Modern Asian Studies **35,** 2 (2001), pp. 257–313. © 2001 Cambridge University Press
Printed in the United Kingdom

Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia

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A system should be formed, which shall preserve as much as possible can be done, their institutions and laws to the natives of Hindoostan, and attemper them with the mild spirit of British government.—John Bruce[1]

Jurisprudence is the nexus where authoritative texts, cultural assumptions, and political expediency come together during a crisis. It is therefore not so much a thing or a system as it is an experience, an interpretative experience. Yet the practice of jurisprudence is very different from other types of interpretation because it is also an exertion of power. A legal interpretation is a decision which mobilizes coercive forces to immediately solidify the interpretation into a social reality. The administrative structure of courts and the legal rhetoric that flows through them disguise jurisprudence as 'a system' rather than revealing its nature as an interpretative experience; this disguise serves to heighten the authority of these exercises of power and to limit the ability to contest them to specialists.

This theoretical perspective is crucial in analyzing the legal 'system' called Anglo-Muhammadan law, through which the British colonial state anchored its authority and asserted its rule in South Asia. Anglo-Muhammadan law disguises itself as a system; however, it should properly be seen as an interpretative experience that regulates and justifies the raw exercise of power. The law embodies the cumulative experience of the British rulers in India, as they both appropriated and rejected the Mughal polity which they conquered.[2] They brought Islamic legal texts and specialists together with British

[1] John Bruce, *Historical Plans for the Government of British India*, 1793.

[2] Here and throughout, this study uses the term Mughal broadly, meaning not only the Mughal empire proper, but also those regions like Bengal which gained autonomy, but whose administration still followed patterns instituted by the Mughal empire.

0026–749X/01/$7.50+$0.10

assumptions, and joined them to the political needs of a modern state. Thus Anglo-Muhammadan jurisprudence acted as the interface between the East India Company (as an early modern state) and the surrounding society, which it could not comprehend but had to control. Jurisprudence forms a way to index two juxtaposed experiences: first the experience of the British in a precarious position of power, and second the experience of south Asian Muslims steadily displaced from their former positions of authority. The same jurisprudence, once renamed as 'the Law of Muslims' later served a new generation of South Asian Muslims who struggled to reassert their voice in British India and to recapture a sense of lost identity.

Until 1862, Anglo-Muhammadan jurisprudence embodied in an uneasy balance two differing conceptions of self, state and society which overlap through the medium of law. Muslims and British had different ideas about what constituted 'law', how the state was involved with it, and how 'law' fit into surrounding social relations. This paper will focus primarily on the formative period of Anglo-Muhammadan jurisprudence, during the sixty-year period from 1771 to 1832. This early period is most interesting and important, for English jurists had not yet legislated into oblivion many of the overtly Islamic facets of the law. Rather, the British in Bengal needed Islamic jurisprudence as a language through which to speak to the Indians they ruled, and to speak of their own needs with each other. However, this system of jurisprudence had long-lasting and indelible effects upon South Asian Muslim society, and this study will follow its effects into the twentieth century. Through the juridical operations of these courts, the shari'ah became a reified and static entity captured in a paradox.[3] The shari'ah was largely codified by the British act of wresting political power away from Muslims, while later

[3] The shari'ah is a notoriously difficult concept to define. In its broadest terms, the shari'ah is the accepted custom of the Muslim community in doctrinal belief, ritual action, commercial transaction, and criminal punishment. More technically, the shari'ah consists of a network of decisions by jurists on whether a specific action is obligatory, recommended, permissible, discouraged or forbidden when compared against the known sources of revelation. As such, the shari'ah is a wide umbrella of moral sanctions covering other theoretical possibilities as well as practical exigencies. The shari'ah embraces contradictory juridical decisions and a multiplicity of juridical methods, insisting only that they be based on certain authentic sources and reasoned deduction. This crucial element of flexibility and multiplicity is often lost when the term shari'ah is translated as 'the law of Islam' or even 'Islamic law'. Rather, shari'ah is a broad set of customs authenticated and sanctified by legal decisions. The principles and institutions of legal specialists who make such decisions generally known as *fiqh*, should be understood as 'Islamic law'.

Muslims sought to regain political power through rhetoric justified by this exact 'colonized' shari'ah. This study argues that the study of Anglo-Muhammadan law, which comes up as a topic only in legal and administrative histories of India, needs to be integrated into cultural and religious histories as well.

The precariousness of the East India Company forced it to administer Islamic law. Company officers administered it first as a way to establish legitimacy and disguise their presence, and later as a way to secure co-operation of the ruled and exercise their power more forcefully. They could not help translating both texts and concepts into English practice, remodelling them around English judicial assumptions, yet retaining their Islamic appearance. The process of translation was also one of codification and systematization which separated substantive law from procedural law; in that process Orientalist presumptions and utilitarian ideals entered the dialogue, and South Asian Muslims found themselves at a greater distance from the law which they had formerly implemented. Translation and codification subtly shaped Islamic jurisprudence to fit the needs of a modernizing, centralizing state. It is the needs of this kind of state which ultimately separated Anglo-Muhammadan law from Islamic *fiqh* or even eighteenth-century English common law.

The balance between Anglo and Muhammadan became steadily tilted in an Anglo direction throughout the nineteenth century, reflecting the solidification of a state bureaucracy and establishment of a civil service which administered law. The quotation from John Bruce which heads this paper reveals the general pattern. The translation of Islamic jurisprudence into 'Muhammadan law' preserved it in a new legal system, creating a space for a modern state and British sovereignty. Although the early experience of Anglo-Muhammadan jurisprudence was lost in the law itself, it exerted persistent influence shaping twentieth-century Muslim conception of shari'ah and self-statement, and also shaping twentieth-century scholarly views of the Muslim past. The six sections of this paper will move from the small kernel of the East India Company, through its courts, and into the wider reactions of the Muslims themselves. Sections one and two document the political expansions of the British and their need to appropriate Islamic law. Sections three and four chart the growth of a modern state in India, how it gave rise to British legal ideals and how they modified the practice of Islamic law. Finally, sections five and six illustrate how the institution of Anglo-Muhammadan law projected itself into the past through the 'doctrine of *taqlid*', and how

it persists in the present through the political revivals of nationalist and communalist Muslim leaders.

I. Expansion from Company to Polity

> The delightful region of Bengal was cheered by the rays of Government of the Nawab Governor-General, Mr. Warren Hastings . . . [who desired] that the care and protection of the country and administration of public affairs would be placed on such a footing, that the community, being sheltered from the scorching heat of the sun of violence and tyranny, might find the gates closed against injustice and oppression.—introductory address of the composers of the Persian version of the *Hedaya*[4]

During the last thirty years of the eighteenth century, two simultaneous changes took place among the British in India. The Parliament in London asserted its control over the East India Company, forcing a mercantile company to transform into a government administration. At the same time, the 'home office' in Calcutta systematized relations between different local powers and tried to identify and buttress a 'traditional India' which could serve as the foundation for a colonial state.[5]

Before 1757, the Company had relied on both local authorities and local custom to settle legal disputes. The Company was interested in trade, and exercised only as little dominion as would insure a steady profit from their business interests.[6] Company officials interfered in judicial proceedings only when trade was threatened. To the early Company, 'rule of law' meant commercial order, and not Law in a systematic, codified, and ordered sense. In 1673, the governor of Bombay, Aungier, established *panchayats* or village councils, and gave them judicial powers to decide 'cases amongst persons of their own castes who agreed to submit the controversies to their arbitration'.[7] In 1694, a Governor of Bombay gave a commission to a qazi 'to be Chief Judge and decider of all difference that may happen in your

[4] Composed by Ghulam Yahya, Mullah Shariatullah, Mullah Taj ud-Din, and Mir Muhammad Hussain in 1791.

[5] C. A. Bayly, *Indian Society and the Making of the British Empire* (Cambridge; Cambridge University Press, 1988), 76.

[6] Asim Kumar Dutta, 'Why did the East India company recognize Hindu and Muslim Law?' in N. R. Ray (ed.), *Western Colonial Policy* (Calcutta: Institute of Historical Studies, 1981), I: 173.

[7] *Panchayats* are local councils of elders who oversee the religious life of a community and often serve as arbitrators. Dutta, 175.

caste—the Moors [Muslims]'. Such multiple and parallel systems of local justice did not bother the English in South Asia, well into the eighteenth century. English judicial process was limited to the forts and factories at Calcutta, Bombay and Madras, and was intended only for royal subjects.[8]

As English merchants grew more actively involved with local politics, moneylending and trade, the facile separation between 'English justice' and 'local justice' became useless. Intermarriage and the employment of Englishmen by the Mughal court also problematized this *ad hoc* style of adjudication.[9] Bayly describes the centers of English trade as 'multi-racial corporate cities in which Indians were justices, members of civic bodies and in which a variety of Mughal officers retained honour'.[10] South Asians not only held respected posts as justices, but also must have been tried in English courts; the new charter granted to the Company in 1753 mentions that Indians could have recourse to their own religious laws rather than adjudication in the company's courts.[11]

In 1757, the East India Company gained military control of Bengal as a result of the battle of Plassey.[12] At first, they saw this victory only in terms of the expansion of trade networks by the Company's 'factories', and increased investment in the Company's army. But in their continuing political manipulations (such as diverting customs money due to the Mughal court into the Company's private treasury) the Company was granted the status of 'Diwan of the Mughal Emperor' in 1765. This was a boon for the British, allowing them to control the collection of tax revenue from the territory of Bengal. However, it was also a burden, for the British were charged with the civil administration of Bengal, including civil courts. For seven years,

[8] Asaf A. A. Fyzee, 'Muhammadan Law in India', *Comparative Studies in Society and History*, 1963: 410. The Charter of the East India Company in 1600 gave the company explicit right to make 'laws, orders, constitutions, ordinances, imprisonments, fines and amerciaments'.

[9] Marshall Hodgeson, *The Venture of Islam* (University of Chicago Press, 1974), 3; 209, documents the frequency of intermarriage and adoption of local custom such as harems among British traders in South Asia in this early period.

[10] Bayly, 70.

[11] This is the first official record of 'native religious law' in British sources.

[12] Since the 1739 invasion of Delhi by Nadir Shah, Bengali Nawabs considered themselves an autonomous administration. They combined the offices of Diwan (treasurer) and Subhadar (governor) which had been kept separate during Mughal ascendancy, but otherwise they followed Mughal administrative patterns and relied on the Mughal heritage for legitimacy. Bayly, 19.

the English did not act out their responsibilities as governors of Diwan, but rather continued to use their new authority to enhance trade advantages.[13]

Engrossed in amassing profits, Company officials took no actions to solve the complicated legal and political problems which had developed due to their presence, up until the Regulations of Warren Hastings. Appointed governor of Fort William in 1772, Hastings decided to act out the role of Diwan.[14] By doing so, he tried to legitimize British power through the forms and titles of Mughal authority; similarly he retained Persian as the administrative language. 'The British were still wary of straying too far from what they considered "traditional" forms',[15] and Hastings became known as 'the Nawab Governor-General'. But Hastings' actions under the umbrella of that title were very unlike a Mughal ruler's. He authorized Company officers to spread into the hinterland of Bengal as revenue collectors. He also ordered English officers to supervise directly the settlement of disputes. In the 1772 Regulations, Hastings stated the basis for arbitration between Indians: officers would apply 'the law' of Hindus and Muslims to matters of inheritance, marriage, caste and religious institutions.

> Their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans [Muslims] by the laws and usages of the Mahomedans, and in the case of Gentoos [Hindus] by the laws and usages of Gentoos, and where one only of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant.[16]

The wording of these Regulations seems to preserve the law of different communities, yet it subtly introduces a new legal fulcrum, around which the ancient indigenous laws would have to pivot. This is a new *lex loci*, namely the experience and presuppositions of the officers of

[13] At this time the specie flow from Britain to Bengal ceased. The Company used revenue collected under the Diwan of Bengal in order to support trade exports to Britain, which had been failing since the early eighteenth century. Bayly, 53.

[14] In his own words, he would 'stand forth as Diwan'. G. C. Kozlowshi, *Muslim Endowments and Society in British India* (Cambridge University Press, 1985), 1985, 106.

[15] *Ibid*., 107.

[16] Warren Hastings, *Mufassal Regulations*, 1772 (formally enacted as the *Regulations* of 1780). Fyzee, 412. The 1780 version was specified to read 'the laws of the Koran with respect to the Mahomedans, and those of the Shaster with respect to the Gentoos . . .' Bhatia, *Political, Legal and Military History of India* (New Delhi: Deep and Deep Publications, 1986), 8; 157.

the Company who had been trained as civil servants.[17] In Hastings' new courts, British officers would oversee the workings of qazis and pandits; they retained the right to interfere and override, but seldom chose to do so, at least at first. Yet gradually British judges understood that they were empowered to apply Islamic law to Muslims. It is this very situation that allows R. K. Wilson to define Anglo-Muhammadan law as the endeavor by British magistrates to 'ascertain and administer Islamic law' to Indian subjects. This endeavor gave rise to an unprecedented political, legal and cultural situation.

Islamic polities had traditionally left each non-Muslim community to administer its own law to its own members through its own specialists as long as the community maintained certain limits on public religious practices and offered up financial compensation in taxes. The Mughal polity never took up as a state project to administer a community's laws to that community as superior to the native legal authorities. Yet in eighteenth-century Bengal, the English found themselves applying Muslim law to Muslim subjects of a no-longer Muslim polity. This situation arose partly due to the accidental repercussions of their financial profiteering in the matter of collecting taxes, and partly out of a cultural adventurousness and presumptuousness that the English could fairly administer any law, probably better than the very community whose laws they were. Just after offering the above definition, R. K. Wilson admits the historical and civilizational anomaly of this presumption of power: he describes Anglo-Muhammadan jurisprudence as 'the special law, administered as Muhammadan to Indian Muhammadans' which has become over time very different from 'pure Muhammadan law' as administered by Muslims for Muslims in other Muslim states.[18]

Under the pretence of continuing Mughal institutions, the British reordered both legal and political structures. This contrasts starkly with the other contemporaneous Indian polities which broke with the Mughal empire, such as the Marathas and the Sikhs. These other Indian polities continued to gain formal legitimacy from the Mughal emperor, organized police and taxation along Mughal patterns, and

[17] The way *lex loci* is used here shifts the term from a legalistic meaning into a social science perspective. Lex loci refers to the law of a certain place, assuming that a law will be applied depending on where the conflict occurred, and assuming only one system of law per land. However in colonial India, places were juxtaposed, and British experience steadily displaced Mughal custom as the primary lex loci.

[18] Roland Knyvet Wilson, *Anglo-Muhammadan Law: a digest*. (fourth edition London: W. Thacker and Co, 1912; first edition published in 1895), 50.

even continued to patronize important Muslim shrines.[19] Although they attained autonomy, they continued the Mughal administrative project. The British, however, did not allow this style of legal or political administration to simply persist. During the governorship of Warren Hastings, his overriding concern for order and bureaucracy was tempered with the need for Mughal legitimacy. For instance, Hastings desired that British magistrates could interfere with indigenous courts in order to 'supply the deficiencies and correct the irregularities' in Islamic sentencing. Yet he justified this interference on the grounds of *siyasa*, the political right of Mughal rulers to side-step the formal procedures of Islamic fiqh.[20]

The two sources of legitimacy, Mughal and English, could not remain balanced for long. After 1784, the Company created a civil service, consisting of professionals to staff the growing bureaucracy. Hastings also established educational institutions in which to train such servants, both Indian and English.[21] The teachers at these educational institutions were the first generation of Orientalists, and their primary project was to compile and translate indigenous Law Codes for use by British officers.

By 1790, the Company had militarily conquered the whole of Bengal, assuming the right of Nizamat (executive powers and control of criminal courts) as well as the right of Diwan.[22] Nizamat was never

[19] Bayly, 22.

[20] *Siyasa* is the concept which ordered law, state, and social interaction in Mughal South Asia. Such an ever-present social ethos is bound to be slippery to conceptualize. Siyasa is commonly translated from Arabic, Persian and Urdu as 'politics', but such a simple equation is misleading. Siyasa is more specifically a method of negotiation, of finding resolution to a problem through manipulating or mobilizing relationships between people or groups. Siyasa is more a type of procedural justice, an ethos, rather than a system of politics. Al-Azmeh argues that siyasa is the *modus operandi* of power that is presupposed, rather than the field of contesting power, as commonly understood as 'politics'. He analyses the term siyasa as it takes shape in classical political texts of the 'mirrors for princes' genre, such as those by Mawardi and Abu Ya'la, and extends the concept of siyasa even farther into the past than the medieval period which it supposedly typifies. He portrays siyasa as a necessary element in the very genesis of shari'ah as a religious ideal, as reflected in the writings of Ibn Muqaffa' in the early Abbasid period. Aziz al-Azmeh, *Islams and Modernisms* (New York: Verso Press, 1993), 91. Thus by citing 'siyasa' as the ruler's right to intervene in juridical affairs, Hastings actually began the long process of erasing the siyasa of Islamic law which allowed its multi-centered practice and its flexible application.

[21] Examples include the Calcutta Madrassa, established in 1781 by Nathaniel Brassey Halhead. See Bayly, 76.

[22] There existed two parallel court structures in British India: the Company courts staffed by officers of the East India Company, and the Presidency courts

officially conferred on the English; they simply assumed it and broke with the practice of justifying their presence through Mughal grants.[23] They debated the legality of this acquisition with reference to the Company's Charter through Parliament, rather than to relations with the Mughal court; this is direct evidence of a new *lex loci* in play. Governor Cornwallis acted on the assumption of British Nizamat and established criminal courts, over which British magistrates presided. In contrast to the civil courts, British criminal magistrates took much wider powers to encourage prosecution and punishment, for they perceived a 'law and order' crisis.[24] In the criminal courts, indigenous jurists were relegated to the role of 'court officer' who assisted the magistrate, if he asked for assistance. This pattern dominated the criminal courts, and slowly became status quo for civil courts as well.

The pattern was to remove 'native agency' and set up a government and judiciary system which was increasingly separate from the Asian population. Cornwallis

> sought to remove Indians from all but minor offices, to remove Company servants from the corruption of 'dubashism' and to demote the people of mixed race who had hitherto been an underpinning of European power in the Orient.[25]

The language of Company regulations reflects the movement of British magistrates from a position of co-operator to supervisor, and from supervisor to superior. In addition to strictly administering indigenous Law Codes, judges were increasingly advised to appeal to some notion of 'natural law'. The most common formula was to act 'according to justice, equity, and good conscience'.

which were administered directly by British government representatives in Calcutta, Bombay, and Madras. This paper focuses mainly on the Company courts because through the conquest of Bengal, the Company courts expanded their jurisdiction to the whole of Bengal, Bihar and Orissa, and from there to most of India (while the Presidency courts' jurisdiction was limited to the three principal cities). In 1864, the two systems were combined on the pattern set by the Company courts, and the Presidency courts were disbanded.

[23] Fisch, *Cheap Lives and Dear Limbs: the British Transformation of the Bengal Criminal Law*, (Wiesbaden: Franz Steiner Verlag, 1983), 4.

[24] Ironically, the cause of this 'law and order' crisis is precisely the establishment of a colonial state. The distance between ruling power and local population encouraged criminal activity, for the political-judicial structure was just a façade which did not represent real power. The instability caused by the British redefinition of land-ownership also heightened criminal activity. Fisch, 32.

[25] Bayly, 78.

Even Fyzee (a genuine admirer of Anglo-Muhammadan Law) admits that the meaning of this formula is not defined with precision but came to mean British notions of 'justice and right', as understood by British jurists.[26] In the guise of preserving Islamic law, this phrase opened the floodgate to conceptual invasion by English presuppositions and utilitarian ideals. Very few jurists supported the wholesale technical application of English laws in Asian situations; the process was far more complicated. English assumptions and legal concepts, rather than English rules, framed the technical vocabulary of Islamic law and guided how rules were applied, thereby reshaping Islamic law itself. In fact, by the close of the eighteenth century, we cannot really call Indian law 'Islamic'. Rather the hybrid and oxymoronic term 'Anglo-Muhammadan' is more accurate. Fyzee offers a useful working definition of the Anglo-Muhammadan system: 'that portion of the law of Islam, which is received in India, and which is affected both by the changing social conditions prevailing in the country and by the principles of English law and equity'.[27] The hybrid term 'Anglo-Muhammadan' captures both the Orientalized limitation imposed on Islamic law, and its gradual buttressing by Anglo legal concepts.

II. The Necessity of Deceptive Deference to Islamic Norms

Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life . . . which they severally hold sacred . . . and which they must have considered as imposed on them by a spirit of rigour and intolerance.—Sir William Jones[28]

I have never seen any European whom I thought competent, from his knowledge of the language and the people, to ascertain the value of evidence given before him.—Thomas Munro[29]

[26] Fyzee, 412.

[27] Fyzee, 413. The definition is useful, if separated from Fyzee's own biases. He claims that the label 'Muhammadan law' is apt and we may disregard those who speak of 'Islamic law' as purists; in dealing with colonial uses of 'Islamic' law, Fyzee is ironically correct. However, he also adds to the end of his definition that Anglo legal concepts are only applied to Muhammadan law 'so far as they conduce to justice'. This point is highly debatable, especially in the light of recent historical work by Kozlowski and Fisch.

[28] Sir William Jones, Letter to the Governor-General and Council of Bengal, March 19, 1788. As quoted in William H. Morley, *The Administration of Justice in British India: its past history and present state* (London: Williams and Northgate, 1858), 193.

[29] G. R. Gleig, *The Life of Major-General Sir Thomas Munro* (London: 1830) as quoted in Rudolph and Rudolph, *The Modernity of Tradition: political development in India* (Chicago: University of Chicago Press, 1967), 260.

The British preserved indigenous law because their early colonial state was in a precarious position. For revenue, they relied on the co-operation of zamindars, a class of large landowners.[30] Although in practice the British changed the Mughal policy of land-ownership, on the surface they had to appear legitimate like other Mughal-derived states, by using Mughal titles. This legitimacy was essential to ward off insurgency and resistance. By saying that Muslims were 'governed' by Islamic law, the British literally erased the fact that they had displaced Mughal suzerainty. In reality the British 'governed' Muslims (and Hindus) in India; however, they created a rhetorical continuity which legalized British supremacy. To blur the distinction between Mughal and British rule, the British presumed that they could administer Islamic law as easily as Mughals, if not more justly. Fyzee repeats this presumption by stating that the Mughals first instituted the policy of state-administered religious law codes and suggesting that the British were following established norms.[31] Despite its rhetoric, the Company was not the same sort of state as the Mughal powers it displaced. 'The range of the Company state, its monopoly of physical force, and its capacity to command resources from a peasantry now increasingly disarmed, set it apart even in its early days from all the regimes which had preceded it.'[32] The reforms of law and of property are major fields in which the new state exercised its power. The two reforms are interwoven, for the law defines and enforces property.

British courts did not operate separately from the political economy of the expanding colonial state. This economy consisted in the collecting of taxes from private landowners, whom the Company had recently established; the power of this system was that if landowners did not collect taxes, their land could be easily liquidated or indebted. Under Mughal administration, access to the royal court had defined wealth and status. Assets were characteristically collective and fixed: land was inalienably vested in families or lineages and was transferable only by inheritance within the blood line. However the British administration made possible the private ownership of land and insured its conversion into capital. 'British administration created an innovative connection between land-ownership and tax collection—if a zamindar under the British failed to collect the

[30] After the British commodified property, the zamindar class consisted of both Muslim and Hindu families.

[31] Fyzee, 403. He ignores the fact that although the Mughals recognized Hindu jurists, they never coopted the practice of Hindu adjudication.

[32] Bayly, 108.

amount of tax demanded, his land might be seized and auctioned to the highest bidder.'[33] Under British patronage, land-ownership became mobile, alienable by individuals as well as families through commercial transactions or through wills.[34]

Retaining indigenous 'law codes' allowed the British to control these changes in property ownership. British jurisprudence played one code off the other in order to carve out the exclusive right of British officers to adjudicate conflicts over property. The Bengal Regulations of 1832 provide a good example of this use of indigenous law.

> In any civil suits, the parties to such suits may be of different persuasions . . . the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for operation of such laws, they 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 law . . . or the application to such cases of any rules not sanctioned by those principles.[35]

British concepts and personnel are the new focus for law-making in all conflicts between religious groups, especially in those conflicts over property.[36] The very paragraph which introduces this new fulcrum obscures it, for the Regulation states that no new law or method of application is being introduced. 'Justice, equity and good conscience' are ciphers for English jurisprudence that operated behind the formal façade of the law's religious origins.

The rise of *waqf* grants among wealthy Muslim families in colonial India demonstrates the effectiveness of this engineering of property ownership. A waqf (plural *awqaf*) grant is an endowment of land established by wealthy families to support religious, charitable, or educational institutions; revenue from waqf land can also pass to heirs of the waqif (grantee), a process with circumvents normal rules for inheritance.[37] As land became a liquid commodity, and an

[33] Bayly notes that these two types of property, tax collection and control of land, were always kept separate in Mughal administration. Bayly, 66.

[34] Rudolph and Rudolph, 279.

[35] Bengal Regulations of 1832 as reproduced in Bhatia, 157.

[36] The transfer of land from Muslim to Hindu was an effect of capitalizing land-ownership. Sometimes wealthy Muslim families could buy out Hindus who failed to collect the required taxes, but the predominant trend was the former.

[37] These standard rules are derived from direct and clear Qur'anic injunctions (ahkam qat'iyyah). Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1991), 21.

unstable one since it was tied to tax collecting responsibilities, wealthy families searched for alternative ways to secure their family wealth in land. A British officer in 1870 wrote that in retrospect,

> The greatest wrong which we did to the Mussalman aristocracy was in defining their rights [that private ownership equals taxation responsibility]. Up to that period their title had not been permanent, but neither had it been fixed . . . we gave them their tenures in perpetuity; but in doing so, we rendered them inelastic.[38]

Many families tried to find both flexibility and permanency by converting their land into awqaf; this would support their family in perpetuity and avoid the British institution of private property and the state control it represented. The beneficiaries of a waqf own the produce of the land, rather than the land itself; therefore awqaf, by their very nature, opposed British jurisprudence and its politico-economic goals.[39]

Ignorance of language and custom was another reason for the British to preserve Islamic law in Bengal. They understood that qazis, and other local authorities, were instrumental in keeping the peace, and that English judges were not recognized at the local level as equivalent authorities. The language barrier made even determining facts in a case problematic, for although texts were accessible through scholarly translation, spoken witness was not. Because their language and experience were so removed from the local population, English magistrates had a difficult time separating verifiable witnesses from false ones. To compensate for this weakness, they administered a special punishment for perjury: branding the forehead.[40] At least through the end of the eighteenth century, qazis acted as essential filters, through whom the British could understand the facts of a case.[41]

III. Translation and Codification

From the labours of a people, however intelligent, whose studies have been confined to the narrow circle of their own religion . . . and whose discussions

[38] Kozlowski, 37.

[39] Because of this inherent challenge, the legitimacy of awqaf was challenged through the machinery of Anglo-Muhammadan law, as discussed in section five of this study.

[40] Fisch, 53. Branding of a 'perpetual stigma' was in addition to possible corporal punishment and imprisonment. The amendment enacting these measures was included in Regulation 17, 1797.

[41] This task of the court officer was especially important in a system which did not sanction independent lawyers for representation.

in the search of truth have wanted that lively aid which it can only derive from the free exertion of the understanding, and an opposition of opinions, a perfect system of jurisprudence cannot be expected.—Warren Hastings[42]

As legal texts were translated, Company officials assumed more control over the actions of local qazis. Translations gave them tools with which to question the legitimacy of qazis' decisions, and gave them de facto authority to restructure the conception of law. This process of creating a new system of law for Bengal embodied many Orientalist dynamics. British scrutiny of Islamic law consisted of a two-fold dynamic: first, the British assumed that law exists in a formal code which they could administer, and second, if such a code did not exist, they assumed the right to alter legal practices in order to form one. Through this dynamic, the British jurists translated Islamic law's 'substantial rationality' into a more 'formal rationality' which they recognized as a real system of law.

To administer the Diwan, the Company needed a comprehensive ideology through which to rule; therefore its officers turned to law. They assumed that India was inhabited by communities which were ancient and discrete; furthermore, these discrete communities rigidly and ritualistically followed their own law in all matters of social custom, religious duty, and commercial transaction. The Orientalist-educated members of the Company decided that, in 'Shari'ah' and 'Shaster', they had found the necessary codes. However, this decision was no mere capitulation to local custom, because these codes were essentially religious in character.

The Mussalman code has been the standard of judicial determination throughout those countries of India which were subjugated by the Mohammadan princes, and have since remained under their dominion . . . as an invariable principle of all Mussalman governments; namely, a rigid and undeviating adherence to their own Law.[43]

The British further assumed that all Indians acted out of inherent religiosity and orthodoxy, so the codes of religious law were sufficient to adjudicate in all their crises.

There were two distinct types of 'codification' in the actions of the colonial administrators. The first was conceptual and the second was textual. On the conceptual level, the British viewed the whole of Islamic law as a code. They imagined it to have been already com-

[42] Warren Hastings, *Proceedings of the Governor and Council at Fort William, representing the administration of Justice amongst the Natives of Bengal*, 1774, 35.

[43] Hamilton, as quoted in Fyzee, 402.

pletely codified in the remote past and ready to be simply applied. On the textual level, they advocated the project to technically reproduce this 'code' in one comprehensive text that would apply to Muslims as a single, discrete community. The British never achieved codification in the textual sense; although they naively tried, such technical codification is virtually impossible. However, the presupposition that Muslim law is a code underscores the whole endeavor of English judges to understand it and apply it. And their assertion of this conceptual codification totally shaped their approach to Islamic jurisprudence.

At the inception of Anglo-Muhammadan legal process when qazis were attached to the English courts, the colonial government announced the need to publish law codes of Islamic (and Hindu) law, to shift power from the local legal experts into the further control of English experts.

> While immediate relief to perplexed European judges was afforded by attaching learned Maulwis and Pandits to every Court, civil and criminal, whose fatwas were in general to be accepted on all points relating to those respective laws, the policy was announced of compiling as soon as possible English Codes of Muhammadan and 'Gentoo' laws, based on the Arabic and Sanskrit authorities.[44]

The role envisioned for these law codes was to replace the human and untrustworthy authority of native experts, the 'Maulwis and Pandits'. In general, this was the role of a secondary body of texts, the case proceedings, and the role of the first generation of translation-codifications. However, the first generation of texts was instrumental in limiting the purview of the qazi to subordinate his decision to the case-framing of the English magistrates. This dynamic allowed the body of case proceedings to build up into a solid framework of precedent.

Having decided to 'ascertain and administer' Islamic law to South Asian Muslims, British jurists were struck with the perplexing prob-

[44] Wilson, 48. Hindu law was treated by the British in a parallel manner to their treatment of Islamic law. However, the case of Hindu law is slightly simpler, since a Hindu government was not in power as the British usurped political authority in Bengal. Further, Hindu legal sources did not have the patina of systematization that the Islamic sources had. The parallel story of the British codification of Hindu law is fascinating and has been dealt with much more thoroughly than the case of Islamic law. For reference, see especially J. Duncan M. Derrett, *Critique of Modern Hindu Law* (Bombay: N. M. Tripathi, 1970) and Wendy Doniger, 'Rationalizing the Irrational Other: 'Orientalism' and the Laws of Manu' *New Literary History* (vol. 22, 1992).

lem of where and how to ascertain what that law was. They formulated two strategies to address this problem. The first strategy was the naïve assumption that Islamic law was a code of law to be located in an authoritative text. This first strategy gave rise to the project to translate and codify Islamic legal texts. A single code was never forthcoming, but qazis were limited to these texts, giving rise to a court process where qazis were 'native court officials' who supplied 'fatwas' based on these texts. The earliest generation of British Orientalists claimed to simply 'find' the law codes. However, in reality they went to considerable difficulty to create texts that would fill this role. One text, the *Hedaya*, forms the foundation for Anglo-Muhammadan law.[45] Charles Hamilton translated the text at the request of Hastings, after a board of scholars first translated the Arabic into a Persian edition,

> which would answer the double purpose of clearing up the ambiguities of the text, and, by being introduced into practice, of furnishing the native judges of the Courts with a more familiar guide, and a more instructive preceptor, than books written in [Arabic] a language of which few of them have opportunities of attaining a competent knowledge.[46]

From the Persian, Hamilton rendered an English version.[47] Not only were the translations of political and practical use, but in the process of translation itself, contradictions and subtleties were excised from the original text. Although Hamilton scolded Bengali Muslim jurists for not reading the original in Arabic, he lauded them for clarifying the ambiguities of the original. Thus, Hastings did not just find a text. He created one.

The *Hedaya* alone was insufficient as a basis for Anglo-Muhammadan law because it did not discuss the subject of inheritance, a subject which the British deemed necessary in their quest to define property outside of Mughal practice. Therefore William Jones was commissioned to translate the *Sirajiyah*,[48] again through the medium of a Persian translation. This literal translation was 'too

[45] Al-Hedaya was originally compiled by Burhan ad-Din Ali al-Marghinani (died 1196 CE/ 593 Hijri), allegedly from the earlier work the *Mukhtasar* of al-Kuduri (died 1036 CE/ 428 Hijri).

[46] Charles Hamilton, *Hedaya or Guide: a commentary of the Mussalman Laws* (reprint Labore: Popular Press, 1957), Preliminary Discourse, xliv.

[47] The Persian version was published separately in 1807.

[48] Originally written as *Fara'id as-Sujawandi* by Siraj ad-Din Muhammad Ben 'Abd ar-Rashid as-Sujawandi (died 1411 CE/814 Hijri). The English translation was first published in 1829.

obtuse' for use in courts, and was superseded by Neil Baillie's treatise on the system of inheritance which he wrote in English.[49]

British magistrates had very little patience for translations which followed the original too closely and did not 'render a very intricate subject perfectly intelligible'. They looked instead for a 'well digested Code of Laws'.[50]

> The only way of avoiding quibbles, chicanery and the evils arising from misplaced and selfish ingenuity is to make the law which is to be administered so clear, short, precise, and comprehensive, as to leave the least possible scope for the exercise of those unamiable qualities.[51]

In fact, magistrates had little patience for cross-referencing texts at all. As Morley admits, after documenting the titles of influential legal texts for sixty-five pages, 'It is only a few of these that are quoted in the Courts; the *Hedaya* and its commentaries, illustrated by the books of Fatawa, generally sufficing to satisfy the Judges, and to offer sufficient grounds on which to base a decision.'[52] Sparked by the prominence of Orientalist scholars in their ranks, the early leadership of the Company felt an enthusiasm for these texts, and admired indigenous laws as sophisticated and comprehensive. However, they mistook a limited portion of the juridical resources of each community to be the entire, immutable code. And then through practice, they forged this mistake into a reality.[53] In this way the British colonial authorities created very new legal texts under the guise of simply 'translating' the books already codified by Muslim jurists.

However, these texts were insufficient and did not add up to a code as envisioned at the outset. Magistrates and administrators

[49] Neil Baillie, *The Moohummudan Law of Inheritance according to Aboo Huneefa and his Followers* (Calcutta, 1832). As quoted in Morley, 305.

[50] Warren Hastings, *Proceedings of the Governor and Council at Fort William*, 33.

[51] James Stephen, as quoted in Anil Chandra Banerjee, *English Law in India* (New Delhi: Abbinav Publications, 1984), 160.

[52] Morley, 294. And Morley is one of the most knowledgeable about Arabic sources to write on the subject of Anglo-Muhammadan law.

[53] The development of English canonical texts of the Hindu 'Dharmashaster', published by Nathaniel Brassey Halhead, shows a parallel (if not more dramatic) development. First, a code had to be written out in Sanskrit by a elite group of Brahmins, whose interpretation was only one out of many local varieties. Secondly, a translation was made into Persian, and from that into English, published in 1774 as *A Code of Gentoo Laws*. English practitioners, among them William Jones, were grateful to see that the section on Inheritance was 'copious and exact', and that the section on Contracts was discussed 'very succinctly and superficially'. The digests of Colebrooke and Duncan were likewise based on oral testimony of Brahmins in a single city, Nadia and Benaras respectively.

thus evolved a second strategy in order to achieve a manner of codification. This strategy was more subtle and, in the words of R. K. Wilson, 'more characteristically British'.[54] It was to record and publish the decisions of these Anglo-Muhammadan courts in case-books of court proceedings.[55] The first of these books was published in 1825 by Macnaghten as *Principles and Precedents of Muhammadan Law*. In contrast to the idea that codifications would announce the principle simply 'found' in Muslim texts, this type of legal book sought to publish precedents of how Islamic decisions were applied by English courts. Islamic law had previously been free from binding precedent. However, in its Anglo-Muhammadan form, the qazi's decisions were increasingly bound by precedent. And this procedure brought uniformity to decisions that 'indigenous codes of law' could never supply.

The Orientalists' assembly of these texts translated the words of fiqh into a new language, but also transposed a 'substantively rational' legal system into a 'formally rational' one. These abstract descriptive terms are borrowed from Max Weber (who used them in a more prescriptive way than they will be used here). Traditionally, shari'ah is substantively rational because the law is found: individual rulings are extracted from a sacred source. Shari'ah has a set source and a single telos, both unified by religious belief. This source and telos encapsulate and unite all the conflicting and divergent opinions extracted by traditional Islamic jurists through the legitimate operations of *usul al-fiqh*.[56] 'Islamic law, as the law of jurists, has been in its formative and later periods an eclectic body of rulings, responding to its immediate social context . . . the rationality of the Shari'ah was substantive rather than formal.'[57] In contrast, formally rational laws are based on abstract rules of jurisprudence, without referring to extra-legal sources to give these rules justification or form.[58] In form-

[54] Wilson, 48.

[55] By 1843, the proceedings of the Sadr Diwani Adalats (Chief Civil Courts) of Calcutta and Agra were being published monthly. In the reforms of the 1860s, court reporters were regularly attached to all courts.

[56] From this viewpoint, it becomes especially critical to translate the four (or more) legal methods *[madhhab]* as methodologies rather than discrete 'schools' or 'sects'. Varying methodologies can arrive at contradictory opinions, yet still share a single source, a single goal, and a single religious justification. *Usul al-fiqh* refers to the rational principles of deducing the law from scriptural sources, as opposed to the content of those decisions themselves, which are termed *furu'*, or specific results of the principles applied to a case.

[57] Bryan Turner, *Weber and Islam: a critical study* (London: Routledge and Kegan Paul, 1974), 119.

[58] Turner, 109 as quoted from Weber, *Economy and Society*, 2: 657.

ally rational law, there can be only one way of enacting the law in the present, but there can be many sources for the law, such as precedent from past cases, custom, natural law or reason. Formal rationality allows the jurist to dispense with a transcendent source or a teleological justification for decisions.

These typologies are useful, but the historical situation is far more confusing than the typologies will admit. Despite Weber's classification of Islamic law as 'substantively irrational', English and Mughal court structures had much in common.[59] In fact they resembled each other more than they resembled Anglo-Muhammadan courts. During the last half of the eighteenth century, the practice of law in England was not yet modernized and centralized. Although it became gradually more professional, this process was not fully complete by the time the British had begun to experiment with jurisprudence in India.

> Common law was still a separate legal entity administered in its own courts. Well into the nineteenth century, equity, admiralty and ecclesiastical laws maintained different establishments. But the movement toward greater centralization was well under way. Therefore, in creating specific jurisdiction for Indian courts, in gradually increasing the educational requirements of legal practitioners and in seeking to collect definite codes of Muslim or Hindu law, British officials had a model in the experience of their own society.[60]

In this passage, Kozlowski paints a contradictory picture. In Britain, the solidification of royal power centralized law very slowly, and never erased the jurisdictions of ecclesiastical or admiralty courts. Yet even as these multiple courts persisted, there was a tremendous generational shift and leaders in the new generation gave centralization a new impetus, and a markedly modern character.

[59] Islamic law was far more rationalized than Weber assessed. Although Weber did not recognize it as rationalized at all, the Islamic law is actually a 'substantively rational system' under his own schema of typologies. It thus bears direct comparison with other rationalized systems. It is probable that Weber was blinded to this fact by orientalist depictions of Islamic judges and their 'arbitrary' decisions. These orientalist images of arbitrary decision-making were part of a whole network of iamges that orientalists used to describe Islamic societies as riddled with tyranny, irrationality, and abuse of power. Clearly, these images originated in the colonial expansion of Western powers, and Weber's writings are enmeshed in this orientalist project. In an attempt to explain the power of Western expansion, Weber had argued that the formal rationalization of English law led to the development of a capital-centered economy. In reality, England's economy developed in capitalist decisions before law was systematized—one could argue that the demands of capital ownership fueled changes in jurisprudence, rather than the converse.

[60] Kozlowski, 127.

This 'astonishing generation', as Hodgeson labels them,[61] witnessed the French and American Revolutions, the widespread use of steam power, and the establishment of European hegemony on a world-wide scale. Defensive reactions against the French Revolution spurred their proclivity for rational thinking and social engineering. One must not be fooled into assuming from the lofty and confident tone of British administrators in India that England already possessed a rational, orderly, egalitarian, and effective system of law, which trained them to be decent arbiters in any locale. One generation earlier, Company agents like English jurists, were used to multiple, localized systems of judicial administration.[62] Rather, the British institution of Common Law in its modern form was taking shape at exactly the same time as the East India Company's hegemony in India. For example, in England chairs of law were only appointed in Oxford and Cambridge in the 1780s.[63] However, English professors were more interested in their London practices than in formulating legal theory or training students. Not until the reforms of 1850 were lectureships and examinations required at the Inns of Court. Until then, the Colleges in India were considered more rigorous and systematic in legal education than those in England.

In both places, a centralized state provided the impetus toward formalized law; the state's main task is legislation, the conscious endeavor to change and model the surrounding society through a bureaucracy in order to increase technical efficiency.

> The very institution of a legislature—an assembly whose explicit task it was not simply to grant taxes, nor even just to appoint administrators and decide on current policy . . . but to meet regularly to change the laws—reflected the degree to which conscious innovation lay at the heart of the new social order. [In previous governing institutions] the laws were in fact sometimes changed . . . but the whole purpose of social institutions was to obviate or at least minimize such change.[64]

In fact, the Company officers had an easier time than their colleagues in England. They exercised legislative powers (which they only gradually identified as such) without the cumbersome machinery of an assembly which represented the surrounding, poten-

[61] Hodgeson, 205.
[62] In England this took the form of a dual jurisdiction between the King's courts and ecclesiastical courts; religion and civil orders did not have to be systematized through hierarchy. Dutta, 178.
[63] Kozlowski, 120.
[64] Hodgeson, 193.

tially resistant forces of other social-religious institutions. The reformers of this generation were more successful in Bengal than in England.

There were two major legal philosophies in circulation at this time. The Whig position conceived of law as built on accumulated experience, with an aim to promote private rights in property, especially land, in order to prevent encroachment by the state. The Utilitarian position, advocated by Mill and Bentham, denounced experience piled on top of experience as 'groping blindly in the dark'. Instead they demanded a systematized, hierarchical legal structure. Utility-minded reformers criticized both English and Indian systems of jurisprudence, but were more able to formalize codes of law in India, where power was already in the hands of a few, and arbitrary government could overpower opposition. Although Whigs and Utilitarians were in conflict in England, these philosophies were freer to overlap in South Asia; the same series of Regulations by the colonial state established private property in land *and* rationalized the administrative system.

Concepts outside of legal philosophy also shaped the opinions of this generation of Company officials. India appeared to them as an administrative *tabula rasa*, and their presence seemed a great experiment in implementing utility and order. Beginning with the governorship of Hastings, bureaucratic order imposed the 'rule of law' both within the company and projected it outward into the surrounding colonized society. ' "The Rule of Law" in the place of the "Rule of Men" is the constantly repeated ideal of British law; an ideal which the British considered fit for export to India.'[65] The shift of emphasis from 'men' to 'law' was fuelled by the creation of institutional courts which were unrelated to the local society over which they ruled, unswayed by local conflicts and uninformed by local conditions. This dynamic was a great change from the earlier laissez faire attitude of English merchants in India.[66]

As a contemporary observer, one must not imagine that the Company reformers were building a 'new' England in India. Many Com-

[65] Kozlowski, 111.

[66] The trial of Hastings presents a fascinating illustration of the new concern for Order. Hastings was trapped between opposing forces on this issue. Local British in Bengal resented his reforms which sought to rationalize the company's bureaucracy and spread that order into the surrounding society; some of his fellow officers in the Company brought him to trial from 1788 to 1795. British opinion in England, however, attacked Hastings for personal arbitrariness and tyrannical control over company resources.

pany leaders were frustrated by English law, and deemed it unjust to impose such a morass of rules 'over their colonial subjects'. Rather, their aims were more utopian; they desired to build a centralized state the likes of which existed in neither India nor the British Isles. The authors of the Regulations perceived

> the necessity of investing the mufassil [local district] courts with their residual jurisdiction, of making them subject to a system of law which, while not being English law, provided a fair standard which the Supreme Court could apply to them, giving them at once protection, security, and a measure of subjection to control.[67]

Such a hierarchical reform of court structure would have been impossible in England at that time. However, colonial political power, cultural separation, and Orientalist assumptions allowed them to execute arbitrary changes with little sympathy for resistance. In the minds of the reformers, 'India' would be a mirror of England: India constituted the nemesis of English rationality, yet it was also the arena in which this new class of civil servants could fulfill its urge toward centralization and order.

A description of the project to rationally order society is not an explanation of such a project's origins. Weber tried to trace these origins by arguing that Europe's development of a formally rational legal system was integral to the development of capitalist economics.[68] The converse of his argument is that Islamic law is not rationalized and therefore impeded similar developments.

> The sacred books of the Hindus, Muslims, Parsees, and Jews . . . treat legal prescriptions in exactly the same manner that they treat ceremonial and ritual norms. All law is sacred law. The dominance of law that has been stereotyped by religion constitutes one of the most significant limitations on the rationalization of the economy.[69]

In this passage Weber draws a causal link between religion and the systemization of law and economy, through the medium of 'religious

[67] J. Duncan M. Derrett, *Religion, Law, and the State in India* (London, 1968), 138.

[68] In Weber's view, the reform of law also depended on an inner-worldly asceticism. 'An unbroken unity integrating in systematic fashion an ethic of vocation in the world with assurance of religious salvation was the unique creation of ascetic Protestantism alone . . . This inner-worldly asceticism had a number of distinct consequences . . . an alert, rationally controlled patterning of life . . . the clear and uniform goal of this asceticism was the disciplining and methodical organization of the whole pattern of life . . . its unique result was the rational organization and institutionalization of social relationships'. Max Weber, *Sociology of Religion*, 183.

[69] Weber, 208.

ethic', or the religious person's theoretical attitude toward the world. This passage claims that all religions based on 'stereotyped' systems, rather than on internal religious faith, provide no ethic, meaning no interface with the surrounding fields of economy, law or politics. Weber asserted that a sacred law like Islamic law

> results in the unmediated juxtaposition of the stereotypes' absolute unalterableness with the extraordinary capriciousness and utter unpredictability of the same stereotypes' validity in any particular application. Thus in dealing with the Islamic Shari'ah it is virtually impossible to assert what is the practice today in regard to any particular matter [because] all sacred laws and ethical injunctions have a formal ritualistic and casuistic character.[70]

Weber's argument does not hold up if set in the context of Mughal administration of Islamic law. Fisch documents how the Mughals administered a substantively rational system of law. Their key innovation was the distinction between extraordinary justice and ordinary justice.[71] Day-to-day affairs were guided by custom and government procedure; however, for certain offences, the shari'ah was invoked to guide decisions. This duality is illustrated by the two types of punishments, *hadd* and *ta'zir*: the first is required by scripture, while the second is discretionary depending on the qazi and government policy. Shari'ah was not limited to theory. It was applied to practice, but in a system consisting of two coexisting types of law. Most importantly, this dual system allowed room for the jurists to continually address new situations according to the practice of fiqh. The mufti was allowed to continue the project of fiqh, to search for religiously appropriate modes of behavior, rather than being limited to the application of formal rules to crimes or conflicts.[72]

Codification was therefore a very complicated process. The early work in translation failed to produce the desired results. However, by subtly restricting the native judges, these translated works on Islamic law allowed the Anglo-Muhammadan courts to build up a thick bulwark of precedent. This eventually led to a more uniform

[70] *Ibid*.

[71] On this crucial point, Fisch follows the schema of Tyan and contradicts the schema of Schacht, which separates *shari'ah* as theory from *Siyasa* as practice. Emile Tyan, *Histoire de l'Organisation Judiciare en pays d'Islam* (Leyden, 1960), 446–51, and Joseph Schacht, *An Introduction to Islamic Law*. (Oxford: Oxford University Press, 1964), 69.

[72] Although Muslim jurists did insist on applying exactly the few rules (the *hudud*) stated in the Qur'an, most of their time and energy was devoted to translating the ethical guidance of Qur'an and example of the Prophet into behavioral norms.

pplication of decisions which were enforced under the illusion of being the natural decisions of 'Islamic Law'. These courts instituted a practical codification even when formal textual codes were impossible to produce. The results of such subtle legal innovations were far ranging.

IV. Ramifications of Mughal Laws, Natural Law and a Modern Legal System

Justice, equity and good conscience . . . Practically speaking these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text books.—J. F. Stephen[73]

The formal rationality imposed by British expectations and needs could not exist in such a dual system. The theoretical shift from a substantially rational to a formally rational ideology of law wrought great changes in the local courts. Dividing substantive law from procedural law provided the means of creating a formally rational system. The indigenous codes provided the substance of the law, and the British state provided the procedure which administered this substance. Despite the Company's early rhetoric, the British did not simply step into the enforcing role vacated by the Mughal-patterned Bengali Nawabs. The procedure through which the shari'ah was implemented subtly enframed and reshaped the content of Islamic jurisprudence. A system of law cannot be divided between substance and procedure and retain its former character and use.

English jurists justified changes to procedural law through the 'doctrine of siyasa'[74] and through legal sources themselves, especially through the phrase 'Justice, Equity and good Conscience'. This phrase was first used in government regulations which encouraged magistrates not to impose the technicalities of English common law, but rather co-operate with qazis to find a culturally appropriate expression of the law. These regulations were nothing more that inter-Company recommendations. However, the phrase took on an active life of its own that swelled its importance. Later Regulations repeated the phrase, and eventually administrators recorded it into

[73] F. C. Stephen, *Law Commission*, 31 March 1871, as quoted in Fyzee, 413.

[74] The concept of siyasa allowed the discretion of the politically dominant group to shape how punishments should be administered. The British claimed that if the Mughals before them had executed siyasa in practice, then the British were justified in altering procedural laws.

a statute from where it passed into common usage in the courts.[75]

The phrase was first used in jurisprudence to describe the procedure judges should follow outside of the Company's scanty positive law directives. 'That in all cases, within the jurisdiction of the Mofussil Dewannee Adaulut [civil courts], for which no specific Directions are hereby given, the respective Judges thereof do act according to Justice, Equity and good Conscience.'[76] This procedure would become relevant especially when English magistrates administered Islamic law, about which the Company's positive law had very little to say. This allowed magistrates recourse to English procedures, even though they were ostensibly administering Islamic law. There was a strong elective affinity between 'justice, equity, and good conscience' and the rule of English procedures in the minds and hearts of British judges.

The phrase was easily reversed to justify English procedures: Derrett explains that the intention 'was that if an English rule was applied, this was to be because it happened to be an expression of justice, equity, and good conscience'.[77] Especially in the nineteenth century, English rules dominated the application of Islamic law. The East India College at Haileybury taught young civil servants English law and the 'principles of universal jurisprudence', but nowhere mentioned that Islamic law was anything but a previously codified system of substantive law. In this way, during the two decades from 1781 to 1800, they enacted the bifurcation of substantive and procedural law.

The Mughal system of procedure became an object of British criticism in order to justify their taking up administrative and punitive authority. At first, they criticized the Mughals for arbitrary and unsystematic application of the shari'ah. Later, they penetrated deeper to accuse Mughal procedure of not following the letter of their own shari'ah. They typified Mughal courts as lenient, careless, and ineffective; if the text spoke of *hudud* punishments, the British could not imagine why they were not always applied.[78] Not only were textual sources given exclusive priority over former practice, but the

[75] Derrett, 142.

[76] *Regulations for the Administration of Justice*, 1781 as quoted in Derrett, 133.

[77] Derrett, 142.

[78] Hudud punishments are those specified in the Qur'an: for theft, highway robbery leading to murder, adultery, and the false accusation of adultery. However, the Prophet Muhammad himself set the precedent for not applying Hudud punishments if there were any social or legal way to avoid their application.

use of selected texts blotted out the relevance of other, perhaps contradictory textual sources. This was both a process of exclusion through ignorance, and through self-conscious effort to make a *system* which would work in an impersonal way, as a system should. The effect of translation and new rules of process 'have been to smooth out discrepancies between [and within] systems of law'.[79] For instance, in translating the *Hedaya*, Hamilton could not understand why Abu Yusuf and Imam Muhammad would give opinions which contradicted their 'master', Abu Hanifa. In order to cope with this 'irregularity' Hamilton suggested the policy of always following the opinions of the students above the opinion of the teacher.[80]

The British translated Islamic texts, but did not understand the policy or philosophy of Islamic legal practice. The Mughal policy of multi-levelled application of textual precedents was not recorded in the texts which the British chose as authoritative.[81] The British ignored the Mughal practice of two parallel procedures—ordinary justice and extraordinary justice. Rather they collapsed all the dimensions of Islamic juridical thought into one monolithic, textual shari'ah which was both apparent to their cognition and useful to their needs. The result was that a conceptual translation followed the simpler linguistic translation of texts.

British judges affected great changes in Islamic law due to their conceptual translation of juridical terminology. An assumption about the nature of law led to a presumption of equivalence between terms. This equivalence was made concrete through a definition which was commodified through publication and teaching.

> Following the supposition of an essential similarity between the two ['shari'ah' and what British judges called 'law'] judges made a series of further terminological connections. They identified the Qur'an, the example (sunnah) of the Prophet and the writings of Muslim religious scholars as the 'sources' of Muhammadan/Muslim law. Scholars of shari'ah [from the eighth and ninth centuries CE] became 'legal authorities', the Muslim counterparts of Coke and Blackstone. Treatises written by these

[79] Fyzee, 150.

[80] This is a self-consciously formulated policy, yet its necessity rested on the arbitrary authority granted to the *Hedaya*. This collection was compiled from the opinions of the students of Abu Hanifa, and therefore often ignored the decisions of the 'master' himself.

[81] In fact, the Mughal procedure was not recorded in written texts or manuals. It would have taken linguistic skill and careful observation from actual practice for the British to perceive its logic.

learned and pious men became 'legal textbooks', their opinions (fatawa) 'precedents'. Qazis, official guardians of the shari^{c}ah appointed by Muslim rulers, became 'judges' and the ulama 'lawyers'. Thus in making their decisions British judges did not approach shari^{c}ah on its own terms.[82]

It was impossible for the British to approach Islamic law 'on its own terms'. Firstly, they were ignorant of fiqh; only through the concrete process of administering the shari'ah did they learn about it at all. Secondly, The British were in direct competition with Mughal legitimacy, meaning that they had to condemn Mughal jurisprudence as disorderly, arbitrary, and cruel in order to justify their own seizure of political authority. Thirdly, the administrators who reshaped Islamic law were those British who also desired to reorder English law; their mind-set was utilitarian, rationalist, and progressive, which gave them a tone of superiority in regarding any legal 'tradition', whether Islamic or English.

British-formulated procedure enframed not only the text, but also the qazis and muftis who constituted the personnel of the new courts. The location of Company courts was fixed to certain official buildings. Their geographic jurisdiction was also fixed and bounded. Each court was set in a hierarchical order, with mofussil courts in the towns under the jurisdiction of superior city courts, which were ultimately crowned by the Supreme Court in Calcutta. 'The government guaranteed the superiority of metropolitan tribunals over local institutions. Thus the Company's organization of the courts and procedure followed more closely the British Isles than it did of Mughal India.'[83] In the Mughal pattern of adjudication, the qazi was not tied to an official building; he could exercise his authority anywhere as long as witnesses were present to insure fair proceedings. The qazi's authority was not clearly differentiated from that of other government officials. Nor was the qazi considered the sole judicial authority; people had other options such as extended family, religious leaders like local religious guides (Pirs), scholars, or village elders. Often the person of the qazi overlapped with these other fields of authority. It is clear that the shari'ah was interpreted and enacted by many

[82] Kozlowski, 97.

[83] Kozlowski, 107. Kozlowski's generalization about a pattern of jurisdiction which differentiated the British Isles from India must be qualified; the process of fixing jurisdictions was proceeding in both societies under the direction of a class of elites which newly ruled both locations. However, he is right that this process marked an indelible change from the Mughal past.

social groups, many of which were outside the government control.

The Company's delineation of jurisdictions sharply narrowed this scope and flexibility. By solidly incorporating the qazis into a bureaucratic structure, they delegitimized other local options for adjudication.[84] By fixing the location of qazis in towns, the Company forced people to travel for hearings, and truncated the qazis' connections to the social context of any dispute. This structure tended to erase differences in local customary law. For example, in 1877, a High Court judge wrote that the goal of the British procedure over the past century was 'gradually to remove the differentiations of customary law, and bring about a certain amount of manageable uniformity [rather than the] enforcement of an overwhelming variety of discordant customs among the lower classes'.[85] A metropolitan-centered standard of justice replaced the variety of local customary approaches to adjudication. The bureaucratic structure of the courts actually altered the substance of 'indigenous law'.

Within the court itself, the qazis were displaced from the role of independent judge to 'judicial officer' who assisted an English magistrate. The magistrate ultimately decided what the 'facts' of the case were; this opened another avenue for the intervention of English legal concepts. This pattern was sealed when the colonial state decided that all courts must be run in English rather than Persian.[86] This decision depended on the growth of a class of *wakils*, lawyers who were trained in English schools and could represent the interests of non-English-speaking litigants; hence qazis were removed even from the role as translators.

The role of the qazi became as limited and bounded as the written texts of shari'ah. The English magistrate would hear the litigants, often through translation, and decide what issue the case centered on, and which facts were pertinent to that issue. He would then hand

[84] Since the establishment of such fixed mofussil courts, the British recorded that the courts were overloaded with cases; this is a result of the delegitimization of local authorities and subsequent narrowing of options in the search for conflict resolution. 'The vexations that accompanied the establishment under British rule of a national legal system [include] expense and delay in the administration of justice, the so-called rise in litigation, and the prevalence of false witness'. Rudolph and Rudolph, 259.

[85] Nelson, *Indian Usage and Judge-Made Law*, 7–8 as cited in Rudolph and Rudolph, 276.

[86] The switch from Persian to English as the official administrative language in Bengal, Bihar and Orissa is 1832. However, the use of English dominates court procedures from an earlier date.

this 'processed' case to the qazi for a decision on which litigant was guilty and what was the proper punishment according to 'Islamic law'. The English assumption was that in juridical actions, one party is guilty, while the other is innocent, meaning that adjudication is a contest which determines winner and loser. This assumption limited the qazi's range of actions. This situation contrasts sharply to the role of the qazi in Mughal administration, in which the qazi enjoyed much wider contact with the local conditions of the dispute, could recommend measures (as well as dictate punishments) and held responsibility for the community's well-being beyond the scope of two litigants.

Through the instrument of a fatwa, the qazi was expected to issue his decision on which litigant was justified by 'Islamic law'. This use of the fatwa constituted a major departure from the fatwa in classical fiqh or Mughal jurisprudence. The Anglo-Muhammadan fatwa determines guilt or innocence in a specific case according to a fixed standard codified in legal hand-books.

> The Muhammadan law was to be regulated by the Fatwa of the law officers, which was directed to be given according to the doctrine of [Abu] Yusuf and [Imam] Muhammad . . . the Judges were enjoined to refer to the translation of the Hedaya by Hamilton . . . as likewise to a tract entitled 'Observations' which then constituted a part of the criminal Code.[87]

The fatwa does not affect the body of law itself—its impact is limited to a singular case presented to the qazi by an English magistrate.

Previously, the shari'ah was built by individual query and jurist's response (or jurists' responses). The goal was to sanction certain behaviors through the written sources of Qur'an and Prophetic Sunnah, in hopes that these behaviors would become normative, shape the surrounding society and uphold religious precepts. In previous systems, the fatwa or 'counselling' was an extension of the law, through the methods of Usul al-Fiqh.[88] The pre-British fatwa was non-binding; an individual could consult any jurist and request a fatwa which sanctioned a particular course of action. Not only were these fatawa non-binding on the inquirer, but they were often

[87] Morley, 186.

[88] The methods of usul al-fiqh were to extend the network of shari'ah sanctions by linking an already acceptable belief or behavior (*'asl* or root) to a new situation under consideration (*far'* or branch). The two cases must share an essential attribute or condition (*'illah*) which was the cause of the original ruling (*hukum*). If these conditions obtain, then the original ruling covers the new case as well, and it is incorporated under the umbrella of shari'ah. See Kamali, 199–200.

detached from specific cases. 'Most of these prophylactic rules were developed by the jurists in their disputations and writings with one another . . . the jurists developed them in disputations solely among themselves or in connection with actual cases, as did the common law.'[89] Muftis and qazis exercised a creative interaction on questions which were free from actual cases. As a result, cases did not build up a hegemonic body of precedents. Fatawa could not forcibly set a precedent, except in the sense that other jurists might appreciate the argument behind a specific fatwa, and reuse that argument in a later analogous query.

Once the British shackled fatawa onto the structure of strict case-law, the fatwa lost its creative function. Under this system, the fatwa no longer expanded the body of what is considered 'law'. British codification fixed the extent of the law itself, and the fatwa only determined guilt or innocence under the rule of that code. Likewise, the Anglo-Muhammadan fatwa was binding on the parties involved unless the magistrate saw fit to intervene. Intervention was usually for the purpose of making punishments harsher, more public, and exemplary, although the Governor-General reserved the right to pardon.[90]

Two cases provide evidence that illustrates this enforced distinction between substantive law and legal procedure. In the case *Abul Fata v. Russomoy Dhur Chowdhury*,[91] British magistrates of the Privy Council overrode the opinion of Justice Amir Ali. The Muslim justice argued that family waqf grants were valid as charitable institutions, as proved by both a long tradition of medieval decisions upholding them, and by hadith reports from the Prophet to the effect that the best charity is supporting one's family and dependants in need. The British magistrates rejected this opinion. They warned that the Muslim judge was returning to the original texts in order to extract a new law. Such an extraction of law from sacred sources was, of course, the traditional method of fiqh, yet it stood as an illegitimate procedure in the Colonial courts. The Privy Council conversely declared family waqf grants to be void. They claimed to have 'endeavored to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in India'. This meant what was

[89] David F. Forte, 'Islamic Law and the Crime of Theft', *Cleveland State Law Review* (vol. 34–35), 66.

[90] Fisch, 44.

[91] *Abul Fata v. Russomoy Dhur Chowdhury* (1894) 22 I.A 76, 86–7; Cases, 388, 395. The decision in this case was penned by Lord Hobhouse.

written down in the books of fatawa that were translated and codified and given ultimate authority in British courts to represent 'Muhammadan law', as disconnected from any juridical procedure of interpreting the text, extending a prior ruling to a new case, which are the basic operations of Islamic law.[92]

This important decision was quoted and explicated by a later decision, in which British magistrates forcefully upheld the principle of preventing Muslim lawyers from expanding the law. Again, the issue centered around Waqf grants. The magistrates overturned the decision of a Muslim Justice Mahmud, whom they accused of extracting a legal decision from sacred texts, an operation which subverted the procedural straitjacket created by colonial courts.[93] The Muslim jurists were to simply apply the laws found in those few texts translated as authoritative by British judges. They were not to engage in interpretation or deduction which the British judges saw as 'dangerous' operations even though these were the natural procedure of Islamic law.

> In *Abul Fata v. Russomoy Dhur Chowdhury* . . . the danger was pointed out of relying upon ancient texts of the Mahomedan law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great, whether reliance be placed upon fresh texts newly brought to light, or upon logical inferences newly drawn from old and undisputed texts. Their Lordships think 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.[94]

These case decisions reveal the limitations placed upon juridical procedure in the Anglo-Muhammadan courts. They show the way that authorized texts were used to curb the interpretative process that was previously integral to Islamic law, changing both the role of the qazi and function of the qazi's decision.

[92] In this decision, the British magistrates' 'best ability to ascertain the law' did not go far to outweigh the economic and financial gains of the government by outlawing family waqf grants which would have taken much property out of private ownership and taxation revenues. Their 'best ability' certainly did not allow them to see beyond their British legal assumption that private was clearly private and public was clearly public, a dichotomy that the institution of waqf manifestly contradicts.

[93] *Baker Ali Khan v. Anjuman Ara Begum* (1903) 30 I.A 94 at 111–12; Cases, 4, 17. The decision in this case was penned by Sir Arthur Wilson, and it overturned the decision of a prior case, *Agha Ali Khan* (14 All. 429 (1892) which was written by Justice Mahmud.

[94] Wilson, 479.

These cases also reveal an even deeper structural change, which supported the bounding of qazi's jurisdiction and the limitation placed on fatawa. The cases talk of furthering 'substantial justice' which is the goal of Anglo-Muhammadan law that demanded the suppression of Mughal legal procedures; at other times, British magistrates expressed the same ideal in terms of 'humanity' or 'natural law'. By using such terms, the colonial state enforced a split between public and private spheres through 'Islamic law', a dichotomy not previously present. They advocated the concept of an individual living in an abstract entity called 'society', the poles of which were mediated by a centralized state. The responsibility of such a state would be to patrol religious or social institutions which are defined as 'public'. Such a dichotomy between public and private affairs seems intuitive to those living in the world shaped by modern European norms such that the importance of such an innovation could be easily overlooked. Their advocating this dichotomy affected religious leaders very early: the qazi was enframed in a state bureau while the mufti was pushed into the role of private citizen with no state recognition or authority. Within the courts, the state first asserted veto rights, then controlled staffing, and then claimed outright authority on its own terms. The state justified its interference through references to reason, natural law, and humanity.

A British notion of 'natural law' or 'humanity' replaced Mughal custom as the vehicle through which shari'ah was administered. 'Humanity' assumed that people acted principally as individuals, rather than as religious or corporate groups; 'natural law' presupposed the existence of society in an abstract sense, which can be disciplined into efficiency and productivity.

> Intervening groups based on personal contacts, such as had stood between the individual and the ultimate government in most agrarianate-level societies, were reduced to relative impotence or replaced by functional groupings based on specialized roles in the new technicalism. The state dealt, to a degree unprecedented in large territorial societies, directly with the individual.[95]

Resting government on 'natural law' means setting up the channels through which individuals can take their place in such a society. The Anglo-Muhammadan courts were one of the chief channels by which the state enacted this vision of society.

In the courts that administered Anglo-Muhammadan law, the state defined the public realm, while all people who entered its arena

[95] Hodgeson, 194.

came as private citizens. In this framework, crime became a violation of the public order and the state assumed the right and responsibility to prosecute and punish.

> Crime in the eyes of the prevailing Muslim law was, generally, a private offence. Punishment had become a public responsibility, but complaint, even in serious cases such as murder, remained the prerogative of the affected family, a private and corporate body . . . In 1792 the British made certain actions, including murder, crimes in the eyes of the state.[96]

The British administered exemplary punishments for the purpose of discouraging other such individuals from the same crime in the future. Magistrates felt that amputation of hands or feet for theft was 'inhuman' because it was cruel to 'the individual' and made the thief a 'burden on society'. 'Mutilation which is too common a sentence of the Mohummudan [*sic*] courts, though it may deter others, yet renders the criminal a burden to the public, and imposes on him the necessity of persevering in the crimes which it was meant to repress.'[97] They discouraged mutilation in favor of hanging in a public square during business hours, which was painless for 'the individual' and instructive 'for society'. The criminal (and the victims' families) were important only as public symbols of deterrence.[98]

In order to establish this system of 'public justice' the magistrates tried to suppress the practice of 'private justice', found most notably in the victim-centered justice of retaliation and pardon (*qisas* and *diyah*). In Mughal jurisprudence informed by fiqh, crime was understood as an affair between two interdependent parties. The Mughal state did not prosecute anyone unless a victim (or their family) came forward with a complaint; at any stage of the trial, the victim could offer a pardon and the parties would be released. If a person murdered their child, this did not constitute two independent parties (for it was intrafamilial) and did not constitute a 'crime' in which the state had any role. It was not the role of the Mughal state to 'repress crime' but rather to see that an aggrieved party has a chance to achieve some retribution.[99]

[96] Rudolph and Rudolph, 282–3.

[97] Harrington, *An Elementary Analysis of the Laws and Regulations* (1807), 1: 302.

[98] The deterrence of highway robbery was so important that Hastings relied on public notoriety, eschewing due process or the need for evidence, to convict a suspected 'dacoit' and transform him or her into a symbol of deterrence. Fisch, 35.

[99] And of course it was in the state's own interest to see that criminals do not obstruct the state administration, military apparatus, or collection of taxes. Yet the Mughal state was not a force in shaping 'shari'ah'. If there was state interference (which there often was) it was in the interest of securing legitimacy from the scholars and jurists (as was the purpose of the Emperor Aurangzeb's collecting and

The British reformed judicial method in order to suppress this conception of 'private' justice, which recognizes the inviolability of extended family, religious identity or social grouping.[100] If the victim expressed a desire to pardon their aggressor, the magistrate would simply filter the facts as if the victim did not desire pardon,[101] since this was not the legitimate role of a victim. Judges used the same procedure if a child was killed by parents—the family relation was simply not recorded in the 'facts' of the case. The substance of the law was pristinely Islamic, but the court procedure did not let it function in an Islamic way, according to the presuppositions of fiqh as to what constitutes a 'crime' or a 'person'. The qazi never had a chance to declare qisas valid under Shari'ah.

In this way, the social background of the victim became irrelevant in criminal proceedings. Mughal criminal proceedings had distinguished different levels of punishment according to the social background of the victim. British courts also erased these distinctions. In British notions of justice, individuals were given equal treatment before the law. In their view, the state was the only institution which was to mediate between an individual and society; therefore, British jurists rid procedural law of qisas and diyah, legal institutions which made criminal prosecution and punishment the imperative of the aggrieved parties. Yet too often 'public' interest remained undifferentiated from state interest.

The British state claimed that its mediation between an abstract society and individuals improved adjudication because it could administer punishments with equality, without being informed by the status of social groups. British magistrates refused to recognize different standards of justice for different social classes. This created a distance between legal authority and the surrounding social context. This distance was a central component of British power in South Asia: it was one of the main rhetorical points used to justify British modification of Mughal criminal court procedure.

The assumption that conflicts in court centered around two individuals disconnected from their social habitation led to the British habit of assigning a winner and loser, one right and the other wrong. In this context, 'good conscience' became a code word for the ability

compiling fatawa), not interfering in the interest of a positive, abstract notion of 'society', in which people need state guidance.

[100] This example also provides an excellent example of British manipulation of procedural law to affect covert changes in substantive law.

[101] Fisch, 45.

of the judge to determine right from wrong, and assign penalties. Thus British 'public' justice gave priority to decisions that gave clear title to one 'private' person, rather than making decisions for the betterment of the community as a whole. As local arbitrators, qazis had previously approached decision-making with an interest in reconciliation more than punishment. They tended to 'shy away from making awards which satisfied one party by aggravating another. Living in the midst of the disputants, they were inclined to seek first an amicable compromise ... [or] deferred judgement, hoping that the contestants would cool off or lose interest'.[102] This aspect of Islamic judicial practice was totally truncated by British procedural changes, in the interest of increased efficiency and public order.

Two major legal interventions of the British were in prosecuting theft and regulating awqaf grants. These provide excellent examples (one from criminal cases and one from civil cases) of how the public/private dichotomy was injected into the substance of Islamic law and how the British incorporated fiqh into an Anglo-Muhammadan system. In the field of criminal jurisprudence, the procedures of Anglo-Muhammadan law changed the criteria for punishment from questions of situation to questions of intention. In fiqh, argues Forte, theft is seen as 'manifest criminality'. This means that 'theft' is defined by common experience, rather than by external legislation about what constitutes 'theft'.[103] Judging whether the situation conforms to a common notion of 'theft' is what constitutes guilt; determining intent was only minimally important. For instance, if stolen goods were returned prior to the trial, the situation was no longer criminal.

Qazis' methodology in a potential case of theft was to separate out an act of crime from the similarity it bore to other legal actions. A series of categories measured the situation, and separated out cases of theft which merited punishment.[104] Such categories included adult responsibility of the thief (*baligh* and *'aqil*), the non-coerced condition of the thief (*niya*), minimum value of the stolen object (*nihab*), type of good stolen (*mal*), relation of the thief to the victim, and the location of the stolen object (*hirz*).

[102] Rudolph and Rudolph, 108.

[103] Forte, 49.

[104] Forte, 54. He claims that situational elements became especially important in cases of theft because of the harsh hadd penalty that applied if the case was shown to be undoubtedly a case of theft. He overstates this case, ignoring the role of extraordinary justice (*ta'zir*) which could be used at the qazi's discretion. Forte's vision is clouded by obsession with severed hands and feet.

These categories show that qazis were interested in regulating the interaction of interdependent social groups, rather than representing a general public. This is especially evident in the last category of hirz, or safekeeping. In order for theft to have occurred, the property must have been lying in a situation of hirz, in a place which is regarded as protected within the range of a family's ownership.

> Islamic law maintains a sense of things being properly in their ordinary place of safekeeping, such as goods in a shop, personal possessions in a house, an animal in a fold . . . however, household goods and clothes are not secure in a stable, nor are gold and silver coins that safe in a courtyard of a house.[105]

Qazis did not possess an all-embracing authority to define property rights, except in situations outside of specific, family-centered situations. If wealth is left in a public place and removed by another person, the qazis cannot determine that the removal was 'theft' because the original owner did not treat it like wealth and keep it within safekeeping.[106] Qazis clearly delegate a large responsibility for determining property rights, ownership and protection to families themselves. If families regulate their spheres of safekeeping, then the qazi can punish a thief; however, if there are situational irregularities then he will not generally apply the punishment for theft.[107] The Mughal state represented by qazis was not an all-pervading entity which could define and regulate property from the ground up, regardless of social groupings or community dynamics.

The shift from fiqh to Anglo-Muhammadan jurisprudence left no room in judicial decisions to weigh community interest. British procedure erased the situational categories previously used to judge theft. Under the colonial state, thieves were guilty because of their intent to steal, which posed a threat to the well-being of society. Property was therefore defined by the courts, and had little in common with social groups and boundaries. From a utilitarian standpoint, that a crime depended on the willingness of the victim to complain was 'a law of barbarous construction, and contrary to the first principle of civil society, by which the state acquires an interest in every member which composes it, and a right in his security'.[108]

[105] Forte, 63.
[106] Interestingly, if a family allows a guest to enter their house, and the guest takes some good, this is not 'theft' because the guest has been incorporated into the family and is part of the safekeeping structure of their household. Forte, 63.
[107] Forte, 55.
[108] Harrington, 303, as quoted in Fisch, 34.

Theft was not a 'private' matter just between the affected and affecting parties.[109] On the one hand, it was a matter of state protection of society in general; on the other, punishments for theft were also public, including public hangings[110] and fines levied on entire villages from where a thief hailed.

In the field of civil jurisprudence, awqaf were a major concern of British magistrates because they obstructed the transformation of land into easily liquid wealth, and because the treatment of awqaf in fiqh offered contradictions to the British method of appropriating fiqh. The issue of awqaf illustrates two important points. First, British adjudication was never objectively distinct from their economic needs; second, rather than simply applying Islamic law, they had to selectively reinterpret it. Awqaf fused public and private functions, and mixed religious with legal and economic matters. Therefore, they seriously vexed British jurists.

> Euro-American legal lexicons do not supply a single technical term which is exactly equivalent to waqf. Sometimes a waqf serves as a 'trust' sustaining some 'public' religious or charitable institution. At other times, a waqf's provisions resemble those of a 'will' or 'entitlement' and therefore have a 'private' dimension.[111]

The British translated the two interwoven functions of a waqf as two separate types of institution: *waqf-i-'amm* and *waqf-i-khandan*. Waqf-i-'amm corresponded to a 'public' waqf: the profit from this land went to support charities, schools, or religious institutions. Waqf-i-khandan marked a 'private' waqf: its profits supported family and represented a disguised form of inheritance.

Having made this technical distinction, Anglo-Muhammadan jurists acted it out, forcing awqaf out of their originally religious function within the Muslim community. Public awqaf, because of their public nature, should be managed by state officials.[112] A fine example

[109] A change in the laws of evidence illuminates this fundamental shift. Under Anglo-Muhammadan procedure, one thief was allowed to witness against another thief. In a system where crime is seen as a private matter between two parties, if one of the parties is an unreliable witness (as thieves were presumed to be) then there was no case. But if theft is a crime against the public and a thief is to be tried solely on intention to steal, anyone can serve as a witness regardless of external criteria, like social status or trustworthiness. See Banerjee, 69.

[110] Victim-executed punishments were also abolished; punishment was a state prerogative and private citizens were to witness it and be trained by it.

[111] Kozlowski, 2.

[112] Regulation Number XIX of 1810 gave Company officials the right to enforce 'good management' of any public trust, including 'public' awqaf.

is that of the Shi'i Imambarah in Hooghli built and maintained by a family waqf, which was subject to such management.

> Local authorities appointed a visitor . . . who was supposed to make the custodian [of the waqf, *mutawalli*] behave in line with the government's standards for honest trusteeship. When the mutawalli refused to co-operate, the government appointed [the visitor] in his place. After that officials gradually made many changes in the way in which the endowment's funds were used.[113]

These changes in the use of funds eventually transformed the Shi'i community hall into Hooghli College, a training ground for civil servants for the Company.

Private awqaf fared no better; they were subject to a textual assault rather than a managerial assault. The British interpreted 'private' awqaf as a way to subvert the Islamic laws of inheritance, which because they are in the Qur'an, must be immutable, rigorous, and sacred. On that basis, they argued that 'private' awqaf were later innovations, corruptions of the original law, which ought to be excised.[114] J. T. Woodroffe, Advocate General of Bengal in 1892, said: 'This matter of private wakfs [awqaf] is an offspring of purely modern and secular considerations'.[115] British administrators also saw these awqaf as tax-dodging, but argued against them on a scriptual basis. This particular incidence of reworking scripture selectively on the basis of British legal preconceptions was hotly contested by later Muslim lawyers; however, most other incidents were not.

V. Open Door of Codification, Closed Door of Ijtihad

> There is nothing Indian or Oriental about codification.—C. D. Field[116]

> The closing of the door of Ijtihad is pure fiction . . . If some later doctors upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence.—Muhammad Iqbal[117]

Codification is a term which entered the English language through the rationalist, reformist writing of Jeremy Bentham. It is no coincid-

[113] Kozlowski, 39.

[114] They did not take into account that the justifications for awqaf were worked out through the methods of usul al-fiqh, extracted from scriptural sources, and were therefore also justified by other portions of the Qur'an and Prophetic sunnah.

[115] Kozlowski, 140.

[116] C. D. Field, *Some Observations on Codification in India* (Calcutta, 1893).

[117] Iqbal, *Reconstruction of Religious Thought*, 1928, 141.

ence that Bentham also influenced many of the Company's judicial officers after the governorship of Cornwallis. Legal codification consisted of a two-fold process: the first process is to reduce a complex aggregation of practices into a single process, and the second is to systematize that process so that it has an internal logic and operates as a closed system.

Codification packaged the law, allowing it to stand in the illusion of independence, separate from persons of authority. The British saw that if the indigenous judges could limit their citations 'to a few works of notorious authority, it might have a salutary effect in curbing their fancy, if not their cupidity.[118] Codifying authoritative texts allowed the parallel establishment case-law, and with only a few texts in circulation, previous cases could limit the possibilities of future cases. Through this process, magistrates circumvented the personal authority of the qazi. The authority of formal precedent came to outweigh the authority inherent in a person as skilled and specialized interpreter of the law. Qazis did not previously give much emphasis to precedent. Rather their decisions were anchored in social reality outside the court itself. However, under the Colonial state, the solidification of a bureaucracy separated the judges from other social contexts. In such a bureaucracy, authority was invested in an office rather than in a person. The dual processes of codification and bureaucratization transferred the responsibility of adjudication away from the Muslim scholars and into the company's offices.

The types of texts created by British codification differ from medieval and Mughal handbooks of fiqh: as compilation differs from codification. Compilation brings together many different decisions with the reasoning behind them into a single folio. This compilation allows the judge to have more resources in making future decisions.[119] A compilation gives verdicts which can serve as models,

[118] W. H. Macnaughten, *Principles and Precedents of Moohummudan Law* (Calcutta, 1825) as cited in Rudolph and Rudolph, 283.

[119] This line of reasoning has a long genealogy (the importance of which will be clear in the section concerning taqlid, below). Zarkashi, an eighth-century jurist, wrote that the crystallization of law provides more material for later jurists, making new legal reasoning easier, more efficient, and more broadly practicable. Shawkani (who died in 1838) revived this viewpoint in arguing that compiling manuals of fiqh was not evidence of manifest taqlid, but rather fuel for further ijtihad. Shawkani is followed by Iqbal in his lectures on the 'Reconstruction of Religious Thought in Islam', and later by Wael Hallaq, 'Was the Gate of Ijtihad Closed?' *International Journal of Middle East Studies* (vol. 16, 1984), 32. This article was reprinted along with other concise and pertinent articles in Hallaq, *Law and Legal Theory in Classical and Medieval Islam*. (Hampshire: Valorium Press, 1994).

but the path of reasoning based on Qur'an and Hadith must be carefully displayed. Compiling does not iron out contradicting decisions, or force decisions to become pure precedent, freed from their foundations in the reasoning of usul al-fiqh. 'Even at the height of their influence and power, the Mughals did not apparently consider forcing a single version of shari'ah on India's disparate Muslim population . . . the compilation of [Fatawa-i-Alamgiri] was not part of some scheme to impose its views on all Muslims.'[120] These collections certainly do not merit the label 'code'. They were a part of a living, evolving tradition of jurisprudence which accepted contradictions within its fold. '[The Fatawa] include numerous cases that were either raised to be decided for the first time, or older problems that were reinterpreted through fresh legal reasoning.'[121] In South Asia, the *Fatawa-i-Alamgiri* is the most famous of these compilations. The *Hedaya* is similar in structure and purpose.[122]

Although these compilations were the first texts to be translated by the Company, British magistrates did not find them very useful, even after taking liberties in the translation process to rearrange and simplify the diversity of opinions. A selection of cases does not make a code, as Banerjee notes. 'Case-law does not ordinarily lay down general rules beyond the limits prescribed by the precise facts of each case. It does not provide for different kinds of facts which may arise later, nor does it prevent co-ordinate and conflicting decisions from standing side by side.'[123] Rather, codification seeks to limit divergent opinions, both by limiting the resources on which decisions may be based, and by minimizing the variety of conceptualizations under which any case might enter adjudication.

British jurists in the early nineteenth century authored a second generation of texts which secured this end. These secondary texts quickly became more authoritative than the original translations on which they were based. Neil Baillie documented the changes he wrought on the *Fatawa-i-Alamgiri* during and after translation: 'The

[120] Kozlowski, 105. Rather Kozlowski suggests that the compilation was for the purpose of asserting Imperial control over religious scholars, for the purposes of government legitimacy rather than for primarily juridical motives.

[121] Hallaq, 19.

[122] In 1663, the Emperor Aurangzeb (known as Alamgir) appointed the commission to write this compilation in Arabic. It was completed in 1670, and translated into Persian a few years later. Morley claims that this collection of Fatawa is deficient in providing the arguments of the cases, and that the *Hedaya* is more complete in this regard.

[123] Banerjee, 160.

rule adopted in making selections was to retain everything of the nature of general proposition, but to reject particular cases, except when they were considered to involve or illustrate some principle or maxim of law.'[124] Only those sources could be used in the courts which had been processed through translation, separation from traditional authorities, and codification into a system. In order to systematize these compilations, selected cases were elevated into general principles and propositions, which could suffice as precedent for all later decisions. The greater a text's distance from original sources, the greater its frequency of use in courts.

The British did not see their changes to Islamic law as codification in the terms just described. Rather they assumed that Islamic law had already been codified centuries ago, when 'the door of ijtihad was closed'. By assuming the reality of taqlid the British essentially created stagnation and enforced it.[125] The transmutation of fiqh into Muhammadan law undermined ijtihad in any recognizable form. The British did not create the term taqlid; it arose out of debate between different Muslim jurists during times of political crisis. Most Western scholars continue to call taqlid 'an accepted doctrine' since the ninth or twelfth century; Schacht repeats this view eloquently.

> Islamic law had been elaborated in detail; the principle of the infalibility of the scholars [*ijma'*] worked in favour of a progressive narrowing and hardening of doctrine; and, a little later, the doctrine which denied the further possibility of 'independent reasoning' (ijtihad) sanctioned officially a state of things which had come to prevail in fact.[126]

Wael Hallaq has bravely challenged this notion (following the more gingerly lead of Iqbal in the 1920s). Hallaq reverses the components of the argument. He claims that the 'doctrine' of taqlid was never actually accepted as a doctrine, and that the consensus of Muslim jurists supported the continuing practice of ijtihad.

Rather than taqlid being a description of a social reality 'which had come to prevail in fact', it was actually a rhetorical gesture by a limited group of jurists whose prime concern was the growing sep-

[124] Morley, 315.

[125] Ijtihad refers to the use of legal reasoning to make juridical decisions which are binding upon the community. The authority of ijtihad was limited to a few scholars who were well trained in religious scripture and the principles of legal reasoning. Taqlid is the opposite of ijtihad, and means being bound to apply the decisions of past legitimate jurists without the application of new juridical reasoning.

[126] Schacht, 67.

aration between the Khalifah's political authority and the 'ulama's practice of usul al-fiqh.[127] The social reality had always allowed ijtihad, although from the sixteenth century on, that allowance was contested.[128] As the voices in favor of taqlid grew stronger, ijtihad disguised itself under a number of other guises, names and practices; but it never died out.[129] Hallaq argues against the hegemony of taqlid from the nature of fiqh itself, from the actual writings of jurists,[130] and finally from an analysis of the political position which advocated the rhetoric of taqlid since the sixteenth century.

Hallaq finishes his argument with an indirect question which pierces to the heart of the matter. If almost everyone has bought into the rhetoric that the possibility of ijtihad has been relegated to the past, who exactly has taken on the authority to pronounce this decision? '*Insadda baab al-ijtihaadi* [the closing of the way of independent reasoning] conveys no idea as to who had actually closed the gate'.[131] With reference to South Asia, either the sixteenth- and seventeenth-century Mughals achieved this notoriety of slamming closed the 'gate of ijtihad', or else the eighteenth- and nineteenth-century British rulers did. Bryan Turner equates the development of religio-legal taqlid with the establishment of patrimonial military elites.[132] In Turner's view, 'an alliance of necessity between the milit-

[127] When Sunni jurists of the medieval period consider the question of taqlid, they do so in reference to politics. The Khalifah [Caliph] was rapidly becoming a political leader based solely on military qualifications, and becoming less and less able to combine political supremacy with religious leadership. In reaction to this situation, a chain of scholars and jurists (from Baghdadi and Mawardi, through Juwayni to Ghazali) grew to accept the idea that the Khalifah can be a muqallid (unable to make his own legally reasoned decisions, but rather following the decisions of another scholar), as long as the real power of ijtihad was being delegated to able jurists. Imam Ghazali asked: 'What difference does it make if the Imam reaches a legal opinion through his own interpretation or through the interpretations of a *mujtahid?*' The use of the term taqlid was used to criticize the political disintegration of Islam and the distance from a 'golden age'. For more detail, see Hallaq, 14.

[128] Hallaq, 29.

[129] Guises such as the practice of *maslaha* or *istihsan* which are essentially ijtihad yet bear different names for rhetorical purposes.

[130] He notes, for instance, that Sunni jurists condemned as heterodox some movements which denied the relevance of reason to the building of the shari'ah (such as the Hashawiyya, or the Hanbalis before the tenth century); he also notes that the leading jurists' stated qualifications for acting as a mujtahid actually became more flexible with time, rather than more stringent. Hallaq, 7 and 9.

[131] Hallaq, 20.

[132] In Weber's terminology, patriarchy is the situation in which an elder male dominates his household and uses the extended family to control a political unit. Patrimonialism expands this model as the patriarch recruits a staff outside the

ary and the 'ulama' set the conditions for picturing the shari'ah as an 'unchanging code'.[133] In this cultural environment, politics, religion, and law were shaped by a social ethic 'which stressed discipline, obedience and imitation'.[134] Yet there is reason to doubt the historical framework that Turner erects; it is doubtful whether all the scholars, especially the relatively independent jurists, were ever in alliance with the military leaders. Of course, qazis out of necessity found a place in official government service. However, other jurists practiced jurisprudence without official sanction, and many avoided political entanglements and struggled to keep the practice of jurisprudence well outside the sphere of political control. In this environment, siyasa (and not legal taqlid) became the military elite's method of influencing judicial decisions. Not until the British took over the mantel of siyasa from the Mughals could they enforce systematic taqlid through a centralizing state, bureaucracy, translation and printing. The British did not create the term taqlid, but their presence in India did give the term a legal reality which it did not enjoy in any period prior. British dislocation and remodelling of Islamic law erased all presence or potential for ijtihad: once again, their assumption slowly became a coercive reality.

British procedure sapped the very 'substantively rational' method of fiqh, that is finding a new rule to extend authoritative behaviors into present conflicts. This is the very essence of ijtihad, which British magistrates found unacceptable in contemporaneous Muslim judges or lawyers. Kozlowski presents an illuminating case. Sir Arthur Wilson, a Privy Councillor, challenged the decisions of a Muslim justice, Sayyid Mahmud,[135] which upheld the legitimacy of 'private' awqaf.[136] Wilson accused the Muslim justice of drawing 'fresh logical inferences newly drawn from old and disputed texts . . . [It is an] extremely dangerous principle . . . that new rules of law

confines of the extended family, depending on slaves, conscripts or courtiers. Turner, 80–1.

[133] Turner, 142.

[134] Turner's use of a Weberian 'elective affinity' skirts the issue of casual relationships between these various social forces. He does not see the need to illustrate an actual causal link between military rule and the reaction of the scholars. An argument relying solely on 'elective affinity' tends to create a monolith out of any historical period, with all social forces acting toward one unified result.

[135] He was the son of Sayyid Ahmad Khan, studied Greek, Latin and Arabic at Cambridge, was called to the Bar in England, and served as Justice between 1883 and 1893. He was dismissed from that post due to alleged 'chronic drunkenness'.

[136] *Baqar Ali Khan (and another)* v. *Altaf Hasan Khan (and another)*, Indian Law Reports, Allahabad Series, xiv: 430 and 254.

are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative'.[137] In the British eyes, such interpretative actions violated the very norms of Islamic Law, which had been defined as static, unchanging, waiting only for fair application. Extension of the law, or extraction of a new law, is not a justifiable maneuver, once the British had defined and encased shari'ah in their own procedural law and political power.

VI. From Jurisprudence to a Persistent Cultural Pattern

> Little or no change has taken place in the religious opinions of the natives since the days of Hastings and Jones: the Hindu still venerates the Institutes [of Manu] that have served to regulate the conduct of his forefathers for upwards to twenty centuries; and the Muhammadan looks with undiminished respect on the precepts of the Koran.—William Morley[138]

> The British replaced this elastic customary law by judicial decisions based on the old texts . . . In the way it was done, it resulted in the perpetuation of the ancient law unmodified by subsequent customs.—Jawaharlal Nehru[139]

All of these incremental changes over the preceding century took their full form in the decade between 1862 and 1872. In a series of legal enactments and reforms, the British administrators finally engineered 'Islamic law' into a personal code of law governing the private transactions of Muslims and their religious usages. This series of broad reforms came in the wake of the 'war of independence' waged by the loosely combined forces of Mughal authorities, Rajput nobility, and mutinying soldiers of the British army. By the time the British had recovered from shock, reconquered Awadh and Delhi, and punished all suspected traitors, there was no longer a Mughal empire to serve as either a model or a foil for their own government. Accordingly, the colonial administration erased any props of legitimacy left over from that earlier era of tense cooperation and competition with Mughal rulers and their administrative forms. In 1862, the Indian Penal Code and the Code of Criminal Procedure finally removed the last traces of Islamic law from the criminal field. In 1864, Muslim assistants to the colonial courts (the

[137] Kozlowski, 119.
[138] Morley, 193.
[139] Jawaharlal Nehru, *The Discovery of India* (Garden City, New Jersey: Anchor Books, 1959).

vestiges of the qazis) were finally disbarred and all Persian titles were discontinued. In 1872, the Evidence Act was passed, removing Islamic legal elements from the procedure of testimony and evidence. All elements of overtly Islamic practice were erased from the realm of 'public law', while they were retained in a rigid form as the 'personal' code governing Muslims.[140]

This series of reforms had a persistent effect on later jurists and scholars, both Muslim and non-Muslim. Through them, the dual hierarchies of Company courts and Presidency courts merged into a single bureaucracy. Court reporters were made mandatory, in order to publish decisions and build up a system of precedent. Court officers learned 'the law' from British published text books, relying on precedents built up in Anglo-Indian courts over the past ninety years. The final move in sealing the process was that Anglo-Muhammadan law became known in practice as simply 'Muhammadan law'. British courts effectively erased the record of their own production, and allowed 'the shari'ah' to stand on its own, bounded by the frame they had provided.[141]

Many of the South Asian Muslims who might have protested against this situation had been killed or scattered by the war in 1857. Those who were left accepted this situation, because British domination of property disputes led to their de facto power in jurisprudence.

> The basic rules governing the ownership of real property were established by colonial legal fiat, they had little choice [but to take their disputes to British courts]. Only the imperial courts provided definitive judgements on rights to property. Those Muslims who won their suits were probably satisfied with the Anglo-Indian courts' understanding of 'Muhammadan law'.[142]

Among those 'who won their suits' were the newly created class of Muslim lawyers who were trained in British educational institutes,

[140] Actually the Reforms of 1862 promulgated multiple Codes, one code for each recognized religious group. This sealed the division between Hindu and Muslim, and in addition broke the Muslim community into its constituent 'sects', each with its own code of law.

[141] Textbooks published in the second half of the nineteenth century and early twentieth century reveal this grand erasure in their titles. Muhammad Hidayatullah and Arshad Hidayatullah, *Mulla's Principles of Mahomedan Law* (nineteenth edition, Bombay: N. M. Tripathi Publishers, 1990; first published in 1906) and Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (fourth edition, Delhi: Oxford University Press, 1974, first edition in 1949). Even contemporary scholars who are not attentive to the disruptions of British colonial rule continue to perpetuate this illusion of continuity, such as the very misleadingly titled book, David Pearl, *A Textbook on Muslim Law* (London, 1979).

[142] Kozlowski, 154.

in India and in England. These professional and intellectual adventurers and entrepreneurs include Syed Amir Ali, Abd ur-Rahim, and Faiz Badruddin Tyabji.[143] On the one hand, these lawyers authored textbooks on Islamic law, whose format and basic presumptions copied Anglo-Muhammadan patterns. Although they quoted sources from Arabic texts, their English translations did not challenge the British lexicon.[144] Because they lacked training in usul al-fiqh, they were unable to bypass British procedural reforms, or even see that there might be alternate routes. One such loyalist Muslim lawyer, Fyzee, comments that the British Magistrates' removal of any possibility of ijtihad and creative expansion of Islamic law is well adjusted to the needs of Indian Muslims. In their 'orthodoxy' (which is assumed and never demonstrated) they would never want to see their law changed in any way.[145] Fyzee's comments reveal a crucial cultural pattern that emerged after the war in 1857 and the destruction of the vestiges of Mughal authority. Muslims turned increasingly to 'law' as the sole pillar of their community; in fact, the need to define a single Muslim community through law became a social need only after the umbrella of Mughal legitimacy was violently snapped shut. However, as leaders of the Muslim community that emerged after the war turned to shari'ah to define their community, they necessarily turned to 'the shari'ah' that had been framed by Anglo-Muhammadan court activity as 'Muslim personal law'.

Although some lawyers of the new generation were loyalists to the British regime, many others had a more ambivalent relationship to

[143] Some of their biographies are detailed in Kozlowski, 116–17. As a class, the lawyers were not drawn from the body of scholars, or people who had an exposure to, ability with, or need to preserve traditional styles of Islamic jurisprudence. Despite their appropriation of 'religious law', the operation of the courts created a sphere in which religious affiliation was no longer important or profitable. 'A Muslim litigant, arguing a case under Muhammadan law, was apt to pick a winning Hindu or Englishman to represent him. . . Such choices indicated that personal conviction was not required of a lawyer . . . indeed it was discouraged in the interests of legal objectivity'. Kozlowski, 122. The courts created a 'public' space from which religion was sealed off. Ironically, this situation allowed many Muslims from minority communities, such as Shi'i or Isma'ili, to enter public prominence.

[144] Kozlowski, 117.

[145] Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford, 1974), 51. He attributes this evident stagnation to two factors: the doctrine of 'taqlid' among late medieval Muslim jurists, and 'the common law doctrine of precedent' in which British judges only apply the law and shy away from expanding and creating it by logic or analogy. These two factors have 'had the effect, in the last two centuries, of keeping the law stationary and static except for two broadening influences: legislation and the healthy introduction of the principles of the English equity'. In this passage, Fyzee displays his loyalty to the British judicial institutions and British rule as well.

the colonial government. They were reliant on the government for their profession, yet they could be critical of legal decisions or government policies. Many lawyers shared in the power of the court hierarchy, and became the self-styled spokesmen for the Muslim community, since their voices could reach the ears of colonial authorities. For these men, Islamic law became a form of political rhetoric, although admittedly an 'Orientalized' form. Muslim lawyers did contest individual decisions during British administration of shari'ah, but they did so from within the conceptual framework set up by the British involvement with Islamic law. They could contest the details of certain decisions, but could not protest against the way Islamic law had been framed by British courts. They did not try to strategically revive the creativity of the shari'ah or its former fluidity; instead they voiced their opposition through nationalist or communalist politics. In cases of dispute, the lawyers simply claimed that the changeless, ancient Shari'ah did not support what the British claimed it did. Without succumbing to this language, there could be no direct communication with British authorities; without drawing a bounded arena, there could be no contest.

Through a legal lexicon, the Anglo-Muhammadan system spread into the wider political consciousness of Muslims in South Asia. British jurisprudence had defined Islam as a rarefied and monolithic identity, and now Muslims accepted this definition as a vehicle to agitate for political rights and nationalist agendas. Muslim political leaders advocated a representational government in which they would represent the Muslim community, as if there were only one. Their leadership was not grounded in regional identity, family groupings, or religious learning because of their participation in the profession of law; they were leaders in search of a constituency. Lacking a social base, they defined their constituency, the Muslim Ummah, as those who strictly applied textual Islamic law, which they conceived of as a one-dimensional 'legal canon'.

Those scholars who still actively promoted fiqh (and their own mastery of it) were marginalized by the creation of this new class of professional lawyers. Although they rejected the Anglo-Muhammadan fusion, and often rejected British colonialism outright, they were unable to escape the wider social changes which affected (and were effected by) the legal structure. 'Traditional' fiqh did not die out, but it was largely displaced to the private realm of community ritual, family sanctity, and local politics. As a result, those scholars who rejected British law as a profession were also unable

to approach shari'ah with an intact methodology, because shari'ah had been defined and bounded by an authority they could not physically contradict. 'In restricting authority in shari'ah to a comparatively small number of translations and introductory manuals, the British were able to accomplish something that most Muslim rulers never had. They assigned definite sovereignty in matters of the shari'ah.'[146] The shari'ah of the scholars became increasingly tied to sectarian identity or separatist politics. The Deoband School, founded in 1867, is the closest that South Asian Muslims came toward an organized and authoritative attempt to revive the practice of fiqh. Yet they were limited to the requests which their constituents brought before them. After the initial enthusiasm passed, their requests were limited to ritual affairs, doctrinal points and family relations.[147] The daily lives of South Asian Muslims continued to revolve around local religious leaders and corporate social groups like extended family or caste; however, any aspect of their lives touching the government was radically altered. They were forced to live a dual existence, with dual sets of authorities and dual ethics. The effects of British rewriting have created a lens of texts, terms and experiences which continue to distort the view of shari'ah today.

By the twentieth century, the self-conception of the British rulers in South Asia had changed drastically. The administrative and judicial distance which they had worked so hard to create and maintain became a liability. Their original audacity and assumed superiority were overwhelmed by the confusion and dissonance created by their system of rule. G. C. Rankin (Chief Justice, Calcutta Supreme court) admitted that

> not many people in this country have any settled notion of what we are doing in India administering law to Indians, nor have means of readily acquiring any well-founded notion of how we come to be doing so or of the principles which we apply. Certain I am that when I went in 1918 to India to engage upon the task, I had the smaller amount of information and no real explanation of many facts of great historical importance.[148]

As the British themselves lost confidence in their colonial mission and civilizational superiority, Muslim lawyers began to voice a more acute critique of the legal system that Anglo-Muhammadan jurispru-

[146] Kozlowski, 131.

[147] This forced introversion led to even greater sectarian division, springing up from below as well as being codified from above. In fact the 'Deobandis' themselves have become a sectarian label which persists until today.

[148] G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), vii.

dence had engineered. Many of their critiques were thorough and covered most of the points elucidated above in this study, though in a discontinuous and ad hoc manner as various issues came up in legal decisions.

The most incisive of these critical lawyers is Faiz Badruddin Tyabji, who not only pointed out the injustice of various British decisions but launched a full critique of the British colonial project. He was one of the few lawyers who saw clearly that British assumptions in the eighteenth and nineteenth centuries had in fact shaped juridical and cultural realities for Muslims in the twentieth century. He published his work, *Muhammadan Law: the personal law of Muslims*, in 1913, in which he provided a detailed critique of both the practice of British judges applying Islamic law and the philosophy behind it.

Tyabji alleges that the British administration of Islamic law is warped by unfamiliarity with the language of the texts and with the notions and condition of life that underlie them. British magistrates assume that these texts are confused, inconsistent or inaccurately expressed from the outset. In addition, they assume that there are no 'forces of expansion and development' within Islamic law itself, and that its development cannot be on modern lines or be based on reason unless filtered through British notions of legal equity.

> These assumptions [of British jurists] frequently underlie decisions on Muhammadan law; and, being of too general a nature to form the subject of direct decision, cannot well be discussed in argument at the bar. They are not, therefore, the less important, nor the less deserving of careful scrutiny.[149]

In this important passage, Tyabji shows that the structure of litigation and the specialized language of jurisprudence actually hinder any discussion of the fundamental assumptions that undergird the colonial courts, since the lawyer is confined to a discussion of discrete cases. His critique was the first attempt by a British-trained lawyer to break out of this frame and critically assess how it developed over the preceding century.

Most insightfully, Tyabji notes that alien legal conceptions have been introduced, often unconsciously, by the lax use of English terms and equivalencies.[150] All in all, Tyabji alleges that the creation of a hybrid system of Anglo-Muhammadan law (with the term Anglo first

[149] Tyabji, 85.

[150] Tyabji illustrates his point with reference to *Doe v. Dorabjiv, Bishop of Bombay* (1848) Perr.Or. Cas. 498.

and in a position of power) has rendered Muhammadan law completely hollow and lifeless.

> [Muhammadan law] is presented in British India mostly in the shape of reports of decisions on a set of specific circumstances brought before the courts. The discussions on the law before the courts consist, in the great majority of cases, of the citation of passages from books brought, perhaps for the first time, to the notice of many concerned . . . If the original authorities on Muhammadan law are searched, they appear extremely uninviting, but the difficulty is almost insurmountable when only isolated sentences out of these translations are read. It is not implied that the application of an ancient law to modern circumstances is easy in any case: but from this stricture even law that is well settled and quite recent cannot always escape. Difficulties in understanding the law laid down in the ancient texts do not in the least degree prove that the text-writers were confused or inconsistent . . . the difficulty experienced in appreciating their greatness and ability is in proportion to our own ignorance.[151]

He assesses that this profound ignorance of Islamic law extends to the judges' impression that Muhammadan law is by its essential nature 'ossified and unable to expand except by the application of British custom or litigation'. Tyabji protests that judges could never assume this if they had any understanding of the history of Islamic law. It grew out of the original revelatory sources by methods of deduction and analogy, conflict and consensus, and preference of some decisions over others in the light of social welfare. These various rational operations would lead to a specific fatwa illuminating a specific case.

> Had these stages in the growth and development of Muhammadan law been present to the mind of the learned judge, [he might have] then come to believe that the prejudice is on the part of those who think that, because it is a characteristic of English law to expand, it must be a characteristic of Muhammadan law to be absolutely rigid, and that all expansion of the latter must be from forces brought to its aid from English law.[152]

It is clear from this passage that Tyabji protests not just against the execution of a particular decision or the mechanics of the decision-making process, as did Muslim lawyers before him. Rather, he protests against the whole premise and structure of Anglo-Muhammadan law since it is founded upon colonial occupation. As such, Tyabji's work is one of the earliest critiques of 'orientalism'

[151] Tyabji, 85–6.
[152] Tyabji, 86.

and its uses by colonial powers.[153] In Tyabji's view, the whole system of law and courts rests on the assumption that the British alone can understand law best and apply it fairly, and he rejects such a notion as unsupported by experience and any notion of justice.

> The observations made above have seemed necessary for justifying the very existence of the law of the Muslim community and for protecting it from having imposed upon it interpretations of its law [by the British] that are uncouth, impractical and fantastic . . . [supported by the idea that British magistrates] represent the Muslim law best, and disclose a profundity of knowledge on the part of the expositor only, when by the exposition the greatest difficulties are created in the way of those who are governed by it . . . It would be an extreme hardship on the Muslims if the whole foundation of their law were liable to be shaken and made uncertain on the baseless grounds that the law is unintelligible, or inconsistent, or primitive. The assumption that the law of Islam is incapable of developing and expanding on the lines of justice, equity and good conscience as now understood, is no less a danger for the Muslim community as a whole.[154]

Tyabji saw that British manipulations of Islamic law actually posed a threat to the viability of the Muslim community. Although they endeavored to preserve its outer appearance in a 'personal code', they erased its inner dynamism. Despite the insight of his critique, however, Tyabji does not recommend any political or social steps to remedy the situation. The one program he did advocate, increased training for Muslim lawyers and British judges in the principles of Islamic jurisprudence, was apparently unviable and outside the ethos of his time.

Tyabji's critique passed unnoticed by his fellow Muslim thinkers and politicians. Other South Asians were busy actively formulating their own utopias as the British colonial confidence weakened. These political utopias accepted British presuppositions about social organization and British definitions of the shari'ah, and used them as the basis of a program of reform or revival of the Muslim community. They addressed the perceived stagnation of Islam, and reacted against Orientalist scholars who attributed stagnation either to the essence of Islam as a religion or the essence of Muslims as people. The difficulty is that most of these critics were not trained in fiqh and were not able to revive it against the empowered structure of

[153] Sadly, Edward Said did not consider lawyers or historians of law as possible sites of protest against orientalism in his seminal work, *Orientalism*, published in 1976.

[154] Tyabji, 87.

Anglo-Muhammadan law. Muhammad Iqbal synthesized the religious need to revive fiqh with the political consciousness of a nineteenth-century Indian lawyer. In his lectures during the late 1920s, he defined ijtihad as the 'Principle of Movement' in an attempt to reconnect the vocabulary of fiqh with a sense of cultural pride and political dynamism.

Iqbal attempted to fuse the self-worth of 'tradition' with the political clout of the 'modern'. In this sense, Iqbal was also constrained by Anglo-Muhammadan definitions, even as he tried to turn them inside out. Although he points out that Islamic law can and will grow, 'I have no doubt that a deeper study of the enormous legal literature of Islam is sure to rid the modern critic of the superficial opinion that the Law of Islam is stationary and incapable of development'.[155] Yet he places that growth in the context of modern state institutions. He claimed that individual ijtihad is not longer a viable option, buying into the rhetoric that the gates were closed in the twelfth century and that 'history' has coasted downhill ever since.[156] The alternative, collective ijtihad, is to be established through legislative councils.

> The transfer of the power of Ijtihad from individual representatives of a school to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form Ijma' can take in modern times, will secure contributions to legal discussion from laymen who happen to possess keen insight into affairs.[157]

Iqbal presumes the existence of a lawyer class in whom power should reside; he also presumes the superiority of European-style assemblies which can and should subsume local powers, regional dialects, and religious sects. Yet these British introductions are described through the terminology of fiqh, not only to empower tradition but also to

[155] Muhammad Iqbal, 'The Principle of Movement in the Structure of Islam', in *The Reconstruction of Religious Thought in Islam* (second edition Lahore: Institute of Islamic Culture, 1989; first edition London: Oxford University Press, 1934), 131.

[156] Despite his insight, Iqbal equates 'the closing of the gates of ijtihad' with the crystallization of four legal methods [madhhab], and therefore misses the critical perspective on Islamic legal development. Instead he attributes the closing of the legal mind to the mu'atazili debates, the rise of 'other-worldly' tasawwuf, and the sack of Baghdad by Mongols. Iqbal, 118. Iqbal still accepts the progressive ideal that colonial intervention marks an important break with the 'traditionalist' past (personified for Iqbal by lazy followers of Sufis) which will spark a revival, both religious and political.

[157] Iqbal, 138. In this passage, Iqbal silently invokes the concept of Shura, that government must be a collaboration between those who have political power and other social authorities, including religious specialists but not excluding those in crafts or trade.

close the distance between the state structures and the people who are governed.

Maududi's analysis of the neo-colonial inheritance is piercing; for instance he correctly identifies the problem of translation which was the foundation of British power. The West has power over language and defining issues. 'How you define an issue, and in what language, to a large extent determines the outcome of the debate.'[158] Yet Maududi's solution to the problem presupposes the centralized, authoritarian, and distant state which the British created through their control of language, both political and legal. After extensive searching for legislative and parliamentary options along the lines of Iqbal's thought, Maududi concluded that an Islamic vanguard must control the apparatus of the state in order to restore cohesion and self-worth on that abstract entity called 'society'. 'Human civilization travels along in the direction determined by the people who control power . . . it can hardly resist. A society in the hands of those who have turned away from God . . . drifts towards rebellion against God'.[159] As in the colonial state, Maududi's Islamic state propagates an order which is not generated from the bottom up. The state must educate, admonish, punish and reorganize the people under its authority in order to bring about utopian progress. He criticizes those who claim that the shari'ah is a 'private' realm of religiosity, limited to dress, hygiene, etiquette, or prayer. Yet his alternative is 'public' in the sense created and defined by the British presence. Maududi uses the term shari'ah to mean the system created by such a state; the right path is the glorification of a God-ordained system which is eternal and external to the people who must inhabit it.[160]

Western scholars could not escape the cognitive constraints of the recent past either. The legal lexicon resulting from the British occupation of India has supported a persistent misunderstanding in Western scholarship. Joseph Schacht laid the foundation for Western studies of Islamic law. Although unstated, colonial intervention plays a significant role in his portrayal. He accepts a paradigm of decay and rigidity in defining the character of fiqh.

> Islamic law, which until the early 'Abbasid period (ninth century) had been adaptable and growing . . . became increasingly rigid and set in its final

[158] Abul Ala Maududi, 'Tehrik Islami ki Akhlaqi Bunyadain', a lecture originally delivered in Urdu in 1945, published as 'Moral Foundations of the Islamic Movement', in 1976, p. 27.
[159] Maududi, 11.
[160] Maududi, 97.

mould. This essential rigidity of Islamic law helped it to maintain its stability over the centuries which saw the decay of the political institutions of Islam. It was not altogether immutable, but the changes which did take place were concerned more with legal theory and the systematic superstructure than with positive law.[161]

Schacht divides shari'ah into two components: 'positive law' which remained rigid, and 'legal theory and the systematic superstructure' which did change. This bifurcation corresponds exactly to the divisions created by the British intervention in Islamic jurisprudence, which preserved the inner core of law by recasting it in a modern, bureaucratic, effective system of administration.

Schacht's treatment of 'handbooks' of fiqh in the 'later medieval period' is equally problematic. He claims that the use of handbooks proves that authoritative law was derived not from the early masters who qualified for ijtihad, but rather from the later compilers who codified the current teaching of each school.[162] This move projects the British technique of legal co-optation back into the Muslims' own past, and makes them responsible for their own colonization. Schacht has to maneuver hard to fill in the slippage here: 'The recognized handbooks contain the latest stage of authoritative doctrine that has been reached in each school, but they are not in the nature of codes; Islamic law is not a corpus of legislation but the living result of legal science.'[163] If the late medieval handbooks are not codes, then at what point did shari'ah pass from a 'living result of legal science', which is socially and culturally relevant to Muslims, to a 'rigid stability' which was out of touch with the surrounding social needs? The answer lies in the passive tense of 'the recognized handbooks' which avoids the question: recognized by whom? As early as 1773, the answer is that handbooks were recognized by British courts as authoritative and superior to those persons who created them and used them.

Although Schacht claims Islamic law is essentially rigid and immutable, he does qualify this generalization. However, the examples he gives are mainly concerned with the Wahhabi movement, and the later Salafiyya movement, and both movements are reactions to colonialism, whether French, British, or Ottoman. The underlying assumption is that the rigid 'essential nature' of Islamic law invited colonial intervention, in order to spark a renaissance under the influence of modernism.

[161] Schacht, 75.
[162] Schacht, 71.
[163] *Ibid*.

Schacht presents himself as a foundational scholar; however Bryan Turner presents himself a revisionist who can set Weber's sociological generalizations within the historical context of Muslim experience. Yet even Turner cannot see the pervasive colonial heritage of his 'Islamic law'. Rather than claiming that taqlid is an essential character of Islamic thought, ritual and law, Turner claims that an ideology of taqlid was perfectly suited to the 'law and order' demands of the dominant class in medieval patrimonial society. This tight equation between law and order is more true for the British presence in India, whose centralized control of law and police was explicit and direct, than for the previous military elites. Turner misses the point that the British systematization of the law fully marginalized independent juridical thinking. Turner follows major Western sources when he projects a colonial condition back into the past. To back up his argument, he quotes Maxime Rodinson; yet at the crucial point of talking about 'the closing of the way of Ijtihad', Turner does not feel the need to back up his facts or framework with any reference.[164] Anglo-Muhammadan heritage allows that assumption to stand independently.

Turner's earlier assumptions force him into a contradictory stance with regard to Muslim Modernists. He both praises and blames them for introducing capitalism into the Islamic community through equating 'traditional' religious concepts with European intellectual ideas. To illustrate this cultural translation, he quotes from Hourani:[165] 'Ibn Khaldun's *umran* gradually turned into Guizot's 'civilization', the *maslaha* of the Maliki jurists and Ibn Taymiyya into the 'utility' of John Stuart Mill, the *ijma'* of Islamic jurisprudence into the 'public opinion' of democratic theory.' Because Turner thinks of the Islamic world only in terms of the Arab world, he cannot recognize that this same conceptual translation happened a century earlier in the courts of British India. The intellectual work of the reformers does not automatically translate into the introduction of capitalism; Turner does not endeavor to show how their writings changed actual social relationships, property ownership, the organization of work, or judicial authority. The field of legal change in South Asia is much more directly related to these economic and political changes.

[164] Turner, 143.

[165] Albert Hourani, *Arabic Thought in the Liberal Age, 1798–1939* (London: Oxford University Press under the auspices of the Royal Institute of International Affairs, 1962).

Conclusion

This study has aimed to untangle the hybrid term Anglo-Muhammadan law. It is not an integral system of jurisprudence, as its practitioners may have claimed. Nor is it even a system of jurisprudence that combines elements from Islamic legal traditions and British practical application, as its name may imply. Rather, Anglo-Muhammad law is the contradictory surface of British colonialism that combines political, legal and cultural elements. The effects it has imposed upon South Asian Muslim society are certainly not limited to their field of law, but extend into the field of religion, nationalist politics, and the most basic Muslim self-understanding in the twentieth century. For that reason, Anglo-Muhammadan law deserves a fuller treatment than legal historians have so far provided. This study has proposed to reframe the analysis of Anglo-Muhammadan law in the field of cultural history, and thus to reveal its roots which are deeper than litigation, and its effects which are wider than law. Placing this topic in the field of cultural history necessitates our recognizing that jurisprudence is an ongoing process of creating the law. It is a process that is always changing and always interacting with the political systems, economic exchanges, and religious ideologies which surround and challenge it. This has been true since the inception of Islamic law, yet the first twelve centuries of its evolution have allowed it to maintain the illusion of continuity. Although formally this continuity is a façade, the goals of its creators and sustainers have been relatively constant and integral. However, colonial rule added a new component into the equation. Although the British in some ways simply replaced the Mughals, in many other ways their manipulation and restructuring of society penetrated deeper than Mughal rule ever did, or ever needed to penetrate. The establishment of a modern state in South Asia gave a new role to Islamic law, and opened it to new and disruptive influences. The operation of Colonial courts transformed customary into statutory law. It displaced local law to be replaced by a national code of law. Further, Islamic jurisprudence lost its dynamic substance while being reinforced and reified in form. The modern state neither abolished 'traditional' law, nor fulfilled its promises.

The British colonial administrators achieved these great changes believing that they were setting South Asian society on the proper path: the path of impersonal government, equal rights before the law, public welfare, and profitable business. But perhaps South

Asians did not need a modern state, either in its essential operations or in the way it was imposed. The British did not understand the consequences of their actions, nor did they have to bear them. Yet twentieth-century scholars and Muslim reformers must do both, at least in South Asia.