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Cynthia Vint April 16, 2013

The Effects of Anglo-Muhammadan Law on the Indian Muslim Family Estate

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Abstract

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By Cynthia Vint

I explain the effects of British legislation on Indian Muslim culture in terms of inheritance, endowments, dower, and maintenance. I explain the process that resulted in the syncretism of Islamic and British law and the new, hybridized legal system known as Anglo-Muhammadan Law. I describe the various ways in which Islamic financial institutions and practices were altered by British interpretation and enforcement of translations of texts on Islamic jurisprudence.

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Introduction

Because of centuries of British occupation in South Asia, Islamic culture in the region has been dramatically reshaped, presenting new interpretations of Islamic laws, which have been interwoven with nineteenth century British ideals and orientalist assumptions, the legal system that is today called Anglo-Muhammadan Law still exists in the formerly occupied territories and echoes the former British presence. This thesis will examine how the British interpreted Islamic law in Colonial Indian courts and the development of Anglo-Muhammadan law in the second half of the nineteenth century and the beginning of the twentieth century. I will discuss translations of Islamic legal works, orientalist preconceptions manifested in the Colonial legal process, and the role of Western philosophies of social justice at the time. Through research of individual cases, translated legal texts such as the *Hedaya*, and other recent articles on the topic, I will assess the methods the Colonial administrators employed in the governance of the Muslim population with respect to inheritance, endowments, dower, and maintenance.

When the British Empire expanded to the Indian subcontinent, the region and its people were treated as a single unit, categorized only by the most superficial religious generalizations as observed by its Western occupiers. This population consisted of Hindus, Buddhists, Muslims, Parsis, Jains, and Christians. Anyone who has even a mild familiarity with India's vast diversity can only imagine the administrative mishaps that might have arisen from such a superficial generalization. Moreover, British interpretations of the various religions were condescending at best, although they were most often marked by condemnation.

When Britain first became the dominant political force in the region, it tended to employ a legal system based on that of the Mughals, in which different religious groups had their own autonomous courts, adhered to their own traditions and used their own religious and legal experts.[1] In his introduction to the translation of the *Hedaya*, Charles Hamilton claims that under the Mughals, over time the Indian Muslim population strayed from the strict adherence to Islamic law, supposedly in contrast to other Islamic regimes.[2] Despite the disagreement that most of the British had with Islam in general, it was nonetheless the general consensus that straying from Islamic law was a central but negative aspect of Mughal administration. Although the British considered their religious and philosophical ideals superior to those exhibited in India, they felt that, as the superior race, they could best administer any legal system, inferior as it may be.

Although it came from the same Abrahamic root as Christianity, Islam was no less treated as an inferior religion. However, the relationship between British orientalists and Islamic law was conflicted, usually marked by patronizing distaste, but on rare occasions, it was marked by appreciation for aspects that, were they applied in Britain, would have solved some problems back home. For example, in *Principles and Precedents of Moohummudan Law*, McNaughten and Sloane state that, in the case of Islamic inheritance laws, "it is difficult to conceive any system containing rules more strictly just and equitable."[3] In contrast to other aspects of Islam, British administrators appreciated the Islamic inheritance system and perceived it as not only civilized but also perhaps more advanced than their own. However, Indian Muslims did not strictly adhere to Islamic

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[1] Asaf A. A. Fyzee, "Muhammadan Law in India," *Comparative Studies in Society and History,*
[2] Ali ibn Abi Bakr Marghinani, *Hedaya,* trans. Charles Hamilton (London: Wm. H. Allen & Co., 1870), xiv.
[3] William H. McNaughten, William Sloan, *Principles and Precedents of Moohumudan Law,* v.

inheritance rules. Because the British agreed more with the Sharia law in dealing with inheritance than with local customs, their law enforcement policy became more interventionist, forcing a completely different form of estate management upon Indian Muslims. This is just one example of the situations in which the British administration altered major components of Islamic practice in the region. Sometimes, as in the case of inheritance, their policies resulted in stricter adherence to Sharia customs. In other cases, British disagreements with Islamic law led to more Westernized policies, such as with the Penal Code. This new, hybrid legal system for the Indian Muslim population is today known as Anglo-Muhammadan Law, which helped shape the future of Muslim culture in the region into its current form.

Not many Islamic legal texts were translated for Court reference. The most heavily used texts were the *Hedaya*, books of Sunna, and, naturally, the Quran. The *Hedaya*, originally written in Arabic, was translated with commentary by Sir Charles Hamilton from Persian and is a legal sourcebook in the Hanafi tradition. In *Principles and Precedents of Moohummudan Law*, McNaughten and Sloan state in their introduction:

> The Hedaya or guide, a Commentary on the Mussulman Laws, Civil and Criminal, is the sheet anchor of the Mahomedan Lawyer. It contains a faithful representation of the doctrines of Abu Hanifah, and his disciples Abu Yusuf and Imam Mahomed; and to use the words of a Mahomedan author, 'it has been declared like the Koran, to have superseded all previous books 'on the law.'[4]

[4] McNaughten, Sloane, *Principles and Precedents of Moohumudan Law,* vii.

The common belief among scholars today is that these guidelines were taken literally and enforced as written by the British, despite numerous lapses in practice. This held true to a large extent, but major exceptions did exist, which will be discussed in the following chapters. More common than the steadfast, strict adherence to these texts were Utilitarian interpretations of Islamic law. Completely disregarded by British courts was the intended system of interpretation and deduction for which these legal opinions were written. While there existed in the pre-British Islamic Courts a spectrum of adherence to the written law, anywhere from near disregard to literalism, so did this spectrum exist in British India. What separates the two systems is the jurisprudential background. Where *istihsan* and *qiyas* were once employed, equity and Precedents now prevailed.

Moreover, laws were enforced with new motives; whether or not they were executed as they were in order to protect the Muslim subjects is debatable, as there were a variety of outcomes for different populations within the community. For example, women tended to enjoy more protection in cases of inheritance, marriage and divorce. Mitra Sharafi examines 19 civil cases in her article "The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law," to support her argument that the British regime did not adhere to the translated texts in order to protect women's rights. She also shows in these cases that many judges acted autonomously, without regard to precedent, in order to protect women. In contrast, through the strict enforcement of Islamic inheritance laws, many families suffered the forced fragmentation of their assets, including businesses, lands, and other sources of livelihood. One might argue that with the emergence of feminism in Britain, such sentiments were similarly expressed in Indian courts, as an attempt to protect the "weaker sex." However, exceptions

to female protection involving orientalist assumptions were also sometimes economically detrimental to the Muslim community as a whole as female inheritance rights increased.

Many scholars argue that Utilitarianism and new concepts of "natural law" and liberty made their impact on Anglo-Muhammadan law. While these ideas were spreading rapidly throughout the region through British education, and certain cases do point to their usage in the Courts, it could easily be argued that their prevalence was not nearly as widespread in the judicial system as one might assume, based on the education of the administrators. The first chapter of this thesis will discuss Western philosophies used in the Courts. I will use writings of the nineteenth-century philosopher John Stuart Mill, including *On Liberty, Utilitarianism,* and *The Subjection of Women,* as references in explaining how such British philosophies were applied. Also helpful for my explanation of the effects of Utilitarian philosophy is an article by J. Majeed, "James Mill's 'The History of British India' and Utilitarianism as a Rhetoric of Reform". This article describes the environment in which Utilitarianism was conceived, as well as its application to British India. Gregory Kozlowski's book *Muslim Endowments and Society in British India* provides further information on the influences of several philosophers, including Jeremy Bentham and others. I will also discuss the effects of the replacement of concepts of Islamic jurisprudence with those of British jurisprudence on the Anglo-Muhammadan Courts and its subjects. For comparative purposes, I will use *Principles of Islamic Jurisprudence* by Mohammad Hashem Kamali, which summarizes the methods of interpretation traditionally used in Islamic legal systems.

The first chapter will also discuss the codification of Muhammadan Law in textbooks and translations primarily used in the Colonial Courts. Primary sources for my research

will include, along with the *Hedaya*, several British texts concerning the Court interpretation and execution of Islamic laws. These include Sir William Hay Macnaghten and William Sloan's *Principles and Precedents of Moohummudan Law*, which was heavily used following its compilation in 1825, William H. Morley's *Administration of Justice in British India; Its Past History and Present State: Comprising an Account of the Laws Peculiar to India* (1858), Sir Roland Knyvet Wilson's *An Introduction to the Study of Anglo-Muhammadan Law* (1894), and Neil B.E. Baillie's *A Digest of Moohummudan Law on the Subjects to which it is Usually Applied by the British Courts of India* (1875). These texts played a major role in the education of British judges. As simplifications of translated classical texts and guidelines based on precedential cases, these books were more easily understood and often used in place of texts such as the *Hedaya.* Therefore, in order to understand truly the logical process in determining case outcomes, it is necessary to research these sources.

One aspect of the British administration worth mention is the use of religious experts in the Courts, and the change (i.e. dissolustion) of their roles over time as the British adopted more interventionist methods of government. One article concerning the 'Ulama in India in this period, "The Social Transformation of the 'Ulama' in British India During the 19th Century", by Saira Malik, discusses how the Muslim religious and legal scholars became less powerful under the British government, and how their place in society was transformed.

Scott Alan Kugle's 2001 article, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," portrays the British administration as a much less benevolent force, taking into account their racism and self-serving motives when

describing the judicial process. He discusses the evolution of the Anglo-Muhammadan legal system, with reference to specific issues. He goes on to describe its influence on Muslim cultures in the regionand the heavy influence of orientalist interpretations. The process of translation and interpretation, as well as the contrast between British usage of Islamic texts and Mughal usage is well articulated in the article by Elisa Giunchi, "The Reinvention of Shari'a Under the British Raj: In Search of Authenticity and Uncertainty".

The second chapter will discuss inheritance in the Indian Muslim community during the colonial era. I will explain through the use of several recorded cases the extent of British adherence to Quranic inheritance laws. Several scholars argue that the British Courts enforced a strict interpretation of Islamic inheritance, which resulted in fragmentation of estates and was detrimental to the financial state of the Islamic community. However, I will argue that this was not always the case. I will also discuss the use of gifts as a successful replacement to limitations of Islamic inheritance distribution, comparing the use of gifts in British India with gifts in British inheritance customs.

The third chapter will focus on endowments. One of the most controversial subjects of legislation in British India, the structure of endowments was heavily reshaped in the nineteenth century. The British viewed the institution of *awqaf* as a way for Muslims to avoid the inheritance laws of their own religion. In the Hanafi tradition, *awqaf* cannot be used to replace the inheritance distributions required in the Quran. In British India, *awqaf* exhibited Anglo-Muhammadan hybridity by requiring that they be used solely for "pious" purposes. I will discuss the British definition of "pious", made especially narrow for the purpose of the *awqaf*, and I will also discuss how the requirement that a large (indefinite)

portion of the *waqf* be allotted to pious purposes in order to ensure its validity was a British idea that inhibited the financial stability of Muslim families.

One of the most detrimental effects of the lack of Islamic legal procedure was the invalidation of family endowments. Many studies mention this issue. *Muslim Endowments and Society in British India*, a book written by Gregory C. Kozlowski, provides a history of the Muslim endowment and its British interpretation. He provides a history of the development of the legal procedures of Muhammadan law and the philosophies that influenced them. He discusses cases involving 40 different *awqaf* from the nineteenth century that provided precedents for all future *waqf* issues, and he explains the political and economic issues that arose from the British treatment of the institution. A contributing article to family *awqaf* in British India is "The Attack on Muslim Family Endowments", by David S. Powers. In it he explains the process of eventual dissolution of the institution through cases that became precedents in the legal system.

The fourth chapter will discuss *mahr* and maintenance, with a focus on the infiltration of British ideals of marriage and divorce into court cases. I will explain how the distinction between proper dower and excessive dower was made unclear and how this affected distribution of estates. I will also explain how legislation on *mahr* and divorce acted as a double-edged sword, enabling women's financial independence but also making it more difficult for women to obtain a divorce. I will explain how this puts the notion of chivalric imperialism into question, as women were not given as much independence from their husbands.

I have used a number of sources to find appropriate cases to defend my arguments. One of the pioneers of the topic of Anglo-Muhammadan law was Asaf A. A. Fyzee, who

wrote primarily in the 1960's. A loyalist to the British cause, he defended the hybrid methods of jurisprudence exhibited in the British Courts. His primary article, "Muhammadan Law in India", describes how texts were generally interpreted, and he also summarizes what parts of Islamic law were replaced with universally applied British laws. He also compiled forty-three individual cases in the book *Cases of Muhammadan Law in India, Pakistan and Bangladesh*, which I employed for some of my arguments. Although it must be recognized that Fyzee favored the British administration, his collection of cases and explanation of the general administration is concise and useful. What is left unnoticed in his writings is the overwhelming number of situations in which the British system failed. I will also refer to cases from the Indian Law Reports of the British High Courts in Oudh, Bombay, Allahabad, and Madras.

With the help of these sources, I will provide a detailed description of significant aspects of Anglo-Muhammadan law and its effects on South Asian Muslim society in the Colonial period. I will focus primarily on the period after the rebellion, or mutiny, of 1857, as this marks a drastic increase in British intervention and reshaping of Indian Muslim customary laws. As the British had a momentous impact on Islam of the South Asian variety, it is imperative that historians continue to seek a better comprehension of its effects. Much scholarship on this topic conforms to the claim that the *Hedaya* was used as a strict legal code, when before British occupation it had been used merely as a guideline. This explanation, in my opinion, is much too simplistic, and if one looks into exceptional cases and certain issues in the Muhammadan Court, it is clear that there existed a continuum of adherence to primary sources. On one end of the continuum, the courts exhibited strict adherence to the texts, especially in the case of inheritance. On the other

end, they exhibited great leniency or complete opposition to texts, as in cases involving endowments as well as other situations to be examined. Their adherence did not always depend on utilitarian principles of what was best for their subjects, neither was it always rooted in a British desire to enforce a pure Islamic jurisprudence. Often it merely depended on British personal interests. This thesis will discuss the hodgepodge of interests, ideologies and outcomes, in hopes of providing a better background for an understanding of the roots of Muslim legal culture in South Asia in the 21st century.

Chapter One: Philosophies and Contradictions of Anglo-Muhammadan Law

"There have been an abundance of people, in all ages of Christianity, who tried to make it something of the same kinds; to convert us into a sort of Christian Mussulmans, with the Bible for a Koran, prohibiting all improvement…"

-John Stuart Mill, *The Subjection of Women,* 1869

As the British government became increasingly interventionist in the governance of Muslims in the Indian subcontinent, Anglo-Muhammadan Law in the region took on a unique form. It was molded not only by Orientalist interpretations of what they thought *fiqh* was supposed to be, but also by rising liberal philosophies in the West. This clash between an assumed traditional conservatism and encouraged modernism can be seen in the comparative analysis of the collection of cases in the following chapters. Anglo-Muhammadan Law was a judicial system in which the authorities did not necessarily agree with the laws, but they enforced them because they believed that they had the greatest authority and ability to do so, and also because it was easier than starting from scratch. This chapter will explain the logic behind the British Indian Muhammadan legal process and dissect the Court's structure.

Justice is not a universal concept any more than right, wrong, good, and evil are. It is the product of a creative, intellectual process in which an authoritative group determines its meaning within a particular community. One must be an expert on his or her community and its cultural norms in order to grasp its concept of Justice. An individual's conscience must be molded, to an extent, to assimilate the morals of the community. Therefore, the British took on an impossible task when they attempted to master the intricacies of the Hanafi law of South Asia. They attempted to become fluent in, and even improve upon, a millennium-old process in just a few years.

Moreover, the British assumed that all Indian Muslims were religiously devout and willingly adhered to the laws laid out in the translated legal texts that they used. Although the ruling class of the Mughal Empire was Sunni with a Hanafi legal background[5], they were a religious minority. Indian converts retained much of their previous Hindu customs, and because Sufis had played a major role in the spread of Islam in the subcontinent, new converts tended to be more spiritually than culturally devout[6]. Several Shia sects were represented in the Indian population as well[7].

It also goes without saying that the degree of adherence to religious customs varied not only from sect to sect, but also from village to village and family to family. Although Islam made its impact on Indian cultures, it did not simply uproot the old cultures and replace it; rather, it became interwoven with local customs and created sects and cultures unique to the region. There was never a time when a single European government attempted to adhere entirely to the teachings of Christianity as laid out in the Bible. Likewise it is important to note the first and most obvious contradiction manifested in Anglo-Muhammadan law: the demand that all Indian Muslims strictly adhere to Islamic Law in all aspects of life.

This basic misunderstanding of the purpose of *Shariah* was the principle cause of failure on the part of the British to govern the Muslim population fairly. The Quran, the *Hedaya*, and the *Sunna*, were meant to illustrate how live a blameless life, something that few, if any, individuals in human history have been able to do perfectly. In Western society, *Shariah* is rarely compared to something like Jesus' Sermon on the Mount or the Eightfold Path of Buddhism. Rather, it is

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[5] The aristocracy was known as the *ashraf*, and they were mainly of Persian or Turkic descent. Their brand of Islam had much less influence from the local religions and caste systems.
[6] Abdullahi A An-Na'im, *Islamic Family Law in a Changing World: a Global Resource Book* (New York: Zed Books Ltd, 2002), 202.
[7] Ibid, 203.

characterized as a legal code. Someone educated in the West might expect to find a clearly labeled, multi-volume collection of laws when searching for *Shariah.* In fact, many are unacquainted with the term outside of the context of a handful of corrupt, oppressive regimes as portrayed in the news, and believe that nothing good can come of it. This view is not unlike the British concept of *Shariah* in the Colonial period. As seen in the quote from J.S. Mill's *The Subjection of Women* at the beginning of this chapter, the common view of Islam, or "Mohammedanism" as they called it, was that it was a religion rooted in salvation superficially acquired through deeds and adherence to "Muhammadan" laws.

This simplification of Islam, combined with deep-seeded prejudices towards their colonized subjects, led to the British exploitation of their own brand of fundamentalism. The architects of Anglo-Muhammadan law were strong believers in the superiority of their own system. In his preliminary discourse to his translation of the *Hedaya* in 1791, Sir Charles Hamilton's statement reveals the British attitude: "We may observe, with some degree of laudable exultation, its obvious inferiority, in every useful view, to that excellent system which we profess, and which is so admirably calculated to promote the temporal good of mankind, as well as their eternal happiness!"[8] It would have made sense to raise the question of whether it was ethically sound to enforce laws without much respect for them, but this was never considered.

Considering the British belief in the superiority of their own civilization, they adopted the idea of a pluralistic system of customary laws based on religious affiliation from an unlikely source. This method of governance was not new in the region of the Indian partition; it had

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[8] Ali ibn Abi Bakr Marghinani, *Hedaya,* trans. Charles Hamilton (London: Wm. H. Allen & Co., 1870), xxvii.

existed for centuries during the Mughal Empire.[9] Because of the great religious diversity in the region, the Mughal government decided to allow semi-autonomy to the various religious groups, with the option to come to the local judge or *qazi* for civil matters. The *qazi* did not interfere in matters brought up in Hindu assemblies[10]. The British government did not want to alter the situation drastically when the East India Company began to consolidate its power in the region, so it attempted to maintain this pluralistic system as it acquired more territories in the seventeenth, eighteenth and early nineteenth centuries. Sir William Jones, a philologist of Ancient India, wrote in a letter to the Governor-General and Council of Bengal in 1788:

> 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; nor could any thing be wiser than, by a legislative act, to assure the Hindu and Muselman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed upon them by a spirit of rigour and intolerance.[11]

However, this policy of non-interference did not last long, and by the second half of the 19th century the Colonial government's structure had little or no resemblance to that of the

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[9] Asaf A. A. Fyzee, "Muhammadan Law in India," *Comparative Studies in Society and History* 5, no. 4 (1963): 402.
[10] M. L. Bhatia, *Administrative History of Medieval India: a Study of Islamic Jurisprudence Under Aurangzeb* (New Delhi: Radha Publications, 1992), 176.
[11] Shama Churun Sircar, *Vyavasthā-Chandrikā: A Digest of Hindu Law, as Current in All the Provinces of India, Except Bengal Proper* (Calcutta: Girish Vidyaratna Press: 1867), xxi-xxii.

previous Mughal Empire. In 1860, the Indian Penal Code replaced the criminal laws of religious communities[12]. The Indian Evidence Act of 1872 replaced the evidence guidelines as laid out in *Shariah*[13]. A Supreme Court in Calcutte was established in 1774, on 26 December 1800 the Madras Supreme Court was established, and the Bombay Supreme Court was established on 8 December 1823. In 1861 the High Courts Act established High Courts in place of the Supreme Courts in Bombay, Madras and Calcutta; all jurisdictions were included in these courts, and this gave them the power to commit for contempt[14] of Court[15]. Moreover, British translators attempted to take a relatively minute portion of the literature on Islamic Jurisprudence, including the *Hedaya* mentioned above, as well as the *Sirajiyyah*[16] and the *Fatwa-e-Alamgiri*[17], and use these few texts to codify Islamic law, or what is today known as "Anglo-Muhammadan" or "Muhammadan" law, as coined by Asaf A. A. Fyzee[18], because of its hybrid nature and its lack of resemblance to Islamic *fiqh.*

The role of the legal scholar from those of the intellectual elites with a classical Islamic education dwindled, and control of all administrative duties in the Muslim communities during

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12 Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh, Second Edition* (Oxford: Oxford University Press, 2005), xxxiii.

13 Ibid, xxxiv.

14 K. Balsankanaran Nair, *Law of Contempt of Court in India* (New Delhi: Atlantic Publishers and Distributors, 2004), 28.

15 "'Direct Contempt of Court' is the inherent power judicial officers possess to maintain respect, dignity, and order during proceedings…A judge may find anyone in her court--attorneys, parties, witnesses, and spectators--in civil or criminal direct contempt. Beacuse direct contempt of court involves conduct at the proceedings, criminal direct contempt is much more unusual than civil direct contempt." (Cornell University Law School, *Legal Information Institute,* http://www.law.cornell.edu/wex/contempt_of_court_direct, 4/4/2013.)

16 Translated by William Jones in 1792, this is a short treatise on inheritance by Shaikh Sirajuddin.

17 This text was translated by William N. Baillie, and then was highly condensed and published in 1865 as the *Digest of Muhammadan Law.* This replaced the *Hedaya* as the standard.

18 Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh, Second Edition* (Oxford: Oxford University Press, 2005), xxxiii.

the Mughal period[19] went to British educated representatives in the Courts by the mid-19th century. Between 1813 and 1835, British authorities enforced several educational reforms on the Islamic schools, or *madrasas*. Before the reforms, the *madrasas* provided an Islamic education in Persian and Arabic, which consisted of both "rational" and "traditional" sciences. In reforming this system, the British split the subjects of study into "non-religious" and "religious", which translated respectively into "useful" and "non-useful". The "useful" subjects were to be taught in English, and the "non-useful" subjects were greatly marginalized, as was the role of the *qazis* in the Courts. This change not only effectively transferred administrative duties to British-trained officials, but the depleted Islamic educational system also undoubtedly impoverished Indian Muslim culture by ensuring a lack of highly educated, influential Muslim scholars in the region.

The British Colonial Courts attempted to construct a façade of semi-autonomy; in the Muslim courts a *qazi* acted as an advisor to the judge, but this position was gradually reduced to a mere representative. At the onset of the British legislation (late 18th century and early 19th century), the *qazi*'s were allowed to work in an environment similar to that of the previous Mughal system, in isolation and judging on a case-by-case basis, rather than making decisions strictly based on previous judgments[20]. However, British officials often disagreed with their judgments, and the will of the authorities would overrule that of the Muslim *'ulama*. Over time former cases would be used more heavily in judgments than the scholarly interpretation of Islamic texts.

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[19] M. L. Bhatia, *Administrative History of Medieval India: a Study of Islamic Jurisprudence Under Aurangzeb* (New Delhi: Radha Publications, 1992), ix, 146,175.

[20] Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985), 132.

As British opinions interfered with the decision-making process of the *'ulama*, the laws became more and more intertwined with British precedents. The categorization of "useful" and "non-useful" education is an example of the heavy influence the popular Western philosophy of Utilitarianism had on British administration in India in the 19th century. It preached that the most morally right action was the one that produced the most "good" or "happiness". In his series of articles published in 1861, John Stuart Mill, often considered a leader of the movement (along with Jeremy Bentham), provides his definition of the principle:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the absence of pleasure.[21]

As a secretary to the India Company's London directors, Mill was influential in formalizing the administration in the subcontinent[22]. He was extremely prejudiced towards Indian society, as he considered Hindus and Muslims misguided to the point of barbarism, but he was also passionately against the irrationality and unnecessary complexity of the British legal system[23]. He was much more in favor of starting from scratch, creating a new, practical system based on his Utilitarian standards. Legislation such as the aforementioned Indian Penal Code and the Indian Evidence Act are examples of the creation of a new system unique to the region.

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21 John Stuart Mill, *Utilitarianism* (New York: The Modern Library, 2002), 239.
22 Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985), 128.
23 Ibid.

The combination of Utilitarian ideals with the customary system adopted from that of the Mughals (but altered by the increasingly interventionist policies of the British) had contradictory outcomes. While India was often treated as a testing ground for novel philosophies, its history quickly became littered with manipulations of "Muslim" laws to promote "happiness", as we will see in the following chapters. The new system's failure was not necessarily because of the inferiority of the modern philosophies available to lawmakers; rather, it was primarily because of the heavily ingrained prejudices that many influential British exhibited.

First and foremost, a common belief among the British in this time period was that it was the British Empire's absolute right to conquer other lands because of British racial and moral superiority. In many books, letters or speeches written by Englishmen in the 19th century concerning this matter, one can find explicit examples of such beliefs. In Charles Wood's speech to Parliament (1861), he makes this bold statement before discussing the establishment of the Imperial Legislative Council:

> We have to legislate for different races with different languages, religions, manners and customs ranging from the bigoted Mahommedan, who considers that we have usurped his legitimate position as the ruler of India, to the timid Hindoo, who, though bowing to every conqueror, is bigotedly attached to his caste, his religion, his laws and his customs, which have descended to him uninterruptedly for countless generations. But, added to that, we have English settlers in India differing in almost every respect from the native population- active, energetic, enterprising, with all the pride of race and conquest, presuming on their superior powers and looking down in many respects and I am afraid

> violating in others, the feelings and prejudices of the native populations, with whom, nevertheless, they must be subject to laws passed by the legislative body in India.[24]

If a statement such as this could go without any comment in Parliament, then it is clear that such degrading generalizations of the colonized subjects were widespread. Moreover, this statement clearly implies that Indians deserved a more oppressive legal system than British colonists. The purported objective was customary autonomy, as noted in Queen Victoria's proclamation to the Princes, Chiefs and people of India just three years before:

> Firmly relying ourselves on the truth of Christianity, and acknowledging with gratitude the solace of religion, we disclaim alike the right and the desire to impose our convictions on any of our subjects. We declare it to be our royal will and pleasure that none be in any wise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure.[25]

However, because the governance of India was placed in the hands of people like Charles Wood, who had an obvious antipathy towards Indians and their cultures, oppression and alteration of the anticipated customary laws were inevitable.

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[24] "Charles Wood's Speech to Parliament (1861)," *Routledge,* January 27, http://cw.routledge.com/textbooks/9780415485432/48.asp.

[25] "Queen Victoria's Proclamation to the Princes, Chiefs and the People of India (1858)", *Routledge,* January 28, 2013, http://cw.routledge.com/textbooks/9780415485432/48.asp.

The common belief in the Indian population's moral inferiority combined with modern ideals about the role of women to create the idea that it was the British Courts' chivalric duty to protect their female subjects from male oppression, which they believed to be much more common in these supposedly less civilized parts of the world. The rights of women in England were considered proof of the superior success of Christian civilization[26]. In reality, an English marriage removed almost all of a woman's rights (rights to own property, to sue, etc.), and she was more subordinate to her husband than a woman in a traditional Islamic or Hindu marriage until the second half of the 19th century. In 1857 matrimonial jurisdiction was moved from the Ecclesiastical courts to civil courts; the Matrimonial Causes Act of 1857 gave Englishwomen the right to separation; the Married Women's Property Act of 1882 allowed married women to hold separate property[27].

However, instead of focusing on the marital rights of Muslim and Hindu women in their own context, British propaganda focused on cultural differences in order to enhance the perceived barbarism of the stereotypical Indian. *Sati,* or widow-burning, was often alluded to when describing Indian civilization, and it was sensationalized in British propaganda[28]. Also considered necessary reforms for the enlightened British were the treatment of widows, child marriage, and female infanticide. These were the main priorities of British legislation, and they were treated in the Sati Regulation Act of 1829, the Widow Remarriage Act of 1856, the Age of

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[26] Flavia Agnes, "Women, marriage and Subordination of rights," in *Community, Gender and Violence: Subaltern Studies XI*, ed. Partha Chatterjee and Pradeep Jeganathan, 106-137, (New York: Columbia University Press, 2000), 117.
[27] Ibid, 118.
[28] Harald Fischer-Tiné, Michael Mann, *Colonialism as Civilizing Mission: Cultural Ideology in British India* (London: Wimbledon Publishing Company, 2004), 18.

Consent Act of 1860 and the Prohibition of Female Infanticide Act of 1872[29]. The history of these acts is in itself a separate, complex argument. Although pre-colonial Indian society was by no means utopian, it was a completely erroneous assumption that customs such as these were uniformly practiced; there existed a wide variety of doctrines and sects beyond those defined by the texts translated by the British, and the translations often ignored the context of many customs[30].

By systematically propagating a distorted image of a sadistic, woman-hating India, the British were able to justify absolute legislative power. Now that I have examined the process of creating Anglo-Muhammadan Law from a philosophical angle, I will look into specific case studies. For the purposes of my research, I will focus on cases to do with Inheritance, *awqaf*, and *mahr* and maintenance, in that order.

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[29] Flavia Agnes, *Law and Gender Inequality: the Politics of Women's Rights in India* (Oxford: Oxford University Press, 2001), 47.
[30] Ibid, 15.

Chapter 2: Inheritance

Because of the exceptional diversity of the Indian Muslim population, combined with syncretism with aspects of Hindu culture, Islamic inheritance customs in the subcontinent did not accurately reflect the inheritance customs laid out on the Quran. Women tended to renounce their share of inheritance as prescribed by the Quran to maintain a relationship with their male relatives in case of divorce.[31] Also, in order to avoid the fragmentation of family businesses and lands, it was common practice to avoid Islamic inheritance laws through the institution of perpetual endowments (a strategy adopted throughout the Islamic world).[32] This institution will be explained further in the following chapter. Aside from *Sharia* endorsed methods of avoiding the division of family wealth, Indian Muslims, especially descendants of Indians who converted from Hinduism, rather than those who migrated from Central Asia and elsewhere, tended to share cultural practices with their Hindu neighbors.[33] Also, many Indian Muslims converted to Islam under the influence of Sufism, and therefore their brand of Islam was based more on the devotional aspects than the legal aspects of the religion.[34] Therefore, Islamic personal law was, and still is, often ignored.

The replacement of Mughal administration with that of the British completely altered the economic system of the region. With the establishment of the Permanent Settlement of Bengal in 1793, land ownership replaced the system of entitlement to goods

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[31] Abdullahi An-Na'im, *Islamic Family Law in a Changing World: a Global Resource Book* (New York: Zed Books Ltd, 2002) , 211.
[32] David S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India", *Comparative Studies in Society and History* 31:3, 1989, 536.
[33] *Islamic Family Law,* 202.
[34] Ibid.

and services in order for the British government to receive tax revenue.[35] The switch from a feudal system could have been beneficial, but it was accompanied by the gradual enforcement of Islamic inheritance customs, without regard to any loopholes, whether customary or *Sharia*-based. This enforcement was not immediate, but by 1861, with the increased centralization of the judicial system in the Indian High Courts Act, the Quranic inheritance system was strictly enforced, with little to no regard of the diversity of sects.[36] However, Shia Muslims were expected to adhere to slightly different inheritance customs.[37]

Aside from the supposed chivalric mission of colonialism as explained in the previous chapter, there existed a virtually unanimous admiration among the British for Islamic inheritance laws.[38] Some even stated that Islamic inheritance customs were more just than the inheritance customs in Britain. McNaughten and Sloan in *Principles and Precedents of Muhammadan Law* state, "indeed it is difficult to conceive any system containing rules more strictly just and equitable."[39] This can partly be explained by dissatisfaction with the British system of primogeniture; the Islamic method of splitting the inheritance among siblings allowed Utilitarian happiness for a much greater number of individuals. Moreover, it must have been surprising to British scholars to find that another culture had already been granting women privileges for a millennium, privileges for which women in England were currently fighting.

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[35] Powers, "Orientalism, Colonialism, and Legal History…", 555.
[36] Anil Chandra, *English Law in India* (New Delhi: Abhinav Publications, 1984), 180.
[37] Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh Second Edition* (Oxford: Oxford University Press, 2002), 79.
[38] Powers, "Orientalism, Colonialism, and Legal History…", 555.
[39] W.H. McNaughten, William Sloane, *Principles and Precedents of Moohummudan Law* (Madras: Law Bookseller and Publisher, 1864), v.

Although it is refreshing to see that the British were willing to notice the strengths in cultures and religions not their own, the enforcement of Islamic inheritance on the Indian Muslim population was the imposition of an entirely different custom from the inheritance customs being practiced in the region before the influence of Anglo-Muhammadan law. Before the British occupation, individual wealth was based on entitlement to products and services. In 1793, the Permanent Settlement in Bengal was established, and people received permanent titles to their land and gained socioeconomic status in accordance with the land they owned and the taxes they paid on it.[40] Land was suddenly worth keeping in the family even more than it had been earlier. Along with the longstanding disregard among a huge portion of Indian Muslims for Islamic inheritance laws, there was absolutely no incentive to distribute inheritances according to the Quran.

In 1825, Sir William McNaughten published *Principles and Precedents of Muhammadan Law*, which provided a clear, simplified list of guidelines for Muslim inheritance. This was used by judges more often than the *Hedaya* on account of its clarity and its condensed form.[41] This guide allowed judges to be more uniform in their decision-making process, rather than take into account the peculiarities of each case. It clarified the exact portion that each family member should be allotted from the estate, and this was much simpler to use than gathering several witnesses to attest to a unique custom with its own inheritance guidelines.

Indians attempted different methods to avoid such predicaments. Many would request exemption from the religious inheritance law on the grounds that their family

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[40] Powers, "Orientalism, Colonialism, and Legal History…", 555.
[41] Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985), 130.

adhered to a local inheritance custom that differed from the inheritance laws laid out in the Quran. Several recorded cases reveal attempts to legitimize customs in the British Court. The case of *Fatimabai v. Aishabai* (Feb. 12, 1888) involves the Kutchi Memon sect[42]. These two women had a history of arguments in the Court. Both were previously married to a man who died in 1878, and Fatimabai had a daughter with him. In 1882, Aishabai filed a suit against Fatimabai, claiming that the latter was only a mistress of the deceased husband and therefore was entitled no share in the inheritance. The Court ignored her request and split the inheritance evenly between the two. Aishabai remarried in 1886, so Fatimabai brought her to court in the final case of 1888, claiming that according to Kutchi Memon custom remarriage requires the forfeiture of the inheritance from a previous marriage. Although in the previous suit the Court ruled that Fatimabai deserved half of the inheritance, they upheld in this case that it could not be proven that Fatimabai was in fact the man's wife, thus she had no rights to Aishabai's share regardless of any custom. We can see from this scenario that in the British Courts the distribution of inheritances according to the Quran was favored over any local customs introduced.

While the neglect of customs altered the finances of innumerable families, sometimes the chivalry of the Court helped to avoid the fragmentation of estates. Although this might have deprived some men of their inheritances, women sometimes received the entire estate, thus maintaining a singular estate and providing some women with financial means that would not have been gained without British enforcement. This was more likely in cases concerning Shia inheritance. In *Abdul Hussein v. Bibi Sona Dero* (1917), a Shiite Muslim died and left no will. The Court was inclined to maintain that his estate was to be

[42] The Memons are a Sunni, Hanafi sect from the region of Gujarat that converted to Islam around the 12th century. Read more in the *Encyclopedia of Islam.*

distributed according to Shia custom. Since he had no children, the entire estate was supposed to go to his sister, Bibi Sona Dero. (Had the deceased been Sunni, she and his nephew would each get half.) However, his nephew, Abdul Hussein, claimed that it was the local custom to exclude females from inheritances. Moreover, the plaintiff claimed that the deceased had been Sunni, and therefore he should receive at least half of the inheritance. The plaintiff brought forward 61 different witnesses who claimed prevalence of the custom. The British Court, however, instead took the testimony of a "prominent member" of the deceased's family, which held that no such custom existed. The Court also brought to light a recent inheritance case in the same community in which the inheritance was distributed according to Shiite rules. Moreover, the Court ruled that, because of his visible religious behavior, it was clear that the deceased had in fact been Shiite, and therefore the entirety of the estate went to the defendant, Bibi Sona Dero.[43]

In this case, an attempt to split an inheritance on the grounds of custom was rejected by the British Court. This shows that, although this was not always the outcome, judges were not motivated by the destruction of the economic well being of their Muslim subjects. Another possible motive for an outcome such as this, besides the supposed mission to protect women, could be the unwillingness to complicate the legal system already in place by adding more branches for more customs. Had the Court accepted the plaintiff's (Abdul Hussein's) request to recognize the local custom of solely male inheritors, rearrangements were required in order to accommodate for the sub-category of Sunnism in this particular region of India. Considering the great diversity of the Indian Muslim

[43] *Cases in the Muhammadan Law*, 78-85.

population, the British must have decided not to bother attempting to recognize every sub-sect and instead imposed a more generalized version of Islam on its subjects.

That being said, even mainstream persuasions did not always overrule the application of Quranic inheritance laws. Families of mixed religions had just as much difficulty avoiding Sharia inheritance. This was because of the unclear legislation regarding inheritance in families with more than one religion. In *Principles and Precedents,* two of the general rules concerning difference of religion are as follows:

> 6. Slavery, homicide, difference of religion and difference of allegiance, exclude from inheritance.
>
> 7. But persons not professing the Muhammadan faith may be heirs to those of their own persuasion, and in the case of those who are of the Muhammadan faith, difference of allegiance does not exclude from inheritance.[44]

This contradiction makes it unclear as to whether non-Muslims were lawfully entitled to a share of a Muslim's estate. *Mitar Sen v. Maqbul Hasan* (1930) is a case in which British-administered Islamic law caused fragmentation despite the prevalence of Hindus in the family. Jagardeo Singh, a member of a Hindu family, had converted to Islam in 1843 and died in 1844, leaving two sons and two daughters. One of the sons inherited his entire estate. He then married and had one daughter. She married and had three children, who were the defendants in this case. Mitar Sen Singh, a sixth generation descendant of Babu Sangram Shah, his common ancestor with Jagardeo Singh, brought the issue forth. He

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[44] *Principles and Precedents*, 1-2.

claimed to be the rightful heir of Jagardeo Singh according to Hindu customs, and that females were to be excluded from inheritance. The plaintiff alluded to the Caste Disabilities Removal Act of 1850; "Whenever in any civil suit the parties to such suit 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 the operation of such laws, they would be entitled…" The Court's reply was that this act was meant to protect solely the inheritance rights of the individual who renounced his religion. The appellant's case was dismissed on the grounds that, with some exceptions in regards to unconverted children, the deceased's estate should be distributed to his or her heirs according to his or her persuasion.[45]

Here, the local custom argument clearly was not very successful. It appears from the above cases that the reluctance to recognize many inheritance customs was a pattern in the Colonial courts. This had a direct impact on the distribution of finances in Muslim families, but it is highly probably that there were other outcomes as well. The generalization of local customs reshaped inheritance methods for Muslim communities in the Indian subcontinent, and under British rule Indian Muslims were influenced by this foreign, strict system that was forced upon them.

Another method of avoiding Anglo-Muhammadan inheritance was by way of gifts. This method was more successful than the custom argument. A gift, or *hiba*, according to the *Hedaya*, "in its literal sense, signifies the donation of a thing from which the donee may derive a benefit: in the language of the Law it means a transfer of property, made immediately, and without any exchange."[46] Indian Muslims in the colonial period

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[45] Ibid, 423-426.
[46] Ali ibn Abi Bakr Marghinani, *Hedaya,* trans. Charles Hamilton (London: Wm. H. Allen & Co., 1870), 482

sometimes attempted to give their estates as a gift to a sole inheritor. However, the *Hedaya* states clearly that this is not allowable: "A gift made from divisible property must be divided off; but not a gift made from indivisible property."[47]

In contrast, the first precedent of gifts in *Principles and Precedents* offers room for flexibility. It states that if an entire estate is given by way of a gift to a sole inheritor, this is allowable as long as the deceased was mentally fit to prescribe such an inheritance.[48] Other subsequent precedents provide guidance in considering the validity of more specific gifts. Case IV states that an inheritance cannot be given as a lump sum to three wives and must be split between them.[49] Case V, however, states that it was legal to grant a single gift to two individuals, but it did not allow them to split up the gift unless it was split immediately upon receiving the gift.[50] The ambiguity in these precedents could have offered more hope to the Indian Muslim population in their efforts to avoid fragmentation of estates, but *Principles and Precedents* also provides the following rules concerning gifts:

> 3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period.
>
> …
>
> 11. A gift on a deathbed is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently, no person can make a gift of any

[47] Ibid, 483.
[48] *Principles and Precedents*, 197-198.
[49] Ibid, 199.
[50] Ibid, 200.

> part of his property on his deathbed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest.[51]

It is clear that *Principles and Precedents* contradicts itself on the grounds of gifts. We must take actual cases to see how such ambiguity played out in the Courts.

The law according to the *Hedaya* was used in order to invalidate a gift in the following case. In *Ranee Khujooroonnissa v. Mussamut Roushun Jehan* (1876), a granddaughter of the deceased opened a lawsuit against his eldest son in order to get the "Muhammadan" share of the estate, which had been solely bequeathed as a gift to the eldest son as laid out in the will. The intention of this will was that he would care for his family members with the estate, but it appeared that they were left in a state of poverty. It was determined that the will was " in contravention of Muhammadan Law", and so the plaintiff was awarded her share as prescribed by the Quran.[52] Although this situation might have helped the rest of the family's financial state, this sort of ruling did not allow much freedom within a family for managing the ownership of an estate. This particular inheritance was largely made up of a *zemindary*, or a landholding, which is more profitable as a unified property.

The following case had the opposite outcome. In *Mahomed Buksh v. Hosseini Bibi* (1888), a *pardanashin* woman had gifted the entirety of her properties, which consisted of "some twenty-two villages," to one of her two daughters. Her other daughter brought the case forward on the grounds that the *hibanama*, the will that specificed the amount of the gift and its recipient, was a forgery. The Court dismissed the case after deciding that the

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[51] Ibid, 51.
[52] *Cases in the Muhammadan Law*, 253-262.

document was in fact genuine with the support of three eyewitnesses. They did not consult any precedents or translated texts in order to make a decision.[53]

These gift cases reveal some major characteristics of the Colonial Courts. They were often autonomous in their decisions and at times capable of taking into account special circumstances, as evident in *Ranee Khujooroonnissa v. Mussamut Roushun Jehan*. They did not always discuss Islamic texts or Islamic precedents before making a judgment. Moreover, there was not an aggressive mission to pursue the fragmentation of Muslim estates actively. Because some gifts that contradicted Quranic inheritance were upheld in Colonial India, it could be argued that the fragmentation of estates was an unintended consequence of the British treatment of inheritance cases. It is also important to note the dates of the cases; the varying legality of gifts that overruled Islamic inheritance distribution remained even as the Courts became stricter with regard to cases that dealt solely with the inheritance laws.

The most probable reason for such treatment of gifts in British India is that the institution of gifts laid out in a will was not a foreign concept to the British. The traditional rule of inheritance in Britain was that one third went to the Church, one third to the widow, and one third to the children. (During the feudal system one third went to the lord, one third to the Church and one third to the family.) As the Church's portion was meant to cover funeral costs and the verification and execution of wills, this fraction varied.[54] However, this custom had decreasing adherence with time. In 1692 an act was passed that allowed the inhabitants of the northern province of York to bequeath all their goods to the

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[53] Ibid, 262-273.
[54] John Addy, *Death, Money and the Vultures: Inheritance and Avarice, 1660-1750* (New York: Routledge, 1992), 8.

family.[55] Eventually the norm became the custom of primogeniture,[56] but each will had its own peculiarities and did not necessarily adhere to this custom; deviant executors of such wills were known to alter its contents in their favor.[57]

The splitting into thirds, the tradition of old, has surprisingly much more similarity to Islamic inheritance customs laid out in the Quran. In a time when many British were exasperated with the custom of primogeniture, a return to a more evenly divided inheritance was seen as refreshing and much needed. It is common in scholarship on Colonial India to see a comparison between Roman family law and Islamic and Hindu family law; Flavia Agnes provides a comparison between the three systems in *Community, Gender and Violence*[58], referring to British family law as an offshoot of Roman law. However, in reality, British inheritance customs could not be considered similar to the Roman law or the later medieval law, but was a mixture of Roman and Germanic tradition, altered by developments from the twelfth and thirteenth centuries.[59]

Therefore, the disparity between the outcomes of cases involving an attempt to legitimate a previously unacknowledged custom and those involving gifts are more a reflection of the British cultural understanding of inheritance. The precedent of gifts mentioned above that allowed inheritance of an entire property by a single son in the form of a gift gives us some insight into the main focus of the Judge in determining this precedent:

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[55] Ibid, 12.
[56] Ibid, 9.
[57] Ibid, 55-73.
[58] Flavia Agnes, "Women, Marriage, and the Subordination of Rights", *Community, Gender,Violence: Subaltern Studies XI,* eds. Partha Chatterjee and Pradeep Jeganathan (New York: Columbia University Press, 2000), 109-120.
[59] Linda Tollerton, *Wills and Will-Making in Anglo-Saxon England* (Rochester: York Medieval Studies, 2011), 1.

> It is allowable for a person to make over all his property by gift to one of his heirs, if, at the time of making that gift, the donor was in a state of health and sound disposing mind; and, even though at the time he was sick, the gift is valid, provided he subsequently recover from the sickness. But if he dies in consequence of such sickness, the disposition holds good to the extent of a third only, of the donor's property; that is to say, the donee will be entitled to one-third only, and the remaining two-thirds will be distributed among the other heirs.[60]

The Judge was clearly not nearly as interested in the legality of the gift with respect to Islamic law as he was concerned with the donor's state of mental health. This tells us that suspicion concerning the mental state of the donor and the possibility of taking advantage of such a situation was taken into the highest consideration, was higher than custom. This sort of suspicion was not uncommon among British judges. In England, by the seventeenth century, apparitors were sent to funerals as spies, making sure that widows took out letters of administration and listening to gossip concerning illegal administration of the estate.[61] The character of those executing the will was taken more into consideration in determining the legality of the will's execution, than was the canonical adherence of the will itself. This is confirmed in British India by the outcome of *Ranee Khujooroonnissa v. Mussamut Roushun Jehan*, in which inheritance to a sole heir was rejected because of the impoverished situation in which the heir left the rest of the family. As long as the heir had sound mind and character, he or she could retain the deceased's entire estate.

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[60] *Principles and Precedents*, 197-198.
[61] *Death, Money and the Vultures*, 15.

As we have seen, the issue of inheritance in the Anglo-Indian Courts was complex and often contradictory. The outcome was never guaranteed (although this analysis did not have the means to take into account the possible effects of bribery.), and it must have been unsettling for Indian Muslim families. Inheritance customs were generalized and reshaped in communities that had previously distributed inheritances with less Islamic methods. In the next chapter, I will discuss *awqaf*, another attempt of this population to manage the family estate independently.

Chapter 3: Endowments

As an alternative to the Quranic inheritance enforcement, many Muslims resorted to the institution of the *waqf* in an attempt to maintain the coherence of estates. This alternative has been used throughout Islamic history. A *waqf*, or endowment, is a sort of charitable fund, the funds of which can be used for many purposes, such as building and maintaining mosques and schools, and constructing graveyards. However, the Islamic *waqf* had no equivalent in British Law. The difference between a charitable endowment in Britain and a *waqf* is that there exists a unique hybridity in the *waqf.* It is not created solely for the purpose of funding public projects; it can also be created for the maintenance of a certain family. It offers the family financial stability and has a greater degree of immunity, which was often useful in times of political turmoil.[62]

Wakfs[63] were often used in British India, which was a time of political and economic uncertainty. This section of Muhammadan Law experienced a great deal of evolution during the nineteenth century. Unfortunately, the hybridity of wakfs did not sit well with the Anglo Indian Court. In 1879 the High Courts began overturning endowments considered to primarily benefit the settler's family, and in 1894 it was ruled that endowments must be solely "religious" or "charitable".[64]

"Religious" and "charitable" were very strictly defined in the British context. Charitable purposes had four general approved categories:

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[62] Kozlowski, *Muslim Endowments and Society in British India,* 46.
[63] For the purposes of my research, "wakf" is representative of a Muslim endowment in British India; "*waqf" (pl. awqaf)* refers to the institution as dictated by Islamic tradition. This is an important distinction because of the unique legislative history of the British Indian wakf.
[64] Ibid, 5.

(1) the relief of poverty;

(2) education;

(3) the advancement of religion;

(4) other purposes beneficial to the community not falling under any of the preceding headlines.[65]

Moreover, there was a recognized distinction between charities of a public and private nature. Charities for a "private" purpose- that is, trusts meant to benefit specific individuals such as a particular family- were not considered "charitable", even if they provided services that fit in the four above categories of charity.[66] The hybridity of the Islamic *waqf* did not exist in the English tradition, and therefore it was not accepted in the Anglo-Muhammadan tradition either. Accompanied by the lack of an adequate English translation of the term was the history of religious endowments in Great Britain, which was marked by tension between the powers of the Church and the State. As churches were charitable institutions that were considered separate legal persons, they were not subject to escheats upon the holder's death and could continue to accumulate land and funds. The "Mortmain Statutes" (1279, 1290) were put into place in order to check such accumulation of land and prohibit clergymen from taking fees without license.[67] Therefore, charitable funds were not allowed to produce an income for any group of individuals. This history of suspicion of corruption and aggrandizement of charities and religious funds trickled into the administration of wakfs in Colonial India.

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[65] L. S. Bristowe, W. I. Cook, *The Law of Charities and Mortmain* (London: Reeves and Turner, 1889), 37.
[66] Ibid, 37-38.
[67] Ibid, 8.

This was especially seen in the administration of Islamic education. The case of Wasiq Ali exhibited a complete elimination of Islamic education. Wasiq Ali managed the heavily endowed Hughli *Imambarah* until revenue authorities removed him in 1824 under charges of corruption. The *Imambarah* contained a small school, which the British took over and secularized, removing the education of the Quran and the Persian language.[68] This sort of treatment could easily have been seen as rooted in the treatment of "superstitious" institutions in England, such as monastic bodies. The education and maintenance of Catholic priests and monks was not considered a valid charitable endowment.[69]

The British definitions of "religious" and "charitable" purposes were subject to evolution as the administration adopted increasingly interventionist policies. In 1882, it was decided in the High Courts that a wakf created for the benefit of a family was valid as long as it contained a "charitable" or "public" purpose.[70] In 1889, however, this decision was overruled, and it was determined that the family wakf was a method of avoiding the strict Islamic inheritance laws and therefore invalid.[71]

This gives rise to the following question: what, according to *Shariah*, is "religious" and "charitable"? Before the Mussalman Wakf Validating Act of 1913, it was the British assumption that this included the maintenance of mosques, schools, hospitals and charities for the poor. It was also ruled, in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894), that wakfs created "for the aggrandizement of a family" were illegitimate. In this particular case, two brothers created a wakf of which the benefits were designated to their posterity, and they made the condition that upon the extinction of the family the wakf's

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[68] Kozlowski, *Muslim Endowments and Society in British India,* 133.
[69] Charitable trusts textbook, 44.
[70] Powers, "The Attack on Family Endowments," 558.
[71] Ibid.

benefits would be designated to the poor. The Court ruled that this was not a substantial but an illusory charity, and it therefore did not meet the requirements to be a valid wakf.

However, this does not agree with the Islamic concept of a *waqf.* The Prophet was reported to have said, "When a Muslim bestows on his family and kindred hoping for reward in the next world it becomes alms, although he has not given to the poor but to his family and children."[72] In the *Khazanat-ul-Muftiin*[73], it is stated: "And if he [who makes a *waqf*] says, 'whilst I am alive its produce will be for me, and after me for my child and my child's child and their *nasl* so long as their *nasl* exist' it will be for them, and when they cease to exist it will be for the poor; this is lawful."[74] The importance of parental responsibility is taken more into account in the Islamic definition of charity. Therefore, the family wakf, acceptable in Islam, should have been upheld in the British Courts given their supposed mission to allow the continuation of religious customs. However, the misunderstanding of the range of acceptable purposes of a *wakf* led to the ruling in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry*, and it also led to many protests against the ruling in the Indian Muslim community. This remained the state of the Indian wakf until 1913, when the Mussalman Wakf Validating Act restored the validity of a wakf that primarily benefitted a family.[75]

Despite the common belief among judges that maintenance of family members was not charitable, it appears that judges often allowed wakfs that benefitted family members as long as their ultimate purpose or the majority of their profit was used for religious or

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[72] Fyzee, *Outlines of Muhammadan Law,* 241.
[73] Translated by Syed Ameer Ali: "'The Treasure-house of the Muftis,' frequently quoted by the law-officers and referred to in the *Fatwayi Alamgiri* and in the cases given in McNaughten's *Principles and Precedents of Mahommedan Law*.
[74] Trans. Syed Ameer Ali*, Khazanat-ul-muftiin*.
[75] Kozlowski, *Muslim Endowments and Society in British India,* 128*.*

charitable purposes. This statement was made in the case of *Syed Mustafa v. Abdul Rahman Khan* (1905):

> There is a strong body of authority in favor of the view that a *waqf* is not valid unless there is an express dedication of the property to a religious or charitable purpose, either immediate or ultimate, and unless the real and principal object of the appropriator is to provide for such a purpose, with simply an intermediate provision for members of his family, and is not to create a provision for some members of the family, which cannot be reached by the law, by the insertion of some incidental charges for religious and charitable purposes.[76]

This case was brought by the appellant in an attempt to recover property that had been inherited by another family member. However, the Court did not even acknowledge who should be the *mutawalli* of the wakf, because the judge dismissed the case on the grounds that the wakf was invalid. The significance of this case lies in the judge's statements concerning the Anglo-Muhammadan definition of a wakf. The endowment in question provided the first *mutawalli* to receive 50 rupees per month until his death, 50 rupees per month to his daughter and her descendants as long as they survived, 15 for successive *mutawallis,* 10 for a mosque, 20 for the settlor's grave and the Quran reader, 10 for the poor and 10 for wakf buildings. The Court decision was that, since the majority of the profit went to individuals in the family, it was essentially not charitable or religious enough to be a wakf.

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[76] Dar, Bishan N, Misra, Gokaran N., *The Oudh Cases* (Lucknow: Anglo-Oriental Press, 1906) Court of the Judicial Commisioner, Vol. 8, 384.

Although compromises were allowed in theory, and a wakf with some charity and some benefit to relatives was at least considered, it is difficult to conceive, based on the rhetoric in many cases, exactly what percentage was to be required for pious purposes. Moreover, British judges did not liberally apply the labels "pious", "religious", or "charitable" to many wakf provisions that the *wakifs*[77] intended to be labeled as such. Instead, several religious activities funded by the wakfs were considered forms of "aggrandizement" of the family. In *Muhammad Munawar Ali vs Rasulan Bibi* (1899)[78], the judge dissected the wakf and illustrated the British notion of an endowment for "pious" purposes. Quran recitation and mosque maintenance was taken into account but was only noted before explaining that not enough money went to the poor. Based on the judgment, a designation to charity was the most important religious activity. This was a British assumption without reference to any Islamic texts.

The portion of the wakf required to go to alms in order to ensure its validity was also unclear. No definite percentage was ever mentioned in any of the cases that I have reviewed. In *Muhammad Munawar Ali vs Rasulan Bibi*, it appears that this must be a much more significant portion than the amount of *zakat.* Out of a net income of nine to ten thousand rupees per annum, a little over 1,000 rupees were designated to fund religious and charitable activities. The judge ruled that this was not substantial enough and did not make the object of the wakf charitable. Moreover, the religious and charitable activities that the family had funded before founding the wakf were included in the pious activities, and the judge decided that a continuance of previous activities could not be considered an

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[77] The person creating a *waqf*.
[78] *Muhammad Munawar Ali vs Rasulan Bibi* (1899) http://indiankanoon.org/doc/1170890/ (accessed March 29, 2013).

exercise of "self-denial". In my opinion, this is illogical, because if pious activities are transferred from an individual to a wakf, it allows the activity to continue after the individual's death, thus providing a more sustainable benefit to the community.

To make matters worse, the judge exhibited prejudice toward the character of the *mutawallis*, claiming that the pious activity laid out in the *wakfnama* would most likely not be carried out for several years. He had no explanation for such an assumption, but he used it as an argument against the wakf's validity. Such a hostile atmosphere in the Allahabad High Court could not have allowed a proper interpretation and enforcement of Islamic law.

References to religious authorities in cases wakf give some insight into how this judges determined their credibility. For example, Syed Amir Ali and his judgments are referred to in *Syed Mustafa v. Abdul Rahman Khan*, as the defense referred to his writings on Muhammadan law several times. The judge decided that Amir Ali's Court decisions and writings did not provide a valid argument because of his rank: "But it is obvious that this Court must follow the decisions of their Lordships of the Privy Council, and should be inclined to allow greater weight to the views of the High Courts generally than to those of any particular Judge, however erudite."[79] Although Amir Ali was an accomplished scholar in Muhammadan and English law, his extensive writings on the subject of wakfs were more or less disregarded. The Judge also rebuffed the opinions of the classical scholar Abu Yusuf, concerning the validity of the appropriation of an object liable to termination, for similar reasons: 'The learned Judges observed that this view was opposed to the opinion of Hanifa and Mohammad and had been dissented from more than once by our Courts."[80]

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[79] Ibid, 385.
[80] Ibid, 382.

Also referenced in this case were other cases that provided precedents for future wakf disputes. One such case was *Abul Fata Mahomed Ishak And Ors. vs Rasamaya Dhur Chowdhuri And Ors*. (1891).[81] In this case, the defendants had executed a *wakfnama* in 1868 that was intended to benefit their families. They revoked it in 1874 for personal expenses, and the suit was brought forth by the first defendant's sons to recover the property that had been alienated to cover the current *mutawalli's* debts and instate themselves as the new *mutawallis*. However, the judge decided that, since the wakf had been designated to benefit the family and only to go to religious or pious purposes following the family's extinction, it was never a valid wakf to begin with. Although the judge claimed that evidence for the necessity of a religious or charitable purpose was found in the *Hedaya* (He also offered his opinion of what God intended to be the wakf's purpose.), this case was from a series of cases notorious for their rulings against wakfs used for personal debts in the time period of 1879 to 1893.[82] This bias against the family wakf engendered a wave of political activity until the precedent was revoked in 1913 with the Mussalman Wakf Validating Act (although rulings prior to the act were not revoked, much to the disappointment of many activists).[83]

In short, a wakf was probably the most insecure institution for Indian Muslims in the Colonial period. While the bequest of gifts was widely accepted as a valid substitute for Islamic inheritance, the treatment of wakfs was a source of financial instability for the executors and their families. In the judgments, it appears that there was an assumption of hypocrisy and greed among the Muslim community, and it can easily be argued after a review of several cases that British prejudice towards Islamic law and religious customs was most heavily exhibited in cases

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[81] *Abul Fata Mahomed Ishak And Ors. vs Rasamaya Dhur Chowdhuri And Ors*. (1891) http://indiankanoon.org/doc/759864/ (accessed March 29, 2013).
[82] Powers, "The Attack on Muslim Family Endowments," 557.
[83] Ibid, 563.

dealing with wakfs. Also, because of the subjective nature of the definitions of piety and charity, wakfs were more subject to British influence than other Islamic institutions, such as inheritance, that gave a specific fraction of inheritance to a particular individual. Indian Muslim wakfs were altered very differently from the way that inheritance methods were altered. While Indians were often forced to practice Islamic inheritance customs, their wakfs became less Islamic and more Anglicized. The similar alteration of *mahr* is to be discussed in the following chapter.

Chapter 4: Mahr and Maintenance

In the Indian subcontinent, dowries are very common among Hindus and Muslims, and in the West this practice is often considered an Eastern practice with no Western equivalent. However, this is not entirely true and is worth clarifying before delving into the analysis of *mahr,* the dower given to the woman in a Muslim marriage, in British-occupied India. It used to be the custom in Britain that the wife was entitled to a dower, that is, her customary portion of the husband's estate, which she would receive upon his death. Records of this practice from as early as the early fourteenth century exist today.[84] Rather than receive a sum agreed upon in the marriage contract, as is the practice in Islam, the Englishwoman's dower consisted of one third or one half of the husband's estate, in order to provide for children who did not inherit and the widow's maintenance.[85] Rather than receive a portion upon marriage and a deferred sum at some later period, as is the Islamic custom, the Englishwoman received it upon widowhood.[86]

However, the practice was gradually abolished from general custom, and in 1833 the Dower Act, for the most part, voided the practice.[87] Ironically, while the custom in Britain was in the process of removal from societal norms, it was being treated with much higher regard in the Courts in the Indian subcontinent. Because the closest equivalent to *mahr* was virtually extinct in Britain, its codification in India was much more organic and less hybridized than that of endowments and other familial financial institutions.

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[84] Sue Sheridan Walker, *Wife and Widow in Medieval England* (Ann Arbor: University of Michigan Press, 1993), 81.
[85] Ibid.
[86] However, this is also possible in Islam. Ibid.
[87] Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge: Harvard University Press, 1990), 28.

In the colonial courts, although the institution of *mahr* was not hybridized with a prevalent western counterpart, the British Court did not leave pre-colonial *mahr* customs in India unchanged. For one thing, the British courts considered it a requirement for Muslim marriage, rather than a formality, as it had been in some communities. In 1925, it was stated in the Calcutta High Court, "There is an implied obligation and a claim would be decreed on its basis as the incident of law. There is even a presumption that dower was fixed." This is the same as the aforementioned Hanafi tradition that dower is implied even when it is not mentioned. In the Hanafi tradition, the woman is entitled to *mahr al-mithl*, or appropriate dower (whatever local custom decides),[88] which varies between communities and schools of thought.[89] The *Hedaya* states: "Where no dower is stipulated in the contract, the wife receives her proper dower."[90] Also, the *Hedaya* and *Principles and Precedents* agree that 10 dirhams is the lawful minimum dower. *Principles and Precedents* also mentions the ambiguity of this sum, as it was already outdated.[91] Syed Ameer Ali explains some of the variety of *mahr* customs in India:

> In India, for example, among that portion of the Mussulman community which occupies an analogous position to the upper middle class of English society, the amount of dower ranges from 4,000 rupees to 40,000 rupees. In Behar, the latter is, generally speaking, the customary dower; in Lower Bengal, there is no custom.

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[88] Khan Noor Ephroz, *Women and Law: Muslim Personal Law Perspective* (New Delhi: Rawat Publications, 2003), 163.
[89] Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (Oxford: Oxford University Press, 2008), 107.
[90] Al-Marghinani, *Hedaya*, trans. Charles Hamilton (Lahore: Premier Book House, 1957), 45.
[91] *Hedaya*, 44; *Principles and Precedents,* 59.

> Among the lower class, the *mahr* varies from 50 rupees to 400 rupees. In princely families, the dower consists of several lacs [100,000 rupees].[92]

This variation in the customary amount of *mahr* was not only based on the husband's means. Often the dower stipulated in the marriage contract was an unrealistic amount that was meant for show more than for actual execution upon a divorce or the husband's death. Although excessive dower is not ideal in Islamic law, especially in Hanafi law,[93] a nominally exorbitant dower was a very common custom in the subcontinent. In 1876, the Oudh Laws Act allowed such excessive dowers to be dismissed in the state of Oudh, but not in other provinces.[94] In her article concerning these dowers that deals with 19 cases between 1855 and 1924, Mitra Sharafi reveals a trend in the courts to ignore this ruling, even within the Oudh province. One very common form of avoiding the ban on excessive dowers was by fabricating a custom. The term "proper dower", or *mahr al-mithl*, was meant to be a generally reasonable amount of dower to be paid to the bride in the absence of a stipulated amount in the contract, and the actual amount was based on the *mahr* accorded to brides similar to her. Should the excessive dower be voided in the Court, it would then be replaced with the "proper dower." However, the Courts would manipulate this term by comparing the allegedly excessive dower with the dowers in the contracts of other women in the wife's family, all of whom had been offered an excessive dower that was also never expected to be paid. This comparison was made without regard to the

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[92] Syed Ameer Ali, *Commentaries on Mahommedan Law* (Allahabad: Hind Publishing House, 2004, 1st ed. 1880), 1515.
[93] Ibid.
[94] Mitra Sharafi, "The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law," *Indian Economic and Social History Review* 46:1, 57-81 (2009), p. 69.

financial means of the husbands or the possibility of the prevalence of excessive dowers with no intention of payment in the family. In this way, the Court was able to fabricate a "proper dower" that was actually (based on the husband's means) excessive, and overrule the Islamic law concerning dowers, which does not approve excessive dowers, with a false custom. This is contrary to the logical process of determining the validity of a custom in terms of inheritance, as we saw in the case of *Abdul Hussein v. Bibi Sona Dero*, in which dozens of members of the community were asked to attest to the prevalence of a particular local inheritance custom.

Sharafi argues that British judges were semi-autonomous in their rulings and ignored laws such as those of the Oudh Laws Act in order to execute a supposed mission of chivalric imperialism. She claims that the British laws perpetuated a misogynistic patriarchy and that the judges attempted to protect Muslim women by granting them excessive dowers. Also, the diversity of treatment of customs that is seen between cases of excessive dowers and cases of un-Islamic inheritance customs also confirms such autonomy in that it reveals the liberty that judges had in determining the validity of customs. However, the Oudh law that banned excessive dowers merely allowed dowers that were already only a formality to continue to be a mere formality and not require execution. Rather than imposing a British-rooted patriarchal agenda, the ban on excessive dowers made it easier for the courts to deal with this custom without having to anticipate the consequences of altering this subcategory of Islamic inheritance law. That said, the efforts taken to dodge the Oudh law, a law that would have maintained Indian Muslim loyalty and still allowed women one-eighth of the estate (or one-fourth if the deceased had no children), reveals that there was an imbalance of loyalty in favor of the widows among

many judges. An agenda of chivalry could easily be argued. This is especially likely in the case of widows, as there was much imperialist propaganda concerning poor widow treatment in India.

While the deferred *mahr* was usually given to the wife upon the husband's death, in the case of a failed marriage the husband was supposed to give the wife the deferred portion following the divorce. Following the divorce, it was necessary to provide maintenance to the ex-wife. However, a failed marriage often did not necessarily result in a divorce in British India. Instead, such as in the case of a man acquiring a second wife, for example, the first wife would either move back to her parents' house or to a residence provided by the husband in order to avoid conflicts. She would then receive maintenance from the husband. This agreement was stipulated either in the marriage contract or in a contract preceding the successive marriage.[95] According to the *Hedaya*, the divorced wife requires maintenance only during her *ᶜidda*[96], and the wife, even if the husband acquires another wife, only requires maintenance if she is fulfilling her physical duty as his spouse. This does not include residing with the husband, and it is actually required in the *Hedaya* that she has her own private quarters, even if they share a house.[97]

In a British marriage, maintenance during the marriage is not specified. In the case of a divorce, the general rule was that the husband would provide one fifth of his net income for alimony, but in actuality the portion ranged from one third to one sixth, unless

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[95] Lucy Carroll, "*Talaq-i-Tawfid* and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife," *Modern Asian Studies* 16:2 (1892), 286-288.

[96] The *ᶜidda,* or "waiting period", is the prescribed amount of time following the divorce or death of the husband that the woman must continue to reside in the former husband's home. It is either the time it takes for three menstrual periods to pass, three months if she is menopausal, or the duration of her pregnancy if she is pregnant.

[97] *Hedaya.* 140-145.

the wife's personal means were greater than his.[98] In comparison, a Muslim man is expected in the *Hedaya,* as well as the *Quran*, to provide a portion of his income according to his means. The one difference is that if he is of a much poorer background than she, then he must provide enough to allow her to live in conditions to which she is accustomed.[99]

In her article on maintenance and divorce among Muslims in British India, Lucy Carroll provides examples of recorded cases in which an agreement was written either in the marriage contract or preceding a second marriage that entitled the woman to maintenance in the case of her leaving the house because of disagreements with her spouse or the other wife or wives. When brought to court, these cases had varying outcomes. In *Bia Fatma v. Ali Mahomed Aiyeb*, such a contract was signed preceding a second marriage, and the wife brought her husband to the Bombay High Court to fulfill the promise of maintenance a few months later. The Court ruled the contract void, combining the Islamic legality of polygamy and the English law of cohabitation. This case was often referred to, and the old custom of separate residences with distributed maintenance was often ignored.[100] Although Islamic law requires physical submission of the wife in exchange for such maintenance, separate living quarters were also required. With the British cultural imposition, this had a negative impact on the financial and emotional well being of Muslim women, as the British Court required cohabitation regardless of prenuptial contracts stipulating otherwise in the case of additional wives.

In the case of maintenance after a divorce, the same court ruling was often alluded to, not requiring the husband to pay any alimony. In the case of divorce, English law, which

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[98] Ernst-Browning, *Laws of Marriage and Divorce as Administered in the Court for Divorce and Matrimonial Causes* (London: Steven and Haynes, 1872), 232-233.
[99] *Hedaya*, 140.
[100] "Talaq-i-Tafwid," 290-293.

was stricter concerning separation, combined with Islamic law, which did not require maintenance after the *ʿidda*, to overrule agreements that called for alimony. Although British law required alimony, it did not allow the woman to divorce her husband merely for infidelity.[101] Therefore, in many of the cases that involved polygamy, even if such a practice was condemned in Britain, it was not a valid reason for the woman to leave her marital duties, especially since it was an allowable practice in her respective religion. Generally speaking, in the case of divorce, alimony and maintenance, the British government took the worst of the two legal traditions and often combined them to give women the worst possible outcomes. They required cohabitation, in contrast with Hanafi law, and a divorce was much more difficult to obtain. At the same time, polygamy was upheld. Carroll argues in her article that "the Muslim law of marriage places the woman in a weak and subordinate position."[102] However, even if this were true, the British Courts added the more sexist parts of their legal tradition and took away some of the more equalizing parts of Hanafi law to create an even more oppressive situation for women.

This stands in contrast to their treatment of *mahr.* The contradiction refutes the idea of chivalric imperialism, as, all dowers aside, Victorian ideals infiltrated Indian Muslim society through enforcement in British courts that often infringed on the woman's rights in marriage and divorce. Rather than "rescue" women from their oppressive husbands, they made it more difficult for married couples to separate and enforced cohabitation, even if the *Hedaya* allowed otherwise.

From the above contradiction, it could be argued that the British, in general, frowned upon divorce. Anyone who attempted it suffered consequences. When a man

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[101] *Laws of Marriage and Divorce,* 60.
[102] "Talaq-i-Tafwid," 305.

divorced, he was obligated to pay the full dower, as ridiculous or nominal as it may be. In the case of women, it was difficult for the wife to prove any mistreatment or other reason considered necessary to grant her a divorce. In his commentary on the *Hedaya*, Hamilton provides us with an idea of the British view on Islamic divorce:

> What most forcibly strikes us on the perusal of this subject is the extreme facility with which a husband may rid himself of his female partner, -a facility which, when we consider the too frequent levity and fickleness of Man, seems at first sight calculated to expose the weaker sex to the most degrading insult which malice could dictate, or caprice put in practice.[103]

Divorce was considered immoral in British society, and this mindset trickled into the legislation in India. Moreover, the British requirement of cohabitation altered the institution of the Indian Muslim marriage. The Anglo-Muhammadan marriage required cohabitation but also allowed polygamy. It made divorce and maintenance more difficult for the woman to obtain. In contrast to these diminished rights, however, the execution of *mahr* upon divorce or widowhood could have been the punishment for abandoning the "weaker sex." In this way, Victorian and Hanafi custom were woven together to offer women more personal assets occasionally and offer them fewer personal rights often.

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[103] *Hedaya*, xlii.

Conclusion

The British presence in India, as we have seen, was marked by manipulation of Islamic law and hybridization with British ideals, often resulting in a drastic redistribution of assets in Indian Muslim families. Although the scholarly pursuit of knowledge of Hanafi law often resulted in admiration of much of what Islamic jurisprudence had to offer, as seen in British treatment of texts concerning Islamic inheritance, the adherence to these laws in practice was dependent on several other factors, including their agreement with British societal norms, the existence of equivalent practices in British society, and the variability in recognition of local customs in India. As the use of textbooks such as *Principles and Precedents* spread, translated texts were gradually replaced.

In the case of inheritance, local customs were often ignored and the Quranic distribution of inheritance was applied instead. In this way the British Courts brought about a change in Indian Muslim inheritance practices. However, in the case of gifts, the British usually ignored Islamic inheritance laws executed in the wills of the deceased. The existence of an equivalent to gifts in British law gave jurists a preexisting template from their own experiences, and their application was therefore more accepted.

Islamic law was often disregarded in terms of endowments, especially in cases involving family endowments. Because of prejudice against Muslims and the validity of their religious institutions, the Islamic wakf was, in most cases, abolished. This is the exact opposite of what we see in the case of gifts. The uncertainty of how much of a family wakf was required to go to alms made it difficult for Muslims to create wakfs without suffering the consequences of using them for the family's financial well-being later. This caused

much protesting in the Muslim community in the late nineteenth and early twentieth century.

Dowers, often treated as formalities in the Indian context, were taken much more seriously in British courts, and excessive mahrs were problematic in regions where ridiculous amounts, more nominal than executable, were often applied. The insistence on upholding such a custom that is directly against Islamic law (In the Hanafi tradition, excessive dowers, or dowers beyond the means of the husband, are frowned upon.) is contradictory to the treatment of local customs concerning inheritance distribution, in which family estates were often split up in Quranic proportions.

In both the cases of mahr and inheritance, women often received much more private assets than before the occupation, and exhibited in several cases this did not always result in the fragmentation of family estates, a potential detriment to the Indian community. However, it is worth mentioning that basic rights such as the right to divorce were infringed upon in several cases, in exchange for the occasional, newfound financial independence that others acquired in the Colonial era.

Any efforts on the part of the Muslim Indian population to change the law, such as in the case of *awqaf*, did not succeed quickly. It took decades of public protests in order to bring about any change. As the presence of the *'ulama* in Court declined, so did the voice of the Indian people. This lack of Islamic scholars had a negative impact on the Islamic educational institutions, which made it even more difficult for Muslims to argue on their religion's behalf. The Colonial legislation gradually syncretized British ideologies with South Asian Islam, creating a hybrid legislation that incorporated bits of Islamic law and

British law, thus reshaping the society and altering the financial balance of Muslim peoples in the subcontinent.

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