the Sunni law was the foundation of administration of justice—a situation Syed Mahmood compared to the application of Ḥanafī law by the Ottomans in Egypt, where the Muslim inhabitants adhered primarily to the Mālikī school. No other system had a firm root in Awadh, and it was not till the Nawāb-Vazīr Ghāzī-ud-Dīn Ḥaydar (1774-1827) declared his independence of the Mughal ruler by assuming the title of kingship of Awadh in 1819, that any attempt was made to administer the Shi'i law, and even then only to the Shi'ahs, but not to other people. The disintegration of the Mughal Empire in the 18th century led to what Syed Mahmood termed an "instability of government" and "anarchy" resulting in the annexation of the province by the British in 1856. But even at that time there was some show of administering justice according to the Muslim law, with a type of High Court at Lucknow, and *qāḍīs* serving in other regions as

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[97] *The Indian Law Reports* 7 All. 297 (6 Dec. 1884), Mazhar Ali v. Budh Singh, p. 309.
[98] For more on the *Fatāwá-yi Ālamgīrī*, see: Guenther, "Hanafi *Fiqh*."
[99] "Note by the Hon'ble Syed Mahmud, Officiating Puisne Judge, North-Western Provinces High Court, dated Allahabad, 20th April 1886," Indian Office Records, Public and Judicial Department Records, L/PJ/6/213, File 1832, dated 14 Jan 1888, British Library.

well. However, Syed Mahmood noted that there was "no real system of the administration of justice, and disputes were settled either by arbitration or by the executive force of the *Amils* and *Nizams*."[100]

With the annexation of Awadh, the British rule concentrated all power—executive, revenue, criminal and civil—in the Deputy Commissioner, a move that was perhaps pragmatic but did a great deal of practical harm to the administration of justice in its ideal form. "The system of administering justice, however, improved as the British rule became firmer in the province, and the value of land and other permanent rights increased in proportion, the result of the people being convinced that there was some sort of law in the land regulating rights and governing disputes."[101] This concentration of the whole range of powers in a few individuals eventually produced an administrative block which brought about the inauguration of the judicial scheme of 1879 under which Syed Mahmood had been appointed as District Judge.

Syed Mahmood's comments on the Muslim administration of Muslim law are very brief in comparison with his critique of the British administration of that law, the subject of the next chapter. He seemed prepared to accept in general the verdict of British historians that Muslim rule in India had been despotic, and that the rule of law had been introduced by the British. But when addressing the specific situation of Awadh, with which he was personally familiar, his evaluation of the role of Muslim law was much more favourable. His appeal to the continuing validity and authority of the Muslim law that had been enforced in India prior to the spread of British rule is a theme that featured prominently in his quest for a truly Indian body of laws, as is demonstrated in the next chapter.

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[100] Ibid.
[101] Ibid.

Chapter 4: British administration of Muslim law

4.1 Transformation of Muslim law in the British administration

4.1a Transformation through translation

The transformation of Muslim law in India under British colonialism was effected by three concurrent processes throughout the late 18th and 19th centuries: (1) translation, (2) legislation, and (3) adjudication leading to judicial precedents. In the first part of this chapter, these three processes are explored through an analysis of the major legal texts produced by key actors in each. Of the three processes, the work of translation was the most intermittent but nonetheless influential in changing the face of Muslim law in India. Only a few texts were translated in the late 1700s, and a few more in the middle of the 1800s, but they eventually became the primary sources to be consulted on any question involving Muslim law. The translations were also motivated in a large part by the conviction on the part of the British that consistent justice could only be brought about by recourse to the original texts of law, thus bypassing reliance on the opinion of Indian judges as they interpreted and applied their traditional laws.

4.1a (1) Integrity and reliability of Indian jurists questioned

The major change in the administration of law in general that occurred with the British assuming a greater role in the Bengal region in the 1770s was that British servants of the East India Company were appointed as judges and magistrates to superintend the courts and decide both civil and criminal matters. Not knowing the languages in which the Muslim and Hindu laws were written, these officials assigned to administer the laws relied on native officers for advice to guide them. The British deemed this arrangement unsatisfactory because the native officers were seen as "men sometimes themselves too ill informed to be capable of judging, and generally open to corruption" as Charles Hamilton (1753-1792) stated in the "Preliminary Discourse" to his translation of the Marghīnānī's (d. 1196) *Hidāyah* in 1791.[1] It was this belief in the superiority of British justice that motivated the translations of works of Muslim law by him and other early Orientalists in India. Although Hamilton opined that the British government had introduced as few innova-

[1] Hamilton, *Hedáya*, vii.

tions into the native forms and principles of the administration of justice "as were consistent with prudence," the major change had been the appointment of Englishmen to run the courts.[2] This had led to the necessity, in Hamilton's view, of books such as his translation—"the necessity of procuring some certain rule whereby those gentlemen might be guided, without being exposed to the misconstructions of ignorance or interest, and which might enable them to determine for themselves, by a direct appeal to the *Mussulman* or *Hindoo* authority on the ground of which they were to decide."[3]

This view of the unreliability of Indian judicial officers was shared by a contemporary Orientalist, William Jones (1746-1794), who translated two works on Muslim law in the same era. He stated, "Perpetual references to native lawyers must always be inconvenient and precarious; since the solidity of their answers must depend on their integrity, as well as their learning; and at best, if they be neither influenced nor ignorant, the court will *hear and determine* the cause, but merely pronounce judgement on the report of other men."[4] For this reason, the English judge would have to have sufficient knowledge of Muslim jurisprudence and languages "for the purpose of keeping a check over the native counsellors, of understanding and examining their opinion, and of rejecting or adopting it, as it may be opposed or supported by their books of allowed authority, to which they should constantly refer."[5]

4.1a (2) Authority of muftīs undermined

Thus not only were Indian Muslims displaced as the ones with ultimate authority to administer Muslim law in the highest courts, their right to interpret and decide the content of that law was undermined. The authority of the *muftīs* as the living scholars of Muslim jurisprudence qualified to issue authoritative judicial decisions, was being replaced by the authority of a book; and where the *muftīs* had consulted a range of judicial texts in formulating their decisions, the British judges were now limited to the one or two

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[2] Ibid., vi.
[3] Ibid., vii. On the same quest for "certainty in Hindu law through a translation of ancient Hindu texts, see: J. Duncan M. Derrett, *Religion, Law and the State in India*, Law in India Series (Faber and Faber Limited, 1968; reprint, Delhi: Oxford University Press, 1999), 237-256.
[4] William Jones, "The Mahomedan Law of Succession to the Property of Intestates in Arabick, engraved on Copper Plates from an Ancient Manuscript: with a verbal Translation, and explanatory Notes," in *The Works of Sir William Jones*, ed. Lord Teignmouth, vol. 8 (London: John Stockdale, 1807), 162.
[5] Ibid., 162-163.

translations that had been made, in order to promote uniformity and standardization of law. A similar dynamic was occurring with regard to Hindu law. "The pandit as a professor of a living science was rejected for the more or less fossilized treatises which would head the pandits' lists of references."[6] In practice, this displacement did not occur as completely or as quickly as envisioned by Hamilton and Jones, because the Muslim court officers continued to function as advisors to the British judges, writing *fatāwá* (pl. of *fatwá*, a legal opinion given by a *muftī*) on Muslim law, until their position was abolished some 70 years later.

In his preface to his translation of al-Sajāwandī's (fl. 1023) *Sirājiyyah* , Jones demonstrated the way he was changing both the law itself and the way it was administered by executing his translation.[7] He noted that the Persian translation of the work by Maulavi Muhammad Kasim from which he was doing his own translation into English was too lengthy for his purposes, prompting him to select what was "important" and to omit minute criticisms, various readings and literary curiosities, anecdotes of lawyers and their subtle controversies.[8] He also rejected Kasim's accompanying commentary on the text, complaining that "it is often impossible to separate what is fixed law from what is merely his own opinion."[9] He thus misconstrued the working of Muslim law in seeking to isolate an elusive "fixed text" from the accretions of the centuries of Muslim jurists, and failed to understand that it was precisely the debates and controversies of learned Muslims—past and present—that constituted a living and dynamic law.

4.1a (3) Expansion of the role of Muslim law attempted

After the heyday of translation at the end of the 18th century, the attention of British jurists turned towards the legislating laws and regulations and towards collecting and organizing the rapidly growing accumulation of judicial precedents. The only other major contribution in the area of translation until Syed Mahmood's time was Neil B. E. Baillie's (1799-1883) translation of a work on inheritance based on standard Ḥanafī texts in 1832,

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[6] Derrett, *Religion*, 255.
[7] The *Sirājiyyah* by al-Sajāwandī was considered to be "the highest authority on the law of inheritance amongst the Sunnīs of India." See: Morley, *Administration*, 304.
[8] William Jones, "Al Sirájiyyah: or, the Mohammedan Law of Inheritance; with a Commentary," in *The Works of Sir William Jones*, ed. Lord Teignmouth, vol. 8 (London: John Stockdale, 1807), 201.
[9] Ibid., 200.

and portions of the *Fatāwá-yi 'Ālamgīrī* in 1850 and 1853.[10] In his preliminary remarks to his work on the Muslim law of sale, Baillie noted that the application of Muslim law had become restricted in the courts of justice of the East India Company to matters "which have relation to religion, marriage, or inheritance."[11] However, he added, it continued to be observed by Muslims in their dealings with each other, and even by Hindus in areas where through centuries of use it had become the customary law. Thus Muslim law was "accordingly administered by the Company's judges, as a rule of justice, equity, and good conscience," in applicable cases.[12] He argued that in the event of a code of law being created for the whole of the Muslim community, their own law should be accommodated since that was the one by which most of the Muslims regulated their transactions, provided that it be not "calculated to retard the advance of society in India, under the new impulse which has been given to it by its connection with England."[13]

Despite his predilection for a textually based authority for Muslim law, Baillie was prepared to grant Muslim law—or at least the Muslims' administration of it—a flexibility to meet the changing circumstances in India. He pointed to the doctrine of *ḥīlah*, or legal stratagems, designed to circumvent restrictions imposed by a very literal reading of the law. If the government in India were to intervene and abolish such restrictions in the matter of sale, the Muslim law thus altered "would not only be well suited to the present condition of Indian society, but sufficiently accommodated to its progress," and prove better adapted to the people of India than unmixed English law.[14]

When Baillie produced a complete *Digest* of Muslim law more than ten years later, the British government in India had abolished the office of the Muslim law officer,

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[10] Neil B. E. Baillie, *The Moohummudan law of inheritance, according to Aboo Huneefa and his followers, comp. in large part from the Sirajiyah of al-Sajawandi, and its commentary, the Sharifiyat of Jurjani* (Calcutta: Baptist Mission Press, 1832). Neil B. E. Baillie, *The Moohummudan Law of Sale, according to the Huneefeea Code: from the Futawa Alumgeeree, a Digest of the whole Law, prepared by command of the Emperor Aurungzebe Alumgeer* (London: 1850; reprint, Delhi: Delhi Law House, n.d.). Neil B. E. Baillie, *The land tax of India, according to the Moohummudan law; translated from the Futawa Alumgeeree, with explanatory notes, and an introductory essay, containing a brief exposition of leading principles, and their application to the present system of land revenue* (London: Smith, Elder and Co., 1853).

[11] Baillie, *Moohummudan Law of Sale*, x.

[12] Ibid. The phrase, "justice, equity, and good conscience will be discussed more fully in chapters 4 and 5.

[13] Ibid., xiv.

[14] Ibid.

encouraging a greater reliance on compendiums such as his *Digest*.[15] The process of codifying law was also gaining momentum by that time, but the 1855 Report of the Law Commission made the decision not to enact either Muslim law or Hindu law in any codified form for the reasons that such codification would tend to obstruct rather than promote the gradual progress of the society, and that a British legislature could not presume to make religion, since such laws were seen to derive their authority from the Muslim and Hindu religions.[16] Baillie concurred with this opinion, and saw that decision as enhancing the importance and necessity of his translations.

4.1b Transformation through legislation

4.1b (1) Regulations that changed Muslim law

Despite this stated reluctance to codify the whole of Muslim law, legislation had already had a severe impact on the practice of Muslim law by the time of Syed Mahmood. During the first two decades of the 19th century, J. H. Harington (1764-1828) produced a major analysis of the laws being administered by the British government in India, in which he outlined the changes that had been introduced. With respect to Muslim law, he described the historical development of Ḥanafī law and the various authoritative texts which the Muslim jurists had been consulting in administering that law in India.[17] He went on to state the modifications and additions to Muslim criminal law that the British government had made through the Regulations it issued from time to time. He quoted extensive sections from letters by Governors Hastings and Cornwallis in which the "defects" of Muslim criminal law were discussed and amendments proposed.[18] For example, both governors opposed the privilege granted by Muslim law to the nearest of kin to par-

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[15] Baillie, *Digest*, xxii.

[16] Ibid., xxiii. See also: United Kingdom. Indian Law Commission, *Second Report of Her Majesty's Commissioners appointed to consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India* (London: George Edward Eyre and William Spottiswoode, 1856; reprint, Chadwick Healy microfiche, 60.188), 7-9. Roland Knyvet Wilson, "Should the Personal Laws of the Natives of India Be Codified?," *The Imperial and Asiatic Quarterly Review and Oriental and Colonial Record* 3rd ser., 6 (1898): 239-240.

[17] John Herbert Harington, *An Elementary Analysis of the Laws and Regulations Enacted by the Governor General in Council at Fort William in Bengal for the Civil Government of the British Territories under that Presidency*, 3 vols., vol. 1 (Calcutta: Honorable Company's Press, 1805), 215-245. This section was also published as: John Herbert Harington, "Remarks upon the authorities of Mosulman law," *Asiatic Researches* 10 (1808): 475-512.

[18] Harington, *Elementary Analysis*, 341-369.

don the murderers of their kinsmen, Hastings being of the opinion that this right belonged only to the state, and Cornwallis arguing that too often the criminal escaped punishment. In his volumes, Harington went on to list the specific changes to Muslim law in areas such as punishments for murder and for perjury produced by the Regulations enacted by the government in 1793 and subsequent years, where the provisions of existing Muslim law had appeared to the British officials to be inadequate.[19]

4.1b (2) Regulations that changed the role of muftīs

The regulations introduced by the British government in the early 19th century included changes to how *muftīs* were to provide their *fatāwá* when serving as "law officers" and assisting British judges in the courts. No longer were they free to prepare specific judgments applying to specific cases, because the British insisted on capital punishment for murderers, and were unwilling to be bound to follow a *muftī's* fatwa which accepted the payment of blood money. To circumvent the possibility of kinsmen pardoning a murderer, "the judge, without making any reference to the heir or heirs of the slain, shall require the law officer to declare the punishment to which the prisoner convicted would be liable according to the Mahomedan law, supposing all the heirs of the slain entitled to prosecute the prisoner for kissas, to have attended and prosecuted him..."[20] Likewise, in cases where the witnesses presenting evidence were not Muslims, "the law officers of the courts of circuit are to declare what would have been their futwa, supposing such witnesses to have been Mohummudans."[21] Thus the British were changing not only substantive rules of Muslim law, but also adjective rules as to how the rules were to be administered. Harington's work in bringing together the various regulations enacted by the British Indian government affecting the administration of Muslim law became more than a modest "elementary analysis," as he entitled it, and actually functioned as a convenient primary sourcebook for judges deciding cases pertaining to Muslim law.

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[19] Ibid., 370-486. For a thorough analysis of the intervention of the British in the administration of Muslim criminal law during this time period, see: Singha, *Despotism of Law*, 49-75.
[20] Harington, *Elementary Analysis*, 371.
[21] Ibid., 396-397.

4.1b (3) Modification rather than codification proposed

A similar systematization of government Regulations was prepared by Richard Clarke as an Appendix to the Minutes of Evidence taken before the Judicial Sub-Committee of the British House of Commons in 1832. In the preliminary description of Muslim law at beginning Sketch of the General Principles of the Mahomedan Criminal Law," he presented a more positive assessment of the pre-British administration of justice in India than some of his contemporaries who were promoting the necessity of a complete codification of law. Rather than the introduction of a completely new system of law, he advocated a modification of the existing institutions.

> When the British Government succeeded to the administration of justice in the provinces of Bengal, Bahar and Orissa, they found Mahomedan criminal law established, and well known to the people, and Mahomedan lawyers trained to its study and its execution. Indeed, when the officers of the British Government first took their seats on the judicial bench, it was in character of assessors to the kazees under the Mahomedan rule, and to see that they performed their duty. Thus mixed up with the administration of Mahomdean law, when the British Government made provision of the establishments of courts of criminal justice, the modification of that law was the most simple and most popular mode of proceeding.[22]

However, in concluding his summary he made the same complaint that Hamilton and Jones had made against the Indians appointed as court officers in the judicial administration. He pointed out that because of the lack of consistency in the exposition of the Muslim law by its scholars as employed in the courts, "the powers of the judges of the English courts to control and modify the futwas, have been from time to time extended."[23] Once again this was the reason given for introducing modifications in the form of frequent, legislated Regulations. In his Abstracts, he summarized all the regulations introduced by the British government in India that modified both the civil and criminal laws as they had been enforced by Muslim rulers and their officials prior to the extension of British power.[24] Harington's and Clarke's lengthy compendiums of these regulations demon-

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[22] Richard Clarke, "Abstract of the Regulations of the Bengal Government for the Administration of Criminal Justice, arranged under appropriate Heads," in *Appendix to Report from Select Committee on the Affairs of the East India Company, Appendix No. VI*, ed. United Kingdom. Select Committee on the Affairs of the East India Company (London: 1832; reprint, London: Chadwyck Healey, microfiche 35.103-4), 694.
[23] Ibid., 702.
[24] For *civil* law, see: Richard Clarke, "Abstract of the Regulations of the Bengal Government for the Administration of Civil Justice, arranged under appropriate Heads," in *Appendix to Report from Select Committee on the Affairs of the East India Company, Appendix No. VI*, ed. United Kingdom. Select Committee

strated the ad hoc and unwieldy nature of this approach to legislation, prompting a movement toward the systematic codification of law, as is discussed in detail in chapter five. Legislated codes of law completely replaced the vestiges of Muslim criminal law and procedural law that had not already been transformed by the Regulations, leaving only certain sections of civil law to remain under the rubric of Muslim law.

4.1b (4) Abrogation of Muslim law opposed

Another significant compendium of legislation and its affects on Muslim, as well as Hindu, law was Morley's volume on the administration of justice in India.[25] He traced the Regulations that had guaranteed to the Muslim and Hindu communities resident in British territories their respective laws. He concluded his review with a strong plea for caution in any consideration of altering or abrogating Hindu or Muslim laws, emphasizing that "in the present state of society in India, they are undoubtedly the best adapted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of the faith of that people; and that, though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments."[26] As will be seen later in this chapter, Syed Mahmood frequently appealed to these "proclamations and enactments" in his promotion of a wider role for Muslim law in British India.

In his description of Muslim law in particular, Morley began with a review of the standard sources of Muslim law and the history of the development of its various schools.[27] This was followed by an extensive list of the texts utilized by the legal scholars of Islam in administering Muslim law, in which Morley gave details of which had been published to that time or which could be located as manuscripts in various libraries.[28] He did not limit himself to works of *fiqh* or jurisprudence, but included commentaries on the Qur'ān, books of Ḥadīth, and collections *fatāwá* that were recognized as authoritative by

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on the Affairs of the East India Company (London: 1832; reprint, London: Chadwyck Healey, microfiche 35.103-4), 638-692.

[25] Morley, *Administration*. In the preface he notes that the work is an expanded version of the introduction to his *Analytical Digest of the reported cases decided by the Supreme Courts* published a few years previously.

[26] Ibid., 197.

[27] Ibid., 241-257.

[28] Ibid., 257-323.

Muslims in India. The paucity of English translations and original treatises by European authors that he includes in his list is striking in comparison with his entire list of available and authoritative works of Muslim jurisprudence.

4.1c Transformation through adjudication

Initially, the British judges newly appointed to administer justice in the ever-expanding British territories relied on their Muslim court officers to assist them in determining the relevant laws. The testimony of David Anderson, assistant to Resident Samuel Middleton at Murshidabad, would be typical of the early efforts under the Hastings administration. In 1772, he wrote to his parents that Middleton had entrusted to him the administration of justice and in the description of his duties revealed that the responsibility of providing justice was hardly an over-riding concern—certainly secondary to his preoccupation with making his financial fortune in India.

> This office does not require so great a share or Capacity of Knowledge as you would imagine. The Decrees are guided by the Mussulman and Gentoo Laws, and I have always 3 or 4 learned men to expound them, and it is only when no Law can be found, that I allow my own notions of Equity to regulate my Determinations. An Appeal may be made to the President and Council so that the parties may always be sure of Redress. This Employment gives me a great Deal of Trouble, but it gives me a Considerable Influence in this part of the Country. I still enjoy the advantages of my paymastership, and I have lately made an addition to my Income by establishing a manufactory for Gold thread in the City, which yields me a sure profit of 3 a 400 Rs. per mensem. In this Way tho' I am laying by monthly a little money, I am not making a Fortune.[29]

However, as the Regulations issued by the British governing council increased, the administration of justice became more complicated.

Because of the cumbersome multiplication of Regulations, judges came to rely on their own interpretations of those regulations and judicial precedents to guide them in matters dealing with the changes to Muslim law in India. The major textual contribution in the field of adjudication came from W. H. Macnaghten (1793-1841) in his *Principles and Precedents of Moohummudan Law* in 1825.[30] In this influential text Macnaghten did

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[29] David Anderson, Moidapore, near Moorshedabad, to his parents, 20 Dec. 1772, folio 91r, Add. Mss. 45,438, British Library.

[30] W. H. Macnaghten, *Principles and Precedents of Moohummudan Law, being a Compilation of Primary Rules Relative to the Doctrine of Inheritance (Including the Tenets of the Schia Sectaries), Contracts and Miscellaneous Subjects; and a Selection of Legal Opinions Involving those Points, Delivered in the Several*

not describe the beginnings and evolution of Muslim law as Morley and Harington had done. Nor did he limit himself to the translation of a text of Muslim jurisprudence, as Hamilton and Jones had done, or to the exposition of the Regulations issued by the British government in India like Harington and Clarke. Rather, in presenting the *principles* of Muslim law, he drew first on his own experience as a judge, and then "had recourse to living authorities, referring to books only for the purpose of verification."[31] By far the major part of his book consisted of the *precedents* he gathered and arranged, the legal expositions of the Muslim law made by the *muftīs* and *qāḍīs* working as court officers the British Indian courts.[32] These precedents were presented in the original *istiftā'-fatwá* form of questions and answers. In his preface to the second edition of Macnaghten's work, Sloan described it as considered to be "the safest guide in the administration of Mahomedan Law, and an indisputable authority both by the Crown and Mofussil Courts," because the accuracy of its doctrines was established "by the concurrent testimony of innumerable Futwas, delivered by Moofties and Cauzies, whose lives had been exclusively devoted to the study of this particular law."[33] While this volume was based on the vital contribution of Indian Muslims who were experts in the law, its publication conversely served to make their role in the courts redundant by providing the English judges with a ready reference text to Muslim law and freeing them from reliance on the verbal pronouncements of their court officers.

4.2 Removal of Muslim law in the British judicial administration

4.2a Critique of British handling of Muslim law by Muslim barristers

4.2a (1) Abolition of the role of qāẓīs

Education in jurisprudence in England had displaced the teaching of *fiqh* in the traditional centres of learning, the *madrasahs*, as the primary source of legal education for

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Courts of Judicature Subordinate to the Presidency of Fort William; together with Notes Illustrative and Explanatory, and Preliminary Remarks (Calcutta: Church Mission Press, 1825).

[31] W. H. Macnaghten and William Sloan, *Principles and Precedents of Moohummudan Law, being a Compilation of Primary Rules Relative to Inheritance, Contracts and Miscellaneous Subjects; and a Selection of Legal Opinions Involving those Points, Delivered in the Several Courts of Judicature Subordinate to the Presidency of Fort William; together with Notes Illustrative and Explanatory, and Preliminary Remarks...with additional Notes and Questions for Students* (1860; reprint, Madras: Higginbotham and Co., 1890), lviii footnote.

[32] Baillie, *Digest*, xxii.

[33] Macnaghten and Sloan, *Principles and Precedents*, v.

those Muslims entering government service. The employment opportunities for those with traditional learning in jurisprudence became restricted with the abolition of the position of court officers for *qāḍīs* and *muftīs* in 1864.[34] These changes in the administration of Muslim law in India did not go unnoticed by the Muslim community. Towards the end of the 19th century, London-trained barristers from that community were at the forefront of critically commenting on the handling of Muslim law in British India. These England-educated Muslim jurists were neither unaware nor uncritical of the transformation wrought by the imposition of British law on India. Writing in 1880, Syed Ameer Ali lamented the disappearance of the Muslim institution of the *qāḍī* that had formerly facilitated the resolution of legal issues related to marriage and its dissolution, and directly blamed British rule for that disappearance.

> The British in India, with hardly commendable wisdom, have persistently and characteristically ignored or abolished the old institutions, which they found existing in Hindustan when they seized the government of the country. The Kāzi's courts, which dealt with the matrimonial cases of the Moslems, have, with many other useful institutions, been swept away by the iconoclastic movement inaugurated under the British rule. The difficulties which were settled formerly by a simple reference to the Kāzi, without employment of advocate or pleader, now eat into the core of Moslem society without remedy or cure.[35]

Ten years earlier, a British judge, James O'Kinealy, had similarly commented on the damage done by the abolition of the role of the *qāḍī* to Muslim education in vernacular languages, pointing out that it removed the remaining respectable employments available to Muslims who did not know the English language.[36] The government yielded to pres-

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[34] Zaman, *Ulama*, 21-25. In his book on the administration of justice in India in 1858, William H. Morley defined the role of the *qāḍī* thus: "A Muhammadan Judge, an officer formerly appointed by the government to administer both civil and criminal law, chiefly in towns, according to the principles of the Kurán: under the British authorities the judicial functions of the Kázís in that capacity ceased, and, with the exception of their employment as the legal advisers of the courts in cases of Muhammadan law, the duties of those stationed in the cities or districts were confined to the preparation and attestation of deeds of conveyance and other legal instruments, and the general superintendence and legalization of the ceremonies of marriage, funerals, and other domestic occurrences among the Muhammadans." Of the *muftī* he wrote: "A Muhammadan law-officer, whose duty it was to expound the law which the Kází was to execute: the latter, in British India, usually discharges the duties of the Muftí also." Morley, *Administration*, 353-354.

[35] Ameer Ali, *Personal Law of the Mahommedans*, 382. Subsequent editions contained moderated language and no direct indictment of the British; see: Ameer Ali, *Mahomedan Law, II*, 481-482.

[36] James O'Kinealy "Memorandum by J. O'Kinealy, Esq." Dec. 1870, GOI, Home Judicial (A), Feb. 1876, Nos. 42-81, National Archives of India, New Delhi. For the decline of the role of the *qāḍī* see: Uma Yaduvansh, "The Decline of the Role of Qadis in India, 1793-1876," *Studies in Islam* 6 (1969): 155-171.

sure from Muslim communities around India and passed the Kazis Act, 1880, in the same year that Ameer Ali's first volume was published.[37]

4.2a (2) Decline of Muslim legal education

In addition to criticizing the British for the disappearance of institutions such as the *qāẓī*, Ameer Ali also blamed their policies for the decline in the traditional study of Muslim law by refusing to support that system of education with their patronage. He noted that in India, even among educated Muslims, knowledge of Muslim law was extremely rare. Whereas the early British governors such as Hastings had encouraged the cultivation of Muslim law and literature and had respected their traditions, Ameer Ali wrote, subsequent rulers such as Lord William Bentinck relegated Indian Muslims into the "cold shade of neglect."[38] As a result, the Muslim institutions died out and the study of every branch of Muslim learning fell into decay. The result, he declared, was that cases were now decided in the highest law courts against every principle of Muslim law, owing to an imperfect knowledge of Muslim jurisprudence, Muslim manners, customs and usages.[39] Ameer Ali did not inculpate his own English legal education in this process of diminishing Muslim law, but rather saw his role as one restoring the lustre and utility of Muslim law in British India.

At the fourth session of the All India Muslim League held in 1910, Kazi Kabiruddin likewise lamented the loss of the prominent position of traditional Muslim jurists and its affect on the education of Indian Muslims in jurisprudence.

> The Indian courts successfully administered [the Act enshrining Islamic law] till the time they were assisted by muftees or Mahommedan law officers, as through them they could ascertain the purport of the original texts. Since the abolition of the posts of muftees, an English judge who is unacquainted with the language in which the law is written finds considerable difficulty in understanding the spirit of that law. ... Another unfortunate effect of the abolition of the posts of muftees was that educated Muslims gave up cultivating the knowledge of Muslim law as there

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[37] "The Kazis Act, 1880 (Act XII of 1880)," GOI, Home Legislative (A), Aug. 1880, Nos. 17-87, National Archives of India, New Delhi. Sir Sayyid Aḥmad Khān, who was a member of the Viceroy's Council at the time, played an active role in getting the Bill passed. The measures proved to be inadequate, and fresh criticism of the government's handling of the institution of *qāẓīs* and their responsibilities for the registration of marriages resurfaced in 1892; see: N.-W. P. & Oudh, Judicial (Civil) Dept. Proceedings (A), Dec. 1892, nos. 1-140, U. P. State Archives, Lucknow.

[38] Ameer Ali, *Personal Law of the Mahommedans*, v-vi.

[39] Ibid., vi.

was no opening for them. Mohammedan law being clothed, for the most part, in the garb of an unfamiliar language, the W[e]stern lawyers and judges found it extremely difficult to ascertain and apply its principles. They, therefore, invoked the aid of English law either to cut down or explain away its meaning, and were thus induced to introduce Western thoughts and ideas into the principles of this law.[40]

The problem of the loss of government employment was compounded by the British policies on education which tended to stop funding of those educational institutions such as *madrasahs* which they considered imparting "religious" knowledge, or which they deemed not effectively transmitting "useful" knowledge.[41] Families who wanted to see their sons employed in the government civil service or to set up private practice as barristers therefore turned to Universities of England and the Inns of Court in London to which to send their youth, after preparing them for such an English education as best they could in the various educational institutions in India.

4.2b Critique by Syed Mahmood

4.2b (1) Conflicting decisions by the High Courts

Syed Mahmood was convinced that the British judicial system in India had mishandled the administration of Muslim law. He worked to rectify the situation in his position as Puisne Judge of the High Court at Allahabad. Rather than independently ruling against precedents in which he felt Muslim law had been misinterpreted, he had on a number of occasions referred questions to a Full Bench of the Allahabad court where he hoped to clarify the ambiguities and correct the mistakes of previous rulings together with his fellow judges. When he was later accused by Chief Justice Edge of obstructing the smooth working of the court by unnecessary referrals, he defended himself by appealing to the sense of duty he felt as the lone Muslim on the bench to faithfully interpret and apply Muslim law.

Under the unfortunate impression that I should be advancing the cause of the proper administration of Muhammadan Law, I, with the consent of my hon'ble colleagues, had referred cases to the Full Bench for disposal, instead of taking it upon myself to say that numerous cases to be found in the reports containing enunciations of the law by learned Chief Justices and by learned Puisne Judges of the highest tribunals in India, were erroneous and had operated in derogation of the

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[40] Shan Muhammad, *The Indian Muslims: A Documentary Record*, vol. 3 (Meerut, India: Meenakshi Prakashan, 1980), 24.
[41] Zaman, *Ulama*, 60-68.

> administration of native laws which had been guaranteed to the people ever since the beginning of the British rule. These cases were heard in Full Bench, of which I had the honor of being a member, but by an irony of fate, on more than one occasion, I was the only member of the Court who was not sufficiently sure of his knowledge of Muhammadan law to be able to deliver judgments there and then.[42]

That final barb was delivered because in two such cases he had reserved his judgments in order to more fully examine books on *fiqh* which dealt with the questions under consideration, while his fellow judges gave immediate, on-the-spot decisions.

Syed Mahmood's criticisms were founded on careful research into the principles and interpretations of Muslim law. In the case of *Jafri Begam* vs. *Amir Muhammad Khan*, Mahmood's fellow judges had been content to say "Yes" or "No" to the various questions, without dealing with the complicated issues of Muslim inheritance involved in the case.[43] Syed Mahmood ultimately concurred with the decision of the other judges but felt it necessary to explain in much more detail the grounds of his conclusion. He noted that the conclusions he and his fellow judges had reached reversed previously established precedents. As such, their judgment demonstrated that "some of the highest tribunals in India have repeatedly expressed views upon the subject which...directly contradict some of the principles of Muhammadan jurisprudence."[44] Mahmood felt this was not an isolated incident, but that there had been a long history of conflicting decisions reflected in the published Law Reports. He intended his judgment to remove "the existing cloud of judicial exposition" with regard to certain aspects of Muslim inheritance. In the case of *Queen-Empress* vs. *Ramzan* which, in Syed Mahmood's view, involved a somewhat difficult question of Muslim law relating to the practice of prayers in a mosque, his fellow judges once again promptly gave their decisions, this time without giving Mahmood the opportunity to form an opinion and present it for their consideration—an action whose legality he publicly questioned.[45] On March 14, 1885, Syed Mahmood returned to give his decisions in both the above cases, incorporating numerous references and quotations from what he termed "original authorities of Muhammadan Law."[46] In the matter of pre-

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[42] Appendix O, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug 1893, British Library, pp. 7A-8A.
[43] *The Indian Law Reports* 7 All. (1885) 822, Jafir Begam vs. Amir Muhammad Khan, pp. 825-826..
[44] Ibid., p. 826.
[45] *The Indian Law Reports* 7 All. 461 (7 Mar. 1885) Queen-Empress vs. Ramzan, p. 465.
[46] Ibid., p. 466.

emption and its application in cases involving non-Muslims, Syed Mahmood again contended that various rulings given by High Court at Allahabad were contradictory and irreconcilable.[47] In his judgment—which became the standard ruling on the issue—he went on to argue that Muslim law had become the customary law for much of the country as non-Muslim communities adopted Muslim law as their own.[48]

4.2b (2) Weaknesses in translations of Muslim legal texts

The chief cause for the mishandling of Muslim law by the British judiciary in India was the lack of access to authoritative legal sources by many of the judges administering the law. Because most if not all of the judges coming from Britain had received no training in the Arabic and Persian languages, they were limited to consulting a few standard texts that had been translated, and to rely on those translations even when they proved to be in error. Syed Mahmood stated the problem thus:

> One of the greatest difficulties in the way of the Courts established in British India, is the paucity of text-books upon Muhammadan Law written in English which are sufficiently accurate to be safe guides in the administration of those branches of that law which, by s. 24 of the Bengal Civil Courts Act (IV of 1871) we are bound to administer. The only means of information consists of books of reference which are either incomprehensive compilations or abbreviated translations, and, in some cases, translations of translations.[49]

By focussing on translation, he made the first significant contribution in the area of translation since Baillie's efforts in the 1830s and 1850s discussed earlier. Although he did not produce a translation of a complete text, Mahmood selected numerous portions from a variety of texts relevant to the particular issues being addressed by the court, and had those portions entered into the official Law Reports along with their translations.

One translation that came under frequent criticism was Hamilton's English version of the *Hidāyah*. Mahmood gave a specific example the effect of poor translation in a judgment by William Markby (1823-1914), who had been a puisne judge of the Calcutta High Court from 1866 to 1878, in the case of *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Sing* (ILR, 4 Calc. 142). Mahmood noted that Markby had relied on the English

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[47] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, pp. 791-792.
[48] Fyzee, *Outlines*, 335-339. Asaf A. A. Fyzee states that Syed Mahmood's judgment is "considered to be one of the most authoritative expositions of the law of pre-emption."
[49] *The Indian Law Reports* 7 All. 822 (10 Feb. 1885) Jafri Begam vs. Amir Muhammad Khan, p. 826.

translation of the *Hidāyah* for his interpretation of the Muslim law of inheritance. Upon examining the *Hidāyah* himself, Mahmood concluded that it did not substantiate Markby's conclusions, and pointed out that the text that had been used was "merely a translation of a translation," being an English translation by Charles Hamilton in 1791, of a Persian translation by Indian *'ulamā* of the Arabic text.[50] He sounded a call for a new translation of the *Hidāyah*, "especially as the English terms employed in Mr. Hamilton's translation are frequently not the equivalents of the original Arabic terms, and are not used with the degree of definiteness essential for a book of law."[51] Mahmood also referred to passages from Hamilton's translation used by judges in another case as "only a loose paraphrase of the original Arabic, and ... liable to convey a wrong meaning."[52] Despite the weaknesses of the translations, it should be noted that Syed Mahmood nevertheless frequently quoted them in his judgments where he found no conflict with the original Arabic because they were the most accessible source of Muslim law for his fellow judges and lawyers.

In his celebrated case on pre-emption, *Gobind Dayal v. Inayatullah*, Syed Mahmood likewise observed that judgments had been made based on faulty perceptions of the rules of the Muslim law, because of the unavailability of necessary texts of Muslim jurisprudence in the English language.[53] In particular, he singled out Hamilton's translation of the *Hidāyah* once again as having been the source of some mistakes by the courts in administering Muslim law because it was not a translation of the original Arabic text but of a Persian translation. In this instance, he explained that *al-shuf'atu tajibu* must be translated as "pre-emption becomes obligatory," "necessary," or "enforceable" rather than as "established" as in Hamilton's translation.[54] The difference this made in the administration of the law was that the right of pre-emption was in existence *prior* to the sale, but only became enforceable *after* the sale. Thus the sale was not the *cause* of pre-emption—that already existed because of the joint right of access of the pre-emptor and the vendor—but the *condition* of it being implemented. Justice Dwarka Nath Mitter of the High

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[50] Ibid. p. 830. See also Hamilton, *Hedáya*, vii, xliv-xlv. For further comment on translations see Kugle, "Framed, Blamed and Renamed," 269-273.
[51] *The Indian Law Reports* 7 All. 822 (10 Feb. 1885) Jafri Begam vs. Amir Muhammad Khan, p. 830.
[52] Ibid., p. 839.
[53] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 794-797.
[54] Ibid., pp. 800-801.

Court at Bombay had ruled on the basis of the Hamilton's translation of the *Hidāyah* that the right of pre-emption under Muslim law did not exist before the actual sale, a Full Bench decision which Syed Mahmood was now disputing.[55] Mahmood quoted a number of other Muslim sources to demonstrate his point, which, he maintained would have prevented the Bombay judges from incorrectly interpreting and applying Muslim law. He sought to rectify this general problem of language to some extent by providing numerous translations of relevant passages—accompanied by the original Arabic quotations in the footnotes—from a range of Ḥanafī legal authorities. At times he would provide these translations for his fellow judges as well, to assist them in exploring Muslim law beyond the few standard works in English.[56]

When lawyers before him representing the contending parties in a suit would disagree as to the translation of relevant texts, Syed Mahmood would adjudicate by examining the original texts and the conflicting translations and then providing the definitive translation. In a case involving the Shi'i legal doctrine of *waqf*, Syed Mahmood translated a lengthy passage from a Shi'i authority, the *Jāmi' al-Maqāṣid*, a commentary on the *Qawā'id*, comparing the two translations from the lawyers with the original, then giving his version.[57] In providing a definitive translation, Syed Mahmood contributed an ability that all his fellow judges lacked, namely a proficiency in the languages of the authorities of Muslim law. An awareness of his knowledge of Arabic and Persian affected the working of the court in that lawyers presenting cases before the Bench could enter into intricate arguments hinging on the interpretation of a particular word or phrase. Another lasting impact of Syed Mahmood's incorporation of works of *fiqh* in his judgments is that lengthy sections of Arabic text appear in the Law Reports for those years that he served as a judge in the High Court of Allahabad. These are usually contained in footnotes, while Mahmood's translation appears in the text of his judgment.

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[55] *Bombay Law Reports*, 4, 134, Sheikh Kudratulla v. Mahini Mohan Shaha, as discussed in ibid., pp. 797-804.

[56] See *The Indian Law Reports*, 10 All. 289, (7 Apr. 1888) Muhammad Allahdad Khan v. Muhammad Ismail Khan, pp. 308-316, 326, where he provided translations of portions of six different texts including *Durr al-Mukhtār*, *Fatāwá-yi 'Ālamgīrī*, and *Fatāwā Qāḍī Khān* for Justice Straight, even though in the end he disagrees with Straight's conclusions.

[57] *The Indian Law Reports*, 14 All. 429 (9 May 1892) Agha Ali Khan v. Altaf Hasan Khan, pp. 471-475. One of the lawyers appearing before him for this case was Karāmat Husayn, whom Mahmood had chosen to teach law at MAOC the previous year.

4.3 Retention of Muslim law in the British judicial administration

4.3a Retention of Muslim law in certain civil matters

While censuring the British judicial administration for its reliance on inadequate translations, Syed Mahmood fervently supported the administration in other areas relating to Muslim law. He considered the British commitment to retain Muslim law in matters of "succession, inheritance, marriage, or caste, or any religious usage or institution," as stated in section 24 of the Bengal Civil Courts Act (VI of 1871), as "one of the most important guarantees given to the people of India by the British rule."[58] The provisions contained in section 24 of this Act dated as far back as the beginning of British rule, being first legislated in 1772, an act "which laid down the exact scope of the application of the Hindu and Muhammadan Laws."[59] The choice of the subjects of succession, inheritance, marriage or caste, and matters of religious worship which were to be administered by Hindu and Muslim laws was prompted both by the influence of local jurists and by the predisposition of English officials to see the law in terms of the English divisions of that time. Since matters of marriage and divorce, of wills and distribution of goods, and of religious worship and discipline were within the jurisdiction of the Bishop's courts in England, English officials had little difficulty in seeing the same subjects belonging to "religious" law in India as well.[60] Cases which did not fall within these subjects were to be decided according to "justice, equity, and good conscience," according the Regulation of 5 July, 1781.

These two principles were repeatedly affirmed by various regulations enacted by the British in the subsequent decades. Section 15 of Regulation IV of 1793 laid down that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Muhammadan laws with respect to Muhammadans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions."[61] Regulation VIII of 1795 enacted the rule that if the religion of the plaintiff differed from that of the defendant in a civil suit, the decision was to be

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[58] *The Indian Law Reports*, 7 All. 297 (6 Dec. 1884) Mazhar Ali v. Budh Singh, p. 302.
[59] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 777. Syed Mahmood relied on C. D. Field's account of the law's history in his *The Regulations of the Bengal Code*.
[60] Derrett, *Religion*, 233.
[61] Gobind Dayal v. Inayatullah, p. 777.

regulated according to the law of the latter, unless the defendant was neither Hindu nor Muslim, in which the case was to be decided according to the law of the plaintiff. Eventually the various regulations were replaced by the enactment of the Bengal Civil Courts Act which continued to guarantee that Muslim and Hindu laws regarding succession, inheritance, marriage, caste and any other religious usage or institution were to form the rule of decision for Muslims and Hindus respectively, except where legislation had altered or abolished specific laws. "Justice, equity, and good conscience" were again declared to govern cases not provided for.[62]

The Bengal, Agra and Assam Civil Courts Act (XII of 1887), s. 37 updated the requirement that Muslim law be followed in those matters in which it was applicable. Section 37 reads:

> (1) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished. (2) In cases not provided for by sub-section (1) or by any other law for the time being in force, the Court shall act according to justice equity and good conscience.[63]

Syed Mahmood considered this extension of the earlier guarantee to be of vital importance, and saw it as a means to create laws designed for the unique conditions of India and to restrict the importation of English law. This is demonstrated in his dissentient ruling on a matter involving the law of salvage, in which he declared:

> And one thing is certain, that so long as s. 37 of the Civil Courts Act (XII of 1887) is allowed to stand in the Statute book of the land (as I hope it will always do), the rule of "*justice, equity and good conscience*" must apply to all cases where there is no legislative enactment one way or the other. Further, that rule, as I understand it, does not mean that we are to disregard the special conditions of the country where it is applied, the principles upon which the laws of that country proceed, and I have no doubt that it does not authorise the importation in a rigid form either of the common law of England or any technical rules of the Courts of Chancery there.[64]

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[62] Ibid., p. 779.
[63] India. Ministry of Law, *The Unrepealed Central Acts with Chronological Table and Index*, 2nd ed., vol. 3, From 1882 to 1897, both inclusive (Delhi: Manager of Publications, 1950), 303.
[64] *The Indian Law Reports* 14 All. 273 (29 June 1892) Seth Chitor Mal v. Shib Lal, p. 321.

Syed Mahmood was critical of decisions by British judges who tended to invoke their own notions of justice, equity, and good conscience too hastily, allowing them to prevail over Muslim law. In this he echoed a decision delivered by the Privy Council in England, the highest court of appeal for Indians, which overturned a ruling by judges of the Calcutta High Court that favoured the standard of equity and good conscience over Muslim law in a matter of marriage. The members of the Privy Council expressed their dissent most emphatically, declaring that for a judge to decide suits involving such domestic relations, according to his own concept of natural justice without reference to Muslim law was, in their opinion, "opposed to the whole policy of the law in British India."[65] They gave as the reason for this opinion the fact that such a policy would rightly upset the Muslim community which had received guarantees that matters concerning domestic relations would be governed by their own laws. While they might be inclined to accept the overriding of Muslim law if it "was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery," the case before them did not warrant such an intrusion. In fact, they remarked, English Ecclesiastical Courts had frequently given decisions in such cases of marriage that were very similar to what was required in Muslim law. Syed Mahmood quoted the Privy Council judgment at length because it gave authority to his opposition to this disdainful treatment of Muslim law. "It has come with my notice," he wrote, "that vague and variable notions of the rule of 'justice, equity and good conscience' are sometimes regarded as affecting the administration of native laws in such matters to a degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion."[66] He declared that the case under question must be decided by Muslim law, and went on in his judgment to consider nature of marriage and its effect upon the contracting parties under Muslim law.

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[65] As quoted by Syed Mahmood in *Indian Law Reports*, 8 All. 149 (21 Jan. 1886) Abdul Kadir v. Salima, p. 153. At the time this judgment was delivered in Allahabad, Syed Mahmood had already ended his second term as officiating puisne judge in the High Court, but his fellow judges approved of his written opinion prepared when the case first appeared, and adopted it as their own judgment in the case.
[66] Ibid., pp. 153-154.

In a similar case involving the Hindu law and the restitution of conjugal rights, Syed Mahmood once again resisted the intrusion of other laws into the areas such as marriage which were to be governed by the respective laws of the Muslims and Hindus.[67] He rejected arguments which held that inferences from legislated statutes could alter the nature of the personal laws of marriage and conjugal relations. Although he accepted the abrogating authority of express legislation, he would not accept anything less than "enacting words of irresistible clearness," because to do so would be "to credit the Legislature with disturbing well-settled existing rights of persons and property by indirect and almost surreptitious methods."[68] Unless the legislated statute contained express words abrogating or modifying "native laws," the latter must be deemed to prevail in such matters of family and personal law.

In a Minute that he wrote on the proposed Guardians and Wards' Bill, Syed Mahmood likewise insisted on the priority of existing "native laws" in a matter so intimately connected with family relations as the appointment of guardians. He proposed an amendment that would expressly state that nothing in the Act would be taken to alter, diminish, or increase the status or powers of guardians of minors as found in the personal laws to which the minor was subject.[69] He expressed his opinion on the importance that Government legislation not interfere with the laws of Hindu and Muslim communities as provided for under the Acts discussed above.

> I do not think the legislature ever intended or does not intend to abrogate the Hindu and Muhammadan personal laws as to minority and guardianship. In both those systems the rules upon that subject are deeply intermixed with the law of marriage and other family relations, and I think it is very important to take advantage of this opportunity to lay down expressly the saving of native laws, which was only implied under the older Acts. I do not think the legislature should lightly, even by implication, disturb the social fabric of the rules of the native laws already accepted by the native population in such matters.[70]

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[67] *The Indian Law Reports* 13 All. 126 (7 May 1890) Binda v. Kaunsilia, p. 144-146, 153-154.
[68] Ibid., p. 144.
[69] Syed Mahmood, "Minute by Mr. Justice Mahmud on the Guardians and Wards' Bill (No.II), dated the 19th April 1890, N.-W. P. and Oudh, Judicial (Civil) Dept. Proceedings (A), May 1890, Nos. 32-38, U. P. State Archives, Lucknow, p. 42.
[70] Ibid.

His comments illustrate his penchant for extending the boundaries of those areas to be governed by Muslim and Hindu laws, rather than restricting them. This tendency is seen more clearly in his rulings on the conduct of prayers.

By his insistence that the original guarantees making space for Muslim law in the British judicial system in India be maintained, Syed Mahmood sought to limit the drastic transformation of Muslim law through adjudication and legislation. With respect to adjudication, he adamantly opposed the practice of judges to override existing provisions of Muslim law to follow their own discretion by an appeal to "justice, equity, and good conscience." By his frequent recourse to original texts of Muslim jurisprudence, he attempted to correct wrong applications of Muslim law, and to guide his fellow judges towards a more correct interpretation. With regards to legislation, he voiced his strong approval for any bills that reinforced the early guarantees that matters of succession and inheritance, marriage and divorce, remain under the purview of Muslim law. He also took an active interest in drafting new legislation, opposing any provisions that would limit that purview, and suggesting alternatives that would enhance the proper administration of Muslim law.

4.3b Priority of Muslim law over criminal law in mosque disturbances

One matter which Syed Mahmood adamantly insisted did not belong in criminal law and should be dealt with under Muslim law was the question of Muslims of the Ahl-i Ḥadīth sect performing their prayers in a distinct manner in the same *masjid* as Muslims adhering more strictly to Ḥanafī *fiqh*. In the criminal case of *Queen Empress v. Ramzan* discussed earlier, the initial judgment of the magistrate focused on the disturbance caused by their action, employing the word "disturbance" or some form of the verb "disturb" at least nine times in his short report. He stated emphatically: "It is useless to inquire whether it is lawful or not to use the word '*amen.*' As long as by doing so the accused disturbed the assembly, they rendered themselves liable to punishment under s.296, Indian Penal Code."[71] When the case was appealed to the High Court in Allahabad, the majority

[71] *The Indian Law Reports* 7 All. 461 (7 Mar. 1885) Queen-Empress vs. Ramzan, p. 463. The section reads as follows: "Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description for

of the judges were quick to give their opinions, sending the case back to the magistrate to be re-tried with regard to questions which focused only on the nature of the religious assembly and the alleged disturbance. In his dissentient judgment, Justice Mahmood rebuked his fellow judges for delivering such a hasty judgment without first hearing his opinion after he had the opportunity to consult the original authorities of Muslim law.[72] He considered the case to be far from simple since it turned on a very minute point of *Muslim* law and not *criminal* law. In later reflecting on the case, he commented:

> In that case, as I can see from the report now before me, three men of apparently unblameable character had been convicted as criminals on account of saying *Amin* aloud in a mosque. I was under the impression that in a case of that kind in which the question was really one of great significance to the Musalman population of British India, the late learned Chief Justice would have sufficient feelings of consideration, if not those of courtesy, to allow me, who by fortuitous chances happened to be the only Muhammadan Judge throughout British India who sat on the High Court Bench, to take my time over consulting books of Muhammadan ecclesiastical law.[73]

His insistence that the question was one of Muslim law eventually prevailed, and provided a precedent for cases dealing with the use of *masjids.*

In this case, Syed Mahmood utilized the Evidence Act to interject Muslim law and then declare that it had priority over criminal law. Neither the counsel for the defence, nor the public prosecutor had referred to authorities of Muslim law in arguing their case. In fact, the observation had been made that the Court was not bound to consider Muslim law in such cases "without having the rules of that law proved by specific evidence like any other fact in a litigation."[74] Syed Mahmood disagreed and argued that clause 1 of section 57 of the Evidence Act (I of 1872) fully covered the introduction of Muslim law in such cases. The clause reads as follows: "57. The Court shall take judicial notice of the following facts—(1) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India." Mahmood wrote:

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a term which may extend to one year, or with fine, or with both. See: Stokes, *Anglo-Indian Codes, vol. 1*, 202.

[72] Ibid., pp. 465-466.

[73] Syed Mahmood, Minute of [2 May 1886], Appendix O, Public and Judicial Department Records, India Office Records, L/PJ/6/355, File 1680, date 15 Aug 1893, British Library, pp. 6A-13A of Appendix, p. 8A.

[74] *The Indian Law Reports* 7 All. 461 (7 Mar. 1885) Queen-Empress vs. Ramzan, p. 468.

> Whenever a question of civil right or the lawfulness of an act arises in a judicial proceeding, even a Criminal Court is bound, *ex necessitate*, to resort to the civil branch of the law; and, in a case like the present, the question being the right of a Muhammadan to pray in a mosque according to his tenets, the question of legality or illegality would fall under the purview of the express guarantee given by the Legislature in s. 24 of the Bengal Civil Courts Act (IV of 1871), that the Muhammadan Law shall be administered with reference to all questions regarding 'any religious usage or institution.' That the application of some of the sections of the Indian Penal Code depends almost entirely upon the correct interpretation of the rules of civil law, cannot, in my opinion, be doubted; and if it is so, the present case is only another illustration of this principle.[75]

Although the charges of the case under review were that of disturbing a religious assembly, an offence under the criminal code, he saw the prior question as being of the right of a Muslim to pray in a mosque according to his beliefs, and thus a matter falling under the purview of the civil law, specifically, of the guarantee given in the Bengal Civil Courts Act that the Muslim law would be administered with reference to all questions regarding any religious usage or institution.

Therefore, three weeks later, Syed Mahmood presented his judgment in which he reviewed what the various Sunni schools of law taught regarding the practice, as expressed in major legal treatises. He employed the standard works of *fiqh* and commentaries on the Ḥadīth on this subject, as has already been discussed, to conclude: "There is absolutely no authority in the Hanafia or any other of the three orthodox schools of Muhammadan Ecclesiastical Law which goes to maintain the proposition that if any person in the congregation says the word *āmīn* aloud at the end of the '*Sura-i-Fateha*,' the utterance of the word causes the smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud."[76] Furthermore, discussion of the matter *after* the completion of the prayer would not either constitute a criminal offence even though a majority of those present did not approve of the discussion, because a *masjid*, unlike a Christian church, "is not only a place for divine worship, but also intended for religious and moral teaching and discussion."[77] Syed Mahmood also opposed the public prosecutor's argument that the disturbance alone was sufficient to constitute an offence without examining the legality of the

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[75] Ibid.
[76] Ibid., pp. 472-473.
[77] Ibid. p. 476.

action itself. Mahmood argued that "such a principle would place the minority at the mercy of the majority, and would, in a case like this, deprive them of the right of worship which the law distinctly confers upon them."[78] Syed Mahmood's success in contending that this was a matter rightly to be adjudicated in the realm of Muslim law can be seen in that when similar cases recurred, the questions all revolved around issues of Muslim law, and Mahmood's reported judgment was cited and upheld.

4.3c Priority of Muslim law over some aspects of the Law of Evidence

When a case appeared before the court on the question of the legitimacy of a son and his right to inherit, Syed Mahmood once again successfully argued that the case was governed by Muslim law, and not by the rules of evidence introduced in the Evidence Act (I of 1872).[79] As will be seen later, he fully accepted the priority of Evidence Act over Muslim law in matters of procedure; but in this case he showed from the books of Ḥanafī law that the rules of Muslim law regarding the acknowledgment by a Muslim male of another as his son were rules of the *substantive* law of inheritance, not *adjective* law. Justice Mahmood along with his fellow judge, Justice Straight, prepared and presented translations from texts such as the *Ramz al-Ḥaqā'iq*, 'Aynī's (d.1451) commentary on *Kanz al-Daqā'iq* by Hāfiẓ al-Dīn al Nasafī (d.1310), the *Durr al-Mukhtār*, the *Fatāwá Qāḍīkhān*, and the *Fatāwá-yi 'Ālamgīrī*, to support their conclusion that "the Muhammadan jurisconsults themselves do not treat the subject of acknowledgments as forming part of the rules of evidence, though they recognise the fact that acknowledgments resemble admissions."[80] The distinction being demonstrated, the court was bound by s. 24 of the Bengal Civil Courts Act (VI of 1871) to apply Muslim law.[81]

Sir Douglas Straight in his ruling expressed his own opinion on the tendency of English judges and even British-trained Indian judges to disregard Muslim (and Hindu) law and follow what seemed more compatible with their sense of justice as conditioned

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[78] Ibid. p. 477.
[79] *The Indian Law Reports*, 10 All. 289 (7 Apr. 1888) Muhammad Allahdad Khan v. Muhammad Ismail Khan.
[80] Ibid., pp. 311-316, 326.
[81] A subsequent ruling by the Calcutta High Court confirmed that position when it laid down "that the doctrine of acknowledgment is an integral potion of the Mahommedan family law and the conditions under which it will take effect must be determined with reference to Mahommedan Jurisprudence, rather than the Evidence Act." See Ameer Ali, *Mahomedan Law, II*, 196.

by their training in England. He acknowledged that there were many apparent anomalies in Muslim law that would strike the average English lawyer with dismay as irreconcilable with the principles of English statute and common law that he had been taught, and recognized that advocates and pleaders in the courts would be tempted to discuss questions along modern lines rather than according to the various sources from which Muslim law was drawn. Nevertheless, he insisted, "So long as the rules of the Hindu and Muahmmadan law stand with such expositions and rulings as have been made in regard to them by their Lordships of the Privy Council, so long are we, sitting as Judges in this country, constrained by statute to find out what those rules are, and when we have ascertained them with precision to give effect to them."[82] After then quoting extensively from the books of *fiqh* enumerated above, Straight concluded "that the acknowledgment of children by a Muhammadan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, is established to be a distinct and specific rule of the substantive Muahmmadan law relating to inheritance to which we are bound to give effect."[83] Syed Mahmood concurred with Straight in this portion of his judgment, expanding on the various Muslim authorities that had been quoted. To support his argument that "acknowledgments of parentage under the Muhammadan law rest upon a footing higher than that of ordinary admissions as pure matters of evidence," he added extracts and details from the *Hidāyah* and two commentaries on it—Ibn al-Humām's (d.1457) *Fath al-Qadīr* and al-Kurlānī's (d. 14th century) *al-Kifayah*,—Ibn Nujaym's (d.1563) *al-Ashbāh wa'l-Naẓā'ir*.[84] He pointed to the passage from the *Ashbāh* as demonstrating conclusively that "the acknowledgment of parentage, though it has reference to evidential presumptions and other considerations, is in effect a rule of *personal status* in the eye of Muhammadan law."[85]

4.3d Authority of the Privy Council in matters of Muslim law

In his ruling, however, Syed Mahmood did not limit himself to Muslim authorities, as numerous as they were. To answer the question whether, in a case where the le-

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[82] *The Indian Law Reports*, 10 All. 289 (7 Apr. 1888) Muhammad Allahdad Khan v. Muhammad Ismail Khan, p. 306.
[83] Ibid., p. 317.
[84] Ibid., pp. 326-330.
[85] Ibid., p. 328.

gitimacy of a child could not be proved by establishing a marriage between his parents, the Muslim law recognized any other method whereby legitimate descent could be presumed, Mahmood turned to case-law in the form of Privy Council judgments for help.[86] He cited four rulings by the Privy Council on the subject and concluded:

> Their Lordships in dealing with those cases applied the principles of the Muhammadan law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance. Any other view of those cases would involve the proposition that their Lordships intended to go far beyond the authority of the Muhammadan law itself as to acknowledge of parentage and legitimacy for purposes of inheritance.[87]

While in this instance Mahmood's acceptance of the authority of the rulings of the Privy Council judges on matters of Muslim law appears to be qualified by their correct interpretation of that law, this acceptance nevertheless indicates a significant development in Muslim understanding of how Muslim law was to be applied in India.

That judges in England, who were not qualified as *mujtahids*, were not trained in Islamic *fiqh*, and were not even Muslims, could make pronouncements on Muslim law that were accepted as authoritative by Indian Muslims was a distinct departure from the traditional view of Muslim law. Syed Mahmood and numerous other Muslim judges at lower levels of the judiciary who regularly ruled on matters falling under the purview of Muslim law did not either have the qualifications of *mujtahids*, but at least they were Muslims. In addition, their judgments, along with those of numerous other non-Muslim judges ruling on Muslim law in India, could be—and regularly were—appealed and overturned by higher courts. The Privy Council in England, on the other hand, was the highest court of appeal; and Syed Mahmood and other leading Muslim jurists in India accepted its authority as the highest court of appeal in matters of Muslim law as well.

By their acceptance of the authority of the Privy Council to rule on Muslim law, the Muslim judges were, in fact, creating a new source for Muslim law as it was to be administered in India, even though they disagreed at times with the changes that resulted. This transformation was directly addressed by one such Muslim barrister trained in England. In his historical sketch of Muslim law, Sir Abdur Rahim (1867-1947), a younger

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[86] Ibid., pp. 330-333.
[87] Ibid., p. 334.

contemporary of Syed Mahmood and Ameer Ali, followed his listing of works on Muslim law available to judges in India with this observation:

> But, once the British India Courts in adjudicating upon questions raised before them have ascertained from the available materials, the Mohammedan Law applicable to the subject, these decisions themselves according to the principles of British Jurisprudence, form henceforth a fresh basis and starting point. If a rule of Mohammedan Law is laid down by a judgment of the Privy Council or has been settled by a uniform course of decisions of the Indian High Courts, it must be accepted even though it may not agree with a proper reading of the original authorities.[88]

Abdur Rahim went on to critically evaluate three decisions by the Judicial Council of the Privy Council that fundamentally altered the way Muslim law had been decided in India. He argued that if the question whether a rule of Muslim law promotes the cause of "substantial justice" was going to be decided without any reference to the principles of Muslim jurisprudence, or if the British courts were going to appropriate the authority to construe the texts of the Qur'ān and the Ḥadīth without regard to the rules laid down for that purpose, then "elements of great uncertainty have been introduced in the administration of Mohammedan Law and a prospect is opened for innovations in the doctrines of Mohammedan jurisprudence."[89]

This pattern has prevailed in India to the present time, even now that the Privy Council has been replaced by the Supreme Court of India after the country's independence in 1947. Tahir Mahmood, a leading Muslim jurist in India considers these courts to be a "source" of Muslim law in India:

> All the Privy Council rulings on Islamic law not superseded by legislation or overruled by the Supreme Court of India are regarded as the 'authentic' exposition of Islamic law, binding on all the High Courts and the lower courts. All judgments of the Supreme Court on any aspect of Islamic law are also similarly binding, while the rulings of the High Courts on Islamic legal principles are regarded as binding law for lower courts unless overruled by the Supreme Court. Judicial decisions on Islamic law as recorded in the law reports are, thus, an important "source" of Islamic law in India. Legislation in this area being scanty, court rulings have assumed greater weight. Of course, even legislation in the area of Islamic law is to be finally interpreted by the higher courts.[90]

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[88] Rahim, "Historical Sketch," 109n.
[89] Ibid.: 111n.
[90] Mahmood, *Islamic Law*, 5.

Although Syed Mahmood never stated his acceptance of the Privy Council rulings as a "source" of Muslim law as explicitly as his modern couterpart, his own judgments incorporating those rulings side by side with quotations from traditional books of *fiqh* reflects that acceptance. As Tahir Mahmood's quotation indicates, even Syed Mahmood's extensive and detailed judgments as recorded in the official law reports have become another "source" of Muslim law for those seeking to administer that law in India today.

4.3e Conflicts over the matter of *waqf*

4.3e (1) Stricter implementation of Muslim law by the British

Another issue in which the power of the Privy Council in shaping Muslim law was made evident was the institution of *waqf*. Unlike his contemporary, Syed Ameer Ali, who made the rules regarding the institution of *waqf* a major study in his legal career, Syed Mahmood wrote little on the subject.[91] As early as 1879, before he had been appointed as a District Judge, he had assisted his father in preparing a Family Waqf Bill which sought to utilize that historic institution to prevent the disintegration of the land holdings of wealthy Muslim families.[92] Sir Sayyid Aḥmad Khān, in his correspondence with the government, outlined the history of practices in Muslim India to enable landed nobility to keep their holdings intact in spite of the stipulations of the Muslim laws of inheritance. Sovereigns in India had made grants of large tracts of land called *jāgīrs* to individuals for the maintenance of their dignity and rank. These *jāgīrs* were not liable to division by inheritance, but reverted to the sovereign upon the death of the *jāgīr*-holder, who could then grant it in its entirety to the eldest son if he so wished, thereby maintaining the property intact.[93] "The Mohammadan law of inheritance did not govern succession to the *jagirs*, and its operation upon other property was not felt."[94]

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[91] For a thorough study of legal developments in British India centering on the matter of *waqf*, including Ameer Ali's views, see: Kozlowski, *Muslim Endowments*.

[92] Letter from Syud Mahmood, Bareli, to Lt.-Col. P.D. Henderson, 15 Jun. 1881, enclosed with a letter from the Marquis of Ripon, Simla, to the Marquis of Hartington, 15 Jul. 1881, no. 35, Letters from the Secretary of State for India to the Viceroy, commencing from January 1881, the Marquis of Ripon, Correspondence with the Secretary of State fro India in England, Ripon Collection, B.P. 7/3, 1881, British Library.

[93] On the institution of *jāgīr*, see: John F. Richards, *The Mughal Empire*, The New Cambridge History of India, ed. Gordon Johnson (Cambridge, UK: Cambridge University Press, 1993), 58-78.

[94] "Remarks on the Necessity of a Law to Provide Facilities for Mohammadan Family Wakfs," contained in a Letter from Syed Ahmed, Calcutta, to the Secretary to the Government of India, Legislative Department, 3 Feb. 1879, GOI, Home Judicial (B), Oct. 1879, Nos. 44-45, National Archives of India, New Delhi

However, with the advent of British rule, the new government no longer employed the *jāgīr* system to reward its employees. Instead, they enforced a stricter interpretation of the Muslim law, one that had not been so strictly applied since the early history of Islam under the caliphs. Sir Sayyid pointed that while the retention of Muslim law by the British was commendable, such stringency in its application also had its drawbacks.

> The anarchy and revolutions which preceded the British rule ruined many old families; but since the establishment of peace and order, and of Courts of Justice, the Mohammadan law, in cases of inheritance, is enforced with greater precision than was known before. The tolerant clemency of the British Government in not interfering with the rules of inheritance prevalent among its subjects, no doubt deserves all praise, and is appreciated by the subjects; but at the same time, in the case of Mohammadans, it has produced some deplorable results...[95]

He went on to propose a detailed legal framework to guide Muslims in writing *waqfnāmāhs* that would manage their estates in a consistent, unassailable manner. As Kozlowski has noted in his analysis of the proposed bill, "the topics covered and the way in which they were presented bore greater similarity to British law than they did to *shariah*."[96] This reflected not only his long experience as a subordinate judge in the British judicial system in India, but also the British legal training of his son, Syed Mahmood, who assisted him in preparing the bill. The plan was rejected at that time, not only by Muslim *'ulamā*, but also by British officials who feared it would permit landlords to escape the land tax and who in general opposed the idea of perpetuities in law.[97] These concerns continued to produce a persistent opposition to the institution of *waqf* among British officials and judges in subsequent decades, an opposition which was reflected in their preference to strictly enforce the Muslim laws of inheritance.

4.3e (2) Sunni rules of waqf inapplicable to Shi'ahs

Syed Mahmood's one major recorded judgment on the subject of *waqf* was given on a suit involving not the Sunni but the Shi'i law, late in his career as judge in the High Court. He emphasized that the difference between Sunni and Shi'i law meant that the rules that were accepted for the former were not relevant for the latter which had devel-

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[95] Ibid.
[96] Kozlowski, *Muslim Endowments*, 158.
[97] Ibid., 162.

oped its own distinct rules.[98] He pointed out that this was a distinction that the British courts in India had not recognized until 1841. The fundamental principle that Syed Mahmood sought to prove was that in Shi'i law, *waqf* was a "contract" (Arabic: *'aqd*), involving an offer and an acceptance of the offer, unlike in Sunni law where it was a unilateral disposition of property.[99] This point he sought to demonstrate from authoritative Shi'i works such as *Sharā'i' al-Islām* and its two commentaries, *Masālik al-Afhām* and *Jawāhir al-Kalām*. He noted the use of Ameer Ali's work on Muslim law by one of the lawyers, but appeared to set that in opposition to the works of *fiqh* which he preferred. He considered other works of Shi'i law mentioned by the lawyer which contradicted Mahmood's conclusions, but rejected their authority on the basis that they were of "comparatively modern date and ... not to be compared in point of authoritativeness with the *Sharāyi-ul-Islām* or the *Masālik-ul-Afhām*."[100] That Syed Mahmood considered himself qualified to make such judgments without ever claiming to be a *mujtahid*, an *'ālim*, or even a Shi'ī Muslim, shows that he had accepted the assumption made by the British that a knowledge of the authoritative texts of Muslim law was sufficient to enable a judge in British India to make rulings about Muslim law. In this instance, his counterparts on the bench fully concurred with his ruling after examining the relevant texts for themselves presumably with the help of Mahmood's translations.

4.3e (3) Privy Council's rejection of fresh interpretations

The Privy Council, however, overturned Mahmood's ruling on *waqf* while passing judgment on another case involving Shi'ī law. The members of the council stated there was danger in placing reliance either "upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts.... It would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."[101] They felt that since there was no unanimity among the texts

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[98] *The Indian Law Reports*, 14 All. 429 (9 May 1892) Agha Ali Khan v. Altaf Hasan Khan, p. 449-450.
[99] Ibid., pp. 447-448.
[100] Ibid., pp. 483-484.
[101] *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 30 IA. 94 Baker Ali Khan v. Anjuman Ara Begam, p. 111-112.

cited, Mahmood had had to choose between texts which he considered of various degrees of authority to support his inference. By concluding that the ruling by Mahmood and the Allahabad High Court had been unsound, they were, in effect, rejecting reasoning on the basis of Muslim legal texts as a source of law to be applied to the ever-changing needs of the Muslim community. In their eyes, the ancient books of *fiqh* were fixed texts, codified law beyond the words of which a judge could not venture. The sources to which the Privy Council did appeal in their effort to address the needs of modern Muslims were the judicial authority of analogies and of precedents of British courts in India. The members of the council reasoned logical inferences on the basis of Shi'i laws of "gift" and of Sunni laws of *waqf*. Precedents were limited to two, the main one being of questionable value because of its early date (1836) and because it had likewise applied Sunni law to Shi'i Muslims. Mahmood had specifically criticized such disregard of distinctions between the two sets of law of the Sunni and the Shi'i communities, but Privy Council went ahead with their ruling based on that analogy. In his thorough exposition of the British treatment of the Muslim law of *waqf* in India, Kozlowski states that the analogy "was a dubious argument from the perspective of any school of *shariah*, but the British controlled the courts and they made the law."[102]

Criticism of Syed Mahmood's ruling on this issue also came from another quarter, this time from his contemporary, Syed Ameer Ali, who was at that time serving as a judge of the High Court in Calcutta, and later was appointed as a member of the Privy Council to hear appeals from Indian courts. In a later volume of the work Mahmood had himself mentioned in his ruling, Ameer Ali declared Mahmood's translations of certain key phrases to be erroneous.[103] He also disagreed with Mahmood's opinion that a testamentary *waqf* would be inoperative unless it had been given effect within the lifetime of the testator; that view, he wrote, "proceeds on a strained construction of the law," one which had been disaffirmed by the Privy Council.[104] But while he accepted the ruling of the Privy Council against Mahmood's judgment, Ameer Ali confronted the criticism of one of his own dissentient judgments, contained in another Privy Council ruling. Lord Hobhouse who delivered the ruling on behalf of the council wrote of Ameer Ali, "The opinion

[102] Kozlowski, *Muslim Endowments*, 119.
[103] Ameer Ali, *Mahomedan Law, I*, 498 n.1, 2.
[104] Ibid., 500-501.

of that learned Mahomedan lawyer is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated."[105] He criticised Ameer Ali for quoting a saying of the Prophet as an authority.

> Clearly the Mahomedan law ought to govern a purely Mahomedan disposition of property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in *India*; but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of wakf, as the learned Judge says they have. But it would be doing wrong to the great lawgiver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other...[106]

From this quote, it would initially appear that the council's main concern was the correct implementation of Muslim law in India, but the references towards the end showed that their views were shaped more by principles of British law where questions of life-interests, inheritance, and trusts were hotly debated.[107] Ameer Ali's own response was to declare that "those very precedents, which appeared meagre or imperfect to their Lordships, form ... the foundation on which the Mahomedan Law relating to *wakf* is based; and it is upon those precedents that Mussulman communities throughout the world have moulded their practice and their religious social life for centuries."[108] He went on to suggest that a lack of understanding of the Muslim doctrine of providing for one's family as an act of piety was the cause of the Privy Council's skewed view of the intention of Muslim law. He then directly challenged the court's right to try to determine the mind of the Lawgiver on the basis of their own prior assumptions or to do other than simple apply the law as it was received and acted upon by the general Muslim community. "It is respectfully submitted," he wrote, "it is not competent to Courts of Justice to refuse to administer the law as they find it, until it is ascertained to be in direct contravention of the statutory enactments of the State."[109] Ameer Ali eventually retired to England in 1904 and was

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[105] *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 22 IA. 76 Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, p. 86.
[106] Ibid., p. 87.
[107] Kozlowski, *Muslim Endowments*, 148.
[108] Ameer Ali, *Mahomedan Law, I*, 345.
[109] Ibid., 347-348.

himself appointed to the Privy Council in 1909, where he served until his death in 1928.[110]

4.3f Reception of the Muslim law of pre-emption as customary law

4.3f (1) Pre-emption defined

Syed Mahmood considered the law of pre-emption to be a civil law of considerable importance in explicating not only how the British should handle Muslim law, but also how Muslim law had been received by the non-Muslim communities in India's history. He defined pre-emption as "a right which the owner of certain immoveable property possesses, as such, for the quiet enjoyment of that immoveable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immoveable property is sold to another person."[111] A basic illustration would be a case in which two parties jointly owned a building; if one of the co-owners sold his share to a third party, the other co-owner could pre-empt the sale by paying the sale price to the third party, because it affected his enjoyment of his own property. The object and basis of the pre-emptive right was to prevent the introduction of "strangers" as co-sharers in the property because of the inconvenience a stranger would cause to the pre-emptive co-sharers.

The right was essentially based upon the injury which such inconvenience was presumed to cause. As such, the right was not one which was to be enforced merely as an instrument of capricious power or vindictiveness; nor could it be made the subject of sale or bargain of any other kind, because that would indicate that the injury of which the pre-emptor complained in his suit was not real and that the motives for pressing the suit were something other than the redress of the injury.[112] Another proviso was that the property claimed by pre-emption could not be divided, but that the pre-emptor could substitute himself in the place of the purchaser only by taking all of the benefits as well as all the disadvantages of the sale. He could not, for example, choose to pre-empt only the fertile portion of the property sold, leaving the purchaser with the barren section. Not only

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[110] S. M. Ali, "Syed Amir Ali," *Journal of the Asiatic Society of Pakistan* 14, no. 3 (1969): 318. Kozlowski suggests that Ameer Ali may not have been very influential in the court on matters such as *waqf*. See: Kozlowski, *Muslim Endowments*, 151.

[111] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 799.

[112] *The Indian Law Reports*, 5 All. 180 (2 Sept. 1882) Rajjo v. Lalman, p. 183.

would such an action be an injustice to the purchaser, it would also violate the principle that a suit pre-emption was fundamentally opposed to the introduction of a stranger which would not be conducive to peace but would disturb the quiet enjoyment of their rights by the co-sharers of the vendor.[113] For the pre-emptor to choose to pre-empt only a portion of the land would indicate once again that his grievance was not real.

A key distinction that Syed Mahmood endeavoured to make in order to correct what he perceived to be faulty understandings of the Muslim law of pre-emption made by other judges, was that this was a right the first owner possessed *before* the second owner chose to make his sale, but a right that could only be exercised *after* the sale had been made. As such, the pre-emptor could not veto or consent to a sale or the terms of a sale that had not yet been brought into effect.

> The pre-emptive right may or may not be asserted or enforced; and it would be absurd to say that that which is only possible should, by a retrospective effect, vitiate that which is certain, namely the sale. This is the manner in which the jurists of the Muhammadan law have dealt with this point of the rule of pre-emption, and it is upon very similar grounds that they hold the pre-emptor incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place.[114]

If such a right did not exist prior to the sale, its exercise subsequent to the sale would infringe on the absolute right of the vendee to enjoy the title he had just purchased. Here Syed Mahmood invoked what he considered to be a foundational principle of jurisprudence: "I take it as a fundamental principle that no state of things can give rise to cause of action, such as can be sued upon in a Court of justice, unless there is a right and an infringement of that right—the right being *necessarily antecedent* to the injury."[115] Since the right of pre-emption was pre-existent, and the sale of the property did not affect the *existence*, only the *exercise*, of that right, he considered it more correct to see the right as one of substitution rather than of re-purchase. "It is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title."[116] Otherwise, he argued, the pre-emptor could be

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[113] *The Indian Law Reports*, 6 All. 423 (2 June 1884) Durga Prasad v. Munsi, pp. 425-426.
[114] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 804.
[115] Ibid., p. 810.
[116] Ibid., p. 809.

subject to another pre-emptive claim with the result that pre-emptive litigation would never end.

4.3f (2) Pre-emption to be governed by Muslim law

Syed Mahmood argued that the Muslim law of pre-emption remained applicable to the Muslims as part of their religious laws, as well as beyond the bounds of the Muslim community. At the time Mahmood was starting out as a barrister in the Allahabad High Court, the judges had ruled in one case that the Muslim laws of pre-emption and of gift were not strictly applicable, even in suits between Muslims, and were not based on local custom or contract.[117] It was *equitable*, however, to apply that law. One of the judges, Robert Spankie, dissented and held that the court was absolutely bound to follow Muslim law, not on the basis of equity, but on the basis that pre-emption and gifts were matters in which Muslim law was binding upon the courts. He objected to the contention that these matters could not be considered "religious" institutions. "It is to be remembered," he wrote, "that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dissevered from it. As long as the religions last, the laws founded on them last."[118]

Syed Mahmood agreed with Spankie's ruling, expanding on the contention that pre-emption must have some other basis than equity, and that in India that basis was Muslim law. Though he acknowledged that he was bound by the rules of the court to follow the decision of the majority in the earlier case, he felt the question was reopened by the case now before the court, giving him the opportunity to examine the foundations of the question. "If the right of pre-emption is only a right of re-purchase, and if the right is to be enforced, *not as a rule of law*, but only by reason of the rule of justice, equity and good conscience, I fail to see, even in a case where all the parties are Muhammadans, where the equity lies in forcing a man to sell that which is *absolutely* his own to a man who had no right in connection with it at the time when the title of the *vendee* was created."[119] He argued that equity could not *invent* rules by which rights were to be determined, but had to follow rules which were already in existence. "Law," in the proper sense, was "a rule of

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[117] Ibid., pp. 779-780.
[118] Ibid., pp. 780-781.
[119] Ibid., p. 808.

conduct binding upon the subjects of a State, and upon the courts which the State has established."[120] The laws of pre-emption that existed in India were those that had been introduced by the Muslim rulers, and those rules should be the ones that the court was bound to apply.

Furthermore, according to Syed Mahmood, the law of pre-emption was vitally linked to the law of inheritance; if the court was bound to administer the latter in British India according to Muslim law, to disallow the former would be to carry out the law in an imperfect manner. Syed Mahmood described the law of pre-emption as mitigating the Muslim law of inheritance by which property could be divided among family members into many small shares, the sales of which would cause great inconvenience to the family if they had no opportunity to prevent the intrusion of "strangers."[121] Another basis for the law of pre-emption which was derived from religious texts was, according to Syed Mahmood, the *zanānah* system which created areas where the women of the family resided and were secluded from the view of men outside the family. "Pre-emption pre-supposes living in joint families, and the desire to exclude strangers from intruding into a family-house or the privacy of a *zenana*."[122] Being so thoroughly intertwined with the other Muslim laws the court was bound to administer, the rules of pre-emption must also be administered on that basis.

4.3f (3) Pre-emption to extend to the Hindu community

From establishing that the courts were bound to administer the Muslim laws of pre-emption as part of the Muslim law decreed by section 24 of the Bengal Civil Courts Act (IV of 1871), Syed Mahmood then explained how the Muslim law was also the law to be applied to Hindus in some regions of India. As early as August of 1882 during his first appointment as officiating judge in the High Court, he had argued that the Muslim law of pre-emption was to be followed as the customary law—not just by Muslims but by Hindus as well—in the absence of any other customary law or any legislation modifying the

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[120] Ibid., 781; See also his comments in *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, p. 275.
[121] Ibid., p. 783.
[122] Ibid., pp. 783, 787.

Muslim rules. The reason was that the Muslim law was the only system prevalent in India which provided substantive rules relating to the right of pre-emption in a systematic form.

> At least in Upper India the origin of the right of pre-emption is not traceable to any source other than Muhammadan jurisprudence which the Musalmans brought with them to this country. It may therefore be safely laid down that in all cases in which the right of pre-emption is claimed, the Courts in administering equity will, by analogy, follow the rules of the Muhammadan law of pre-emption, even in cases where the right is not claimed under that law, but under local usage or custom.[123]

He noted that in cases where pre-emption followed a customary law, custom would supply the rules; but where custom happened to be silent on a particular rule, the Muslim law of pre-emption would then be the one that the judge should employ.

Syed Mahmood considered both equity and customary law to be ultimately dependent upon Muslim law to provide substantive rules in this matter because, firstly, equity could not *invent* rules, only follow existing rules by analogy. Secondly because he believed there was no existing law regarding pre-emption in Hindu legal history before the advent of Muslim rulers, there was no other law that could provide an alternative basis for customary law. This was not a legal innovation on his part, since he was basing his opinion on a judgement given by Chief Justice Peacock of the High Court in Bengal which came to a similar conclusion.[124] His ruling was upheld in future judgments, including ones by his later adversary, Chief Justice Edge, who arrived in India in 1886.[125]

4.3f (4) Pre-emption in India originating in Muslim law

In subsequent cases, he continued to insist that, there having been no system of law prevalent in India other than Muslim law which provided systematic, substantive rules in regard to the right of pre-emption, courts logically should follow the analogies furnished by the rules of that law in dealing with cases in which the right of pre-emption was the subject of controversy.[126] He found that the court, in a number of instances, had already been applying the Muslim law of pre-emption by equitable analogy. Cases in

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[123] *The Indian Law Reports*, 5 All. 110 (31 Aug. 1882) Zamir Husain v. Daulat Ram, pp. 113-114.
[124] Ibid., p. 112.
[125] *The Indian Law Reports*, 9 All. 513 (28 Mar. 1887) Ram Prasad v. Abdul Karim, pp. 516-517. A judgment given by Sir John Edge as a member of the Privy Council dealing with Indian appeals more than 25 years later still reflects the same conclusions regarding pre-emption; see *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 42 IA. 10 (1914) Digambar Singh v. Ahmad Said Khan, p. 18.
[126] *The Indian Law Reports*, 5 All. 180 (2 Sept. 1882) Rajjo v. Lalman, p. 182.

which pre-emption had been claimed, not as a personal law of the Muslims, but as a right based on local custom or on the stipulations of a *wājib ul-'arẓ*.[127] The use of the term *shuf'ah* by the framers of a *wājib ul-'arẓ* indicated to Mahmood that Muslim law was understood to underlie the agreement, since *shuf'ah* was a "technical Arabic legal expression."[128] When a question arose upon which the terms of the *wājib ul-'arẓ* were silent, the Muslim rules should be applied by analogy, Syed Mahmood argued, because Muslim law provided the only comprehensive set of rules in India to govern that right.[129] From then on he proceeded on the assumption that the Court had accepted the principle that it would follow the analogies furnished by the Muslim law of pre-emption in administering equity in cases of pre-emption, even for non-Muslims, the only qualification being that those rules be consistent with the principles of justice, equity, and good conscience.[130]

Mahmood did not, however, insist that the customary law of pre-emption in a region must necessarily be co-extensive with Muslim law in all points. Where claims of pre-emption—especially those involving non-Muslims—were based on customary usage rather than on Muslim law per se, all the formalities and restrictions would not necessarily have to be applied. For example, in *Zamir Husain v. Daulat Ram*, he reversed the ruling of the lower appellate court which had dismissed the suit of pre-emption because the rules of *ishhād*, or the express invocation of witnesses, had not been followed; Mahmood felt that the facts of the case were to be regarded as in "sufficient conformity with the local custom."[131] Again in a case in 1889, in *Deokinandan v. Sri Ram*, he agreed that "a right of pre-emption when adopted by village communities as a custom or compact and entered in the *wajib-ul-arz* may in some of its incidents be different from the rules of the Muhammadan law of pre-emption, that in such cases the Court should carefully interpret the terms of the pre-emptive clause of the *wajib-ul-arz* and give effect to them, even

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[127] In British India, the *wājib ul-'arẓ* was a written record of rights defining the legal ownership of a village by the settlement officer. On this institution, see: Elizabeth Whitcombe, *Agrarian Conditions in Northern India*, vol. 1, The United Provinces under British Rule, 1860-1900 (Berkeley: University of California Press, 1972), 254-258.

[128] *The Indian Law Reports*, 9 All. 513, Ram Prasad v. Abdul Karim, p. 518. See the argument repeated in *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, p. 272.

[129] *The Indian Law Reports*, 5 All. 180 (2 Sept. 1882) Rajjo v. Lalman, pp. 182-183.

[130] *The Indian Law Reports*, 5 All. 197 (14 Sept. 1882) Bhawani Prasad v. Damru, pp. 199-200; see *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, pp. 273-274, where he demonstrates that rulings by his fellow judges confirm that assumption.

[131] *The Indian Law Reports*, 5 All. 110 (31 Aug. 1882), Zamir Husain v. Daulat Ram, pp. 115-117.

though they vary or modify the ordinary rule of the Muhammadan law of pre-emption in any respect."[132]

Having argued in *Gobind Dayal v. Inayatullah* that no rule of equity could either invent the law of pre-emption or administer it to people who never had such a law, Syed Mahmood reasoned that for the previous decision of the court to apply the Muslim law of pre-emption to non-Muslims on the basis of "justice, equity, and good conscience," must logically require that the non-Muslim communities had some prior rules of pre-emption.[133] He insisted that these rules could have only been derived from the Muslims whose rulers had introduced laws of pre-emption into India. To support this argument, Syed Mahmood quoted from "eminent Sanskritists" and case law to demonstrate that "there has never been such a right as that of pre-emption recognized by the Hindu Law."[134] In a later case when a Hindu vakeel argued before him that Hindu law did indeed contain definite rules of pre-emption as found in the text of the *Mahanirvana Tantra*, Syed Mahmood again argued that since Sanskrit scholars had concluded that text to be of a recent date, it was thus not a reliable source of ancient Hindu law. He suggested that the text was possibly "an interpolation made some time in the reign of the Muhammadan Emperor Akbar, when strenuous efforts were made to bring the Hindu and the Muhammadan populations under practically the same law for temporal purposes."[135] Those rules of pre-emption which were now accepted as customary law among the Hindus, then, had been adopted by them from the Muslim rulers.

> The law of pre-emption is essentially a part of Muhammadan jurisprudence. It was introduced into India by Muhammadan Judges who were bound to administer the Muhammadan Law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muahmmadans and Hindus, because in this respect the Muahmmadan Law makes no distinction between persons of different races or creeds...In the course of time, pre-emption became adopted by the Hindus as a custom.[136]

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[132] *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, p. 268.
[133] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 785. See also *Indian Law Reports*, 7 All. 535 (24 Jan. 1885) Narain v. Hira, p. 536, where he again argues, "the rules of Muhammadan Law must be applied by analogy, because equity follows the law, and the only system of the law of pre-emption to which we can look for equity to follow is the Muhammadan law."
[134] Ibid., pp. 786-790.
[135] *The Indian Law Reports*, 12 All. 234 (10 Dec. 1889) Deokinanda v. Sri Ram, p. 255.
[136] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 790. Hindu legal experts have not unanimously agreed with Syed Mahmood in his contention that there was no rule of pre-

4.3f (5) Pre-emption as administered by the British

Syed Mahmood's objection to the way in which the British were administering the law of pre-emption was that they had reduced its applicability to Muslims only. "Although the Muhammadan Law of pre-emption makes no distinction of race or creed, that law, from being the common law of the land, applicable alike to Hindus and Muhammadans, has been reduced to the status of being a personal law of the latter, who alone can enforce the rights or incur the obligations created by that personal law."[137] Syed Mahmood also felt that judgments passed by other high court judges who regarded the right of pre-emption for Hindus to be founded on or originating from rules of Hindu law were historically inaccurate:

> I cannot help feeling that the conclusions at which they arrived on this point are based more upon theoretical surmises and hypotheses than upon the actual ascertainment of the facts of history in connection with the administration of justice in this part of the country.... All I need to point out is, what Mr. Justice Roberts pointed out, that for centuries before the British rule the law of the land was the Muahmmadan Law, that that law had never to contend with any conflicting rules of the Hindu law of pre-emption, because (as I have already shown) no such law existed, that the Muhammadan rule of *shufa* draws absolutely no distinction between Muhammadans and non-Muhammadans, as was pointed out in *Zamir Husain* v. *Daulat Ram*; that when the British rule succeeded to the sovereignty of this country it found the Muhammadan law as modified by local customs actually administered as the law of the land; that so far as the right of *shufa* or pre-emption is concerned the British tribunals, such as the Sadr Courts, continued to administer that law.[138]

He buttressed his argument by pointing out that in those areas where Muslim jurisprudence had not had full sway the right of pre-emption was unknown.

In *Kashi Nath v. Mukhta Prasad*, Syed Mahmood went beyond his argument that Hindu law did not contain rules governing the right to pre-emption, to contend that in the past, the British Government in India had not either introduced legislation to direct the courts in administering that right. "The question being left unprovided for by the Legislature, the Courts have to fall back on the general principles of equity in passing decrees

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emption in Hindu law, but have again cited the *Mahanirvana Tantra*, which he dismissed as being of a later date. See: Sri Gur Dayal Srivastava, "Mr. Justice Mahmood," in *Centenary High Court of Judicature at Allahabad 1866-1966*, vol. 1 (Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966), 282-284.

[137] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 793.

[138] *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, p. 265.

such as would suit the exigencies of each case."[139] And his own court at Allahabad, as well as the one at Calcutta, had taken it as "equitable" to follow Muslim law in such cases. When rules in regard to decrees in pre-emption were finally formulated by the Legislature in 1877 as part of a general law of civil procedure, they fell short of comprehending all the various cases that might arise, again leaving judges to import the principles of equity in administering the enacted code.[140]

Syed Mahmood considered the rules of Muslim law "so consistent with justice, equity, and good conscience," that they must be followed even in situations which were covered to some extent by legislated law.[141] In a subsequent case on pre-emption, he referred to his judgment in *Kashi Nath v. Mukhta Prasad* as an example when even legislation by the British government in India—in this case a section of the Code of Civil Procedure—must not be read without regarding the analogies furnished by the Muslim law of pre-emption.[142] He concluded that in that case as well in several others, he along his fellow judges in the Allahabad court had "followed the analogies of the Muhammadan law of pre-emption, and have laid down rules of law which by dint of those analogies have appeared to us consistent with justice, equity and good conscience."[143] This application by Mahmood of the traditional formula by which the British judges had often imported English law as they saw fit will be examined more closely in the following chapter.

One exception that Syed Mahmood made in his contention that issues of pre-emption should be decided according to Sunni Muslim law was the case in which the property was owned by more than two co-sharers who were all Shi'ahs. Previous rulings of the Allahabad High Court had concluded that since there were indications of some differences of opinion existing within the Shi'i school of Muslim law regarding the right of pre-emption where there were more than two coparceners, such cases should be decided by Sunni law. Syed Mahmood disagreed. He consulted the texts of Shi'i jurisprudence and concluded from them that in Shi'i law, "the prevalent doctrine is that the right of pre-emption does not exist in connection with the sale of property when more than two co-

[139] *The Indian Law Reports*, 6 All. 370 (15 May, 1884) Kashi Nath v. Mukhta Prasad, p. 373.
[140] *The Indian Law Reports*, 6 All. 351 (19 May, 1884) Ishri v. Gopal Saran.
[141] *The Indian Law Reports*, 7 All. 720 (26 Mar. 1885) Jai Ram v. Mahabir Rai, etc., p. 728. See also 5 All. 110 (31 Aug. 1882) Zamir Husain v. Daulat Ram, p. 113.
[142] *The Indian Law Reports*, 12 All. 234 (19 Dec. 1889) Deokinandan v. Sri Ram, p. 270.
[143] Ibid., p. 271.

sharers or coparceners have rights in such property."[144] He found the Shi'i law to be vastly different from the Sunni law which laid down very intricate rules to deal with the complications which might arise in consequence of rival claimants, whereas the former did not. As a result Syed Mahmood dissented from the previous rulings which had decided similar cases on the basis of Sunni laws of pre-emption, adding that the fault with the previous rulings was again lack of access to the necessary texts of law. "Most probably," he wrote, "the exact authorities upon which the Shia law upon the matter proceeds were not duly placed before the learned Judges, and that in dealing with the matter on the principles of the Shia doctrine, the learned Judges went too far in holding that, in the absence of authority in the reported cases among the Shias, the Sunni doctrine was to prevail."[145] Interestingly, Syed Ameer Ali, himself of the Shi'i sect, questioned the correctness of Mahmood's ruling, stating that the Sunni Ḥanafī law did indeed furnish the guiding rules in India for cases of pre-emption, even for Shi'ahs, and that the Shi'i law on the matter was "by no means as explicit as has been assumed in this case."[146] Ameer Ali followed the logic of Mahmood's earlier argument about the applicability of the Ḥanafī law of pre-emption as the customary law of India, and found it encompassing Shi'i Muslims as well.

4.4 Replacement of the Muslim law of evidence with codified law

4.4a Legislated laws of evidence accepted

Although he insisted that the courts were bound to enforce Muslim law in certain areas, Syed Mahmood readily admitted that in the administration of British India, Muslim law formed only part of the broader framework of law being implemented.[147] One of the areas in which he considered the laws legislated by the British to overrule the historic Muslim laws was the area of adjectival or procedural law, specifically the Law of Evidence. Syed Mahmood's first contribution to legal thought—published while still working as a Barrister in Allahabad—had been his Urdu translation and commentary on the Law of Evidence introduced by the British government in India in 1872. The premise that

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[144] *The Indian Law Reports*, 12 All. 229 (3 Aug. 1888) Abbas Ali v. Maya Ram, p. 233.
[145] Ibid., pp. 233-234.
[146] Ameer Ali, *Mahomedan Law, I*, 729n.
[147] *The Indian Law Reports*, 7 All. 822 (10 Feb. 1885) Jafri Begam v. Amir Mohammad Khan, p. 826.

he gave as his reason for undertaking this work was that the Act replaced all the laws of evidence that had existed in India before or after the English administration.[148] He argued that the British rulers were following the pattern adopted by the previous Muslim rulers of India in making changes to the laws relating to secular matters while leaving the religious laws of their subjects relatively intact. The laws of evidence were considered by Mahmood to fall into the category of those laws which were definitely secular.

> It is important to explain that the Hindu law of evidence that was functioning in conformity to the Shasters or that law of evidence which the *'ulamā* and *mujtahidīn* of Islam had collected through their *qiyās* and *ijtihād*, and which was known among Muslims as part of the law of Muhammad (*shar'-i muḥammadī*) is no longer in force. At the present time, the criminal and civil courts are bound to administer the law of evidence promulgated by the English government when making rulings in every kind of matter whether it relates to inheritance or marriage or any other kind of property dispute or any other right.[149]

Subsequently in his judgments as a judge of the High Court, Syed Mahmood continued to insist that "Whatever the law may have been upon the subject [of the verification of documents] before the passing of the Indian Evidence Act (I of 1872), the rules contained in that enactment must now be strictly observed."[150]

In one of his early decisions as Puisne Judge, Syed Mahmood explained how the British had gradually replaced the Muslim laws of evidence. He traced the history of the various official acts governing the issue, showing the evolution of government policy to its existing formulation in the Law of Evidence.[151] The intention of the laws enacted, he wrote, was always to restrain the tendency of police to torture the accused, or induce him in some other way to confess. However, since no uniform law of evidence was in place before the passing of the Indian Evidence Act (I of 1872), diverse systems prevailed in different locations. In the Presidency towns of Calcutta, Madras and Bombay, the rules of English law of evidence were followed, as modified by enactments made by the British rulers, such as Act II of 1855. In the outlying regions, the Mofassil, there were scattered rules of evidence based on the practice of the courts, but these rules had not assumed any definite shape or systematic form though, their foundation was Muslim law. "The practice

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[148] Mahmood, *Law of Evidence*, 5.
[149] Ibid. Translation is mine.
[150] *The Indian Law Reports* 7 All. (1 Apr. 1885) 738, Ram Prasad v. Raghunandan Prasad, p. 743.
[151] *The Indian Law Reports*, 6 All. 503 (30 Jun 1884) Queen Empress v. Babu Lal, p. 519-521.

had grown probably on the basis of the Muhammadan law, which continued to govern the administration of justice for many years, even after the advent of British rule in India."[152]

Until express enactments prohibited its operation, Muslim law was more or less followed with respect to rules of evidence. The introduction of Act II of 1855 did not prohibit the adoption of either English law or rules of Muslim law which by custom or practice had been followed by the courts; nor did it stipulate which rules were to be preferred. Since most judges serving in the Mofassil courts were English, they naturally adopted English rules rather than the traditional Muslim law as their guide when difficulties arose. Syed Mahmood opposed this routine reception of English law as the determinate rule, and lauded the promulgation of an *Indian* Law of Evidence. The areas that codified law failed to address were to be decided on the rules of evidence that had been enforced prior to the British arrival, namely the Muslim laws of evidence.

4.4b Muslim laws of evidence to prevail in absence of legislation

In a judgment delivered in 1889, Syed Mahmood resolutely declared that the English laws of evidence (those in force in England as distinct from *British* laws introduced in India alone) should not be the primary source for guidance in areas where the Muslim law had been in force. The case under question, *The Collector of Gorakhpur v. Palakdhari Singh*, had originated in Awadh, the region in which Syed Mahmood had first served as a District Judge and in the judicial administration of which he continued to take an active interest. In his comments, he briefly traced the history of Awadh to show that Muslim law, not English common law, should be considered to have been the law in force in that region until direct legislation altered that fact. He considered it a sound doctrine of international law that the acquisition of territory by conquest or some other means did not abrogate the law of that territory. Therefore, since the administration of Awadh before the territory came under British sovereignty in 1801 was under the Nawwāb Vazīr of Awadh, Muslim law had been the functioning law of the land. As such, it continued to be the applicable law unless express legislation had been passed to replace that law.

> Up to the date of the cession therefore, there can scarcely be any doubt that the law of evidence in judicial tribunals was the Muhammadan law of evidence, and that if

[152] Ibid., pp. 520-521.

> that law is not abrogated it would be that law which would govern this case. Such abrogation can take place after acquisition of sovereignty by any legislative authority appointed by the sovereign authority, and we have to discover whether there has been such abrogation. If there had been no such abrogation or modification of the law, I should have had very little hesitation, as I have already indicated, in applying the Muhammadan law of evidence to the admissibility of the two judgments to which this reference relates.[153]

The reason Syed Mahmood then gave for *not* applying the Muslim law was that legislation had been introduced which altered the rules of evidence affecting the matter under consideration.

4.4c English laws of evidence unsuitable to India

Syed Mahmood went on to outline the development of the British law of evidence in India. He quoted C. D. Field's *Law of Evidence in British India* to provide the history of fragmentary legislation supplemented by case law created by judges that generally followed the English law of evidence, until the Evidence Act of 1872 which repealed all other rules of evidence. He again reaffirmed his commitment to the priority of legislation, noting that the questions raised in the case had to be determined by the provisions of 1872 enactment.

> I am of the opinion that by dint of s. 2 of the Indian Evidence Act (I of 1872) the rules of evidence recognised either by the common law of England, or by the statute law of that country, or by the Muhammadan law of evidence existing at the date of the cession of the Gorakhpur district in the year 1801, have ceased to exist as the law of the land. The rules of evidence which we are bound to administer are contained in the Evidence Act (I of 1872), and I say so because of the preamble to that enactment, which shows that it is not merely a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of s. 2 of that enactment.[154]

However, Syed Mahmood added, that in cases of doubt or difficulty of interpretation of any sections of that Act, judges should have recourse to both the case law of the land

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[153] *The Indian Law Reports* 12 All. 1 (2 Apr. 1889) The Collector of Gorakhpur v. Palakdhari Singh, p. 32.
[154] Ibid., p. 35. Section 2 reads as follows: "On and from that day the following laws shall be repealed: (1) All rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India. (2) All such rules, laws, and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for; and (3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule. But nothing herein contained shall be deemed to affect any provision of any Statute, Act, or Regulation in force in any part of British India and not hereby expressly repealed." See Whitley Stokes, *The Anglo-Indian Codes*, vol. 2, Adjective Law (Oxford: Clarendon Press, 1888), 850.

which existed prior to the Act and to juristic principles "which only represent the common consensus of juristic reasoning." In this he disagreed with rulings by the judges of other high courts in Calcutta and Bombay because he felt they had been influenced too much by the doctrines of the *English* law of evidence. In its policy to bar the admission of certain judgments as evidence in a subsequent case, the English law of evidence was, according to Syed Mahmood, unreasonable law, and certainly not fitted to be imported into India in the absence of express legislative authority. "In the absence of express legislation the rule of justice, equity and good conscience would be the doctrine, but certainly not the common law of England, since the common law if any would be the Muhammadan law."[155] He appealed to the principle of "justice, equity, and good conscience" because it would supply rules of common sense, not of the common law of England, unless those rules were conformable to the principle according to the judges.

This principle of "justice, equity, and good conscience" was a doctrine by which English judges in India had felt at liberty to import many sections of English law, though, as will be shown in the following chapter, that had not been the intent of the provision. Earlier it was noted that Syed Mahmood employed this ubiquitous formula to insist that in matters of pre-emption, the Muslim law must be followed on the basis of "justice, equity and good conscience." Now, once again in the matter of evidence, Syed Mahmood was utilizing it to argue that the customary laws of evidence—based largely on Muslim law—were to be preferred to English laws which the government-appointed judges were introducing. Two years earlier, the Privy Council in England had, in their ruling on an appeal from the High Court at Bombay, declared that the formula of equity and good conscience was "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."[156] Mahmood had commented on that ruling in his judgment involving the English law of torts in 1888.[157] But in this judgment on law of evidence, he made no reference to the Privy Council ruling and chose to use the formula as a means to

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[155] *The Indian Law Reports* 12 All. 1 (2 Apr. 1889) The Collector of Gorakhpur v. Palakdhari Singh, pp. 36-37.

[156] *Law Reports, Indian Appeals: Being Cases in the Privy Council on Appeal from the East Indies* 14 IA. 89 Waghela Rajsanji v. Shekh Masludin, p. 96. For the history of formula, see: J. Duncan M. Derrett, "Justice, Equity and Good Conscience," in *Changing Law in Developing Countries*, ed. J. N. D. Anderson, Studies on Modern Asia and Africa (London: George Allen & Unwin Ltd., 1963), 140-146. Derrett also rejects the notion that English law should be considered the default law when this principle is invoked.

[157] *The Indian Law Reports*, 10 All. 498 (14 May 1888) Ramphal Rai v. Raghunandan Prasad, p. 503.

restrict the importation of English law, rather than to *receive* it into the Indian context. The antecedent law which should be appealed to was, in his estimation, the Muslim law that had become the common law of the region from which the suit had been filed.

In his commentary on the second clause of the Law of Evidence which declares previous rules of evidence to have been abolished (he translated the verb as *mansūkh hōnā*) by this Act, Syed Mahmood explicitly stated that the problem that necessitated the codification of these rules was the weakness of the *English*, not the *Muslim* law. Prior to the promulgation of the Act, there had been no comprehensive set of rules to govern the presentation of evidence in court. Barristers would invariably turn to their English law books to argue their cases, and the judges would make their rulings on that basis even though the rules applicable in England were not suited for the Indian context. The Law of Evidence promulgated by the British Indian government, according to Syed Mahmood, filled that need of a contextualized law and eliminated some of the mischief introduced into Indian law by the importation of foreign rules.[158] In his letter defending himself against the attacks of Chief Justice Edge in 1892, Syed Mahmood reiterated that "the law of evidence in British India, though mainly founded upon the rules of the English law of evidence, is in some respects vastly different from it," and challenged Edge's accusation that he, Mahmood, had pursued "irrelevant enquiries" in first appeals of civil cases by pointing out that he was much more familiar with the law of evidence in British India than Edge was.[159]

4.4d Distinction between substantive and procedural law

One area of law of evidence which Syed Mahmood considered to be more correctly governed by the provisions of the Evidence Act of 1872 rather than the rules of Muslim law was the rule regarding missing persons. He acknowledged that British courts of justice in India had, since the initial enactment of the Regulation guaranteeing the implementation of Muslim and Hindu laws in matters of inheritance, succession, and marriage, regarded the rule of Muslim law as to missing persons as forming an essential part

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[158] Mahmood, *Mahmood, Sharh-i Qanun-i Shahadat*, 12-14.

[159] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/355, file 1680, date 15 Aug. 1893, British Library London.

of the Muslim law of inheritance. Mahmood felt that this was an incorrect assumption. In the 1884 case of *Mazhar Ali v. Budh Singh*, he took pains to demonstrate that the rule was, "according to the best recognized and most authoritative texts of the Muhammadan Law itself, neither a rule of inheritance, nor of succession, nor of marriage, and that the Muhammadan jurists themselves have regarded it as a rule belonging to that department of procedure which regulates the ascertainment of facts in judicial tribunals."[160] Moreover, the equivalent of that department of procedure in British India was, in Syed Mahmood's opinion, the Evidence Act of 1872, making it the decisive law to be followed in matters dealing with missing persons.

Cases decided in the history of judicial practice in British India and cited by the lawyers as precedents to support their contention that it was Muslim law that was the authority to be considered in deciding matters relating to missing persons were, in Syed Mahmood's view, "not based upon a sound view of the Muhammadan Law."[161] While some authoritative works of Muslim law did discuss the relevant rule as if it was part of the law of inheritance and succession, other authorities including the *Hidāyah* dealt with the matter in a separate chapter, indicating the jurists' understanding that the rule was more general, applying to all branches of law, and thus more correctly to be understood as a law of procedure. He concluded that the provisions of the first clause of section 2 of the Evidence Act which abrogated all previous laws of evidence, made it mandatory that the rules of that Act, and not those of Muslim law, were to govern cases relating to missing persons.

The fact that Syed Mahmood did not feel compelled to preserve the Muslim laws in matters of marriage and inheritance, but preferred the codified form of the Evidence Act deserves some comment. Key to this distinction was his belief that it was only the substantive aspects, not the procedural aspects, of Muslim law that the British regime was compelled by its own guarantees to uphold. He stated in his judgment on *Mazhar Ali* v. *Budh Singh*:

> I think that in administering a medieval system of law it is supremely important that the Courts of Justice in British India should draw a clear distinction between

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[160] *The Indian Law Reports*, 7 All. 297 (6 Dec. 1884) Mazhar Ali v. Budh Singh, p. 303.
[161] Ibid., p. 310.

> the rules of substantive law and those which belong purely to the province of procedure, because, whilst under s. 24 of the Civil Courts Act the Courts are bound to administer the former branch of the law according to native laws in cases of succession, inheritance and marriage, questions which go the remedy, *ad litis ordinationem*, must be decided according to the general law of British India.[162]

He accepted the authority of the British colonialist government in its decisions as to which parts of Muslim law were to be upheld and which were to be abrogated. While he considered the retention of Muslim rules with respect to matters of succession, inheritance and marriage as the fundamental rules governing all such cases, he likewise argued that the rejection of Muslim rules in matters of procedure was equally foundational. His criticism of William Markby's ruling on a question of inheritance was not limited to his reliance on an inadequate translation rather than original texts as discussed earlier, but also on Markby's failure to recognize that the matters on which he quoted from Hamilton's *Hidāyah* belonged to matters of procedure, not substantive law.[163]

This focus on the distinction between substantive and procedural law also influenced Syed Mahmood's perception of the impact of the Law of Evidence on matters of pre-emption and inheritance. In spite of his insistence on the recognition of the Muslim law of pre-emption as customary for much of India, there were aspects of this law, as well as that of inheritance, which Syed Mahmood considered to be more correctly governed by the Law of Evidence than by Muslim law because those aspects belonged to the realm of adjective laws of procedure. In *Gobind Dayal v. Inayatullah*, he responded to other judges in India—both English and Hindu—who characterised Muslim law as containing "tricks and artifices" and "all kinds of devices" for the purpose of frustrating its own law, by acknowledging that Muslim legal texts did include means to defeat certain provisions of the law in certain cases. But he insisted that "the distinction between moral behests and legal duties on the one hand, and between rules of substantive law and procedure on the other, must always be borne in mind."[164] For example, in matters of pre-emption the question whether or not there had been a *bonâ fide* sale was not a question of substantive law, but a mere question of fact, to be ascertained by the rules of procedure contained in the law of evidence. Once this distinction was made, the courts were bound to follow Muslim law in

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[162] *The Indian Law Reports*, 7 All. 297 (6 Dec. 1884) Mazhar Ali v. Budh Singh, pp. 310-311.
[163] *The Indian Law Reports* 7 All. (1885) 822, Jafir Begam vs. Amir Muhammad Khan, p. 830.
[164] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, p. 812.

substantive matters, and were equally bound to follow the Law of Evidence (Act I of 1872) in matters of procedure. The apparent contradictions which the other judges had perceived in Muslim law belonged to the category of technical rules of contract, procedure, or evidence which the British courts were no longer bound to administer. Once it was conceded that these technical laws were not binding in the administration of the substantive matters of the Muslim law of pre-emption, no "tricks or artifices" could defeat this right.

Syed Mahmood acknowledged the difficulty of distinguishing between substantive law and rules of evidence, but insisted that that difficulty was not limited to Muslim law. He wrote, "It cannot be denied that in all mediaeval systems of jurisprudence much confusion exists between rules of substantive law and rules of adjective law, that is between rules which affect the merits ... and rules which regulate the remedy.... The Muhammadan system of jurisprudence is no exception to the general rule."[165] Whereas in a case involving the inheritance of a missing person he unequivocally applied the Law of Evidence, in a matter of the inheritance of a "bastard" son, Mahmood declared the rule on the acknowledgment of parentage (*iqrār*) to be a rule of substantive law, not procedural law. Therefore since such a case fell within the provisions of s. 24 of the Bengal Civil Courts Act (VI of 1871), it was to be governed by Muslim law.[166]

To support this contention that the 1872 Law of Evidence was to preferred in matters of procedural law, Syed Mahmood argued that the corresponding technical rules of Muslim law were unsuitable to the current situation in India because their origin was in a quite a different intellectual and political context.

> We are no more bound to follow the Muhammadan law of evidence in a pre-emptive suit than in a suit involving questions of succession or inheritance. The Muhammadan law of evidence, like other old systems, contains numerous rules which arose either from imperfect notions as to the distinction between the *weight* and *admissibility* of evidence, or from the rules of procedure, or from the political exigencies of the Muhammadan people, when those rules were formulated.[167]

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[165] *The Indian Law Reports*, 10 All. 289 (7 Apr. 1888) Muhammad Allahdad Khan v. Muhammad Ismail Khan, p. 325.
[166] Ibid., pp. 325-328.
[167] *The Indian Law Reports*, 7 All. 775 (9 Feb. 1885) Gobind Dayal v. Inayatullah, pp. 812-813.

He gave as an example the restriction presented in Muslim law texts prohibiting non-Muslims from giving evidence against Muslims in courts of law on the basis that the former "have no power or authority of over the Moslems, and are suspected of inventing falsehoods against them"— a rule had certainly been created in a political climate different than that which appertained to British India. This suggestion of the obsolescence of the Muslim laws of evidence needs to be explored further.

4.4e Muslim laws of evidence obsolete

Mahmood's fellow judge and supervisor, Chief Justice Petheram, had dismissed the applicability of Muslim rule regarding missing persons, but did so by reasoning that relevant rule of Muslim law was outdated and had been replaced by the more rational British law. In his judgment he wrote:

> The rule of Muhammadan Law in regard to missing persons dates from ancient times and from social conditions to which it may well have been adapted. But to apply it to the totally different conditions of the present day, when the means of communication between distant places have been so extended and improved, and when no man can hide his existence form others in the manner which was formerly possible, and to presume that a man was living ninety years from the date of his birth, though his death was practically certain, would be a piece of gross injustice. It was to benefit the people of this country by enabling proof to be given of facts which should be known, that s. 108 of the Evidence Act was passed.[168]

In his judgment on this case, Syed Mahmood had not dismissed the Muslim law on the basis of its irrelevancy, but on the basis of its abrogation by the introduction of the Law of Evidence by the British. He had found enough flexibility within Muslim law to conclude that the question was one of procedural, not substantive, law. Although when dealing with questions of substantive law he would be insistent that Muslim law was paramount, when he dealt with issues involving procedure he considered himself bound to apply the codified Evidence Act of 1872.

However, in a judgment written a few months later, Syed Mahmood presented arguments similar to those of Chief Justice Petheram in setting aside the rules of procedure in Muslim law in favour of the Law of Evidence on the presumption that the Muslim law

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[168] *The Indian Law Reports* 7 All. (1885) 822, Jafir Begam vs. Amir Muhammad Khan, p. 312. Section 108 of the Evidence act reads as follows: "Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." See: Stokes, *Anglo-Indian Codes, vol. 2*, 911.

had been prepared for another era. The case before the Full Bench of the Court sought answers to questions on the Muslim laws of inheritance. Syed Mahmood reserved his judgment in order to examine the relevant authorities of Muslim law, and presented his conclusions five weeks later. Presenting evidence from both standard English authorities and translations of texts as well as Arabic texts, he sought to demonstrate that the specific question regarding claims against the estate of deceased Muslims once the property has devolved upon his heirs "passes into the region of *procedure*, and must be regulated according to the law which governs the action of the Court."[169] As previously, he argued that the relevant sections of Muslim law "are not matters of substantive law; they do not constitute rules of inheritance; and the Courts in British India are no more bound by them than by any such rules of evidence or limitation as the Muhammadan Law may provide, for the simple reason that they fall outside the purview of s. 24 of the Bengal Civil Courts Act, which enumerates the matters in which we are bound to administer the Muhammadan Law."[170] He further explained that he saw the Muslim rules of procedure in this instance to be "conflicting" and "inconsistent" with the provisions of the Civil Procedure Code. In this case, however, he went beyond a simple acceptance of the paramountcy of British legislation to explain why he endorsed the abrogation of the Muslim laws of procedure. His explanation echoed Petheram's arguments on the obsolescence of Muslim rules regarding missing persons:

> There were, of course, reasons arising from the exigencies of life (such as the difficulty of communication and travelling) which induced Muhammadan jurists in the middle ages to frame rules of procedure in many essentials different from those which regulate the procedure of our Courts. But those conditions of life no longer exist: the law of British India has framed its own rules of procedure; and bearing in mind the analogy of the principle by which, not the *lex loci contractus*, but the *lex fori*, regulates all matters going to the remedy, *ad litis ordinationem*, I would reject the rules of the Muhammadan Law of Procedure in connection with the binding effect of decrees upon absent heirs.[171]

Petheram, also, had argued that Muslim laws had been framed to suit the social conditions of a particular era, and that the transformation of the social conditions of India by modern technology meant that the previous rules were outdated. Although Mahmood did not

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[169] *The Indian Law Reports*, 7 All. 823, (10 Feb. 1885) Jafri Begam *versus* Muhammad Khan, p. 842.
[170] Ibid.
[171] Ibid., p. 844.

write of Muslim law in the disparaging tone that Petheram did, he did concede its obsolescence in certain matters pertaining to procedural laws.

In looking back, then, on the transformation of Muslim law in India in the 19th century through the processes of translation, legislation, and adjudication, it becomes clear that Syed Mahmood's contribution was considerable. In the area of translation, he opened up old texts as fresh sources for the Indian judges to use in deciding cases pertaining to Muslim law. No longer were they restricted to the three or four translated texts when ruling on matters such as pre-emption and *waqf* since Mahmood had incorporated the relevant portions from other authoritative works of *fiqh* in his recorded judgments. In the area of legislation, Syed Mahmood diligently fulfilled his responsibilities in writing minutes on bills the legislature had proposed, and assisted his father in the preparation of his speeches for the Viceroy's legislative council. Less directly, Mahmood's judgments explicating the juristic principles underlying cases before the courts frequently examined the motivations of the legislators and exposed inadequacies in the wording of the laws they enacted.

However, it was in the area of adjudication that Mahmood's contribution to the transformation of Muslim law was most striking. His numerous and lengthy judgments recorded in the *Indian Law Reports* bear testimony to his labour in rethinking Muslim law in the terminology of English jurisprudence. His insistence on the retention, and extension, of Muslim law in areas such as pre-emption, and his firm opposition to the wholesale importation of English law helped to secure a continuing role for Muslim law in the British Indian courts. Conversely, his acceptance of the abrogation of Muslim laws of evidence by the legislated code provided a weighty stamp of approval from the Muslim community in India for this significant development. Syed Mahmood's contribution was in no way limited to Muslim law, and his critique of other areas of Indian law is examined next.

Chapter 5: Mahmood's critique of the administration of general British law in India

5.1 Process of codification

5.1a Early efforts by Hastings and Cornwallis

When the British took the responsibility for the administration of justice in Bengal in 1772, the newly appointed Governor-General, Warren Hastings (1732-1818) expressed his intention to govern the people by their existing laws. In a letter expressing his misgivings about attempts to introduce new laws and judicial structures into India, he insisted, "It would be a grievance to deprive the people of the protection of their own laws, but it would be a wanton tyranny to require their obedience to others of which they are wholly ignorant, and of which they have no possible means of acquiring knowledge."[1] Far from being empty of law, even written law, India and its Hindu and Muslim communities had extensively evolved legal traditions, in his view. Muslim law, wrote Hastings, was "as comprehensive, and as well defined, as that of most of the states in Europe."[2] In delineating which laws, which officials, and which courts were to adjudicate various types of legal cases, Hasting's administration proposed:

> That in all suits regarding inheritance, marriage, caste, and all other religious usages or institutions, the laws of the Koran with respect to *Mahometans*, and those of the Shaster with respect to *Gentoos*, shall be invariably adhered to: On all such occasions, the Maulavies or Brahmins shall respectively attend and expound the law, and they shall sign the report, and assist in passing the decree.[3]

However, this did not mean that the existing judicial systems were to be left alone to function as they had been. Rather it was judged advisable that compilations of the Hindu and Muslim laws be formed "for the sake of giving confidence to the people, and of enabling the Courts to decide with certainty."[4] Men such as H. B. Halhed and William Jones were commissioned to produce translations of Hindu and Muslim laws to assist the courts

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[1] G. R. Gleig, *Memoirs of the Life of the Right Hon. Warren Hastings, First Governor-General of Bengal*, vol. 1 (London: Richard Bentley, 1841), 400.
[2] Ibid., 403. For Hastings' rejection of the "despotic model" with its arbitrary rule and total lack of law, see: Bernard S. Cohn, "Law and the Colonial State in India," in *History and Power in the Study of Law: New Directions in Legal Anthropology*, ed. June Starr and Jane F. Collier, Anthropology of Contemporary Issues (Ithica, NY: Cornell University Press, 1989), 140-141.
[3] G. W. Forrest, ed., *Selections from the State Papers of the Governors-General of India*, vol. 2 (Oxford: B. H. Blackwell, 1910), 297.
[4] Gleig, *Memoirs of Hastings*, 402.

in producing consistent judgments.[5] This was not yet codification in the sense promoted by the Utilitarians who had little sympathy for "the attempt to preserve or revive indigenous institutions."[6] When James Mill (1773-1836) in his influential *History of India* criticised William Jones and others for employing "the unenlightened and perverted intellects of a few Indian pundits" for the task of creating a code of Indian law in the form of translations of ancient texts, the editor of a subsequent edition of his work corrected Mill in a footnote, stating, "The Pundits were employed, not to compile a new code, but to digest what laws prevailed amongst the Hindus, and it cannot be denied that it was wise to ascertain what the people had, before supplying them with what they might not be found to require."[7] Although it could not be considered codification in its strictest sense, this work of translation was nevertheless a process of "converting Indian forms of knowledge into European objects," which could then be used by the British to rule India more efficiently.[8]

Those working on the translations, however, referred to the traditional bodies of Hindu and Muslim law as "codes" and saw their own efforts as contributions to a wider dream of the "development" of those legal traditions into uniform system of jurisprudence. In the preliminary discourse to his translation of the *Hidāyah*—the major effort in Hastings' project of compiling Muslim law—Charles Hamilton explained that the judicial regulations of both Hindus and Muslims were so intimately blended with their religion that any attempt to change the former would be viewed as a violation of the latter.

> Should the wisdom of the British legislature ever suggest the expediency of introducing a uniform system of jurisprudence among them, it will, at the same time, dictate the necessity of preserving sacred and unaffected an infinite number of usages, essential to the ease and happiness of a people differing from us as widely in customs, manners, and habits of thinking, as in climate, complexion, or language.[9]

Hamilton's translation of the *Hidāyah*, along with the translation of Hindu legal texts by other contemporaries, was to be seen as part of the struggle to achieve such "uniform system."

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[5] Cohn, "Law and the Colonial State," 141-147.
[6] Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959), 145.
[7] James Mill and Horace Hayman Wilson, *The History of British India*, 4th rev. ed., vol. 5 (London: James Madden, 1848), 603.
[8] Cohn, *Colonialism*, 25-30.
[9] Hamilton, *Hedáya*, iv.

Hasting's successor in the post of Governor-General, Lord Cornwallis (1738-1805), spoke more directly of the need for a codified law and introduced reforms that obliterated indigenous laws and institutions.[10] In the preamble to regulations passed in 1793, he wrote, "It is essential to the future prosperity of the British in Bengal, that all regulations which may be passed by government, affecting, in any respect, the rights, persons, or property of their subjects, should be formed into a regular code; and printed, with translations in the country languages."[11] Such a code would enable individuals to acquaint themselves with the laws and the mode of obtaining speedy redress against any infringement of them, the preamble continued, and would enable the courts to be able to apply the regulations according to their true intent.

James Mill, however, criticised Cornwallis for including much of the English law of procedure, making the administration of law in India more complicated than it needed to be.[12] He felt that the only way to give laws a fixed or real existence was "to be expressed in a written form of words; words, as precise and accurate as it is possible to make them, and let them be published in a book."[13] That was what he understood a pure code to be, and without such a code there could be no good administration of justice. But he had sharper rebukes for the earlier work of Sir William Jones and others in producing compilations of Hindu and Muslim law. He dismissed the results of their work as

> a disorderly compilation of loose, vague, stupid, or unintelligible quotations and maxims, selected arbitrarily from books of law, books of devotion, and books of poetry; attended with a commentary, which only adds to the mass of absurdity and darkness: a farrago, by which nothing is defined, nothing established; and from which, in the distribution of justice, no assistance beyond the materials of a gross interference, can for any purpose be derived."[14]

According to Mills, the creation of a true code of law could only be done by the authority of the government, free from encumbrances of religious authority and of the self-interest of lawyers and others in the legal profession.

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[10] Stokes, *English Utilitarians*, 145-149.
[11] Mill and Wilson, *History of British India*, 514.
[12] Ibid., 502-503. See also Eric Stokes analysis of Mill's critique of Cornwallis' legal reforms; Stokes, *English Utilitarians*, 145-148.
[13] Mill and Wilson, *History of British India*, 602.
[14] Ibid., 603.

5.1b The Law Commission of 1834

The Utilitarian vision of the codification of Indian law was eventually initiated in a systematic manner with the appointment of a Law Commission in 1834 under Thomas B. Macaulay (1800-1859). In 1833, in the debate in the British parliament over the bill reassessing the charter of the East India Company, Lord Macaulay gave a speech in which argued for the necessity of codifying the law of India in order to assimilate the numerous differing systems of law that were in operation. He stated, "I believe that no country ever stood so much in need of a code of laws as India; and I believe also that there never was a country in which the want might so easily be supplied."[15] He described the differing systems as widely differing from each other, but coexisting and coequal. "The indigenous population has its own laws. Each of the successive races of conquerors has brought with it its own peculiar jurisprudence: the Mussulman his Koran and the innumerable commentators on the Koran; the Englishman with his Statute Book and his Term Reports."[16] These then were mingled with each other in the administration of justice, leading to confusion, inconsistencies, and the arbitrary formulation of laws by individual judges which, in Macaulay's opinion, was to be firmly resisted.

> But judge-made law, where [in India as contrasted with England] there is an absolute government and a lax morality, where there is no bar and no public, is a curse and a scandal not to be endured. It is time that the magistrate should know what law he is to administer, that the subject should know under what law he is to live. We do not mean that all the people of India should live under the same law: far from it.... We know how desirable that object is; but we also know that it is unattainable. We know that respect must be paid to feelings generated by differences of religion, of nation, and of caste.... Our principle is simply this; uniformity where you can have it; diversity where you must have it; but in all cases certainty.[17]

Macaulay added that an absolute government such as that of the British rulers in India was better fitted to confer the benefit of a law code on a country than a popular government. A large popular legislative assembly would by nature be divided into adverse fac-

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[15] Thomas B. Macaulay, "A Speech delivered in the House of Commons on the 10th of July, 1833," in *The Works of Lord Macaulay: Speeches, Poems & Miscellaneous Writings*, The Complete Works of Lord Macaulay in twelve volumes, vol. 11, vol. 1 (London: Longmans, Green and Co., 1898), 579.
[16] Ibid.
[17] Ibid., 581-582.

tions, and could not digest "a vast and artificial system of unwritten jurisprudence" as easily as "a quiet knot of two or three veteran jurists."[18]

The same year as the passing of the Charter Act, Macaulay was appointed to India as Law Member on the Governor-General's Council, and headed up a Law Commission with the task of proposing "schemes for an eventual comprehensive and homogeneous body of legal codes for the whole of India."[19] The themes of the inconsistency and confusion produced by the plurality of laws in India, and the priority of legislated rules over judge-made law, were repeated in the "Introductory Report upon the Indian Penal Code" prepared by the Indian Law Commission of 1834 headed by Macaulay. In addition, the foreign nature in the Indian context of both the Muslim law—that had long ago superseded any existing Hindu criminal law—and the English law—that had in turn in large measure superseded the Muslim criminal law—was emphasised, and therefore inadequate as models for the proposed penal law code.[20] The Commission therefore proposed a completely fresh code of law not dependent upon existing legal systems in India, and clarified its rules through abundant illustrations While emphatically rejecting the English legal system as a pattern to follow, Macaulay did not in its place create a code derived from local context. Rather his aim was "a code that was not derivative from the laws of any creed or country but sprang from the universal science of jurisprudence."[21]

This code was drafted and presented in 1837, but it remained a mere proposal that was passed around at various levels of government for the next twenty years. The same year that the Law Commission was appointed for India, a similar Royal Commission on the Criminal Law was appointed in England with similar objectives, though restricted to

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[18] Ibid., 582.
[19] K. J. M. Smith, "Macaulay's 'Utilitarian' Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making," in *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989*, ed. W. M. Gordon and T. D. Fergus (Glasgow: The Hambledon Press, 1989), 149.
[20] India. Law Commission, *Penal Code Prepared by the Indian Law Commissioners, and Published by Command of the Governor General of India in Council* (London: Pelham Richardson, Cornhill, 1838), i-vii. See also: Thomas B. Macaulay, "Introductory Report upon the Indian Penal Code," in *The Works of Lord Macaulay: Speeches, Poems & Miscellaneous Writings*, The Complete Works of Lord Macaulay in twelve volumes, vol. 11, vol. 1 (London: Longmans, Green and Co., 1898), 5-6.
[21] Stokes, *English Utilitarians*, 227.

the arena of criminal law.[22] This attempt, like that of Macaulay's in India, faced continuing opposition and failed to bring about immediate changes to the judicial system in England.

5.1c Codification in Syed Mahmood's time

It was not until 1859 that the Indian Legislature finally began to enact codes largely based on Macaulay's work. The Code of Civil Procedure and the Limitation Act in 1859 was followed by the Penal Code the following year, and the Code of Criminal Procedure the year after in 1861. With that, the bulk of the adjective law of India, as well as all of the substantive criminal law, was codified.[23] Then beginning with Henry J. S. Maine (Law Member from 1862 to 1869), a succession of Law Members on the Governor General's Council introduced numerous bills to reduce the substantive civil law to codes as well. Maine shepherded the following bills through the Council: Indian Succession Act (1865), Marriage Act (1866), Companies Act (1866), General Clauses Act (1868), and the Divorce Act (1896-1869). James Fitzjames Stephen succeeded Maine and served briefly until 1872, but contributed a new Limitation Act (1871), the influential Evidence Act (1872), the Contract Act (1872), and new editions of the Code of Criminal Procedure and the Marriage Act.[24] Arthur Hobhouse (Law Member from 1872-1877) was less prolific, but produced the European Minors Code (1874) and the Specific Relief Act (1877). He was followed by Whitley Stokes (Law Member from 1877-1882), who along with the Law Commission of 1879 was successful in having the legislating council pass the Negotiable Instruments Act (1881), the Indian Trusts Act (1882), the Transfer of Property Act (1882), and the Indian Easements Act (1882), as well as various Consolidation Acts and amendments to existing acts.[25]

This flurry of legislation provoked a cry of "over-legislation" on the part of judges and other officials who complained that the whole of their time was being absorbed in criticizing new Bills and learning new Acts.[26] Courtney P. Ilbert (Law Member from

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[22] Lindsay Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45," *Law and History Review* 18, no. 2 (2000): 403-408.
[23] Stokes, *Anglo-Indian Codes, vol. 1*, xii.
[24] Ibid., xiv.
[25] C. P. Ilbert, "Indian Codification," *The Law Quarterly Review* 5, no. 20 (1889): 360.
[26] Ibid.

1882-1886) arrived in India with strong cautions not to proceed too hastily with further legislation. His name is associated with two controversial measures, the Bengal Tenancy Act and the amendment to the Criminal Code of Procedure that became notorious as the "Ilbert Bill," but his efforts at codification were more modest, resulting in the drafting of a law of torts by Frederick Pollock (1845-1937) in England which never was passed in India. Ilbert also looked into the codification of Hindu family law and other Indian law and the appointing of a commission "to examine the reported cases, ascertain the legal questions out of which most litigation had arisen, and consider how far it would be practicable to reduce the amount of the litigation by an authoritative declaration of certain legal rules."[27] He found there was little desire for such codification and concluded that it "could not be made without the active and willing co-operation of native Indian lawyers"; that such a class of lawyers competent to undertake such a task would arise was indicated by the existence of Indians serving in the high courts. In his list he included Justice Mahmood.[28]

5.1d Sir Sayyid and Syed Mahmood's views of codification

Sir Sayyid Aḥmad Khān was a member of the Viceroy's legislative council from 1878-1882, during the time when Whitley Stokes and the 1879 Law Commission were most active in preparing new legislation. Both the state and provincial legislative councils had been established by the government as committees for the purpose of making laws, obtaining advice and assistance in legislation, and publicizing every stage of the law-making process.[29] Aḥmad Khān strongly supported the process of codification in his speeches during the debates on two new bills presented at that time. In view of the strong interest that Syed Mahmood took in the passage the Bills through the legislature and his stated endorsement of his father's speeches, it is reasonable to assume that Aḥmad Khān's views reflected his own as well.[30] In his speech on the Transfer of Property Bill in Janu-

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[27] Ibid.: 364.
[28] Ibid.: 368-369.
[29] Herbert Cowell, *The History and Constitution of the Courts and Legislative Authorities in India*, 5th ed., Tagore Law Lectures (Calcutta: Thacker, Spink & Co., 1905), 87.
[30] "Letter by S. Mahmud, Justice," 15 Dec. 1884, Proceedings, Judicial (Civil) Department, N.-W. P. & Oudh, Feb. 1885, Nos. 12-19 on Bill to Amend Transfer of Property Act, 1882, U. P. State Archives, Lucknow; Syed Mahmood, "Necessity of extending the Indian Easements Act (V of 1882)," written 23 May 1886, N.-W. P. and Oudh, Judicial (Criminal) Dept. Proceedings (A), Mar. 1891, Nos. 32-58, U. P. State Archives, Lucknow.

ary of 1882, during a sitting of the Council in Calcutta, Aḥmad Khān declared, "So far as I am aware, the Native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty—precision where there is vagueness."[31] He noted that while a criminal code and a code of procedure had been promulgated, the administration of civil law retained a vagueness because it had not been codified and because judges administered that law on the principle of "justice, equity, and good conscience." The fact that the principle was open to differing interpretations resulted in an uneven application of law by different judges and ensuing confusion and pernicious litigation among the parties appearing in court.

> Codification, and codification alone, can remedy the evils which arise from uncertainty of the law; codification alone can enable the public to know their exact rights and obligations; codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India; codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges; and litigants will then be more anxious, before going into Court, to consult the Statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision.[32]

Aḥmad Khān went on to refute the claim that Indians were unfamiliar with living under systematically codified law, pointing to the Institutes of Manu for the Hindus, and the long history of attempts at codifying Muslim law culminating, in India at least, in the *Fatāwá-yi Ālamgīrī* commissioned by the Mughal Emperor Aurangzeb. The Calcutta newspaper, the *Englishman*, praised Aḥmad Khān and his able speech in its editorial, commenting, "No native gentleman hitherto has ever endorsed with equal distinctness the doctrine that the law of the country requires to be codified, admits of codification, and that the past history and literature of both the great sections of the community point emphatically in the direction of a National Code."[33] Such a speech, the editorial went on to say, refuted those who asserted that Hindus and Muslims were habituated to a customary

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[31] Sir Sayyid Ahmad Khan, "Transfer of Property," in *Abstract of the Proceedings of the Council of the Governor General of India, Assembled for the Purpose of Making Laws and Regulations under the Provisions of the Act of Parliament*, vol. 21 (Calcutta: Office of the Supt. of Gov't. Printing, India, 1882), 63. Stokes quoted this speech at length in his compendium of Indian law, see: Stokes, *Anglo-Indian Codes, vol. 1*, xxi-xxii. Ilbert referred to this speech in his own speech on "Indian Codification" in the Legislative Council, on 21 July 1882, GOI, Home Judicial (A), August 1882, No. 319, National Archives of India, New Delhi.

[32] Ibid.

[33] "The Meeting of the Legislative Council," *The Englishman*, 1 Feb. 1882, 2.

law because it was more flexible than written statutes and that any attempt at codification would be out of harmony with the past and uncongenial to the people of the country.

In a debate on the Easements Bill a few weeks later, Aḥmad Khān strongly urged the bill's passage and its implementation in all regions of British India. In his opinion, it would provide much needed assistance to Indian judicial officers, as well as lawyers and the public at large, since it systematically and clearly explained the law. Treatises on the law of easements did not exist in the vernaculars, he explained, and many of the native judicial officers were not acquainted with the English language, causing those writings to be largely inaccessible or unintelligible to them.[34] Aḥmad Khān's strong backing of the bill should not be interpreted as that of a "blind enthusiast or a theoretical advocate of the policy of codification," he stated, but of one who was there to represent the opinions of his countrymen and to place before the legislature such matters as constituted the needs of the Indian population.[35] His advocacy of codification, then, reflected that of its other major promoters such as the Legal Members, in that he saw it as a means to bring certainty and simplicity in the administration of Indian law.

Syed Mahmood demonstrated an equally strong, if not stronger, commitment to the process of codification, declaring, "I am a firm advocate of the policy of codification and of the enunciation of difficult questions of substantive law and procedure in a scientific form."[36] Though the majority of the above codes had been passed before he was appointed to the High Court, he did write numerous minutes and memoranda on subsequent revisions since the practice of the governments was to request the comments of judges and other concerned officials on proposed legislation.[37] Mahmood took this responsibility very seriously, and tended to prolixity in his responses. Perhaps because of his careful,

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[34] Sir Sayyid Ahmad Khan, "Easements," in *Abstract of the Proceedings of the Council of the Governor General of India, Assembled for the Purpose of Making Laws and Regulations under the Provisions of the Act of Parliament*, vol. 21 (Calcutta: Office of the Supt. of Gov't. Printing, India, 1882), 106. Again, Syed Mahmood's strong endorsement of the speech later suggests his possible collaboration in its composition. See: Syed Mahmood, Minute on "Necessity of extending the Indian Easements Act (V of 1882)," 23 May 1886, N.-W. P. and Oudh, Judicial (Criminal) Dept. Proceedings (A), Mar. 1891, Nos. 32-58, U. P. State Archives, Lucknow.

[35] Ibid.

[36] Syed Mahmood, "Appendix A3. Note on the Provincial Small Cause Courts Bill of 1885," High Court, Allahabad, 25 July, 1886, GOI, Home Legislative, Feb. 1893, Nos. 97-114, National Archives of India, New Delhi, p. 17.

[37] As has been suggested in the preceding footnotes, Mahmood may have had a more direct impact on the earlier bills than is explicitly acknowledged.

detailed analyses, his suggestions were not ignored; and he could state with pride in a judgment from the Bench that he was responsible for the wording of a specific section of the amended Civil Procedure Code because "it was at my suggestion that the Legislature adopted those words."[38] His support for codification and the purposes he saw it achieving deserve to be studied more closely in the context of the writings of other major proponents of the doctrine.

5.2 Purpose of codification

5.2a To limit the importing of English law

In his judgments, Syed Mahmood pointed out the weaknesses produced by the lack of legislation, particularly the liberty it gave individual judges to import English law into India without regard for the local context. In one of his last major judgments, he argued that in dealing with questions not covered by express legislation, a judge must not usurp the role of a legislator and create his own law. But it was equally true, he added, that in such situations the judge must refrain from simply administering the laws of England. He recognized the debt the Indian system of jurisprudence owed the English system, but disapproved of the arbitrary importing of English laws.

> To the English system of jurisprudence, common law and the principles of equity administered in the Courts of Chancery in England India owes a vast debt of gratitude for the improvements in the administration of justice. How far the principles of the English system have been imported into India is apparent not only from our Statute book, but also from the vast body of decided cases, which I may describe as judge-made law. Notions of justice, equity and good conscience are necessarily incapable of exact and exhaustive definition, and in administering them the Judge has to take exceptional care whether he is or is not importing foreign notions too far, or giving too much preference to the notions of equity in one country over the notions of another.[39]

Syed Mahmood's opposition to the unreflective importation of English law into India was not unique to him. Influential British writers such as Jeremy Bentham (1748-1832) had espoused such opposition already in the eighteenth century.[40] As early as 1782,

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[38] *The Indian Law Reports*, 7 All. 693 (21 Feb. 1885), Narain Das v. Lajja Ram, p. 699.
[39] *The Indian Law Reports* 14 All. 273 (29 June 1892) Seth Chitor Mal v. Shib Lal, p. 312.
[40] In the judgment just mentioned, Syed Mahmood had gone on to quote Bentham's *Theory of Legislation*, prompting a sarcastic aside from Chief Justice Edge, who resented Mahmood's detailed dissent from his own lengthy judgment, "You should in future be called Jeremy." Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct.

in his "Essay on the Influence of Time and Place in Matters of Legislation," Bentham had argued that as admirable as English law might be, to transplant it into Bengal without consideration for the historical factors that led to its creation was folly. After briefly describing the development of complicated substantive and procedural rules in England, he declaimed the error of forcing Indians to understand and follow those rules. Characteristically, he had denounced the lawyers and judges who thrived on the complexity of law; conversely he praised the traditional Indian judges in their administration of Muslim and Hindu law.

> What, then, must have been the sensations of the poor Hindoo, when forced to submit to all these wanton and ridiculous vexations? Unable to attribute to an European mind the folly adequate to the production of such a mass of nonsense and of gibberish, he must have found himself compelled to ascribe it to a less pardonable cause; to a deliberate plan for forcing him to deliver himself up, without reserve, into the hands of the European professional blood-suckers, carrying on the traffic of injustice under the cloak of law. The most remarkable circumstance connected with these absurdities in English procedure is, that the judges are aware of the evils, and every now and then act upon a different system; but where the English judge acts rightly, once in a hundred times, the Cawzee and the Bramin were in the habit of acting rightly every day.[41]

The alternative to such importation, Bentham suggested, was legislation designed for the specific time and place. Legislators who had freed themselves from "the shackles of authority," could "soar above the mists of prejudice," and would know how to make laws for any country once they were fully possessed of the local situation—"the climate, the bodily constitution, the manners, the legal customs, the religion."[42]

The rules Bentham proposed to guide the legislators were to keep them from the twin errors of leaving the laws to "the wild and spontaneous growth of the country" and of complete disregard for the customs and prejudices of the country. The first two rules indicated the extent to which he wished to preserve customary law in his codified law:

1. No law should be changed, no usage at present prevailing should be abolished, without special reason; unless some specific assignable benefit can be shown as likely to be the result of such a change.

1892, p. 8, India Office Records, Public and Judicial Department Records, L/PJ/6/355, file 1680, date 15 Aug. 1893, British Library London.

[41] Jeremy Bentham, "Essay on the Influence of Time and Place in Matters of Legislation," in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 1 (Edinburgh: William Tait, 1843), 187.

[42] Ibid., 180-181.

2. The changing of a custom repugnant to our own manners and sentiments, to one which is conformable to them, for no other reason than such repugnancy or conformity, is not to be reputed as a benefit. The satisfaction is for one, or a small number; the pain is for all, or a great number.[43]

In this second rule, Bentham attacked the concept that the British administration could freely tamper with the laws of India wherever they were deemed to be "repugnant" to the morality or feelings of the British. Despite Bentham's influence on many of the officials who came from Britain to rule India, the use of English law and legal procedures continued to spread as the British administration penetrated more deeply into Indian territories and society. Macaulay had opposed this transplantation of English law, and his successors in the heyday of codification in the 25 years following the 1857 Revolt echoed that opposition.

The Law Members who were the chief architects of the numerous law codes in British India in the latter half of the 19th century continued to see codification as a means to prevent the wholesale importation of English law by English judges, and to create legal institutions suited for the Indian context. The most conclusive argument for the need of abundant legislative activity, according to Henry Maine, was that in the absence of formal legislation, the law of England was exercising a powerful though indirect influence on the law of India. He defended the promulgation of numerous bills by the legislative council on the basis of equity and expediency, arguing that if the Indian Legislature did not legislate, the courts would; and these latter commands would "scarcely ever even make a pretence of being adjusted to equity or expediency."[44] He blamed of the spread of English law in India on British judges assuming that English law was universally applicable in providing answers when there was no legislation to prescribe a rule.

> The higher courts, while they openly borrowed the English rules from the recognised English authorities, constantly used language which implied that they believed themselves to be taking them from some abstract body of legal principle which lay behind all law; and the inferior judges, when they were applying some half-remembered legal rule learnt in boyhood, or culling a proposition of law from a half-understood English text-book, no doubt honestly thought in many cases that they were following the rule prescribed for them, to decide "by equity and good conscience" wherever no native law or usage was discoverable. The result, how-

[43] Ibid.

[44] Henry James Sumner Maine, "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act," *The Fortnightly Review* 19 (1873): 51.

> ever, of the process is plain upon simple observation. Whole provinces of law became exclusively, or nearly exclusively, English.... I do not think that there is any reason to apply harsh language to this great revolution; for revolution it assuredly was, little as it was intended or even perceived. It was quite inevitable in the absence of formal legislation....[45]

Formal legislation was, in his view, the only possible corrective of that process of change. He considered the introduction of English law into India by courts of justice to amount to a "grievous wrong," and to be "the adoption of an exotic system of legal rules, collected with difficulty from isolated decisions reported in a foreign language."[46] English law—a system of colossal dimensions—could only be mastered by a class of experts, and the result of its increasing prominence in the Indian judicial system was that "all really important influence was steadily falling into the hands of a very small minority of lawyers trained in England, whose knowledge must have seemed to the millions affected by it hardly less mysterious and hardly more explicable than the inspired utterances of Mahomet or Manu."[47] The purpose of the introduction of the Indian Evidence Act by Fitzjames Stephen was, then in Maine's evaluation, one example of an effort to place Indian judges, Indian lawyers, and English civil servants without specialised legal training, on a level with the English barristers practicing before the country's high courts. These concerns were similar to those which motivated Syed Mahmood to support codification.

What Syed Mahmood did not share with Maine, however, was the assumption that India was basically empty of law before the British arrived. It has been noted in the previous chapter how in matters not only of personal law but also of laws pertaining to preemption and to evidence, Mahmood would regularly appeal to the pre-existing Muslim law as the residual law to guide judges. Maine, however, had insisted that "before the British Government began to legislate, India was, regard being had to its moral and material needs, a country singularly empty of law."[48] He had offered this proposition to counter the assumption of opponents of codification "that India is full of indigenous legal or customary rules which suffice for the solution of all questions, and that the great danger of codification is, that through the necessary conditions of the process these rules may

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[45] Ibid.: 53.
[46] Ibid.: 53-54.
[47] Ibid.: 54.
[48] India. Legislative Department, *Minutes by Sir H. S. Maine, 1862-69, with a Note on Indian Codification dated 17th July 1879* (Calcutta: Superintendent of Government Printing, 1890), 225.

be changed."[49] Syed Mahmood, in contrast, did not see his support for codification to be at odds with his belief in a pre-existing body of law that was still a relevant source from which judges could derive guidance. He leaned more towards Bentham's views that no existing laws be abolished without specific benefit accruing from the change and that legislation must always be done with a full understanding of the local situation as distinct from the English one.

While Henry Maine had likewise opposed the spread of English law, he took a stand against those who promoted customary law as well. He saw a legislated code replacing not only imported English law, but the customary law which had become more rigid under British rule. He explained this apparent contradiction of a concurrent spread of English law and solidification of Indian customary law by pointing out the dichotomy between the Supreme Courts of the presidency towns of Calcutta, Madras, and Bombay, and the Sudder Courts of the Mofussil or outlying areas.

> At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the Judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened, and contracted a rigidity which they never had in real native practice.[50]

Codification was therefore necessary to limit this pernicious influence of English officials as well. He described how before the coming of the British, Hindu jurisprudence was evolving through its own inner dynamic of jurists commenting on the writings of Manu and on one another. This "mode of developing law which consists in the successive comments of jurisconsult upon jurisconsult," had been an important means of developing laws throughout European history, traceable to a period as early as the Roman law. Maine saw it as a liberalising process on the whole, changing even "so obstinate a subject-matters as Hindoo law" for the better.

> No doubt the dominant object of each successive Hindoo commentator is so to construe each rule of civil law as to make it appear that there is some sacerdotal

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[49] Ibid.

[50] Henry James Sumner Maine, *Village-Communities in the East and West: Six Lectures delivered at Oxford to which are added other Lectures, Addresses and Essays*, Third ed. (New York: Henry Holt and Company, 1876), 44-45.

> reason for it; but, subject to this controlling aim, each of them leaves in the law after he has explained it, a stronger dose of common sense and a larger element of equity and reasonableness than he found in it as it came from the hands of his predecessors.[51]

To sum up Maine's position, it is clear that he did not dismiss the value of indigenous law as completely as some of his utilitarian forbears did.[52] He resented the intrusion of English law and the rigidity of the Hindu and Muslim law brought about by British rule. To state that India was "empty" of law, then, Maine was referring to his understanding of law as legislated, codified law.

A. C. Lyall, who worked to promote Syed Mahmood during his tenure as Lt.-Governor of the N.-W. P., was a great admirer of Maine, and shared with him his conception of India as being without a written system of law. In his assessment of India under Queen Victoria, he wrote, "The British rule came in upon the confusion bred out of centuries of governmental instability; it brought system and law to bear upon an incoherent mass of usages, traditions, and arbitrary despotisms." Later in the paper as he listed what he considered the achievements of the British in India, he continued, "We have also been slowly moulding the mind of all India to the habitual conception of law, which is a novelty in a country where written ordinances cannot be said to have existed before our time."[53] That Mahmood did not share this assumption is evident throughout his rulings, in which he frequently invoked the Muslim law enforced in many regions of India prior to British rule. That law, rather than English law, should be the one to provide guidance when case law, statutes and legislation failed to provide answers.

5.2b To provide simplicity and certainty

James Fitzjames Stephen (1829-1894), who succeeded Maine as Law Member in 1869, emphasized the need to supply simplicity and certainty, rather than the need to contextualize the law and to limit the importation of English law. In his speech on the Indian Contract Bill in 1872, he reviewed the history of legislation in India, and stated that if the government wished to avoid the twin evils of arbitrary rule and the chicanery of the legal

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[51] Ibid., 46-47.
[52] Clive Dewey, "The influence of Sir Henry Maine on agrarian policy in India," in *The Victorian Achievement of Sir Henry Maine*, ed. Alan Diamond (Cambridge, UK: Cambridge University Press, 1991), 368.
[53] Alfred C. Lyall, "India under Queen Victoria," *The Nineteenth Century* 41 (1897): 875-877.

profession, the only answer was "to make the law which [was] to be administered so clear, short, precise and comprehensive, as to leave the least possible scope for the exercise of those unamiable qualities."[54]

> To try to avert them by leaving the law undefined, and by entrusting Judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a Judge with no rule, or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the Judge can be guided. Shut the lawyer's mouth, and you fall into the evils of arbitrary government. The one remedy which is really sufficient lies in the precise and perfectly clear definition of the law. This is the province of legislation; ... laws which make that certain which was previously vague, and which lay down a plain rule where there was previously none, are the only means by which the amount of law and litigation in the country can be reduced to its proper limits.[55]

The Law Member of the Viceroy's council during the time when Mahmood was first appointed as judge, Whitley Stokes, saw the purpose of codification as two-fold, namely eliminating those aspects of law which were purely English and unsuitable for the Indian context, and preparing a simplified, "Indianized" law that could be more easily administered by judges who did not have extensive training in law and jurisprudence. In encountering resistance to one of his proposed bills, he wrote:

> The assertion that the bill would introduce a mass of new law into India must therefore be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) is actually administered to the Natives by the Anglo-Indian Courts. The object of the Bill, like that of all our Codes, is to strip our own law of all that is local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population and could be easily administered by non-professional Judges. But the Bill will introduce hardly any new substantial law...."[56]

Stokes denunciation of the importation of English law by means of the formula, "justice, equity, and good conscience," was a sentiment shared by Syed Mahmood. In one of his rulings where both plaintiff and defendant were Europeans, Syed Mahmood pointed out that English case law even in this situation was not sufficient. His argument echoes that of Stokes' as to the importance of law being codified into statutes in order to provide certainty and also to avoid wholesale application of English law in India:

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[54] India. Publications Dept., "Indian Contract Bill," *Supplement to the Gazette of India*, no. 18 (1872): 529.
[55] Ibid.
[56] "Fourth Note by Honourable Whitley Stokes," GOI, Home Judicial (A), Feb. 1879, Nos. 161-163, National Archives of India, Delhi.

> The Courts in India, however, in considering such questions, are bound by the provisions of a consolidatory statute, the object of which is to place the principles of law upon a footing more specific and more certain than the practice of the English Courts in such matters. In interpreting those statutory provisions it is our duty especially to guard ourselves against being guided too much by the English cases and too little by the words of the statute.[57]

He recognized that the statute was framed largely on the principles of English law, but insisted that in many matters the statute had also departed from the rules and principles adopted in England. He, therefore, examined the English case law at length, but with a view to extracting relevant principles—not the details—of the rules laid down, in order to apply them to the Indian situation.[58]

In his remarks on the bill to amend the Transfer of Property Act, Syed Mahmood explicitly stated what he saw as the purpose of codification: "I hold it as a fundamental principle of the policy of codification that the legislature should attempt to make the law of British India as uniform as possible, and that no exemption from the general rules of law should be allowed except for very cogent reasons."[59] When his father had made his stirring remarks in support of codification in his speech during the debate on the first passage of the Transfer of Property Act in 1881, he had been criticised for supporting that bill while at the same time insuring that the Muslim community would not be affected by its injunctions. Syed Mahmood seemed to be addressing that criticism in his remarks four years later on the proposed amendments. He wished to see exemption not based on the race, class, or religion of the parties involved, but based on the local context of the property being mortgaged, as determined by the local government.

> The main object of codification being to introduce certainty in the law, and to make that certainty easy of application, I hold that this object is greatly defeated if a mortgagee has to consider the nationality and religion of the parties and not the situation of the property with which he is dealing."[60]

Once again he emphasized that certainty in the administration of law was the major objective of codification.

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[57] *The Indian Law Reports*, 6 All. 583 (7 Jul. 1884) Bachman v. Bachman, p. 597.
[58] Ibid., p. 608.
[59] Syed Mahmood, "Remarks on the Bill to amend the Transfer of Property Act, IV of 1882," Allahabad, 13 Jan. 1885, GOI, Home Judicial (B), Jan. 1885, Nos. 140-142, National Archives of India, New Delhi.
[60] Ibid.

While strongly promoting the application of Muslim law in matters under its purview by the Indian courts, Syed Mahmood also strongly promoted equality before the law as essential regardless of race or religion. He argued that permitting an exemption to the Transfer of Property Act on the basis of religion would in effect make it impossible for a Muslim and an Englishman to jointly own property.

> I cannot feel that such a law is calculated to promote the interests of India in general, for, I should say, the time has arrived when distinctions of nationality or creed between the various classes of the subjects of the British Empire in India should be mitigated as far as possible in all secular matters.[61]

Codification, then, provided not only certainty and simplicity, but promoted the equality before the law of all British subjects—both Indian and English—as Syed Mahmood had advocated on numerous other occasions. The select committee who had put forward the proposed amendments to the Transfer of Property Act considered Mahmood's remarks to carry enough weight that they decided to remove the section permitting exemptions.

5.3 "Justice, equity and good conscience" in theory and practice

5.3a Origin and purpose of the formula

The phrase "justice, equity, and good conscience" had its origins in Roman canonical law as it was understood by English jurists of the sixteenth century. In the form in which it was introduced into England at that time, it was "an appeal to sources of law other than English common and statute law."[62] Courts established by the East India Company in Bombay and Madras at the end of the seventeenth century were mandated to administer justice according to the rules of equity and good conscience and according to the laws already in place. Nearly one hundred years later, the phrase was revived in the 1781 Regulations for the Administration of Justice in the Courts of the Dewannee Adaulut of the provinces of Bengal, Bihar and Orissa passed by Governor General Warren Hastings. "That in all cases, within the jurisdiction of the Mofussil Dewannee Adaulut, for which no specific Directions are hereby given, the respective Judges thereof do act according to Justice, Equity and good Conscience."[63] Those matters regarding which the positive law of the East India Company was silent were then to be judged according to this provision.

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[61] Ibid.
[62] Derrett, "Justice, Equity and Good Conscience," 128.
[63] Ibid., 132-133.

But it was not only the laws promulgated by the Company that were to be implemented, the laws of the Hindus and Muslims were also to be consulted. N. B. E. Baillie who prepared a translation of portions of the *Fatāwá-yi 'Ālamgīri* for the use in Indian courts, stated in his introduction:

> In the *Moofussul*, Moohummudans are more in the habit of regulating their dealings with each other by their own law; and to disregard it when adjudicating on such dealings, would be inconsistent with "justice, equity, and good conscience," according to which the judges are expressly enjoined to act in cases for which there is no specific rule for their guidance. It has thus happened, that the *Moofussul* judges have been obliged to extend the operation of Moohummudan law beyond the cases to which it is strictly applicable, under the regulations of the local governments.[64]

When these sources had been consulted, and if it was found that the provisions of the laws were not clear or inconsistent, the gaps that remained were to be filled with reference to the formula. With it, the judge could seek aid "of Roman Law, the laws of continental countries, English law, both common law and statute law, and finally Natural Law."[65]

5.3b Abuse of the formula in the absence of legislation

Although the intention of the formula was to permit the judge a wide latitude in seeking assistance in cases where no specific source of law was indicated or where the indicated source failed, the practice in British courts in India by the second half of the nineteenth century was to look upon the provision as a means to import English common law almost exclusively. In his law lectures in Calcutta, Sir Fredrick Pollock, one of Mahmood's fellow students at Lincoln's Inn and a respected English jurist, said:

> The only "justice, equity, and good conscience" English judges could and did administer, in default of any other rule, was so much of English law and usage as seemed reasonably applicable in [India]. Hindu and Mahometan law not affording any specific rules, or certainly not that were practicable for a mixed population, in a large part of the common affairs of life outside religion and the family, there was only English law to guide them.[66]

This was in clear contradiction of the spirit of section 9 of Regulation VII of 1832:

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[64] Baillie, *Digest*, xxi.
[65] Derrett, "Justice, Equity and Good Conscience," 140-141.
[66] Frederick Pollock, *The Law of Fraud, Misrepresentation and Mistake in British Iindia*, Tagore Law Lectures, 1894 (Calcutta: Thacker, Spink & Co., 1894), 7-8.

> Where parties are of different persuasions the laws of the religions shall not deprive a party of property to which, but for the operation of such laws, he would have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by these principles.[67]

However, since the English judges in the appeal courts were more familiar with English law than of other systems, it was to English law that they frequently turned. One of the reasons that Lord Salisbury (Secretary of State for India from 1874 to 1878) had urged the government in India to continue the process of codification of the law was this tendency by the judges to import English law to the detriment of the country's legal system. If the only guidance the courts were given was to follow the dictates of equity, judges were apt to apply English authorities with which they were familiar, but which the litigant parties and even the judges of first instance would not know.

> Thus, it is said, many rules ill-suited to oriental habits and institutions, and which would never recommend themselves for adoption in the course of systematic law-making, are indirectly finding their way into India by means of that informal legislation which is gradually effected by judicial decisions. It is manifest that the only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interests of the country.[68]

In spite of these intentions regarding "justice, equity, and good conscience," the Privy Council ruling 1887 discussed in the previous chapter gave sanction to the practice of using the formula to implement rules of English law as they were deemed applicable.

In a judgment delivered in 1888 on a case involving an obstruction created on a public thoroughfare, Syed Mahmood's assessment of the use of "justice, equity, and good conscience" was remarkably similar to that of Lord Salisbury. He noted that the both Indian Penal Code and the Criminal Procedure Code had defined the nature of a public nuisance and rendered it punishable as a criminal offence. The lack, he said, was in the civil side, with no statute law on the matter of torts.[69] Two years previously, he had prepared a

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[67] J. Duncan M. Derrett, "Justice, Equity and Good Conscience in India," *The Bombay Law Reporter* 64 (1962): 145. Reprinted in *Essays in Classical and Modern Hindu Law*, edited by J. Duncan M. Derrett, vol. 4, Current Problems and the Legacy of the Past. Leiden: E.J.Brill, 1978, pp. 8-27

[68] Stokes, *Anglo-Indian Codes, vol. 1*, xvi-xvii.

[69] *The Indian Law Reports*, 10 All. 499 (14 May 1888), Ramphal Rai v. Raghunandan Prasad, p. 502.

couple of memoranda giving his views on the necessity of codifying the law of torts—views which had been appreciated by Pollock, the English jurist asked to prepare a draft bill, but views which his colleagues and the government of the day had not shared.[70] Without statute law as a guide, Mahmood wrote, "it therefore devolves upon Judges sitting in British India virtually to legislate, by judicial exposition, for the people of the country, under the authority of the somewhat indefinite rule of justice, equity and good conscience, which as to be administered, in the absence of any legislative directions, by the Courts of British India."[71] The result was that the practice of the higher courts in British India, presided over by English lawyers had been to fall back upon the analogies of the English law, taking it in all cases to be a good guide for applying the ubiquitous formula. He noted that this practice had been approved by the Privy Council, though he added that in the context of the case being discussed, their Lordships had qualified their approval by indicating that the English law was not to be imported wholesale into India regardless of the conditions of the people and the country.[72] In this case of public nuisances, he had found the case-law of British India decisive, and fortunately the same as the rule of the English law of torts, so he did not have to deal with a conflict between English law and what he considered equitable for India. Nevertheless, he challenged the assumption made by British judges that in the absence of statute law, English law would by default provide what was just and equitable in any given situation.

A few months later, Syed Mahmood dealt with another case involving torts in which he was not prepared to accept the authority of English law, and once again lamented the lack of legislation in India on the subject.

> There is no authority with which I am acquainted which entitles any Court of justice sitting here in India to apply the English common law to the lives and liberties of the people of this country, irrespective of statutory provisions and of the rule of "justice, equity and good conscience," where no statutory provisions are available. There is no statute which renders that law applicable to this country, and if difficulties arise in dealing with questions such as those with which we have to deal in

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[70] N.-W.P. Judicial (Civil) Department, June 1888, nos. 14-19, file 33 B, box no. 5, U.P. State Archives, Lucknow. See also: Pollock, *Law of Torts*, 518.
[71] *The Indian Law Reports*, 10 All. 499 (14 May 1888), Ramphal Rai v. Raghunandan Prasad, p. 502.
[72] Ibid., p. 503.

> this case, it is because Legislature has not yet thought fit to frame any special rules which would govern actions of this character.[73]

He insisted that "for the purpose of deciding such questions which affect a population vastly different to that of England in nationality, creed, and social conditions, the English common law, though it must always be referred to for guidance in questions of difficulty and regarded with respect, is not necessarily fit to be adopted in its integrity, irrespective of the conditions of this country."[74]

Interestingly, in this case in which legislative enactments were silent and Indian case law published on the subject was contradictory, he appealed to Addison on Torts for the principles he chose to apply.[75] What was clear in Indian case law, he wrote, was that "the English law of torts, as to verbal abuse and slander, is not the law of British India, and that we should be importing that law, regardless of the conditions of the people, if we were to apply wholesale the very peculiar rules of that law, on this point denounced by many eminent English lawyers themselves, and called by Lord Brougham as 'not only unsatisfactory but barbarous.'"[76] In his eulogy of Syed Mahmood, Sir Tej Bahadur Sapru lauded Mahmood's understanding of the pervasive formula.

> Mr. Justice Mahmood's conceptions of equity, justice and good conscience were in some respects materially different to those of many other Indian judges; and it was perhaps because of these conceptions that he was enabled to grapple with the modern conditions of Indian life. Equity with him was neither a roguish thing, nor a deceitful will o' the wisp. On the contrary he could always trust to it for lighting up some dark corners in our law. But he at the same time clearly realized that it was by no means desirable to import whole-sale those equitable maxims or rules which are the growth of ages in England and which are peculiarly suited to English life and English Courts.[77]

In challenging the assumption that the formula was a means to import English law, Mahmood stimulated a critical examination of the practice of applying that law by default, and encouraged the production of laws that would be better suited to the unique conditions and peoples of India.

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[73] *The Indian Law Reports*, 10 All. 425 (2 Jul. 1888), Dawan Singh v. Mahip Singh, p. 438.
[74] Ibid.
[75] Charles G. Addison, *Wrongs and their Remedies: being a Treatise on the Law of Torts*, 4th, by F.S.P. Wolferstan ed. (London: Stevens, 1873).
[76] Dawan Singh v. Mahip Singh, p. 449.
[77] Sapru, "Syed Mahmood," 449.

Another abuse of the application of the principle of "justice, equity, and good conscience," which Syed Mahmood considered even more reprehensible than the unwarranted importation of English law, was its utilization to sanction the uninformed whims of individual judges. In arguing for the extension of the Indian Easements Act, he gave an example of a case regarding easements which had come up before him on appeal, in which a "military civilian," (by implication, untrained in any jurisprudence) serving as a subordinate judge, had given a ruling completely dismissing the restrictions introduced by the concept of easements. Mahmood quoted the judge's ruling from memory: "This is a simple case which the plaintiff's pleader has tried to complicate by legal technicalities. It is admitted that the lake belongs to the defendant; and I do not see why a man should not do what he likes with what is his own. These claims are dismissed with costs."[78] In appeal, Syed Mahmood had learned that those who held lands along the banks of the lake had been entitled to take water from the lake for irrigation from time immemorial, and therefore overturned the judge's ruling and decreed the claims. He commented, "It is within my experience as Judge of an Appellate Court in the mufassil and here [Abbotabad], that the greatest absurdities are expected by learned Judges of subordinate Coruts to constitute 'justice, equity, and good conscience.'"[79] That was why he insisted that legislation on matters such as easements was needed, and that the principle of justice, equity, and good conscience alone was an insufficient guide.

5.3c Suitability of the formula in promoting equity

Syed Mahmood's utilization of the principle of "justice, equity, and good conscience," in connection with matters in Muslim law such as pre-emption and rules of evidence where he also resisted the intrusion of English law, has already been discussed in the previous chapter. Briefly summarized, he was not prepared to assume that the formula was a license to import English common law indiscriminately. He argued that as a principle of "justice," the commitment of the British regime to respect the Muslim law in matters of inheritance, marriage, and related matters, should not be over-ridden by the whims of a judge who had predilection for an English legal solution for the problem. Even in

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[78] Syed Mahmood, Minute on "Necessity of extending the Indian Easements Act (V of 1882) to these Provinces and Oudh," N.-W. P. & Oudh, Judicial (Civil) Dept. Proceedings (A) Mar. 1891, Nos. 32-58, p. 26.
[79] Ibid.

cases where the existing rules were silent and the application of the formula of "justice, equity, and good conscience" would be warranted, Mahmood favoured drawing on the principles of Muslim law that pre-dated the coming of the British. He often insisted that the provisions of Muslim law, especially in matters of pre-emption, were so consistent with the principles of justice, equity, and good conscience that it was imperative that Muslim law be applied in those situations. It is apparent from his writings that Syed Mahmood's interpretation of the formula was more in line with its original purpose than that of his contemporaries. Despite his critique of the handling of the formula, Mahmood nevertheless found in it both an encapsulation of his approach to law and a useful tool to circumvent narrow interpretations of rules that seemed to violate the principle of equity—the aspect of the triad which he utilized most frequently in his judgments.

While Syed Mahmood was committed to the codification of law because of the uniformity it provided, he nevertheless believed in the priority of the principle of equity, especially when the question was one of procedural law. In one case where the argument centred on the language of the Civil Code of Procedure, he stated:

> We do not think that the rules of adjective law should be administered regardless of the fundamental principles of substantive law and equity. Where the language of the statue itself is silent upon any special point, the Courts in applying the rules of procedure will import such considerations as will render the application of those rules consistent with equity and substantive law.[80]

In another case, he commented that the case law in India established by "a long course of decision" had created a rule which he found equitable to apply. For him, the equitable nature of the rule was more important than whether that rule had been subsequently established by legislation. "This rule, though it probably originated in the express provisions of the old regulations, is so consonant with equity that it deserves recognition by the Courts, even irrespective of statutory provisions."[81] If the statutes enacted by the legislative council reflected that equity—as it did in this case—so much the better.

Likewise, in a case dealing with the Hindu laws of inheritance, Syed Mahmood insisted that the codified Transfer of Property Act had to yield to provisions of Hindu laws because the Act contained a clause to the effect that "nothing in this Act shall be

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[80] *The Indian Law Reports*, 5 All. 27 (4 Jul. 1882) Banarsi Das v. Maharani Kuar, p. 32.
[81] *The Indian Law Reports*, 6 All. 298 (24 Apr. 1884) Jhabbu Ram v. Girdhari Singh, pp. 308-309.

deemed to affect any rule of Hindu, Muhammadan or Buddhist law."[82] The codified law could not therefore be considered binding in this case. But although the subject matter—inheritance and succession—was a matter belonging to Hindu law, that law was silent on the particular issue in question. Therefore it was necessary to look to the principles of justice, equity, and good conscience for guidance. Again, he was satisfied that the principles of jurisprudence had received effect in the codified law. Thus while arriving in the end at the codified law, the purpose of Mahmood's circuitous route was to demonstrate the ranking of priority in matters belonging to law of a specific religious community in India: firstly the relevant religious law, secondly the principles of justice, equity, and good conscience, which, thirdly, could be found in the codified law of the government of India, but was not restricted to that.

The priority of equity applied not only in matters of procedural law, but also in matters of archaic religious laws. He noted in a judgment on the disbursement of a Hindu widow's estate, that the practice in India was to go beyond the precepts laid down in Hindu law. This extension had arisen from "the exigencies of modern life rather than the precepts of Hindu Law, and ... originated in the principle of equity, which could not be disregarded in administering an ancient law, and in adapting its behests to the present conditions of life in British India."[83] Thus even the application of religious laws in India as guaranteed by the British—a practice stoutly defended by Mahmood—could be modified by the principle of equity to bring those rules into conformity with the current demands of Indian life.

5.4 Weaknesses in the British administration of justice

5.4a Expenses of the judicial system

5.4a (1) Complexity of judicial institutions

An abiding concern of Syed Mahmood's was the cost of the administration of justice in India, particularly to those too poor to afford the lengthy—and hence expensive—litigation process involved in numerous appeals. One factor that made it difficult for the poorer and less educated classes to obtain justice for their smaller suits was the increas-

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[82] *The Indian Law Reports*, 7 All. 516 (23 Dec. 1884) Bhairo v. Parmeshri Dayal, p. 522.
[83] *The Indian Law Reports*, 4 All. 518 (8 Jun. 1882) Ali Hasan v. Dhirja, p. 541.

ingly complicated mass of law they were expected to master in bringing their cases to the court. While affirming his support for the work of codifying the law in India, Syed Mahmood expressed his reservations about the impact of such codification on a person seeking justice in a small and simple matter. Codification had been beneficial in rendering substantive law and procedure in India "ascertained, well-defined, and ascertainable," he wrote.[84]

> I should be the last to deprecate the extension of the policy of codification, for I feel that there is still ample room for the operation of that policy. But with all this, I humbly think that the interests of serious and important litigation have almost entirely absorbed the time available for carrying out the policy, and ... the interests of petty litigation have been practically ignored.[85]

He suggested that the results of this neglect had been more or less disastrous to petty litigants, in proportion as the body of codified law had increased.

Mahmood gave the Civil Procedures Code as an example, calling it "one of the most magnificent instances of codified law." While it furnished excellent guidelines to courts dealing with serious litigation, it would have been incongruous "to apply such an enormous code to a suit in which the value of the subject-matter itself is less than the price of a well-edited copy of the Code itself would be."[86] He believed that there was

> no logical inconsistency in the view that whilst the application of the strict rules of law to serious litigation produces beneficial results, its strict application to petty litigation may produce a greater evil than the law itself, for, as not unfrequently happens in petty cases, the cost of litigation may exceed the value of the subject-matter for which the litigation itself was initiated.[87]

The solution he proposed was a system of village *munsifs* similar to that which he had observed in operation in Madras in his visit there in 1881. These would consist of unpaid village tribunals established to deal with cases involving petty litigation.

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[84] Syed Mahmood, "Appendix A3. Note on the Provincial Small Cause Courts Bill of 1885," High Court, Allahabad, 25 July, 1886, GOI, Home Legislative, Feb. 1893, Nos. 97-114, National Archives of India, New Delhi, pp. 19-20.
[85] Ibid., p. 20.
[86] Ibid.
[87] Ibid.

5.4a (2) Distance of the courts

Another factor which hindered the poor from obtaining justice was the cost of pursuing their cases in courts that were at a considerable distance from their homes. For this, too, Mahmood's solution was a network of numerous village courts to adjudicate the cases "on the spot." Small Cause Courts had been established by the government in 1865 (and it was in response to the governments proposed amendments to this Act that Mahmood recorded his thoughts), and they had proved successful in handling petty litigation in the larger towns and urban centres. But they were too few, and therefore too spread out, to adequately administer the smaller claims from all the outlying rural areas. Syed Mahmood provided a breakdown of the costs involved in a poor farmer pressing his small suit in a Small Cause Court in a distant town.

> For instance, take the case of an agriculturalist living in a village 15 or 20 miles away from the court-house, who wishes to enforce a claim amounting to Rs. 20 in value. What he has to do is that he must, as usually happens, walk the 15 or 20 miles during the better part of the day to arrive at the town where the court is situated. He arrives at the town in the evening and goes to a *sarai* for shelter during the night, for it cannot be till the next morning that he can secure any professional help in the shape of having his plaint written in due form and presented to the court. Taking the wages of such a person at the rate of four annas per diem, my calculation of the costs which he has to incur would be somewhat as follows:—
>
> (1) Loss of work for the day spent in travelling to where the court is situate – 4 annas
> (2) Cost of board and lodging for the night – 2 annas
> (3) Paper for the plaint – 3 paisas
> (4) Fee for the preparation of the plaint – Rs. 1
> (5) Court-fees payable on the plaint and *vakálatnáma* – Rs. 2
> (6) Loss of work for the day spent at the court-house – 4 annas
> (7) Talbána [fees paid for serving a process] for five witnesses (approximate) – 15 annas
> (8) Food for the witnesses – 10 annas
> (9) Board and lodging for the day and night – 4 annas
> (10) Loss of work for the day spent in travelling back from the court town – 4 annas
> (11) Loss of work for the day spent in travelling to the court to attend on the day of hearing – 4 annas
> (12) Board and lodging for the night – 2 annas
> (13) Loss of work for the day spent at the court-house – 4 annas
> (14) Board and lodging for the day and night – 4 annas
> (15)Loss of work for the day spent in travelling back from the court town – 4 annas.
> Total – Rs. 6, and 13 annas, and 3 paisa.
>
> The estimate which I have above given is usually the least which is incurred in such cases even when the case is decided on the date fixed. But if there is a post-

ponement, there is an additional charge which can be estimated easily according to the rates which I have indicated.[88]

A network of village courts such as Mahmood was suggesting would make justice more accessible. Since those administering justice would be unpaid tribunals or honorary *munsifs*, there would be no increase of cost to the state. In fact, such village courts would prevent petty litigation taking up the time and expense of regular courts. An added benefit would be that more of the people of India would be involved in the administration of justice and would thus feel they were having a part in the running of their country.

In his minute, Syed Mahmood explicated his plan in great detail, drawing on his observations in Madras. That minute continued to circulate in government departments for the next six years, acquiring a life of its own much beyond the initial Provincial Small Cause Courts Bill on which he had been asked to comment. In 1890, the Lt.-Gov. of the N.-W. P. & Oudh appointed an official to enquire into the working of the system of Village Munsifs' Court in the Presidencies of Madras and Bombay, and to report on the feasibility of introducing a similar system in the N.-W. P. Syed Mahmood prepared a draft of the instructions to guide the official in his research into the situation in Madras. The government approved of the report and decided to implement it on the grounds that it would "create a popular and effective class of Courts for the settlement of many disputes which at present remain without adequate means of disposal; and will furnish a cheap and summary means for the recovery of a class of small claims, which are of importance to the agricultural population, but of which attempts at realisation are at present attended with what practically are insuperable obstacles."[89] The North-Western Provinces and Oudh Village Courts Act, was passed into law by the Provincial Council on 22 Nov. 1892.

5.4a (3) Levy of court fees

A related issue in which Syed Mahmood took considerable interest was the matter of the court fees charged. In one of his earliest judgments as a new judge of the High Court at Allahabad, he addressed the issue in a case involving the recovery of court costs through payment for stamps affixed to legal documents. He attacked the mindset which

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[88] Ibid., pp. 15-16.

[89] Letter no. 377 of 1892. W. H. L. Impey, Secretary to Government, N.-W. Provinces and Oudh, Naini Tal, to the Secretary to the Government of India, Home Department, 11 May 1892, GOI, Home Judicial (A), July 1892, Nos. 332-381, National Archives of India, New Delhi.

presumed that a failure to affix stamps on a legal transaction was fundamentally evidence of fraud and bad faith. The stamp law, he contended, was only intended as the collection of one form of revenue, and carried its own penalties for its evasion. However, since the problem was that many people were unaware of legal distinctions between various transactions—some of which required stamps and some which did not—it was an abuse of the law to assume that its transgression was always an indication of bad faith. He quoted approvingly a decision by the Privy Council suggesting that British judges in India were too quick to see fraud everywhere.[90] In subsequent judgments, although he upheld the law as stated in the legislated statute, he pointed out somewhat facetiously that the Act lacked a preamble, possibly because the only purpose that could be expressed in it would be for taxation.

> The Legislature might not have been anxious to explain the reasons of these two enactments, but that reason can be nothing other than that they were taxing the Indian population, a statement which might not quite have suited the comfort of the Indian population had the enactment begun by saying something to this effect:—"Whereas it is expedient to impose further taxes upon the people of India, &c."[91]

In a lengthy minute recorded by Syed Mahmood in 1884, he prepared a comprehensive critique of the whole concept of court fees. He challenged the assumption that court fees were levied "as compensation to the Courts for the trouble they have to undergo in disposing of litigation," or "as wages for the labor employed by them," treating justice as if it were a commodity to be purchased by the litigants.[92] He quoted Jeremy Bentham's protest against law taxes to show that those who derived most benefit from the system of justice were those who enjoyed the security it provided and did *not* have to appear in the courts, whereas those for whom the system had *failed* were the ones bearing the cost of its maintenance by paying court fees.

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[90] *The Indian Reports*, 4 All. 462 (26 Jun. 1882) Shankar Lal v. Sukhrani, p. 471.

[91] *The Indian Reports*, 8 All. 66 (20 Oct. 1890) Radha Bai v. Nathu Ram, p. 73. The importance that Syed Mahmood placed on the preamble in interpreting a statute is seen in his ruling in *The Indian Reports*, 13 All. 126 (7 May 1890) Binda v. Kaunsilia, pp. 142-144: "I have no doubt that the preamble of a statute is the most important source of information for ascertaining the object and intention of the Legislature and the scope of the enactment." He quotes a number of passages from Peter Benson Maxwell, *On the Interpretation of Statutes* (London: W. Maxwell & Son, 1875).

[92] "Minute recorded by Hon'ble Mr. Justice Mahmood," 19 Aug. 1884, N.-W. P. & Oudh, Proceedings Judicial (Civil) Department (A), Feb. 1885, Nos. 20-24, U. P. State Archives, Lucknow.

Furthermore, the system of court fees which charged all litigants equally was paradoxically not equitable.

> It would operate as a denial of justice to the poor man whose suit, though of small value, is yet of great value to him, and perhaps involves the imposition of a large amount of labor on the Court. Because the rich man whose suit, though large in value, may involve less labor, would find redress cheaper than the poor man, though he could afford to pay larger fees; and, as a consequence, the fundamental justice that there should be equity between the rich and poor, would not only be disturbed, but the rule would confer an advantage on the rich at the expense of the poor.[93]

Finally, if court fees were intended as a check upon vexatious litigation, that goal was not achieved equitably in that it only restricted the pursuit of litigation by the poorer sections of the population but not the rich. "A poor man may buy cheap clothes, but he cannot buy cheap justice, and if justice costs the same amount in both cases of the rich and the poor, it follows that the rich man will be able to purchase it, whilst the poor man will not."[94]

Syed Mahmood recognized that it would be impossible to abolish all court fees, but suggested that this "necessary evil" be minimized by fixing the fees in proportion to the value of the claim. This, he wrote, would serve as a check on extravagantly large claims being advanced, and would enable the parties to anticipate the cost of pursuing litigation before commencing it. He recommended that arbitration as an alternative to litigation be encouraged much more rigorously. While the Civil Procedure Code provided rules for facilitating arbitration, the Court Fees Act provided no encouragement by a corresponding reduction of fees. He added, "Not only does it, as a rule, satisfy the litigant parties more than an ordinary decree of the Court, but it also operates to put an end to litigation by preventing appeals ... which in themselves are a source of evil."[95]

5.4b Language of the courts

Syed Mahmood regarded it a great misfortune that the language of the High Courts, i.e.English, was not the language of the people. "One of the greatest difficulties in the administration of justice in India," he once declared in a speech to the Allahabad Bar, "is the circumstance that the language of the highest tribunals in the land is a language

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[93] Ibid.
[94] Ibid.
[95] Ibid.

foreign to the people, and unintelligible to the masses of the population for which those tribunals have been established."[96] Although he accepted this reality as "one of those exigencies of the British rule which the people of India have cheerfully welcomed in consideration of the great blessings which it brings," he promoted whatever measures he as a puisne judge could to mitigate its rigour. He likewise exhorted the members of the Bar to fulfill their role in "rendering intelligible to the people what would otherwise seem to the masses of the Indian population as unintelligible as the decrees of fate."[97]

5.4b (1) Delivering the judgment in the vernacular

One measure which Mahmood himself took and considered to be of utmost importance was the translation of his judgments into the vernacular language, even if it meant that he would have to reduce his judicial workload as a consequence. By insisting on the translation into Hindustani, he wished to assure the people that although the judges delivered their judgments in a language unintelligible to them, yet they had understood the facts of the case and after due consideration had solved the difficulty of law involved. He added, "I feel that justice loses the better half of its ends the moment it ceases to satisfy the people that the Judge has grasped the difficulties and complications of their disputes."[98] He defended his tendency to write lengthy judgments by arguing that "a Judge in delivering judgments, especially in India, should remember that he should make his judgments full enough to be intelligible to the *parties* and *not only* to trained professional lawyers. ... For a Court like this the delivery of full judgments is most important as it has adopted the English language as the language of the Court."[99] Especially in light of the onerous law taxes under the Court Fees Act and the equally onerous expenses of translations, the litigant should have the right to expect such a full and complete judgment that would assure him that the judge or judges delivering the judgment fully understood his

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[96] "Mr. Syed Mahmood on Bench and Bar," *The Pioneer* 62 n.s., no. 6634 (17 Apr. 1885): p. 6.
[97] Ibid.
[98] Note by the Hon'ble Syed Mahmud, Officiating Puisne Judge, North-Western Provinces High Court, dated Allahabad, 20th April 1886, Public and Judicial Department Records, India Office Records L/PJ/6/213, File 1832, date 14 Jan 1888, British Library, London.
[99] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, p. 34.

case. "Judges," declared Mahmood, "must not expect that they are to be believed in like the Oracles of Delphi or that their judgments are intended to be laconic."[100]

5.4b (2) Pleading the case in the vernacular

Not only the delivery of the judgment, but also the presentation of the arguments in the case in a foreign language, was a practice that compromised justice in the view of Mahmood. In his comments on a draft bill to extend the jurisdiction of the High Courts, he criticized the requirement that record of the case be translated into English before it was presented for appeal.[101] He noted that some judges had dismissed appeals without hearing them solely on the ground that the appellant had not obeyed the order of the court to translate the record into English. Other judges declined to follow this practice, resulting in procedures that were far from uniform or settled. He advised the government to pass legislation that would specify the language of the court. "The vast masses of the population of these Provinces and Oudh are wholly unfamiliar with the English language; and although it has been the custom of the High Court sometimes to allow arguments to be addressed in Hindustani, I am unaware of any statutory authority or of any rule of the Court which defines the language of the Court."[102] A key consideration in the question of language was once again the cost involved in translating court records into English. "The truth is that the rules as to translations into English involve so considerable an expense on the part of the litigants, that they practically amount to imposing a tax upon the litigant population, and I am afraid in some cases amount to a denial of justice."[103] It was the possible imposition of such form of taxation, Mahmood suggested, that was causing the opposition by the landowners of Awadh to the extension of the Allahabad High Court's jurisdiction to their province.

Syed Mahmood further argued that no rule framed by a High Court could prevent a native litigant from addressing the Court in person in his own language, if he could not speak English or could not retain the services of English-speaking pleaders. He pointed out that the courts at the level of the Judicial Commissioner in Awadh functioned in

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[100] Ibid., p. 41.
[101] "Minute by Mr. Justice Mahmud, dated Aligarh, February 4th, 1889," Government of India, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, p. 38.
[102] Ibid.
[103] Ibid., p. 39.

Hindustani. From his own experience as a District Judge in that province, he considered it a necessary provision because a large number of litigants appeared in person to plead their own cause rather than relying on lawyers to mediate. If through the extension of the High Court's jurisdiction into that province, onerous rules as to translations into English were enforced, grave political harm would result, warned Mahmood, because it would amount to the denial of affordable justice. He would not go as far as advocating the radical step of the elimination of English as the language in which arguments would ordinarily be addressed and judgments be delivered in the High Court. But he did "deeply deprecate a state of things in which Hindustani would be absolutely precluded even where speaking English is impossible."[104]

Mahmood extended his argument to include the admission of pleaders regardless of their knowledge of English. He reviewed the history of the High Court at Allahabad, noting that when it replaced the Sadr Court at Agra in 1866, all the *vakīls* who had been practicing in the Sadr Court at Agra were enrolled without any further tests required, even if they did not know the English language. Many eminent pleaders of that Court were in that situation and addressed the Court in Hindustani. He recalled that even during his practice at the Allahabad Bar, some of the *vakīls* with the largest practices were allowed to address the Court in Hindustani. His concern was that now, in spite of "the influx of new ideas as to the indispensability of English," the Court would be prepared to exercise the same leniency with regard to the pleaders practicing in the court of the Judicial Commissioner of Awadh when that court came under the jurisdiction of the Allahabad High Court.[105] He strongly recommended that such a lenient policy be implemented in order to popularise the amalgamation and to avoid a considerable body of legal practitioners being thrown out of professional employment.

In a letter accompanying Mahmood's minute, his fellow judges at the High Court disagreed with his assessment, stating that their practice in respect to the use of language and translations was indeed uniform and settled, and not dependent upon the whim of a particular judge. However, in explaining their position, they did acknowledge that appeals in certain cases *had* been dismissed because of the failure to translate certain documents

[104] Ibid., p. 40.
[105] Ibid., p. 41.

into English, and that the cost of the translation had been a factor. They also acknowledged that the use of translations had increased considerably in the Allahabad High Court, as had the employment of English-speaking barristers and *vakīls*. "It is only natural," they wrote, revealing their linguistic bias, "that parties should desire to present their evidence in the most prepossessing form." They noted that at the time, only two of the *vakīls* of the court did not speak English.[106] They did concur with Mahmood's analysis that financial concerns were of paramount importance, but the judges were more concerned about the cost to the state than to the people presenting their cases.

> After all it comes to be a question of money. It is obvious that in a Court, constituted as a High Court in India must be under the Act, papers and arguments in the vernacular must be conveyed into English if they are to be used by the Court. This can be done in two ways only, either by oral interpretation or by written translation. In either way the work must be paid for, and it can only be charged against the losing party in a litigation or against the State. But payment by the state is payment by the tax-payer, and the question remains whether the burden should be imposed on the litigating portion of the public only, or should be borne in common with it by the public at large.[107]

Their conclusion was that in passing the draft Bill to extend the High Court's jurisdiction into Awadh, the government needed to take no special action to address Mahmood's concerns about language.

In response, the Lt.-Gov. Sir Aukland Colvin tended to side with the other judges against Mahmood on a number of points, but in the matter of language found Mahmood's arguments persuasive. He agreed that if the extension of the High Courts resulted in further taxation in the form of translation fees, the move would prove politically unpopular. He noted that since the judge presiding in the highest tribunal in Awadh had been an officer accustomed to try cases without translations, he thought it desirable that, "for some considerable time at any rate, the Division Court which will sit at Lucknow should be constituted of Judges trained in the country and thoroughly conversant with the native

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[106] "Memorandum by the Hon'ble the Chief Justice and the Judges of the High Court of Judicature, North-Western Provinces," 22 Feb. 1889, Government of India, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, p. 6.
[107] Ibid.

language."[108] He would not go as far as to recommend to the central government that prescribe the language by legislation, since that would likely limit the selection of judges that could be sent to preside at Lucknow, or would at the least cause "much delay and expense to Government." Again, concerns to prevent political agitation and to maintain financial and administrative efficiency appear to have been of greater concern than the dispensation of affordable justice to the people.

5.4c Harshness of the criminial law

In contrast to his prolific comments on civil law, Syed Mahmood's comments on criminal law were more limited but no less incisive. The reason the number of his rulings on criminal law recorded in the law reports was circumscribed was because Chief Justice Edge had been reluctant to place criminal cases under Syed Mahmood's jurisdiction, as was noted in chapter two. British colonial rulers in India were generally averse to to relinquishing that power of criminal jurisdiction over themselves and their fellow Europeans, as was abundantly evident in the discussions regarding the Ilbert Bill in 1883. One argument that was frequently heard was that in criminal matters, Englishmen must have the right to be judged by other Englishmen. Eminent jurists such as J. Fitzjames Stephen, who had served as Legal Member of the Viceroy's Council in India from 1869-1872, wrote a series of letters to the *Times* defending this position. After emphasizing the distinction between Englishmen and Indians in one such letter, he went on to declaim:

> Remember that the [English] men thus marked off from the general population of India do, in fact, rule India, that their predecessors established a regular Government in India when it was in a state of helpless anarchy, that that Government is essentially absolute, that the administration of criminal justice in particular is by no means what Englishmen are accustomed to in England.... Remember, lastly, that the native system of the administration of justice fell, and had to be replaced by the system now established, on account of its notorious inefficiency and corruption, and that the system which has by degrees replaced it is specially organized and devised with a view to the prevention of such inefficiency and corruption, and so recognizes the possibility of its recurrence; and, putting all this together, say whether it is unnatural, unreasonable, or "anomalous," if the word is used as a term of reproach, that the English in India should cling to a system which, as nearly as circumstances will permit, reproduces the system to which they are ac-

[108] Letter from Secretary to Governmentment N.-W. Provinces and Oudh [J. B. Thompson], Allahabad, to Secretary to the Government of India, 12 Mar. 1889, GOI, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi.

customed at home, and that they should wish that system to be administered by their own countrymen.[109]

This type of attitude may well have been an unexpressed factor in Edge's decision to remove Mahmood from hearing criminal cases.

5.4c (1) Rights of the accused to appear in court

Although the Indian Law Reports include relatively few judgments by Syed Mahmood on criminal cases as a result of Edge's action, the ones recorded contain some of Mahmood's strongest statements against injustice.[110] One celebrated case in which he dissented strongly against the decision presented by his fellow judges was *Queen Empress v. Pohpi and others*.[111] His main contention was that when the High Court admitted an appeal in a criminal case, the appellant had the right to appear before the court to be heard. The practice of the Court—upheld by the other judges—was to dispose of the appeal after the record of the case had been sent for and perused, even though neither the appellant nor his pleader were present. Mahmood noted for the record that the accused were being held without the possibility of bail unless the High Court chose to grant it, and that they were confined in jail "in a fashion in which their legs were tied down by iron chains, not metaphorical iron chains, but solid, actual fetters."[112] Therefore, the High Court had the exclusive power to enable the accused to appear before it; and if it refused to do so, a serious miscarriage of justice occurred. Before arguing that a careful reading of the existing legislation supported his contention, Syed Mahmood appealed to what he termed "maxims of human jurisprudence" which he drew from Roman law and which he considered universally valid and of more weight than local jurisprudence or any current legislation. The key maxim was *Audi alteram partem*, meaning that no one shall be condemned unheard. He furthermore appealed to the saying of Seneca, "Whoever may have decided anything, the other side remaining unheard, granted that his decision may have been just, will not have been just himself."[113] To demonstrate that Indian poets were

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[109] James Fitzjames Stephen, "The Ilbert Bill," *The Times*, 2 Nov. 1883, 4, col. d.
[110] M. Zakaria Siddiqi, "Justice Mahmood on Criminal Procedure," *Aligarh Law Journal* 5, Mahmood Number (1973): 229. Siddiqi lists 12 recorded judgments on criminal procedure of which two were dissenting decisions.
[111] *The Indian Law Reports*, 13 All. 171 (Feb. 1891), Queen-Empress v. Pohpi and others, pp. 171-188.
[112] Ibid., p. 173.
[113] Ibid., pp. 174-175.

equally concerned about justice as were the Romans, he likewise quoted an Urdu couplet which he translated thus: "O friend the day of judgment is near; how then will it be possible to conceal (by silence) the blood of those killed? Even if the tongue of the dagger will keep silence, the blood on the sleeve will speak out."[114]

Syed Mahmood stated that he came by this conviction not only through his study of the history of English law, but also as a result of the study of Muslim jurisprudence. He felt justified in introducing Muslim law in this case because, as he stated, "That jurisprudence was the standing law of the land when the British rule came to this part of the country."[115] Therefore, unless express legislation had been introduced to replace the rules of Muslim jurisprudence, the existing law—even in matters of criminal law—would remain as it was.

> At the date of the cession [of the territory by the Nawab Vazir of Awadh to the East India Company] the law in criminal cases was the Muhammadan law both substantive and adjective, and it goes without saying, as a matter of international law, that when this annexation or cession of territory took place, the British rule took it subject to that law. That law requires that the litigants should be heard before their cases are decided. Under these conditions it is of course obvious that, unless there was express legislative sanction given by the sovereign authority to whom this territory had been ceded changing the old law, such old law would stand unchanged, because such is the notion of all civilized nations dealing with each other, especially in questions of cessions of territory.[116]

Clearly, Syed Mahmood saw transfer of the territory to British rule as valid, and the authority of subsequent legislation as equally valid. However, he appealed to notions of international law and civilization to argue that in the absence of legislated rules specifically abrogating the existing law, Muslim laws of criminal procedure would remain the default law to be followed.

Then after going on to challenge his contemporaries' interpretation of the relevant legislation which would allow for the dismissal of appeals of criminal cases without the accused or his pleader ever appearing in court, Mahmood reminded them that the British law that had been introduced was equally subject to abrogation if it proved deficient.

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[114] Ibid., p. 176.
[115] Ibid., p. 175.
[116] Ibid., pp. 175-176.

> I think it is necessary for me to say that, if it is true that the law of British India makes it possible for me sitting here as a Judge, in the first place, by dint of my writ to order a person to be imprisoned and tied by a chain, then in the next place to require the mockery of giving him notice, the mockery of asking him to attend, when I , by the dint of the exercise of my own power have made it impossible for him to attend, and then have the solemn mockery of having his name called out; if this is the law of British India, I hope the sooner it is abrogated the better.[117]

In light of the discussion in chapter four of his willingness to accept British laws of evidence as having abrogated Muslim laws, this strong denunciation of British law by Mahmood is significant, as is his use of the term "abrogation" as the means by which to remove an unjust law. Clearly he was not one who uncritically supported the British regime or considered all things British to be superior to Indian or Muslim ways. His concern was that universal principles of justice should not be compromised, especially not for the sake of the political expediency of maintaining a show of strength by the imperial regime.

Within a week of hearing the case, Syed Mahmood took further steps to remedy what he considered to be a weakness in the legislation in this matter. He composed a Minute to the government arguing that in light of the Full Bench hearing in which he was the only dissentient judge, "there exists *important* and *urgent* necessity for amending certain portions of the Code of Criminal Procedure so far as they relate to the right of prisoners, appellants or petitioners in jail to be *heard*, who by reason of their imprisonment cannot attend in person in this Court to support their appeals, and owing to poverty, ignorance or friendlessness cannot secure the services of a pleader."[118] He stated that he accepted the Full Bench ruling as binding upon him, and since such a High Court ruling could not be altered without legislation, felt compelled to write the Minute. He felt that specific legislation altering or clarifying the relevant portions of the Code was absolutely essential for the ends of justice. He intended in some future correspondence to offer some suggestions as to what steps might be taken by the legislature to minimize the inconvenience to the Court or to the public revenues, but found his current judicial work at the court did not permit him the time to do so.

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[117] Ibid., p. 186.

[118] Minute by Syed Mahmood, 31 Oct. 1890, N.-W. P. & Oudh Judicial (Criminal) Dept. Proceedings (A), Feb. 1891, No. 101, U. P. State Archives, Lucknow, p. 101. Emphasis in the original.

The reason Chief Justice Edge ceased to give Syed Mahmood any criminal cases to adjudicate was his stated objection in the case of *Queen Empress* vs. *Pophi* that no appeal in a criminal case should be decided unless the accused was present in person in the Court or was represented by an advocate or *vakīl*. In his letter of accusations against Mahmood, Edge stated:

> As Mr. Justice Mahmood professed to hold those views on a question involving the liberty of the subject it became impossible to ask him to act contrary to them by sending criminal cases before him, and I wished to avoid the recurrence of what I once saw, namely, a convict in chains sitting in a corridor of the Court for two days until it suited Mr. Justice Mahmood to call on and dispose of the appeal in his case."[119]

In the same letter, Edge stated his opinion that the appearance of the accused before the court was not required by law, and would be practically impossible to act on unless an extensive jail were built in the immediate precincts of the Court. The Government of the N.-W. P. tended to side with Edge on the matter. It held that Mahmood had taken an "impossible position" with regard to criminal appeals, one which he should have known would have brought the criminal appellate business of the Court to a deadlock if implemented.[120] It recognized that the action of the Chief Justice in excluding Justice Mahmood from all participation in criminal cases was the cause of much ill-feeling, but that the action had been justified in view of that absence of any offer on his part to waive his objections to follow "the ordinary procedure of the Court."[121] This view by the government disregards Mahmood's express statement given in the Minute quoted above stating his acceptance of the Full Bench ruling as binding. He reiterated that position in his letter defending himself against Edge's accusations, pointing out that in civil matters he frequently accepted the rulings of the Full Bench even when he dissented.[122] In this letter he also contradicted Edge's argument that his inexperience in criminal cases made him in-

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[119] Minute by Sir John Edge, Chief Justice of the North-Western Provinces High Court, 5 August, 1892, Public and Judicial Department Records, India Office Records L/PJ/6/340, File 360, date 1 Feb 1893, British Library, London, p. 25.

[120] Letter by the Chief Secretary to Government, N.-W. P. and Oudh, Naini Tal, to the Secretary to the Government of India, Home Department, 11 Jul. 1893, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, p. 7.

[121] Ibid.

[122] Letter from Syed Mahmood, Allahabad, to J. D. LaTouche, Chief Secretary to the Government of the North-Western Provinces and Oudh, 30 Oct. 1892, India Office Records, Public and Judicial Department Records, L/PJ/6/355, File 1680, date 15 Aug. 1893, British Library, London, p. 13.

competent to judge in criminal matters, by pointing out that he had had a considerable criminal practice as a barrister, as well as experience in hearing criminal cases.

In the related matter of the power of judges to hear a criminal appeal, Syed Mahmood and John Edge once again disagreed. Syed Mahmood contended that the power of single judges in connection with criminal appeals, especially involving sentences of transportation for life, should be restricted, and that the government should order such appeals to be heard by a bench of at least two judges. His reason for this was that, unlike civil litigation, such appeals usually involved no difficult question of law while they did often involve complicated questions of fact. And without the benefit of a jury to weight the evidence, a single judge was at a distinct disadvantage, all the more so when it was difficult to determine whether or not the sentence should have been one of capital punishment. "In my opinion," he wrote, "no single human being should sit as a Judge over the life of another."[123] He mentioned that he held to this view so strongly that at one point when it appeared he would be appointed to act as Judicial Commissioner of Awadh, he had determined to decline the office upon that very ground. He went on to criticize the attitude of the Allahabad court, and perhaps by extension, the British courts in India in general. "My fear is (and I say this with due respect) that under the present rules of the High Court much greater importance is attached to the property of persons than to their lives and liberties."[124]

A response by Edge and the other judges was appended the Minute that Mahmood sent to the government on the subject. They disagreed with his view on the desirability of two judges hearing criminal appeals, dismissing such appeals as being for the most part "utterly hopeless appeals, which...can be properly disposed of by one Judge."[125] Their primary concern appeared to be the smooth running of the court, as seen in their comment that "if it were compulsory that all criminal appeals should be heard by two Judges, or if an appeal to two Judges from the judgment of one in criminial cases were allowed, we have no hesitation in saying that the arrears on the Civil side would seriously increase."

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[123] "Minute by Mr. Justice Mahmud, dated Aligarh, February 4th, 1889," Government of India, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, p. 36.
[124] Ibid., pp. 36-37.
[125] "Memorandum by the Hon'ble the Chief Justice and the Judges of the High Court of Judicature, North-Western Provinces," 22 Feb. 1889, Government of India, Home Judicial (A), May 1889, Nos. 236-261, National Archives of India, New Delhi, p. 4.

This would seem to bear out Mahmood's criticism of the court being more concerned about the property than the lives or liberties of persons.

5.4c (2) Rights of the accused in police custody

Syed Mahmood adamantly opposed the extortion of confessions from the accused by the police. To safeguard against this practice, he insisted that even facts discovered through police questioning, unless a magistrate were present, should be considered inadmissible as evidence. He stated categorically, "I hold that the law of India as to confessions improperly obtained is...that *confessions to a police officer* are conclusively presumed to have been improperly obtained...unaffected by the question of discovery."[126] To argue his position, he examined the relevant sections of the Criminal Code and Law of Evidence, describing the historical development of law to its current codified form. Because his fellow judges interpreted the law more generously, he paid careful attention to the exact wording of the statutes, and through tracing the evolution of the law argued that the intention of the legislators had been to retain the strongest of prohibitions against any possibility of confessions obtained through torture. He maintained, "In interpreting these sections, the history of their origin, and the changes which they have from time to time undergone, cannot be lost sight of."[127] His fellow judges were willing to allow the presentation of facts discovered through police questioning to be admitted as evidence, but Mahmood insisted that the rule excluding any confession made to a police officer extended to all types of evidence thus obtained as well. "The reason of the rule," he surmised, "seems to be that the custody of a police officer provides easy opportunities of coercion for extorting confessions."[128] If the rule was not a comprehensive ban, such malpractices would still continue on the part of the police in hope of discovering evidence.

When the prosecuting attorney argued that the courts in England permitted the admission of confessions caused by inducement, threat, or promise, when such confessions related to the discovery of facts, Syed Mahmood argued that the Indian situation warranted a tougher law. He said the stricter prohibitions were probably not called for by

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[126] *The Indian Law Reports*, 6 All. 509 (30 Jun 1884) Queen Empress v. Babu Lal, p. 541. Emphasis his.
[127] Ibid., p. 530. Siddiqi extends the history of legislation and court rulings on this issue to more recent times. See: Siddiqi, "Justice Mahmood," 232-233.
[128] *The Indian Law Reports*, 6 All. 509 (30 Jun 1884) Queen Empress v. Babu Lal, p. 532.

the conditions of life in that country, making it not altogether safe to deduce any conclusions in interpreting statutory rules peculiar to India by following the rule as found in England.[129] What he took as his guide was the principle of relevancy based on the question – What facts afford sufficiently safe data for arriving at the truth?

> The principle, which is an essential law of the human mind, is universal to all mankind, though, in adopting it as a rule of judicial investigation, various nations, according to the exigencies of their position and the stage of civilization at which they have arrived have made differences in matters of detail.[130]

The positive prohibitions found in the law codes of British India were, in his opinion, necessitated by the exigencies of the situation in that country. In disagreeing with Mahmood's final conclusion, fellow judge and officiating Chief Justice Straight did not disagree with his assessment of the Indian situation. If anything he was blunter in declaring that the primary object towards the police directed their energies was to secure a confession.

> It requires no very vivid imagination to picture what too often takes place when two or three of these not to very intellectual or highly-paid police officials are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons, instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is.[131]

While Straight appreciated Mahmood's detailed analysis, he felt that he had been unduly influenced by his strong feelings and impressions in interpreting the legal phraseology of the statute. Straight felt that the legislation never intended to "debar police officers from deposing to *facts* discovered by them, no matter by what means they have obtained the information that led to discovery from the accused."[132] He considered it impossible to completely safeguard against the possibility of policemen committing perjury, and that it was up to the courts to weigh all evidence presented with much caution and discrimination.

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[129] Ibid., pp. 536-537.
[130] Ibid., p. 538.
[131] Ibid., p. 542.
[132] Ibid., p. 545.

Justice Duthoit agreed with his Chief Justice, but added his view that the reliance on extorted confessions in India was due to the Oriental mindset which was more fatalistic than that of his Western brother. "In the parts of India with which I am acquainted, a man who has been guilty of culpable homicide not unfrequently gives in at once. He looks upon himself as the instrument of fate, and says of the victim of his malice or ungovernable rage, 'his time had come.' He is for the moment, in despair, and glad to purchase immediate ease by making a confession."[133] In his detailed arguments on the history of legislation and in his consistent interpretation of the codified statutes, Mahmood did not resort to such facile characterizations to make his point. Furthermore, his concern extended beyond the presentation of acceptable evidence in the court and the securing of a conviction, to the rights of the accused and his protection against the possibility of incriminating evidence being "planted" by the investigating police.

Several years later when the judges in Madras once again raised the question and requested clear legislation by the government, Syed Mahmood reiterated his concern in a letter to the government expressing his opinion on the proposed legislation. He made frequent reference to his dissentient judgment, again emphasizing that the evil of extorting confessions from the accused had been found so rampant from the early period of British rule onwards as to require repeated legislated measures to check it. He felt that government intervention by means of legislation was once more warranted in order to make the law state clearly that all confessions made to police unless in the presence of a magistrate were inadmissible. Such legislation would "achieve the desired result of diminishing the suspicion which is rightly attached to confessions made by accused persons to Police Officers themselves, or to others whilst such accused persons are in the custody of the police."[134] In answer to the question why such confessions leading to discovery of facts should be proscribed only in India, he commented that the history of legislation showed "the unhappy fact that the police in India cannot be trusted to use only proper methods for investigating offences and bringing criminals to justice."[135] And if the police could be

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[133] Ibid., p. 550.
[134] "Opinion of Syed Mahmood on proposed legislation to amend section 26 of the Indian Evidence Act and section 164 of the Criminal Procedure Code on recording confessions," N.-W. P. & Oudh Judicial (Criminal) Dept. Proceedings (A), May 1889, No. 50, p. 51.
[135] Ibid., p. 52.

suspected of using improper means in gaining confessions, it was a natural extension to suspect they would also employ improper means for linking the confession with the discovery of facts. This evil, he proposed, was to be checked by a combination of legislation and executive measures enforcing existing legislation and by improving the internal working of the police. In connection with the latter suggestion, he returned to a theme he emphasized in his criticism of court fees—that of the necessity of ensuring the easy availability of magistrates for the recording of genuine confessions without requiring long distances of travelling.

5.4c (3) Rights of minors

Syed Mahmood's concern for the accused also included the sentencing of minors to prison. In a case that had not appeared before him in appeal but rather had been noticed by him in his regular perusal of monthly statements from the lower courts, he discovered that a 13-year-old boy had been sentenced to five years of rigorous imprisonment. He had sent for the record of the case in order to determine whether perhaps some other sentence could be awarded the boy that "would be conducive to bring him to morality and honesty instead of growing into manhood under conditions such as life in a jail for so young a person involves."[136] He suggested the age of 13 was sufficiently tender to enable the prisoner to learn positive notions of morality if given the opportunity. He therefore advocated the establishment of Reform Schools as provided by Act V of 1876; the absence of such schools hampered the execution of his duties as a judge because this option was not available in the N.-W. P. His fellow justices Brodhurst and Straight fully agreed with him and urged the government to establish such reform schools, noting that such institutions were working well in the Bengal where they had already been established. Subsequent correspondence indicates that the government yielded to the pressure of the court and proceeded with the establishment of reform schools.

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[136] "Minute by Syed Mahmood on a case involving sentencing a minor to prison," N.-W. P. & Oudh, Judicial (Criminal) Dept. Proceedings A, Mar. 1890, Nos. 85-93, p. 118.

Conclusion

Recent scholarship has demonstrated how thoroughly the British colonial rulers transformed Muslim law after they undertook the judicial administration of those parts of India under their control. Through their translation of a limited number of texts of *fiqh*, and through their insistence that these few translations were to be regarded as the only authoritative expression of Muslim law, they constructed a rigid edifice lacking the flexibility to adapt to the changing needs of the Muslim community.[137] Although the British proclaimed their intention to administer their (transformed) Muslim law to the Muslims, they continually undermined that edifice by introducing legislation that whittled away at the territory governed by Muslim law.[138] The law codes promulgated in the 1860s and 1870s removed the final vestiges of Muslim criminal and procedural laws, and eroded some of the civil law as well. Muslim *'ulamā* had continued to function as *muftīs* in the court, providing *fatwās* to guide the British judges. Muslims also served in the Civil Service as judges in the lower courts and as *vakīls*, but had not only lost their dominance in the judicial administration of India, but also lost the prerogative to interpret and administrate the Muslim law still applicable to their own communities. It was at this point in history that Syed Mahmood rose to prominence and charted a new direction for the on-going transformation of Muslim law.

His resistance to the colonial regime was not one of withdrawing active participation in the British judiciary in India, as that of *'ulamā* who established their own *fatwā*-issuing institutions when their services to the state were abolished.[139] Nor was it one of active opposition such as that of Jamāl al-Dīn al-Afghānī.[140] His participation in the transformation of Muslim law can best be analyzed as a dialogic interaction with the British colonial power.[141] Though working in a context of colonial domination and exploitation, he was able to use that context to create new answers to new existential problems.

Syed Mahmood's choice of an education in England rather than in his native India, his choice of a career in law rather than education, and his choice to pursue uncertain

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[137] See: Anderson, "Legal Scholarship."; Cohn, *Colonialism;* Kugle, "Framed, Blamed and Renamed."
[138] See: Fisch, *Cheap Lives;* Singha, *Despotism of Law.*
[139] See: Metcalf, *Islamic Revival;* Zaman, *Ulama.*
[140] See: Keddie, *Sayyid Jamal ad-Din.*
[141] On a dialogic approach to colonialism, see: Bayly, "Orientalists."; Irschick, *Dialogue and History.*

postings within British India rather than the security and influence of a high position within the Muslim territory of Hyderabad demonstrate his commitment to work within the British colonial system rather than against it. However, his unwillingness to compromise on issues he considered matters of equality and justice likewise shows that his co-operation was not a servile submission or selfish collaboration. Since he was also very sensitive to actions or attitudes that slighted him because he was not European, and was quick to speak his mind, those Englishmen who came to India with a certain amount of cultural arrogance, expecting the Indians to respond to servility to their "conquerors," found in him an implacable opponent. Mahmood had a quick mind and an excellent command of the English language, as his erudite judgments from the bench, as well as his speeches and other writings, demonstrate. He used whatever forum was available to oppose injustice.

Syed Mahmood was guided by a firm belief in the equality of British administrators and their Indian counterparts in the Indian bureaucracy as equal subjects of the British crown. He not only expressed this frequently in his speeches, but also continually worked to realize this equality through amendments to procedural rules which discriminated against Indians in the civil service. He sought equality of pay and benefits for Indian judges who were receiving less than their European counterparts by deliberate government policy. He pushed for a working equality between the judges of the Allahabad High Court and vociferously opposed those practices which failed to measure up to his expectations. His frequent confrontations with the Chief Justice engendered an antagonism that eventually led to Mahmood's resignation. One might conclude that his efforts to attain equality were then a hopeless failure, especially in light of his own disillusionment with the experiment. Nevertheless, as he advanced up the judicial hierarchy his arguments for equality of pay and benefits were echoed by an increasing number of others, bringing about changes in the rules that removed the earlier discrimination. Also, he had opened the way for other Indian Muslims to become barristers and High Court judges who could enjoy the privileges and respect that Mahmood had won only by a hard fight.

For the most part, the British administrators and judges with whom Mahmood corresponded and who were responsible for both the rise and fall of his career did not share his perception of a fundamental equality between the rulers and ruled. In contrast to

Mahmood's insistence that the British had not "conquered" India and that many Indians had laboured hard to promote the rule of the British, administrators such as A. C. Lyall continued to argue that British dominance must be maintained. Nevertheless, those same administrators were the ones who, seeing political advantages in advancing a select group of Indians, chose to make it possible for Syed Mahmood to advance to ever-increasing positions of responsibility and authority as a judge. His advancement was resisted by others, particularly career civil servants who felt he was being appointed to posts which were rightly theirs and by fellow judges who found him difficult to work with.

Attaining the high-ranking position of puisne judge of the High Court in Allahabad, Syed Mahmood distinguished himself by his erudite and thorough judgments. He used the power of logic and the English language to implement changes in the administration of justice. When sitting on a bench with other judges, Syed Mahmood frequently issued his own ruling, emphasizing his independent position even when he agreed with the fundamentals of the collective ruling. He did not hesitate to be forceful in dissension, and to present his lengthy, carefully researched and intricately argued judgments when he opposed the general consensus, which occurred with remarkable regularity. This was an irritant to those of his colleagues who valued economy and efficiency more than complicated expositions of justice and equity. These factors coupled with his declining ability because of his addiction to alcohol, made the decisive break with his fellow judges inevitable. His forced retirement, or "impeachment" as he termed it, led to disillusionment with British rule and with the possibility of achieving a social equality with fellow administrators from England. The final decade of his life stands in sad contrast to the brilliance of his intellectual output to that point. The subsequent rupture in relationships with his father and with the administrators—both Indians and British—of the MAOC tended to overshadow his legacy after his death, and the positive contributions he made in the field of jurisprudence and, specifically, in the transformation of Muslim law.

The analysis of Syed Mahmood's life and writings shows that Mahmood, along with Syed Ameer Ali and the Muslim lawyers and judges that followed him, pioneered a new approach to Muslim law in India. It was his generation that went to England to study

law, and returned to reformulate Muslim law in English legal discourse. The British had begun the process of transformation a century earlier, but Mahmood and his contemporaries carried that process much further by systematically arranging those branches of Muslim law still in force into a framework compatible with the legal structures instituted by the British for the administration of law in British India. In so doing, they endorsed the transformation of Muslim law wrought by the British, because their willingness to work within the system imposed by the British and their adoption of the British legal discourse as a means by which to express Muslim law, implied their approval to some extent. The resulting amalgam was termed "Anglo-Muhammadan" law, and continues to be basis for both the content and administration of Muslim personal law in India today. But while Syed Mahmood was explicit in his endorsement of English law, he was equally emphatic about the limitations of that law and its application in India. He worked diligently to preserve those aspects of Muslim law which he considered beneficial, and to resist those laws which were more defined by their English origin than by their Indian context.

This study argues that Mahmood's willingness to accept and even promote the transformation of Muslim law in India was directly related to his perception of the development of Muslim law in history. Syed Mahmood understood Muslim law to be rooted in the prophetic utterances of the Prophet Muhammad and in the social and political environment prevailing in Arabia during his time. According to his understanding, however, that law was neither rigid nor static, but rather adaptable to the conditions in which a particular community of Muslims found itself. Thus the early Muslim jurists felt free to borrow from the legal traditions around them and to utilize reason in expanding and transforming the law to address needs not covered in the initial divine injunctions. As seen in his preference for rulings by Abū Yūsuf, Mahmood valued the jurisprudence of those jurists who were actively serving as judges more than the jurisprudence of those he considered to be merely "speculative jurisconsults." This understanding of the early developments in Muslim law, then, influenced how he administered Muslim law in British India. He was convinced that Muslim law needed to be adapted to the needs of the Muslim community as it existed in under British rule in the 19th century, and believed in the inherent flexibility in Muslim law that enabled such adaptation. This was illustrated, for example, in his argument for the necessity of changing the inheritance laws in order to

accommodate landholders who wished to maintain the unity of their land rather than dividing it among all the heirs, diminishing its value and viability as a source of stability. It is also seen in his willingness to accept British law in matters of evidence and other procedural matters as abrogating similar provisions in Muslim law. He, like other Indian modernists of his generation, saw strict adherence to Muslim law as particularly relevant in matters of worship, while its application in more secular matters required greater flexibility in interpretation.

Syed Mahmood constructed his authority to administer Muslim law on a different basis than that of the traditional *'ulamā*. Though he had not received the traditional education of an *'ālim*, he considered himself competent to handle the books of *fiqh* and to make correct judgments on questions of Muslim law without recourse to a *muftī*. In fact, he saw himself as having a special responsibility to assist his British colleagues in deciding matters of Muslim law because he was the lone Muslim on the Bench. He further saw the court at Allahabad as having a pre-eminent place among the High Courts of India in adjudicating on Muslim law, because of the traditional dominance of the north-Indian Muslim community. He constructed his authority more with a view to the British context in which he worked rather than in reference to his Indian Muslim context. He appealed to his training and experience as a barrister serving at the Allahabad Bar as well at the bars of subordinate courts in the province and neighbouring provinces. He contrasted his expertise in the Muslim texts and in the languages and customs of India with the reduced ability of his British colleagues, rather than comparing himself with Muslims experts in *fiqh*. Consequently, he invested much time and research into questions of Muslim law when they arose in cases pleaded before him in court, preparing extensive judgments replete with quotations and translations from a wide range of relevant Sunni and Shi'ī texts.

The examination of government records and Mahmood's recorded judgments has shown that in spite of his recepetion of British rules of evidence, Syed Mahmood sought to restrict the extent to which English law would be allowed to intrude into India. He rejected a wholesale importation of English law because, he felt, it was not particularly adapted to the Indian environment. Tools such as the formula "justice, equity, and good conscience," which had been used to import English law, were subverted and used by Mahmood for the opposite purpose of restricting it. Furthermore, he promoted the Muslim

law that had been administered by previous Muslim rulers in India as the existing law of the land to which recourse should first be made when existing legislation proved inadequate to answer legal questions. Those areas which had been recognized as belonging to the purview of Muslim law from the time of Warren Hasting's administration were to be jealously guarded and protected from the invasive influence of foreign laws. In fact, Mahmood sought to *extend* the jurisdiction of Muslim law by claiming it comprised the customary law in matters such as pre-emption for all communities. Beyond matters directly concerned with Muslim law, Mahmood continued to be guided by the principles of fairness that he found permeated his legal heritage as a Muslim, and continually pressured the government and the courts to provide inexpensive, accessible, and comprehensible justice for all Indians.

A central premise of this dissertation has been that Muslims participated in the three processes of translation, legislation, and adjudication by which the British transformed Muslim law. In the matter of translation, Syed Mahmood opened up fresh legal texts for use on particular questions. By entering the Arabic texts and their translations into the official record, he considerably expanded the resources available to judges to use in their deliberations on questions of Muslim law. In the matter of adjudication, the large number of lengthy recorded judgments by Syed Mahmood in the official Law Reports attests to the significance of his contribution in transforming Muslim law through his work as a judge. His judgments on matters such as right of Muslims of the Ahl-i Ḥadīth to pray in mosques dominated by Muslims following the Ḥanafī rite were endorsed by the Privy Council in their judgments on the matter. Thus, in the position of a judge, his impact on the interpretation and application of law was direct, as his extensive rulings became part of the authoritative body of case law guiding judges in British India in their understanding and administration of Muslim law.

In the matter of legislation, Syed Mahmood was more ambivalent. Like his fellow judges, he sought to guard his prerogative to exercise judicial independence without interference from political leaders. Yet he was a strong supporter of the move to codify law in India, sometimes standing alone, as when he supported a bill on civil wrongs or torts when no other High Court judge spoke in favour of the bill. Ultimately, he preferred that law be legislated by the government rather than created by the whim of individual judges.

He believed legislation could provide the simplicity, clarity, and consistency that case law never could. Also, he feared further importation of English law if English judges in India were permitted to rule according to what they considered to be just and equitable. He believed a legislative council would be more responsive to the Indian people and more cognizant of the Indian context when formulating law. Accordingly, he took his duty to comment on proposed legislation very seriously, and wrote extensive minutes on various bills sent to him for comment. In his position as the first Muslim appointed to an Indian High Court, he was in a unique position to influence legislation.

In sum, this study shows that Syed Mahmood pioneered in the development of a pattern that became the dominant way of "doing" law in India. As a Muslim, he participated with the British in a dialogic productive process through which new institutions and a new knowledge of Muslim law were constructed. The pattern of his life—that of being educated in the British system of jurisprudence, working as a barrister in India, and being appointed as a judge and rising to unprecedented levels in the Indian judiciary—became the model that other Muslims followed. In the Muslim community, he promoted the replacement of Muslim law with criminal codes and procedural codes, and pushed for increased codification in the area of civil law. He vociferously advocated the sweeping away of reliance on English case law as the default law where legislation had not specified a law for India. By insisting on a legislated code designed for India, he used law as a means of moderating the indiscriminate exercise of power and domination by the British. In a similar fashion, he employed legal concepts introduced by the British colonialists, and even his impressive ability in the English language, to subvert the colonial project. Finally, he was a forerunner in exploring a synthesis of Muslim law and English law that other contemporaries as well as subsequent generations of Muslims elucidated in more detail and arranged with more systematic structure. His early death prevented him from compiling a systematization of Muslim law and legal theory. His impact on the transformation of Muslim law in India at the close of the nineteenth century, nevertheless, was profound, and is attested by the authority his judgments on Muslim law still carry.

Appendix

Year	Syed Mahmood's life	Chief Justce in the High Court at Allahabad	Lieut. Gov. of N.-W. P.	Viceroy of India
1857	[1857 Revolt]			
1858				Earl Canning
1859			Sir George Edmonstone	
1860				
1861				
1862				8th Earl of Elgin
1863			Sir Edwar Drummond	
1864				Baron John Lawrence
1865				
1866		Sir Walter Morgan		
1867				
1868			Sir William Muir	
1869	Goes to England; admitted to Lincoln's Inn;			Earl of Mayo
1870	Admitted at Christ's College, Cambridge University			
1871		Sir Robert Stuart		
1872	Called to the Bar; returns to India; enrolled as a barrister in Allahabad			Earl of Northbrook
1873				
1874			Sir John Strachey	
1875				
1876				Earl of Lytton
1877			Sir George Couper	
1878				
1879	Appointed as District Judge in Awadh			
1880				Marquis of Ripon
1881	Goes to Hyderabad to reform judicial system			
1882	Appointed as officiating judge of High Court at Allahabad; serves on Education Commission		Sir Alfred Comyn Lyall	
1883	Returned to England to recruit a principal for MAOC			
1884	Second officiating appointment	Sir William Comer Petheram		Marquis of Dufferin

1885			
1886	Third officiating appointment	Sir John Edge	
1887	Appointed Puisne Judge of High Court at Allahabad		Sir Auckland Colvin
1888	Marriage		Marquis of Lansdowne
1889	Birth of his son, Ross Masood		
1890			
1891			
1892	Dispute with Chief Justice Edge		Sir Charles Crosthwaite
1893	Resigns from High Court		
1894			9th Earl of Elgin
1895			Sir Anthony Macdonnell
1896	Appointed to N.-W. P. and Oudh Legislative Council (2 years); resumes practice as barrister in Lucknow		
1897			
1898	Death of his father, Sir Sayyid Ahmad Khan	Sir Arthur Strachey	
1899	Removed from position as Life Honorary Secretary of MAOC		Baron Curzon
1900	Removed from position as President of MAOC		
1901			Sir James La Touche
1902			
1903	Death in Sitapur		

Bibliography

Archives and Manuscript Collections

British Library, London:

European Manuscripts – Curzon Papers

European Manuscripts – Landsdowne Collection

European Manuscripts – Lyall Collection

European Manuscripts – Ripon Collection

Proceedings and Consultations files, India Office Records

Public and Judicial Department files, India Office Records

National Archives of India, Delhi:

Home Establishments files

Home Judicial files

Home Legislative files

Home Public files

Foreign Political files

Foreign Secret files

North-West Provinces and Oudh, Judicial Dept. Proceedings, Uttar Pradesh State Archives, Lucknow

Maulana Azad Library, Aligarh Muslim University

Sir Syed Academy, Aligarh

Library of Lincoln's Inn, London

Kimberly Papers, Department of Special Collections and Western Manuscripts, New Bodleian Library, Oxford University, Oxford

Papers of Lord Randolph Churchill, Cambridge University Libraries, Cambridge

Newspapers

Aligarh Institute Gazette (Aligarh) 1872-1903

The Pioneer (Allahabad) 1872-1903

Selections from the Vernacular Newspapers, published in the Panjab, North-Western Provinces, Oudh, Central India, and Rajputana 1879-1903

Law Reports

Indian Law Reports, Allahabad Series, 1882-1893

Books and articles

Abbasi, Muhammad Yusuf. *Muslim Politics and Leadership in South Asia, 1876-92* Historical Studies (Muslim India) Series, 4. Islamabad: Institute of Islamic History, Culture and Civilization, 1981.

Abdul Majid, Syed H. R. "A Historical Study of Mohammedan Law." *Law Quarterly Review* 27 (1911): 28-42.

_____. "A Historical Study of Mohammedan Law, II." *Law Quarterly Review* 28 (1912): 355-371.

_____. "The Moslem International Law." *Law Quarterly Review* 28 (1912): 89-93.

Abdul Majid, Syed H. R., Raymond West, and Roland Knyvet Wilson. "Wakf as Family Settlement among the Mohammedans." *Journal of the Society of Comparative Legislation* n.s. 9 (1908): 122-141 [1-20].

Abdur Rahman, A. F. M. *Institutes of Mussalman Law: A Treatise on Personal Law according to the Hanafite School, with References to Original Arabic Sources and Decided Cases from 1795 to 1906.* Calcutta: Thacker, Spink & Co., 1906.

Abel-Smith, Brian, and Robert Stevens. *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965.* London: Heinemann Educational Books, 1967.

Addison, Charles G. *Wrongs and their Remedies: being a Treatise on the Law of Torts.* 4th, by F.S.P. Wolferstan ed. London: Stevens, 1873.

"The Administration of Justice in our Indian Empire." *The Solicitors' Journal and Reporter* 14 (1869): 23-24.

Ahmad, Aziz. *Islamic Modernism in India and Pakistan, 1857-1964.* London: Oxford University Press, 1967.

_____. "Afghani's Indian Contacts." *Journal of the American Oriental Society* 89 (1969): 476-504.

Ahmad Khan, Sir Sayyid. *Review on Dr. Hunter's Indian Musalmans: Are they Bound in Conscience to Rebel against the Queen?* Benares: Medical Hall Press, 1872. Reprint, Lahore: Premier Book House, n.d.

_____. *The Causes of the Indian Revolt* Oxford in Asia Historical Reprints. Benares: Benares Medical Hall Press, 1873. Reprint, Karachi: Oxford University Press, 2000.

_____. "Easements." In *Abstract of the Proceedings of the Council of the Governor General of India, Assembled for the Purpose of Making Laws and Regulations under the Provisions of the Act of Parliament*, 21, 104-107. Calcutta: Office of the Supt. of Gov't. Printing, India, 1882.

_____. "Transfer of Property." In *Abstract of the Proceedings of the Council of the Governor General of India, Assembled for the Purpose of Making Laws and Regulations under the Provisions of the Act of Parliament*, 21, 61-64. Calcutta: Office of the Supt. of Gov't. Printing, India, 1882.

_____. *Khutut-i Sar Sayyid*, ed. Sayyid Ross Masud. Badayun: Nizami Press, 1931.

_____. *Maqalat-i Sar Sayyid.* Vol. 12, *Taqriri Maqalat.* Urdu ka Klasiki Adab. Lahore: Majlis-i Tarraqi-i Adab, 1963.

_____. "Mistar Sayyid Maḥmūd kī Nisbat Anarbel Sar Sayyid Aḥmad Khān Sāḥib Bahādur ke Khyālāt." In *Maktūbat-i Sar Sayyid*, ed. Shaykh Muhammad Isma'il Panipati, 1, 138-141. Lahore: Majlis-i Tarraqi-i Adab, 1976.

_____. *Sir Sayyid Ahmad Khan's History of the Bijnor Rebellion.* Translated by Hafeez Malik and Morris Dembo IAD Oriental (Original) Series, no. 21. Delhi: Idarah-i Adabiyat-i Delhi, 1982.

'Ali, Chiragh. *The Proposed Political, Legal, and Social Reforms in the Ottoman Empire and Other Mohammadan States.* Bombay: The Education Society's Press, 1883.

Ali, S. M. "Syed Amir Ali." *Journal of the Asiatic Society of Pakistan* 14, no. 3 (1969): 305-324.

Ali, Sayyid Kazim. "English University Education and Life." *Journal of the National Indian Association* (1881): 401-410.

Ameer Ali, Syed. *The Personal Law of the Mahommedans, according to all the Schools, together with a Comparative Sketch of the Law of Inheritance among the Sunnis and the Shiahs.* London: W. H. Allen, 1880.

_____. *The Law relating to Gifts, Trusts, and Testamentary Dispositions among the Mahommedans, according to the Hanafi, Maliki, Shafei, and Shiah Schools, compiled from Authorities in the Original Arabic with Explanatory Notes and References to Decided Cases, and an Introduction on the Growth and Development of Mahommedan Jurisprudence* Tagore Law Lectures, 1884. Calcutta: Thacker, Spink & Co., 1885.

_____. "Memoirs of the Late Rt. Hon'ble Syed Ameer Ali." *Islamic Culture: the Hyderabad Quarterly Review* 5 (1931): 509-542.

_____. "Memoirs of the Late Rt. Hon'ble Syed Ameer Ali." *Islamic Culture: the Hyderabad Quarterly Review* 6 (1932): 1-18.

_____. *Mahomedan Law containing the Law relating to Succession and Status compiled from Authorities in the Original Arabic.* Vol. 2. 7 ed., ed. Raja Said Akbar Khan. New Delhi: Kitab Bhavan, 1976. Reprint, 1986.

_____. *Mahommedan Law compiled from Authorities in the Original Arabic containing the Law relating to Gifts, Wakfs, Wills, Pre-emption and Bailment (with an Appendix on the Law of Wakf).* Vol. 1. 5 ed., ed. Raja Said Akbar Khan. New Delhi: Kitab Bhavan, 1976.

Anderson, J. N. D. "The Anglo-Muhammadan Law." In *Contributions to the Study of Indian Law and Society: South Asia Seminar 1966-1967*, 137-172. Philadelphia: South Asia Regional Studies, University of Pennsylvania, 1967.

_____. "Islamic Law and Its Administration in India." In *Contributions to the Study of Indian Law and Society: South Asia Seminar 1966-1967*, 105-136. Philadelphia: South Asia Regional Studies, University of Pennsylvania, 1967.

Anderson, Michael R. "Legal Scholarship and the Politics of Islam in British India." In *Perspectives on Islamic Law, Justice, and Society*, ed. R. S. Khare. Lanham, MD: Rowman & Littlefield Publishers, 1999.

Ansari, Anis. "Syed Mahmood: His Life and Works." *Aligarh Law Journal* 5, Mahmood Number (1973): 1-16.

Aziz, Qutubuddin. *Quaid-i-Azam Jinnah and the Battle for Pakistan.* Karachi: The Islamic Media Corporation, 1997.

Baillie, Neil B. E. *The Moohummudan law of inheritance, according to Aboo Huneefa and his followers, comp. in large part from the Sirajiyah of al-Sajawandi, and its commentary, the Sharifiyat of Jurjani.* Calcutta: Baptist Mission Press, 1832.

_____. *The Moohummudan Law of Sale, according to the Huneefeea Code: from the Futawa Alumgeeree, a Digest of the whole Law, prepared by command of the Emperor Aurungzebe Alumgeer.* London, 1850. Reprint, Delhi: Delhi Law House, n.d.

_____. *The land tax of India, according to the Moohummudan law; translated from the Futawa Alumgeeree, with explanatory notes, and an introductory essay, containing a brief exposition of leading principles, and their application to the present system of land revenue.* London: Smith, Elder and Co., 1853.

_____. *A Digest of Moohummudan Law on the Subjects to which it is usually applied by British Courts of Justice in India, Compiled and Translated from Authorities in*

the Original Arabic, with an Introduction and Explanatory Notes. London: Smith, Elder and Co., 1865.

Banerji, Satish Chandra. "Syed Mahmood: Recollections and Impressions." *The Hindustan Review and Kayastha Samachar*, n.s., 7, no. 3 (1903): 439-443.

Bawa, Vasant Kumar. *The Nizam between Mughals and British: Hyderabad under Salar Jang I*. New Delhi: S. Chand & Company Ltd., 1986.

Bayly, C. A. *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770-1870*. Cambridge, UK: Cambridge University Press, 1983. Reprint, New Delhi: Oxford India Paperbacks, 2002.

_____. *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870* Cambridge Studies in Indian History and Society, 1, ed. C. A. Bayly, Rajnavayan Chandavarkar and Gordon Johnson. Cambridge, UK: Cambridge University Press, 1996.

_____. "Orientalists, Informants and Critics in Benares, 1790-1860." In *Perspectives of Mutual Encounters in South Asian History 1760-1860*, ed. Jamal Malik, 97-127. Leiden: Brill, 2000.

Beck, Theodore. "A Journey to Aligarh." *The Cambridge Review* 5, no. 112 (1884): 146-148.

_____. *Essays on Indian Topics*. Allahabad: Pioneer Press, 1888.

Bentham, Jeremy. "Essay on the Influence of Time and Place in Matters of Legislation." In *The Works of Jeremy Bentham*, ed. John Bowring, 1, 169-194. Edinburgh: William Tait, 1843.

Bharati, Ray. "The Politics of Indirect Rule: Lord Ripon and Hyderabad State, 1880-1884." *The Quarterly Review of Historical Studies* 25, no. 1 (1985-86): 13-31.

Bhatnagar, S. K. *History of the M.A.O. College Aligarh* Sir Syed Hall Publication, 1, ed. K. A. Nizami. Bombay: Asia Publishing House, 1969.

Bilgrami, Saiyid Husain, and C. Willmott. *Historical and Descriptive Sketch of His Highness the Nizam's Dominions*. Vol. 2. 2 vols. Bombay: Times of India Steam Press, 1884.

Bose, Sudhindra Nath. *Two Decisions on the Right of Ahl-i-Hadis (Wahabis) to Pray in the Same Mosque with the Sunnis*. Allahabad: Panini Office, 1907.

Brown, Daniel. *Rethinking Tradition in Modern Islamic Thought* Cambridge Middle East Studies, 5, ed. Charles Tripp. Cambridge, UK: Cambridge University Press, 1996.

Brown, F. H. "Indian Students in Great Britain." *The Edinburgh Review* 217 (1913): 138-156.

Brown, Nathan J. *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* Cambridge Middle East Studies, 6, ed. Charles Tripp. Cambridge, UK: Cambridge University Press, 1997.

_____. "Shari'a and State in the Modern Muslim Middle East." *International Journal of Middle East Studies* 29 (1997): 359-376.

Buckee, Gillian Frances Mary. "An Examination of the Development and Structure of the Legal Profession at Allahabad, 1866-1935." Ph.D., University of London, 1972.

Carroll, Lucy. "Life Interests and Inter-Generational Transfer of Property avoiding the Law of Succession." *Islamic Law and Society* 8, no. 2 (2001): 245-286.

"Chair of Hindu, Mahommedan and Indian Law." *The Solicitors' Journal and Reporter* 14 (1869): 62.

Chandra, Sudhir. *Enslaved Daughters: Colonialism, Law and Women's Rights.* Delhi: Oxford University Press, 1998.

Christelow, Allan. *Muslim Law Courts and the French Colonial State in Algeria.* Princeton, NJ: Princeton University Press, 1985.

"A Christian cum Mahomedan Entertainment." *The Pioneer*, 4 Dec. 1872, 3-4.

"Civil Procedure Code ya'ni Zabitah-i Diwani 'Adalat." *The Aligarh Institute Gazette*, 13 Apr. 1877, 233.

Clarke, Richard. "Abstract of the Regulations of the Bengal Government for the Administration of Civil Justice, arranged under appropriate Heads." In *Appendix to Report from Select Committee on the Affairs of the East India Company, Appendix No. VI*, ed. United Kingdom. Select Committee on the Affairs of the East India Company, 638-692. London, 1832. Reprint, London: Chadwyck Healey, microfiche 35.103-4.

_____. "Abstract of the Regulations of the Bengal Government for the Administration of Criminal Justice, arranged under appropriate Heads." In *Appendix to Report from Select Committee on the Affairs of the East India Company, Appendix No. VI*, ed. United Kingdom. Select Committee on the Affairs of the East India Company, 693-740. London, 1832. Reprint, London: Chadwyck Healey, microfiche 35.103-4.

Cocks, Raymond. *Foundations of the Modern Bar* The S.P.T.L. Book Series, ed. P. S. Atiyah. London: Sweet & Maxwell, 1983.

Cocks, Raymond C. J. *Sir Henry Maine: A Study in Victorian Jurisprudence* Cambridge Studies in English Legal History, ed. J. H. Baker. Cambridge, UK: Cambridge University Press, 1988.

Cohn, Bernard S. "Law and the Colonial State in India." In *History and Power in the Study of Law: New Directions in Legal Anthropology*, ed. June Starr and Jane F. Collier, 131-152. Ithica, NY: Cornell University Press, 1989.

_____. *Colonialism and its Forms of Knowledge: The British in India* Princeton Studies in Culture/Power/History, ed. Sherry B. Ortner, Nicholas B. Dirks and Geoff Eley. Princeton, NJ: Princeton University Press, 1996.

Cole, Juan R. I. "Sacred Space and Holy War in India." In *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 173-183. Cambridge, MA: Harvard University Press, 1996.

Coulson, N. J. *A History of Islamic Law* Islamic Surveys, no. 2. Edinburgh: Edinburgh University Press, 1964.

Cowell, Herbert. *The History and Constitution of the Courts and Legislative Authorities in India.* 5th ed. Tagore Law Lectures. Calcutta: Thacker, Spink & Co., 1905.

Derrett, J. Duncan M. "Justice, Equity and Good Conscience in India." *The Bombay Law Reporter* 64 (1962): 129-138, 145-152.

_____. "Justice, Equity and Good Conscience." In *Changing Law in Developing Countries*, ed. J. N. D. Anderson, 114-153. London: George Allen & Unwin Ltd., 1963.

_____. *Religion, Law and the State in India.* New York: The Free Press, 1968.

_____. *Religion, Law and the State in India* Law in India Series: Faber and Faber Limited, 1968. Reprint, Delhi: Oxford University Press, 1999.

_____, ed. *Essays in Classical and Modern Hindu Law.* Vol. 4, Current Problems and the Legacy of the Past. Leiden: E. J. Brill, 1878.

Deslandes, Paul R. "'The Foreign Element': Newcomers and the Rhetoric of Race, Nation, and Empire in 'Oxbridge' Undergraduate Culture, 1850-1920." *Journal of British Studies* 37 (1998): 54-90.

Dewey, Clive. "The influence of Sir Henry Maine on agrarian policy in India." In *The Victorian Achievement of Sir Henry Maine*, ed. Alan Diamond, 353-375. Cambridge, UK: Cambridge University Press, 1991.

Dodson, Michael S. "Re-Presented for the Pandits: James Ballantyne, 'Useful Knowledge,' and Sanskrit Scholarship in Benares College during the Mid-Nineteenth Century." *Modern Asian Studies* 36, no. 2 (2002): 257-298.

Duncan, Daniel. *The English and Colonial Bars in the Nineteenth Century*. London: Croom Helm, 1983.

Durand, Mortimer. *Life of the Right Hon. Sir Alfred Comyn Lyall P.C., K.C.B., G.C.I.E., D.C.L., LL.D.* Edinburgh: William Blackwood and Sons, 1913.

Dutt, Romesh Chunder. *Three Years in Europe 1868-1871, with an Account of Subsequent Visits to Europe in 1886 and 1893*. 4th ed. Calcutta: S. K. Lahiri, 1896.

Eaton, Richard M. "(Re)imag(in)ing Other2ness: A Postmortem for the Postmodern in India." In *Essays on Islam and Indian History*, ed. Richard M. Eaton, 133-155. Delhi: Oxford University Press, 2000.

"The Education Commission at Allahabad." *The Pioneer*, 19 Aug. 1882, 4.

Farmer, Lindsay. "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45." *Law and History Review* 18, no. 2 (2000): 397-425.

Fisch, Jörg. *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1817* Beiträge zur Südasienforschung, Süasien-Institut, Universität Heidelberg, band 79. Wiesbaden: Franz Steiner Verlag, 1983.

Forrest, G. W., ed. *Selections from the State Papers of the Governors-General of India.* Vol. 2. Oxford: B. H. Blackwell, 1910.

Foster, Joseph. *Men-at-the-Bar: A Biographical Hand-list of the Members of the Various Inns of Court, including her Majesty's Judges, etc.* London: Reeves and Turner, 1885.

Fyzee, Asaf A. A. *An Introduction to the Study of Mahomedan Law*. London: Oxford University Press, 1931.

_____. *Cases in the Muhammadan Law of India and Pakistan*. Oxford: Clarendon Press, 1965.

_____. *The Reform of Muslim Personal Law in India* Indian Secular Society. Bombay: Nachiketa Publications Limited, 1971.

_____. *Outlines of Muhammadan Law*. 4th ed. Law in India Series. Delhi: Oxford University Press, 1999.

Galanter, Marc. *Law and Society in Modern India*, ed. Rajeef Dhavan. Delhi: Oxford University Press, 1989.

Gerber, Haim. *Islamic Law and Culture, 1600-1840, no. 9* Studies in Islamic Law and Society, ed. Ruud Peters and Bernard Weiss. Leiden: Brill, 1999.

Gilmartin, David. "Customary Law and *Shari'at* in British Punjab." In *Shari'at and Ambiguity in South Asian Islam*, ed. Katherine Pratt Ewing, 43-62. Berkeley: University of California Press, 1988.

Gleig, G. R. *Memoirs of the Life of the Right Hon. Warren Hastings, First Governor-General of Bengal*. Vol. 1. London: Richard Bentley, 1841.

Gopal, S. *British Policy in India, 1858-1905* Cambridge South Asian Studies. Cambridge, UK: Cambridge University Press, 1965.

Grady, Standish Grove. *Treatise on the Hindoo Law of Inheritance comprising the Doctrines of the Various Schools, with the Decisions of the High Courts of the Several Presidencies of India, and the Judgments of the Privy Council on Appeal*. Madras: Gantz Brothers, 1868.

_____. *A Manual of the Mahommedan Law of Inheritance and Contract, comprising the Doctrines of the Soonee and Sheea Schools, and based upon the Text of Sir W. H. Macnaghten's Principles and Precedents, together with the Decisions of the Privy Council, and High Courts of the Presidencies in India*. London: Wm. H. Allen and Co., 1869.

Graham, G. F. I. *The Life and Work of Sir Syed Ahmed Khan*. 2nd, rev. ed. London: Hodder & Stoughten, 1909. Reprint, Karachi: Oxford University Press, 1974.

Graham, George Farquhar Irving. *The Life and Work of Syed Ahmad Khan C.S.I.* Edinburgh: William Blackwood and Sons, 1885.

Guenther, Alan M. "Response of Sayyid Ahmad Han to Sir William Muir's Evaluation of *Hadit* Literature." *Oriente Moderno* 82, no. 1 (2002): 219-254.

_____. "Hanafi *Fiqh* in Mughal India: The *Fatawá-i 'Alamgiri*." In *India's Islamic Traditions, 711-1750*, ed. Richard Eaton, 209-230. Delhi: Oxford University Press, 2003.

Hali, Altaf Husain. *Hayat-i Javid jis men 'Alá Jinab Jawwad ud-Dawlah 'Arif-i Jang Daktar Sar Sayyid Ahmad Khan ki Zindigi ke Halat aur un ki Sirkari, Mulki,*

Qaumi aur Mazhbi Khidmat Mufassal biyan ki gai hain. 4 ed. New Delhi: Qaumi Kaunsil barai Farugh Urdu Zuban, 1979.

_____. *Hayat-i-Javed: A Biographical Account of Sir Sayyid.* Translated by K. H. Qadiri and David J. Matthews IAD Oriental (Original) Series, no. 10. Delhi: Idarah-i Adabiyat-i Delli, 1979.

Hallaq, Wael B. "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984): 3-41.

_____. *Authority, Continuity and Change in Islamic Law.* Cambridge, UK: Cambridge University Press, 2001.

Hamilton, Charles. *The Hedáya, or Guide; A Commentary on the Mussulman Laws: Translated by Order of the Governor-General and Council of Bengal.* 4 vols. London: T. Bensley, 1791.

Hardy, Peter. *The Muslims of British India.* First corrected South Asian ed. Cambridge South Asian Studies. Cambridge, UK: Cambridge University Press, 1972. Reprint, New Delhi: Foundation Books, 1998.

Harington, John Herbert. *An Elementary Analysis of the Laws and Regulations Enacted by the Governor General in Council at Fort William in Bengal for the Civil Government of the British Territories under that Presidency.* Vol. 1. 3 vols. Calcutta: Honorable Company's Press, 1805.

_____. "Remarks upon the authorities of Mosulman law." *Asiatic Researches* 10 (1808): 475-512.

Hidayatullah, M. "Justice Syed Mahmood." In *A Judge's Miscellany*, ed. M. Hidayatullah, 105-115. Bombay: N. M. Tripathi, 1972.

"The High Court N.-W.P. and its Chief Justice." *The Civil and Military Gazette*, 10 Apr. 1879, 2.

Hosaen Ahmad Meerza, Delawarr. *Muslim Modernism in Bengal: Selected Writings of Delawarr Hosaen Ahamed Meerza (1840-1913).* Vol. 1, ed. Sultan Jahan Salik. Dacca: Centre for Social Studies, 1980.

Hunter, William Wilson. *The Indian Musalmans: Are They Bound in Conscience to Rebel against the Queen?* London: Trübner and Company, 1871.

Husain, Wahed. *History of the Development of Muslim Law.* Calcutta: published by the author, n.d.

Husain, Yusuf, ed. *Selected Documents from the Aligarh Archives*. Bombay: Asia Publishing House for the Departement of History, Aligarh Muslim University, 1967.

Ḥusayn, Mīr Wilāyat. *Āp Betī: Yā M.A.O. Kālij 'Alīgaṛh kī Kihānī*. Aligarh: Sayyid Hādī Ḥusayn Zaidī, 1970.

Husein, Syed Karamat. *A Treatise on Right and Duty: their Evolution, Definition, Analysis and Classification according to the Principles of Jurisprudence being a Portion of the Muhammadan Law of Gifts*. Allahabad, 1899. Reprint, Delhi: Delhi Law House, 1984.

Hussain, Abul. *The History of the Development of Muslim Law in British India* Tagore Law Lectures, 1935. Calcutta: Abinas Press for the author, 1934.

Ilbert, C. P. "Indian Codification." *The Law Quarterly Review* 5, no. 20 (1889): 347-369.

India, Government of. *Selections from the Records of the Government of India, Home Department. No. 70. Papers Relating to the Question of Forming a Separate Judicial Branch of the Civil Service in India, and the Legal Training of Civil Servants*. Calcutta: Office of Superintendent of Government Printing, 1868.

_____. *Selections from the Vernacular Newspapers, published in the Panjab, North-Western Provinces, Oudh, Central India, and Rajputana*, 1882.

_____. *Selections from the Records of the Government of India, Home Department. No. 205, Home Department Serial No. 2. Correspondence on the Subject of the Education of the Muhammadan Community in British India and their Employment in the Public Service generally*. Calcutta: Office of Superintendent of Government Printing, 1886.

The India List and India Office List for 1897, compiled from Official Records by Direction of the Secretary of State for India in Council. London: Harrison and Sons, 1897.

The India Office List for 1895 containing an Account of the Services of Officers in the Indian Service and other Information. London: Harrison and Sons, 1895.

India. Education Commission. *Report of the North-Western Provinces and Oudh Provincial Committee; with Evidence Taken before the Committee, and Memorials Addressed to the Education Committee*. Calcutta: Government of India, 1884.

India. Law Commission. *Penal Code Prepared by the Indian Law Commissioners, and Published by Command of the Governor General of India in Council*. London: Pelham Richardson, Cornhill, 1838.

India. Legislative Council for the North-Western Provinces and Oudh. *Abstract of the Proceedings of the Legislative Council for the North-Western Provinces and Oudh, assembled for the Purpose of Making Laws and Regulations under the Provisions of the Indian Councils Acts, 1861 and 1892.* Allahabad, 1896.

India. Legislative Department. *Minutes by Sir H. S. Maine, 1862-69, with a Note on Indian Codification dated 17th July 1879.* Calcutta: Superintendent of Government Printing, 1890.

India. Ministry of Law. *The Unrepealed Central Acts with Chronological Table and Index.* Vol. 3, From 1882 to 1897, both inclusive. 2nd ed. Delhi: Manager of Publications, 1950.

India. Public Service Commission. *Proceedings of the Public Service Commission.* Vol. 2, *Proceedings relating to the North-Western Provinces and Oudh.* Calcutta: Government of India, 1887.

India. Publications Dept. "Indian Contract Bill." *Supplement to the Gazette of India*, no. 18 (1872): 527-534.

Irschick, Eugene F. *Dialogue and History: Constructing South India, 1795-1895.* Delhi: Oxford University Press, 1994.

Islam, Zafar ul, Joel M. Woldman, and A. B. M. Habibullah. "Indian Muslims and the Ilbert Bill: 1883-1884." *Journal of the Asiatic Society of Pakistan* 8, no. 2 (1963): 131-154.

Jones, William. "Al Sirájiyyah: or, the Mohammedan Law of Inheritance; with a Commentary." In *The Works of Sir William Jones*, ed. Lord Teignmouth, 8, 197-322. London: John Stockdale, 1807.

_____. "The Mahomedan Law of Succession to the Property of Intestates in Arabick, engraved on Copper Plates from an Ancient Manuscript: with a verbal Translation, and explanatory Notes." In *The Works of Sir William Jones*, ed. Lord Teignmouth, 8, 159-196. London: John Stockdale, 1807.

Keddie, Nikki R. *Sayyid Jamal ad-Din "al-Afghani": A Political Biography.* Berkeley: University of California Press, 1972.

Khan, Abdul Rashid. *The All India Muslim Educational Conference: Its Contribution to the Cultural Development of Indian Muslims, 1886-1947.* Karachi, Pakistan: Oxford University Press, 2001.

Khuda Bukhsh, S. "The Origin and Development of Muslim Law." *Journal of the Moslem Institute* 3, no. 2 (1907): 101-168.

Kidwai, Jalil Ahmad. "A Forgotten Hero of our Struggle." In *Sar Sayyid, Mazamimah, Sayyid Mahmud*, ed. Jalil Ahmad Kidwai, 77-86. Karachi, Pakistan: Ross Masood Education and Culture Society of Pakistan, 1985.

Kirwan, Daniel Joseph. *Palace and Hovel: or, Phases of London Life, being Personal Observations of an American in London, by Day and Night; with Graphic Descriptions of Royal and Noble Personages, their Residences and Relaxations; together with Vivid Illustrations of the Manners, Social Customs, and Modes of Living of the Rich and the Reckless, the Destitute and the Depraved, in the Metropolis of Great Britain, with Valuable Statistical Information, Collected from the Most Reliable Sources*. Hartford: Belknap & Bliss, 1870.

Kozlowski, Gregory C. *Muslim Endowments and Society in British India* Cambridge South Asian Studies, 35. Cambridge, UK: Cambridge University Press, 1985.

Kugle, Scott Alan. "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia." *Modern Asian Studies* 35, no. 2 (2001): 257-313.

Kumar, Gyanendra. "Dr. Satish Chandra Banerji." In *Centenary High Court of Judicature at Allahabad 1866-1966*, 1, 407-414. Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966.

_____. "Law and Laughter." In *Centenary High Court of Judicature at Allahabad 1866-1966*, 2, 195-230. Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1968.

"The Late Mr. Syed Mahmood." *The Indian People. A Weekly Record & Review*, 15 May 1903, 185-187.

"The Late Mr. Syed Mahmood." *The Moslem Chronicle and the Muhammadan Observer: Weekly Newspaper of Politics, Literature and Society*, 16 May 1903, 149-150.

"Law Students' Journal: General Examination, Michaelmas Term, 1871." *The Solicitors' Journal and Reporter* 15 (1871): 754-755.

"Legal Education." *The Saturday Review* 34 (1872): 652-653.

"Legal Education, No. III." *The Solicitors' Journal and Reporter* 13 (1869): 262-264.

Lelyveld, David. *Aligarh's First Generation: Muslim Solidarity in British India*. OUP ed. Princeton, NJ: Princeton University Press, 1978. Reprint, Delhi: Oxford University Press, 1996.

_____. *Aligarh's First Generation: Muslim Solidarity in British India*. OUP ed. Delhi: Oxford University Press, 1996.

_____. "Macaulay's Curse: Sir Syed and Syed Mahmood." In *Sir Syed Ahmad Khan: A Centenary Tribute*, ed. Asloob Ahmad Ansari, 193-213. Delhi: Adam Publishers, 2001.

_____. "The Mystery Mansion: Swaraj Bhawan and the Myths of Patriotic Nationalism." *The Little Magazine* 4, no. 4, "Ghosts" (2004).

Leonard, Karen. "Hyderabad: The Mulki-Non-Mulki Conflict." In *People, Princes and Paramount Power: Society and Politics in the Indian Princely States*, ed. Robin Jeffrey, 65-106. Delhi: Oxford University Press, 1978.

Lovett, H. Verney. "The Development of the Services, 1858-1918." In *The Cambridge History of India*, ed. H. H. Dodwell and R. R. Sethi, 6, The Indian Empire 1858-1918, and the Last Phase 1919-1947, 357-378. Delhi: S. Chand, 1964.

Lubis, Nur Fadhil. "Islamic Legal Literature and Substantive Law in Indonesia." *Studia Islamika* 4, no. 4 (1997): 33-92.

Lyall, Alfred C. "Government of the Indian Empire." *The Edinburgh Review* 159 (1884): 1-41.

_____. "India under Queen Victoria." *The Nineteenth Century* 41 (1897): 865-882.

Macaulay, Thomas B. "Introductory Report upon the Indian Penal Code." In *The Works of Lord Macaulay: Speeches, Poems & Miscellaneous Writings*, 1, 4-22. London: Longmans, Green and Co., 1898.

_____. "A Speech delivered in the House of Commons on the 10th of July, 1833." In *The Works of Lord Macaulay: Speeches, Poems & Miscellaneous Writings*, 1, 543-586. London: Longmans, Green and Co., 1898.

Macnaghten, W. H. *Principles and Precedents of Moohummudan Law, being a Compilation of Primary Rules Relative to the Doctrine of Inheritance (Including the Tenets of the Schia Sectaries), Contracts and Miscellaneous Subjects; and a Selection of Legal Opinions Involving those Points, Delivered in the Several Courts of Judicature Subordinate to the Presidency of Fort William; together with Notes Illustrative and Explanatory, and Preliminary Remarks.* Calcutta: Church Mission Press, 1825.

Macnaghten, W. H., and William Sloan. *Principles and Precedents of Moohummudan Law, being a Compilation of Primary Rules Relative to Inheritance, Contracts and Miscellaneous Subjects; and a Selection of Legal Opinions Involving those Points, Delivered in the Several Courts of Judicature Subordinate to the Presidency of Fort William; together with Notes Illustrative and Explanatory, and Preliminary Remarks...with additional Notes and Questions for Students*, 1860. Reprint, Madras: Higginbotham and Co., 1890.

Mahmood, Syed Mohammed. "Dosti." *Tahzib ul-Akhlaq* 2 (1871): 3-4.

_____. "Shiddat-i Itqa'." *Tahzib ul-Akhlaq* 2 (1871): 78-80.

_____. *The Law of Evidence in British India, being a Commentary in Hindustani on the Indian Evidence Act (I of 1872.) as Amended by The Indian Evidence Act Amendment Act, (XVIII of 1872.) together with The Indian Oaths Act (X of 1873.): Sharh-i Qanun-i Shahadat-i Mujriyyah-yi Hind ya'ni, aikt-i awal-i sanh 1872 hasb-i tarmim-i aikt sanh 18-i 1872, ma'ah Qanun-i half-i mujriyyah-yi Hind, ya'ni aikt 10-i sanh 1873,*. Aligarh: Aligarh Institute Press, 1872.

_____. "Yuniwirsity Kaimbirij." *Aligarh Institute Gazette*, 22 Mar. 1872, 184-186.

_____. *The Law of Evidence in British India, being a Commentary in Hindustani on the Indian Evidence Act (I of 1872.) as Amended by The Indian Evidence Act Amendment Act, (XVIII of 1872.) together with The Indian Oaths Act (X of 1873.): Sharḥ-i Qānūn-i Shahādat-i Mujriyyah-yi Hind ya'nī, Aikṭ Awal sanh 1872 ḥasb-i tarmīm-i Aikṭ 18-i sanh 1872, ma'ah Qānūn-i ḥalf-i mujriyyah-yi Hind, ya'ni Aikṭ 10-i sanh 1873,,*. Aligarh: Aligarh Institute Press, 1876.

_____. "British Rule in India: Does it Owe its Origin to Conquest and its Maintenance to Physical Force?" *The Calcutta Review* 68, no. 135 (1879): 1-18.

_____. *Sharḥ-i Qānūn-i Shahādat-i Mujriyyah-yi Hind ya'nī, Aikṭ Awal sanh 1872 ḥasb-i tarmīm-i Aikṭ 18-i 1872, ma'ah Qānūn-i ḥalf-i mujriyyah-yi Hind, ya'ni Aikṭ 10-i 1873*. 2nd ed. Hyderabad, Deccan, India: Matba'-i Burhaniyah, 1887.

_____. *A History of English Education in India: Its Rise, Development, Progress, Present Condition and Prospects, being a Narrative of the Various Phases of Educational Policy and Measures adopted under the British Rule from its Beginning to the Present Period, 1781-1893, comprising Extracts from Parliamentary Papers, Official Reports, Authoritative Despatches, Minutes and Writings of Statesmen, Resolutions of the Government, and Statistical Tables Illustrated in Coloured Diagrams*. Aligarh: M.A.-O. College, 1895.

_____. "A Scheme for the Proposed Mohammedan Anglo-Oriental College." In *Selected Documents from the Aligarh Archives*, ed. Yusuf Husain, 222-237. Bombay: Asia Publishing House for the Department of History, Aligarh Muslim University, 1967.

Mahmood, Syed Mohammed, and Theodore Beck. "Musalmānon kī ṭaraf se Lajislativ Kāunsal aur Myunisipolitiyon Vaghairah men Intikhab." *The Muhammadan Anglo-Oriental College Magazine* n.s. 4, no. 12 (1896): 507-519.

Mahmood, Tahir. *Islamic Law in Indian Courts since Independence: Fifty Years of Judicial Interpretation* IOS Readings in Islamic Law. New Delhi: Institute of Objective Studies, 1997.

Maine, Henry James Sumner. "Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act." *The Fortnightly Review* 19 (1873): 51-67.

_____. *Village-Communities in the East and West: Six Lectures delivered at Oxford to which are added other Lectures, Addresses and Essays*. Third ed. New York: Henry Holt and Company, 1876.

Malik, Jamal. "The Making of a Council: The Nadwat al-'Ulama." *Zeitschrift der Deutschen Morgenlandischen Gesellschaft* 144, no. 1 (1994): 60-91.

_____. "Perspectives of Mutual Encounters in South Asian History 1760-1860: Introduction." In *Perspectives of Mutual Encounters in South Asian History 1760-1860*, ed. Jamal Malik, 1-18. Leiden: Brill, 2000.

Malik, Shahdeen. "Historical Discourse on Colonial Criminal Law." *Journal of the Asiatic Society of Bangladesh, Hum.* 44, no. 1 (1999): 15-41.

Martin, Briton, Jr. *New India, 1885: British Official Policy and the Emergence of the Indian National Congress* Publications of the Center for South and Southeast Asia Studies. Berkeley: University of California Press, 1969.

Masood, Arshad. "The Case that Raised Syed Mahmood to High Court Judgeship." *Aligarh Law Journal* 5, Mahmood Number (1973): 243-265.

Masud, Muhammad Khalid. "Apostasy and Judicial Separation in British India." In *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 193-203. Cambridge, MA: Harvard University Press, 1996.

Mathur, Sri K. P. "The 'Judges in the English Department' Subsequently known as 'Judges in the Administrative Department'." In *Centenary: High Court of Judicature at Allahabad, 1866-1966*, 1, 133-143. Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966.

"The Meeting of the Legislative Council." *The Englishman*, 1 Feb. 1882, 2.

Mehdi Ali Khan, Sayyid. *Majmuah Lekchars o Ispichaz*. Vol. 1. Lahore: Matbu'ah Naval Kishor Gas Printing Works Press, 1904.

Messick, Brinkley. *The Calligraphic State: Textual Domination and History in a Muslim Society* Comparative Studies on Muslim Societies, ed. Barbara Daly Metcalf. Berkeley: University of California Press, 1993.

Metcalf, Barbara Daly. *Islamic Revival in British India: Deoband, 1860-1900.* Princeton: Princeton University Press, 1982.

_____. "Two Fatwas on Hajj in British India." In *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 184-192. Cambridge, MA: Harvard University Press, 1996.

Mill, James, and Horace Hayman Wilson. *The History of British India.* Vol. 5. 4th rev. ed. London: James Madden, 1848.

Minault, Gail. "Sayyid Karamat Husain and Education for Women." In *Lucknow: Memories of a City*, ed. Violette Graff, 155-164. New Delhi: Oxford University Press, 1997.

Misra, B. B. *The Administrative History of India, 1834-1947: General Administration.* Bombay: Oxford University Press, 1970.

Moore, Robin J. *Liberalism and Indian Politics, 1872-1922* Foundations of Modern History. London: Edwin Arnold, 1966.

Morison, Theodore. *The History of the M. A.-O. College, Aligarh: From its Foundation to the year 1903; Together with the Annual Report for the year 1902-1903 and Appendices.* Allahabad: Pioneer Press, 1903.

Morley, William H. *The Administration of Justice in British India: Its past History and present State comprising an Account of the Laws peculiar to India*, 1858. Reprint, New Delhi: Metropolitan Book Co.,1976.

Moulton, Edward C. *Lord Northbrook's Indian Administration, 1872-1876.* Bombay: Asia Publishing House, 1968.

Muhammad, Shan. *Sir Syed Ahmad Khan: A Political Biography.* Meerut, India: Meenakshi Prakashan, 1969.

_____. *The Indian Muslims: A Documentary Record.* Vol. 3. Meerut, India: Meenakshi Prakashan, 1980.

_____. *The Growth of Muslim Politics in India (1900-1919).* New Delhi: Ashish Publishing House, 1991.

_____, ed. *The Aligarh Movement: Basic Documents, 1864-1898.* Vol. 1. Meerut, India: Meenakshi Prakashan, 1978.

_____, ed. *The Aligarh Movement: Basic Documents, 1864-1898.* Vol. 3. Meerut, India: Meenakshi Prakashan, 1978.

Mujeeb, Mohammad. *The Indian Muslims*. new ed., 1967. Reprint, New Delhi: Munshiram Manoharlal Publishers, 1995.

_____. *The Indian Muslims*. new ed. New Delhi: Munshiram Manoharlal Publishers, 1995.

Mulla, Dinshah Fardunji. *Principles of Mahomedan Law*. Bombay: Thacker & Company, 1905.

Mushtaq Husayn. "Sayyid Muhammad Mahmud Sahib Salatallah Ta'alay." *Tahzib ul-Akhlaq* 2 (1871): 95-96.

Muttalib, M. A. *Administration of Justice under the Nizams, 1724-1948*. Hyderabad, Deccan, India: State Archives, Andhra Pradesh, 1988.

Nandi, Ashis. *The Intimate Enemy: Loss and Recovery of Self under Colonialism*. Delhi: Oxford University Press, 1983.

Nizami, Khaliq Ahmad, ed. *Theodore Beck Papers from the Sir Syed Academy Archives*, Selected Documents from the Aligarh Archives, 2. Aligarh: Aligarh Muslim University, 1991.

Paul, John J. *The Legal Profession in Colonial South India*. Oxford: Oxford University Press, 1991.

Penner, Peter. *The Patronage Bureaucracy in North India: The Robert M. Bird and James Thomason School 1820-1870*. Delhi: Chanakya Publications, 1986.

Phillips, C. H. *The Evolution of India and Pakistan, 1858-1947: Select Documents* Select Documents on the History of India and Pakistan, 4, ed. C. H. Phillips. London: Oxford University Press, 1962.

Pollock, Frederick. *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law; to which is added the Draft of a Code of Civil Wrongs prepared for the Government of India*. 2nd ed. London: Stevens and Sons, 1890.

_____. *The Law of Fraud, Misrepresentation and Mistake in British Iindia* Tagore Law Lectures, 1894. Calcutta: Thacker, Spink & Co., 1894.

Powell, Avril A. "Modernist Muslim Responses to Christian Critiques of Islamic Culture, Civilization, and History in Northern India." In *Christians, Cultural Interactions, and India's Religious Traditions*, ed. Judith M. Brown and Robert Eric Frykenberg, 61-91. Grand Rapids, MI: William B. Eerdmans Publishing Company, 2002.

Qureshi, M. A. *Waqfs in India: A Study of Administrative and Legislative Control.* New Delhi: Gian Publishing House, 1990.

Rahbar, Daud. "Shah Wali Ullah and Ijtihad." *The Muslim World* 45 (1955): 346-358.

Rahim, Abdur. "A Historical Sketch of the Growth of Mohamedan Jurisprudence." *Calcutta Law Journal* 3 (1906): 19n-23n, 27n-31n, 47n-50n, 55n-58n, 67n-70n, 85n-88n, 97n-102n, 107n-111n.

_____. *The Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki, Shafi'i, and Hanbali Schools.* London: Luzac & Company, 1911.

Rahman, Fazlur. "A Review of Syed Mahmood's 'Kitab al-Talaq' and 'Kitab al'Shuf'ah'." *Aligarh Law Journal* 5, Mahmood Number (1973): 323-333.

Raj, Kapil. "Refashioning Civilities, Engineering Trust: William Jones, Indian Intermediaries and the Production of Reliable Legal Knowledge in Late Eighteenth-century Bengal." *Studies in History (New Delhi)* 17, no. 2 (2001): 175-209.

Rashid, S. Khalid. "Justice Mahmood's Resignation: Mystery Unveiled." *Aligarh Law Journal* 5, Mahmood Number (1973): 266-300.

Rattigan, William Henry. "The Influence of English Law and Legislation upon the Native Laws of India." *Journal of the Society of Comparative Legislation* n.s., 3, no. 1 (1901): 46-65.

_____. "The Scientific Study of the Muhammadan Law." *Law Quarterly Review* 17 (1901): 402-414.

Richards, John F. *The Mughal Empire* The New Cambridge History of India, ed. Gordon Johnson. Cambridge, UK: Cambridge University Press, 1993.

Robertson, A. J. *The Principles of Mahomedan Law, with an Appendix Tracing the Growth of Personal Law, the Progress of Legislation, and the Jurisdiction of the Courts in Relation thereto, from the Time of the East India Company.* Rangoon: Myles Standish, 1911.

Robinson, Francis. *Separatism among Indian Muslims: The Politics of the United Provinces' Muslims 1860-1923.* Paperback edition, revised ed. Delhi: Oxford University Press, 1993.

Roxburgh, Ronald, ed. *Records of the Honorable Society of Lincoln's Inn: The Black Books.* Vol. 5, A.D. 1845-A.D. 1914. London: Lincoln's Inn, 1968.

Rumsey, Almaric. *Moohummudan Law of Inheritance and Rights and Relations affecting it: Sunni Doctrine: comprising together with much collateral information, the*

Substance greatly expanded of the Author's Chart of Family Inheritance. London: W. H. Allen, 1880.

Samiullah Khan. *A Judgment containing an Exposition of the Muahmmadan Matrimonial Law*. Allahabad: Indian Press, 1891.

Sanyal, Usha. "Are Wahhabis Kafirs? Ahmad Riza Khan Barelwi and His *Sword of the Haramayn*." In *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 204-213. Cambridge, MA: Harvard University Press, 1996.

Sapru, Tej Bahadur. "Syed Mahmood, as a Judge." *The Hindustan Review and Kayastha Samachar* 7 n.s., no. 3 (1903): 443-452.

Sarkar, Hem Chandra. *A Life of Ananda Mohan Bose*. Calcutta: Classic Press, 1929.

Sarkar, Mahua. *Justice in a Gothic Edifice: The Calcutta High Court and Colonial Rule in Bengal*. Calcutta: Firma KLM Private Limited, 1997.

Shaikh, Farzana. *Community and Consensus in Islam: Muslim Representation in Colonial India, 1860-1947* Cambridge South Asian Studies, 42. Cambridge, UK: Cambridge University Press, 1989.

Shearwood, Joseph A. "The Bar Examinations." *Journal of the National Indian Association*, no. 123 (1881): 150-159.

Shodhan, Amrita. *A Question of Community: Religious Groups and Colonial Law*. Calcutta: SAMYA, 2001.

Siddiqi, M. Zakaria. "Justice Mahmood on Criminal Procedure." *Aligarh Law Journal* 5, Mahmood Number (1973): 229-244.

Singh, Mahavir. "Mahmood and Ameer Ali on Muslim Law: A Comparison." *Aligarh Law Journal* 5, Mahmood Number (1973): 181-196.

Singha, Radhika. *A Despotism of Law: Crime and Justice in Early Colonial India* Oxford India Paperbacks. New Delhi: Oxford University Press, 1998.

Sircar, Shama Churn. *The Muhammadan Law, being a Digest of the Sunni Code in Part and of the Imamiyah Code* Tagore Law Lectures. Calcutta: Thacker, Spink & Co., 1875.

Smith, K. J. M. "Macaulay's 'Utilitarian' Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making." In *Legal History in the Making: Proceedings of the Ninth British Legal History Conference,*

Glasgow 1989, ed. W. M. Gordon and T. D. Fergus, 145-164. Glasgow: The Hambledon Press, 1989.

Sorabji, Cornelia. *India Calling: The Memories of Cornelia Sorabji, India's First Woman Barrister*, ed. Chandani Lokugé. New Delhi: Oxford University Press, 2001.

Sri Ram, Lalah, ed. *Tazkirah-yi hazar Dastan ma'ruf bah Khum Khana-yi Javed.* Vol. 2. Lahore: Munshi Naval Kishor, 1908-1940.

Srivastava, Sri Gur Dayal. "Mr. Justice Mahmood." In *Centenary High Court of Judicature at Allahabad 1866-1966*, 1, 217-292. Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966.

Stephen, James Fitzjames. "The Ilbert Bill." *The Times*, 2 Nov. 1883, 4.

Stokes, Eric. *The English Utilitarians and India.* Oxford: Clarendon Press, 1959.

Stokes, Whitley. *The Anglo-Indian Codes.* Vol. 1, Substantive Law. Oxford: Clarendon Press, 1887.

_____. *The Anglo-Indian Codes.* Vol. 2, Adjective Law. Oxford: Clarendon Press, 1888.

Tarlo, Emma. *Clothing Matters: Dress and Identity in India.* Chicago: University of Chicago Press, 1996.

Tyabji, Faiz Badruddin. *Principles of Muhammadan Law: An Essay at a Complete Statement of the Personal Law Applicable to Muslims in British India.* Bombay: D. B. Taraporevala Sons, 1913.

Tyssen, A. D. "The English Bar." *Journal of the National Indian Association*, no. 122 (1881): 69-81.

United Kingdom. East India (Civil Service). "Extract from the Proceedings of the Government of India in the Home Department (Education), under the date the 30th June 1868." In *Papers Relating to the Admission of Natives to the Civil Service of India*, 6-7. London: George Edward Eyre and William Spottiswoode, 1868.

United Kingdom. Indian Law Commission. *Second Report of Her Majesty's Commissioners appointed to consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India.* London: George Edward Eyre and William Spottiswoode, 1856. Reprint, Chadwick Healy microfiche, 60.188.

Vans Kennedy, Lt. Col. "An Abstract of Muhammedan Law." *Journal of the Royal Asiatic Society of Great Britain and Ireland* 2 (1835): 81-165.

Varma, Sri Satyendra Nath. "History of the High Court Bar Association." In *Centenary: High Court of Judicature at Allahabad, 1866-1966*, ed. Uttar Pradesh (India) High Court of Judicature, 1. Allahabad: Allahabad High Court Centenary Commemoration Volume Committee, 1966.

Venn, J. A., ed. *Alumni Cantabrigienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900. Part 2, from 1752 to 1900.* Vol. 4, Kahlenberg-Oyler. Cambridge, UK: Cambridge University Press, 1951.

Vishram, Rozina. *Asians in Britain: 400 Years of History*. London: Pluto Press, 2002.

Wahidur-Rahman. "The Religious Thought of Moulvie Chiragh 'Ali." M.A. thesis, McGill University, 1982.

West, Raymond. "Modern Developments of Mohammedan Law." *Journal of the Society of Comparative Legislation* 2 n.s., no. 2 (1900): 271-275.

_____. "Mohammedan Law on India: Its Origin and Growth." *Journal of the Society of Comparative Legislation* 2 n.s., no. 1 (1900): 27-44.

Whitcombe, Elizabeth. *Agrarian Conditions in Northern India*. Vol. 1, The United Provinces under British Rule, 1860-1900. Berkeley: University of California Press, 1972.

Wilson, Roland Knyvet. *An Introduction to the Study of Anglo-Muhammadan Law*. London: W. Thacker and Co., 1894.

_____. *A Digest of Anglo-Muhammadan Law Setting Forth in the Form of a Code, with Full References to Modern and Ancient Authorities, the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India*. London: W. Thacker and Co., 1895.

_____. "Should the Personal Laws of the Natives of India Be Codified?" *The Imperial and Asiatic Quarterly Review and Oriental and Colonial Record* 3rd ser., 6 (1898): 225-249.

Yaduvansh, Uma. "The Decline of the Role of Qadis in India, 1793-1876." *Studies in Islam* 6 (1969): 155-171.

Yusuf Khan Bahadur, Muhammad. *Mohamedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors, according to the Soonees*. 3 vols. Calcutta: Thacker, Spink & Co., 1895, 1898.

Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change* Princeton Studies in Muslim Politics, ed. Dale F. Eickelman and James Piscatori. Princeton, NJ: Princeton University Press, 2003.

Zubayrī, Muḥammad Amīn. *Tazkirah-i Sayyid Maḥmūd Marḥūm*. Aligarh: Muslim University Press, n.d.