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The Temperament of Empire. Law and Conquest in late nineteenth century India¹

Final text as published in Gunnell Cederlof and Sanjukta Das Gupta, *Subjects, Citizens and Law. Colonial and Postcolonial India* (Routledge, 2016).

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I.

The administration of justice occurred in an impatient and suspicious mood in the north Indian town of Allahabad during the late 1880s and early 1890s. The anxious atmosphere in the High Court centred on conflict between the British judges and Justice Syed Mahmud. Second son of the north Indian Muslim leader Sir Syed Ahmed Khan, Mahmud was appointed as a permanent member of the Allahabad bench in 1886, after acting up when British judges went on leave since 1879. Two successive chief justices, Comer Petheram and John Edge, didn't want an Indian on the bench. But at a time of political unease, when British administrators had lost the confidence which followed their reconquest of North India in 1857-8 and Muslim loyalty in particular was questioned, senior imperial officers imagined appointing an Indian judge would consolidate the loyalty of elite groups well-disposed to British rule. The former law member of the Governor-General's Council, Sir Arthur Hobhouse, argued that Mahmud's appointment would cement his father's loyalty to the imperial regime. Similarly, the Governor of the North-West Provinces felt 'it was most desirable that at least one of the judges of the Court be a Native'.²

Mahmud's support from the imperial hierarchy didn't stop his time on the bench being a period of fractious argument. Mahmud and his 'brother judges' disagreed on some major points of law, and squabbled over minor procedural matters. His enemies, particularly Chief Justice Sir John Edge, described him as a disordered drunk with terrible time-

¹ I'd like to thank audiences at Oxford University's South Asian History Seminar and European Association of South Asian Studies at Zurich for comments on this paper, and to Gunnell Cederlof and Sanjukta Dasgupta for comments.

² Arthur Hobhouse, "Native Indian Judges: Mr. Ilbert's Bill," *The Contemporary Review*, January 1, 1883

keeping. Mahmud himself claimed his colleagues were impatient autocrats, ignorant of India and not willing to put the effort into knowing the country they ruled. He noted that the Chief Justice treated him like a conquered subject rather than an equal. 'If', he suggested, 'John Edge had only allowed himself enough time to understand the Indian laws and the facts of Indian life, before assuming the position of *'Veni, vidi, vici'* he might have made even a better Chief Justice than he is now', Mahmud sardonically wrote in 1893. Eventually, relations broke down so badly Edge contemplated sacking Mahmud. But Mahmud felt so humiliated he resigned first.³

Mahmud's difficult relationship with his British colleagues occurred in spite of his agreement with them about many things. Mahmud was fluent in English, educated at Cambridge and well-read in Roman as well as Indian law. He was possibly an agnostic and certainly a supporter of British rule. Throughout his life he argued that British rule was 'the only alternative of anarchy and barbarism'. As Gregory Kozlowski suggested, the style of jurisprudence which Mahmud administered was a radical departure from the idioms of pre-colonial Muslim jurisprudence still practised outside British courts. Mahmud learned 'not only his law but his Arabic in England'. This background alienated him from some of his Indian neighbours. One Urdu newspaper suggested he was 'not a native in the proper sense of the term', having 'adopted the customs and manners of Europeans'. Mahmud's seeming assimilation to ostensibly European values and practices was never the object of condescension amongst British officers. Quite the reverse in fact. As we shall see, the British judges' problem with Mahmud was that, despite his English education and Anglophile political opinions, he was still too closely embedded within 'native' life. It was his conduct, not his identity or his beliefs, which elicited a critical response from his British fellow 'brother judges', and led to his dismissal from the bench, his descent into heavy drinking and his early death.⁴

³ Syed Mahmud, "Letter to Government of NW Provinces," October 30, 1892, 64, L/PJ/6/355, no.1680, IOR.

⁴ Syed Mahmud, "British Rule in India. Does It Owe Its Origin to Conquest, and Its Maintenance to Physical Force?," *Calcutta Review*, 1879, 68 (135): 4; Gregory C. Kozlowski, *Muslim Endowments and Society in British India*, Cambridge: Cambridge University Press, 1985, p. 119.

This chapter examines the practice of the law in north India, particularly the professional life of Syed Mahmud, to challenge the way historians think about both imperial power and South Asian subject-hood during the nineteenth century. During the last forty years, scholars have argued that British rule was a project of mental domination. What Partha Chatterjee describes as ‘the rule of colonial difference’ created systems of knowledge that classified Indian subjects as inferior, backward, and incapable of exercising their own sovereign power. Empire was, from this perspective, a paradoxical pedagogical project that aimed to teach Indians how to rule themselves whilst violently denying their power. Behind the production of an important swathe of scholarship on the ‘texts of power’ (again to use Chatterjee’s phrase) that buttressed imperial authority, this literature nonetheless over-estimates the place of formal discourse in the mechanics of colonial rule. It presupposes that practices of domination can be reduced to forms of thought reproduced in a textual form, thus neglecting the scale to which texts and action can be out of kilter with one another. Recent scholarship has little to say about the everyday encounters – such as those in court I began this chapter with – through which domination was asserted in practice, however much that domination might have been described in another form in rhetoric. As Mahmud correctly recognised, British officers did not see themselves as the confident tutors of an inferior race, but as an embattled ruling class whose violent power was in danger of being undermined. Empire was a process of conquest not a project of pedagogy. To understand this essential character of imperial rule, the forms of subjectivity it tried to produce and the practical way Indians acted out their own lives in relation to it, my argument is that historians should shift their attention from the realm of ideas and categories to those of emotions and practices ⁵.

In fact, constructing knowledge about its subject population was anything but a priority for the functionaries of the British regime, the men who staffed courts and revenue offices like Sir John Edge. Their domination was asserted in a less cerebral, much more visceral register than recent historians imagine. British officers were keenly aware they

⁵ P. Chatterjee, *The Nation and Its Fragments. Colonial and Postcolonial Histories*, Princeton, NJ: Princeton University Press, 1993, pp.16–27; Partha Chatterjee, *Texts of Power: Emerging Disciplines in Colonial Bengal* Minneapolis, MN: U of Minnesota Press, 1995; Sanjay Seth, *Subject Lessons: The Western Education of Colonial India*, Durham, NC: Duke University Press, 2007.

were members of a tiny European class which did not have the consent of the people they ruled. Most Britons in late nineteenth-century India thought British power ultimately rested on violence. The priority for imperial officers was to have their conquest of India affirmed, at least not challenged. That affirmation came through the visible absence of resistance and the seeming continuation of Indian subjection. Both before and after the great rebellion of 1857-8, the over-riding British concern was security and certainty, to prevent rebellion on a scale capable of undermining imperial lives and lifestyles. Always aware of the limitations of their authority, British officers were seized by a mood which was prickly and often paranoid, which interpreted every action that didn't fit with their expectations as a potentially major slight.

By the time Syed Mahmud was appointed to the Allahabad High Court, British rule had constructed a series of self-contained systems of rule in order to curtail forms of negotiation and challenge that had the potential to undermine British power. These systems asserted power in many different ways: they regulated the flow of water, attempted to reduce the heterogeneity of the human-created landscape to the survey map, to transport goods at the regular pace dictated by the steam engine on metal tracks, and to regulate the conduct of Indian economic and social interaction by reducing it to rules transmitted in portable law books. What these different systems had in common was their use of imperial power to imposing authority on a world of things at some distance from the lives of the people they ruled. Whether in the law or in increasingly large-scale technological projects like railways or irrigation systems, British rule tried to manipulate a standardised, objective world in. Unlike even English-trained lawyers like Syed Mahmud, this world of stone, steel and paper did not talk back. In fact, these material processes of government barely considered the people of India as an object of government at all.⁶

But imperial systems created their own forms of practical knowledge. The regular operation of imperial institutions was supposed to be assured through rulebooks and

⁶ Jon E. Wilson, *India Conquered. Britain's Raj and the Chaos of Empire*, London: Simon and Schuster, forthcoming, chapters 7-8.

guides, standardised records, account books, court reports, all of these very boring and functional texts which historians have not paid much attention to. Yet rather than studying this vital quotidian literature of the Raj, scholars have focused has on works produced by people like them, by scholars and intellectually-minded bureaucrats who wrote histories of Indian regions, disquisitions on Indian law or religion, surveys of castes or tribes, or maps concerned with the detail of the landscape not land rights. As interesting as they may be, they texts were produced by figures who were often marginal to the process of government, in institutions distant from the point at which British power governed its ordinary subjects. Even where their authors did matter, there is little evidence their intellectual pursuits affected their governmental actions. Herbert Risley was both the author of the great classificatory digest of the Indian population, the *Peoples of India*, and a senior bureaucratic who wrote proposal for Lord Curzon to partition the province of Bengal. Yet, as Chris Fuller argues, there is no evidence one influenced the other. The partition of Bengal was a tactical move designed to preserve British power by dividing two communities – Muslim and Hindu Bengalis – who according to *The Peoples of India* had separate ethnographic reality. The point is that a different logic governed administrative decision-making compared to writing more ‘scholarly’ forms of analysis.⁷

The argument here is that the process by which imperial institutions, particularly the legal system, made people into subjects was not primarily concerned about classification. The priority was the visible exercise of power, the smooth functioning of a system of rule viewed normatively as a ‘machine’ which tried to minimise points of contestable contact with the population it ostensibly ruled. Knowledge was not itself an instrument of power. Knowledge about the subjects of the imperial regime was collected and constructed by government institutions in various forms, of course, in revenue surveys, in censuses, in reports about local custom, in the inquiries made by courts into the circumstances of a particular case. Sometimes knowledge was created at some distance from sites of direct political authority, by individuals ruled by purposes which were detached from the operation of governmental power. Mapping projects, censuses, collections of botanical

⁷ Chris Fuller, ‘Anthropology and Government in British India, 1881-1911: Ibbetson and Risley Reconsidered’, talk at Religious Diversity Colloquium, Max Planck Institut, Göttingen, May 6, 2014.

specimens, translations of Indian texts, all developed their own institutional momentum which was only indirectly connected to imperial rule. Where knowledge was directly produced in the practice of government knowledge it was thin and perfunctory, often deliberately so. In institutions such as courts and revenue offices, the discursive constitution of South Asian subjectivity was always subordinate to an essentially self-referential system of power. To make the point another way: India's British administrators were only interested in their Indian subjects when a particular problem or crisis forced them to take notice. The most detailed engagement with the social practices of their subjects occurred with those seen as the greatest danger to British power. For example, late nineteenth century inquiries about local custom were most frequently made into areas seen as most likely to resist: in border areas, or in 'tribal' regions. Where they could, the British tried to get away without 'knowing the country' at all.

If colonial knowledge cannot tell us everything we need to know about the way imperial power worked, we need to look elsewhere. This paper suggests that historians should move beyond language, to look to the practical, unspoken features of action in different contexts to explain the character of imperial domination. Here, the concepts of mood and temperament are useful. 'Temperament' or 'temper' were once important concepts within political sociology, denoting the style with which individuals go about their lives, how they practically respond to events and act upon the world. In ancient Greek and early Islamic medicine, thinkers connected temperament to different forms of bodily fluid, and spoke about four moods: sanguine, choleric, melancholic and phlegmatic. Temperament was variously attributed to body type, race and climate. It remains an important part of everyday speech: we speak of people as rash, impatient, decisive, languid. Yet, the rejection of physical determinism led modern social scientists to abandon temperament as an explanatory category in the nineteenth century, much to the detriment of scholarly analysis. Now, our language of historical explanation tries to explain events only with reference to explicitly held beliefs and intellectual categories. We know from our own experience that there is so much more to human action.⁸

⁸ For a political theorist's use of the concept of temperament, see Joshua I. Miller, *Democratic Temperament: The Legacy of William James*, Kansas, KN: University Press of Kansas, 1997; For a

The quality British officers in nineteenth century India valued most highly in themselves was efficiency. Being efficient meant acting in a quick and authoritative way, making decisions with as little information as necessary, recognising that British rule would cease if it became too heavily immersed in Indian contexts or detail. ‘An efficient district officer’, John Strachey said, ‘watches every department of the administration; he is always ready to intervene, but he does not occupy himself with the details of business’. The imperial temperament encouraged fast action in defence of imperial prestige. It valued impartiality, aloofness, detachment. It also created a prickly disposition and a tendency towards paranoia. This was a temperament which made the quick resort to violence when trouble occurred always a possibility.

Efficiency relied on being disconnected from interests, commitments and forms of knowledge particular to local society, and which slowed the governing process down. Indian officers working for the colonial regime were seen as ‘inefficient’ when their minds were being distracted by local concerns. They could only become efficient agents of the colonial governance if they adopted a temper and set of techniques that detached them from the Indian worlds they grew up in. Aparajith Ramnath’s recent study of colonial engineering shows how British administrators and politicians believed that Indian irrigation officers were technically competent, but ‘were subject to outside influences’, as one British chief officer put it, which reduced their efficiency. Writing in 1882, the senior officer John Strachey thought the calibre of Indian officers in the 1850s had been very poor, but the ‘honest and efficiency’ of Indian judges had improved for two reasons. Their pay had increased, so they didn’t need to take money from local allies in return for partial decisions. And their practice was now determined more intensively by codes of law, by abstract systems that brought them into the fold of the imperial regime’s self-referential system of power. Strachey was an enthusiastic advocate of the Code of Criminal Law, a text drafted entirely from abstract principles. ‘The system it lays down is complete, efficient and successful’, entirely avoiding the need for European or

discussion of late enlightenment uses of the concept, see Ludmilla Jordanova, ‘Sex and Gender’, in Christopher Fox and Roy Porter, *Inventing Human Science: Eighteenth-Century Domains*, eds., Berkeley, CA: University of California Press, 1995.

Indian judges to engage with sources outside the court on the nature of law. The code represented a hermetically sealed system of power.⁹

Because it didn't rely on an explicit set of beliefs or arguments, because it existed in practice not ideas, in a mood or attitude rather than an ideology, the temperament of late nineteenth-century imperial rule offered significant space for challenge. The non-discursive character of British domination created room for alternative stories of what it meant to be subjects (in both senses of that word) in India. The courts, in particular, provided an arena for Indian interlocutors of British authority to fundamentally contest the practices of imperial power. For Syed Mahmud and others, that challenge seemed to offer the possibility of a very different, non-imperial form of Indian legal subjectivity. As we'll see, Mahmud fundamentally contested the tacit assumptions British imperialists made about the basis of their authority. That challenge then led to a negative critique of the style with which the British exercised power, and a positive effort to create an alternative form of jurisprudence based on a different kind of practice. Where Sir John Edge and most of his European colleagues issued terse statements that referred solely to texts produced by other British officers in order to produce quick and certain rules of decision, Mahmud's judicial practice was an attempt to root legal decisions in what he saw as the historical practices of Indian social life. Rather than reflecting the anxious desire to make quick decisions in a hostile environment (as it seemed to British judges) Mahmud believed the task of the judge was to take part in a conversation about law in India that he believed was centuries old and long preceded British rule. That approach needed patient sensitivity to the languages and idioms of Indian life, which the brusque, impatient and self-obsessed style of colonial justice denied. For Mahmud, this practice was nothing less than the undoing of a regime based on imperial conquest, creating a political order instead founded on consent not violence.

The challenge which Mahmud and others offered to British power agreed with the abstract statements which British imperial officers made about the benevolent

⁹ Aparajith Ramnath, 'Engineers in India. Industrialisation, Indianisation and the State, 1900-47', Unpublished PhD Dissertation, Imperial College, 2012, p.123; John Strachey, *India*, London: Kegan, Paul & Trench, 1888, p. 148.

possibilities of British rule. But, in the process, they dramatically challenged the structure of British argument, reframing the practical, institutional and affective history of imperialism in ways that made partial agreements with the claims of empire beside the point. To understand how Indians were made into subjects, we need to recognise both the character of British rule and the complexity and subtlety of late nineteenth century Indians' critical engagement with empire. On the one hand, historians need to see imperial power is a process that cannot be comprehended by colonial discourse. At the same time, they also need to recognise that elite Indian relations with empire cannot be reduced to belief or otherwise in the potential virtues of British power.

By examining the encounter between Mahmud and the British judges in the Allahabad court, this chapter engages with two concerns central to this volume. First, what does it mean to see subjecthood as an act, as Gunnell Cederlof suggests in the introduction to this volume? The following pages suggest that it's non-discursive, often physical character made the relationship between subject and state open to radically different interpretations, even within the same institution. Secondly, how do governmental institutions enforce limits to the plural meanings which subjecthood might have? In nineteenth-century north India, the British regime was comfortable when Indians like Syed Mahmud articulated rival stories about subjecthood and imperial citizenship. But conflict occurred, and authority was (temporarily) re-imposed when those stories involved radically different forms of judicial practice which were rooted in a temperament that challenged the mood of imperial power.

Memories of Conquest

For both Syed Mahmud and his European interlocutors, arguments about law and subjecthood were cut through with memories and perceptions of conquest. The war of re-conquest which followed the Indian insurgency of 1857, an event still in the memory both of middle-aged Indians and senior British officers in the 1880s, was crucial. For many officers within the newly proclaimed British empire of India, the act of re-conquest needed to be followed by the emphatic and visible assertion of Britain's sovereignty. 1857 gave the British an edgy kind of confidence. The rebellion proved the seemingly

dangerous predicament of British power in India, indicating the scale of opposition. But it also appeared to the imperial regime was safe if it was capable of countering opposition with sufficient violence.

1857-8 had a large impact on law in India. North India's military re-conquest was followed by the legislative subjugation of the subcontinent, as the new Crown regime issued a rapid succession of statutes which attempted to impose a rational and systematic legal order on India. 'The effect of the Mutiny on the Statute-book was unmistakable', Stephen went on to argue in his *History of the English Criminal Law*. It was 'practically a principle of British government ... that serious disaster in any department of public affairs should be followed by large legislative or administrative reconstruction', his friend Sir Henry Sumner Maine wrote. Britain's catastrophic defeat and then decisive victory against the Mughal rebels gave British officers a new commitment to the permanency of their regime, creating a new effort to convert their military domination into a systematic regime through legal reform. The long-stalled project of enact codes of law to systematize the chaotic judicial institutions in Company India was given new energy. A revised version of Thomas Macaulay's 1838 Code of Criminal Law was enacted in 1860, and the final document was concerned more than anything else to punish acts which threatened the security of the British regime, with ten sections on 'offences against the state' and only three on murder. The year before, the first consistent set of rules for civil courts were enacted. The 1859 Code of Civil Procedure more emphatically imposed the authority of British judges on trial proceedings. It removed the Indian legal advisors, the pandits and qazis who had previously offered British judges guidance on Hindu and Muslim traditions of jurisprudence. The code also made the court's proceedings more 'simple and expeditious', by removing written pleadings and judgements, and limiting the litigant's appearance in court to a short interrogation on the 'particulars of the case'. These were procedures designed to assert the power of British officials over a newly re-

conquered country, to minimise the scope for serious dialogue at the point at which authority was asserted over India society.¹⁰

But for Syed Mahmud's father, it was North India's conquest by the British in 1857-8 which forced the ruling elite he belonged to reach an accommodation with British rule. Syed Ahmed Khan was born into a family of minor Mughal service gentry, and worked within the subordinate, Indian-run courts of the British regime in the region around Delhi since 1838. Initially his contact with Europeans were limited. Syed Ahmed Khan's career was assisted by connections to a European officer, John Strachey. But as David Lelyveld notes, Syed Ahmed barely noticed the British in the books he wrote on the history of the region. The Delhi poet Mirza Ghalib criticised him for uselessly celebrating the dead past, when the prospect of British India was potentially glorious.¹¹

The defeat of the rebels and their Mughal sovereign in the great insurrection of 1857-8 led Syed Ahmed Khan to see the British as a source of order and stability, the only possible supporter of North India's Muslim elite and, most importantly rulers to whom submission was necessary by the brute fact of violence. Even then, Sir Syed (knighted in 1888) saw friendship with the British as necessary but defensive and limited. As Faisal Devji notes, when Sir Syed suggested that 'we can befriend the English socially', it was only because he imagined that British goodwill would protect North Indian Muslims from dominance by numerically predominant Bengali Hindus. As Devji argues, Sir Syed was not interested in sharing political power with the British. Instead, his efforts focused on building educational institutions that would allow a defeated people to create a sphere of autonomous intellectual life in 'a world over which they exercised no political control'¹².

Born seven years before the rebellion of 1857, Mahmud was educated at English-language Benares College and then Calcutta University before travelling with his father

¹⁰ Sir James FitzJames Stephen, *A History of the Criminal Law of England*, London: Macmillan, 1883, III, 299; Sir Charles Wood Wood, 'Despatch Relating to Judicial Procedure', *Parliamentary Papers* 1859 Session 2 (49).

¹¹ David Lelyveld, *Aligarh's First Generation: Muslim Solidarity in British India*, Princeton, NJ: Princeton University Press, 1978, p.88.

¹² Faisal Devji, 'Apologetic Modernity', *Modern Intellectual History* 2007, 4 (8): 64.

to England in 1869. There, he studied law at Lincoln's Inn, and was called to the bar in 1872. Whilst in English he spent two years as student at Christ's College Cambridge, coming second in an English language prize. Syed Ahmed later argued that his purpose in sending his child to England was defensive and (to use Devji's phrase) apologetic. Instead of pushing him to join the class of men who wielded practical power in India, the father's aim was to make his boy a weapon to attack British misrepresentations of Islam in the world of ideas. Mahmud would learn English and 'acquire such a mastery in it that when he left the University he should be able to expose the blunders and errors which the English writers in *Islam*, the *Founder of Islam*, the *Muhammadan Society* and *Government* have, whether intentionally or not, committed'. The law was an irrelevant remunerative side-line, to be tolerated as it didn't interfere with his 'national work'.¹³

Yet, somewhere between Britain and India, Mahmud formed the idea of an Anglo-Indian political order which exceeded the limited bounds for collaboration set by his father. At a dinner for British officers hosted in Allahabad to celebrate his return in 1872, Syed Mahmud spoke of the possibility of a greater degree of cooperation between the British and Indians than his father imagined. The 22 year-old Mahmud made the case for a liberal imperialism based not merely on liberal values but a common form of conviviality. His aim, like his father, was 'to unite England and India socially even more than politically'. But unlike Syed Ahmed, Mahmud argued that Anglo-Indian sociability could create the foundation for a virtuous form of political power. 'English rule in India' could create an ethical state. But this state, he said, 'in order to be good, must promise to be eternal'. That was impossible 'until the English people are known to us more as friends and fellow subjects, than as rulers and foreign conquerors'.

Mahmud expanded this argument in an essay he wrote for the *Calcutta Review* in 1879. Like his speech at Allahabad, the article had an educative aim, directed at an audience of British officials. In the piece, Mahmud began by noting the tense state of relations between the 'English' and Indians. 'Under the influence of supposed grievances on the one hand, and the effects of injured pride on the other', he said, 'the political and social

¹³ Selections from Vernacular Newspapers, 465 (6), 1893: IOR, L/R/570.

relation of the Englishman with the people of this country becomes a matter of national antagonism or of personal insult and provocation'. British rule had, Mahmud argued, 'brought order and good government, peace and civilization'. But it was undermined by the intemperate conduct of Europeans. The 'present state of feeling', he said, was conducive neither 'to the welfare of British rule or to the prosperity of India'.¹⁴

Mahmud presented his article as a cool, dispassionate analysis of the causes that created mutual hostility between the two 'races'. Nowhere did he discuss negative British *representations* of Indians. Mahmud was aware but unconcerned about the condescending rhetoric which India's British rulers used to talk about Indian society or character. Instead he attacked the psychic effects of the way in which the British (wrongly he thought) talked about the kind of power they possessed. Mahmud argued that Britons imagined their rule in India was founded on physical force. The only story the British told about themselves was the one narrated by Thomas Macaulay, about the successful subjugation of India by force of arms. The British in India took unwarranted pride in being members of a nation that had conquered India. As he suggested, many 'Englishmen in India' during the 1870s 'tread the land of our birth with much greater consciousness of 'the glory and rights of conquest' than we imagine ever filled the bosom of characterized the demeanour of the hero of Plassey', Robert Clive. In fact, Mahmud argued, British rule in India was based on cooperation and consent. Britain's dominions in India were 'acquired by means far different from physical violence', he argued. The East India Company had been transformed from a body of merchants into an Indian sovereign through a series of 'transactions or compacts' between the British and legally-constituted Indian political entities. Throughout these events, he suggested, 'native agency, native friendship, native counsels, native valour, played an important part'. From the late eighteenth century, Indians had both suffered for and benefited from 'British rule in India'. Thousands of Indians, for example, 'fought and fell for the English standard' in 1857. 'The British empire in the East has been built up by the combined efforts of the two nations; it is the product of the bravery and energy of both the races'. The British, Mahmud argued, did not rule India because of their 'superior valour' or 'mechanical and

¹⁴ Mahmud, 'British Rule in India', 5.

chemical inventions' but purely because of a 'curious coincidence', which couldn't last long, that Europeans were better trained in government at his own particular moment in time.

Historians now treat the claim that Indians consented to their own domination as a crucial plank within the rhetoric which India's imperial rulers used to justify their domination.¹⁵ It was, after all, the central argument made in a work usually regarded as a classic piece of imperialist apologetics, John R. Seeley's *Expansion of England*. '[T]he conquest of India is not in the ordinary sense a conquest at all', Seeley claimed. Mahmud and the Cambridge Regius Professor of History shared elements of a common argument. Both men wanted to downplay the role of military violence in the making and sustaining of empires, Seeley suggesting that it was their 'violent military character that has made most Empires short-lived and liable to decay'. Both Mahmud and Seeley were critical of arguments focused on the importance of hierarchical power, military honour and a belief in England's peculiar destiny which characterised the new Tory ideology of empire that Benjamin Disraeli had articulated since the early 1870s, and which shaped the Earl of Lytton's period as Viceroy between 1876 and 1880. Instead, as Seeley put it, there was 'nothing wonderful' about the way Britain acquired or maintained its rule in India.¹⁶

It's worth dwelling on these connections, because it is possible that Seeley was Syed Mahmud's teacher, although it's not certain which direction the influence flowed between the two men. Seeley and Mahmud were at the same college in Cambridge at the same time. Both men arrived at Christ's College in the Autumn of 1869, Mahmud as a 19-year old undergraduate, Seeley returning to Cambridge as Regius Professor at the age of 35 after a spell as Professor of Latin University College London. Seeley's *Expansion of England* was based on lectures given two years after Mahmud's widely-read *Calcutta Review* article was read. Mahmud might have picked up his critique of conquest from conversations with Seeley given by the professor before his empire lectures. But,

¹⁵ Nicholas Dirks, *Castes of Mind. Colonialism and the Making of Modern India*, Princeton, NJ: Princeton University Press, 2001, pp.303–316; Chatterjee, *The Nation and Its Fragments*, pp.27–33.

¹⁶ John R Seeley, *The Expansion of England: Two Courses of Lectures*, London: Macmillan, 1883, p.243; Deborah Wormell, *Sir John Seeley and the Uses of History*, Cambridge: Cambridge University Press, 1980.

Seeley's text might also have been a plagiarism of Mahmud's essay, which had widely circulated in Britain by John Strachey, the British officer closest to both Sir Syed Ahmed and his son.

Seeley's purpose, though, was very different from that of his Indian student. As Duncan Bell suggests, Seeley's point was to persuade his British compatriots to shift their attention from India to those parts of Britain's empire populated by 'the English nation', the white settler colonies. Seeley had an idealist (in every sense of that word) vision of global British state, bound together through the emigration of people with a common ethnic, intellectual and, particularly, religious heritage. Because 'the races of India are far removed from us in all physical, intellectual and moral conditions', India could never be truly part of Britain's empire. British rule in Asia was based on a weak and contingent series of transactions, not the kind of unitary ideal made possible by a shared racial heritage. All the British could do was to act as 'teachers and civilisers' for the short term until, eventually, they would be expelled by people who vastly outnumbered them. 'The English nation' was, after all, 'but an imperceptible drop in the ocean of an Asiatic population'¹⁷.

If Seeley did plagiarise Syed Mahmud's critique of the idea that India had never been conquered, he was translating an argument originally intended as a dramatic challenge to the sentiments of India's British rulers into the idealist idioms of Cambridge political thought. In contrast to Seeley, Syed Mahmud believed that the history of treaties and alliances by which Indians had consented to the growth of British power had created a strong and stable regime based on mutual consent and continual negotiation. There was, of course, 'no allegiance of blood or nationality', and no 'sacred ties of religion' to bind Mahmud and his countrymen to the British. But, Mahmud posed the possibility of inter-cultural friendship against Seeley's assumption that people belonging to different religions could not combine into a single state. Mahmud was 'convinced, the ties of law and constitution are ties stronger, in the nineteenth century, than ties of either blood or

¹⁷ Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900*, Princeton University Press, 2009, p.173; Seeley, *The Expansion of England*, pp.193, 291 & 54.

religion'. Mahmud believed the British empire in India was a constitutional regime based on the historic process by which different Indian groups submitted to the authority of the Company and the Crown in a sequence of political negotiations. Each moment in this story transformed but did not annihilate the rights and laws which different groups of Indians possessed beforehand. If ruled by people with a friendly disposition to one another, Britain's imperial constitution could provide an arena for a stable polity to be forged from ethnic and religious difference. This was a conception of the empire as a constitutional polity which intersected with arguments made about other imperial locations¹⁸.

The problem, for Mahmud, was that there was no such disposition. The passionate, irrational commitment of British imperialists to 'the fallacious idea of being 'the conquerors of India' undermined the basis of a liberal imperial regime. That commitment corroded the empire's legal and affective foundations. First, the idea that the British state in India was founded on violence allowed jurists to imagine India was a legal *tabula rasa*. As a result, they falsely imagined existing traditions of law had been abrogated by English sovereign power. But, as importantly, the false idea the English had of themselves as a people responsible for subjugating India by force created a temperament ruled by 'bigotry' and 'fanaticism'. That temperament in turn prevented the kind of conviviality needed to sustain a government whose only basis could be the consent of those who were ruled.

Seeley had argued that the absence of racial unity prevented empire from being an enduring reality. Mahmud, by contrast, believed British sovereignty could be a permanent source of 'peace, order and prosperity' if only British administrators learnt 'the lessons of history' and cultivated friendship with their fellow Indian subjects of the Crown. In 1879, Mahmud imagined that it was possible to instruct his British colleagues the true character of British rule. Far from assuming that the British would be India's 'teachers and

¹⁸ Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire*, Oxford: Oxford University Press, 2011.

civilisers', Mahmud thought Indian officials like him could teach the British the disposition necessary to sustain their empire.

Law in Context

Returning to India from England, Syed Mahmud began to practice as a barrister before the Allahabad High Court. His judicial career was rapid. Mahmud was appointed a sessions judge in 1873. In 1879, the same year he published his critique of conquest in the *Calcutta Review*, Mahmud began to stand in for British judges on the Allahabad High Court when they went on leave, leading to his permanent appointment on the bench in 1887. During these fourteen years, Mahmud wrote and delivered over three hundred judgements. These mostly concerned cases which dealt with civil law, particular the law governing the inheritance of property.

Mahmud's judgements were long, educative and sociological. Usually at least 1,000 words long, sometimes ten times that length, Mahmud's legal opinions were almost always the longest offered in any case. Throughout his legal work, Mahmud would politely push and challenge his colleagues on the bench, offering his own deliberate, complex reasons for a decision. British judges, by contrast, tended to give a pithy verdict with few reasons. Often, Mahmud's opinion differed from other jurists, sometimes in a minority of one against the rest of the bench. Even when he concurred with their view, Mahmud presented his own arguments, using a different logic from his colleagues. Rather than simply emanating from the texts created within the self-validating world of colonial British justice in India, Mahmud's judgements argue that law emerged from particular historical practices which existed beyond the court. To discover them, the judge needed a temperament capable of inquiring into local circumstances.

To give an early example from his career. In 1884, a dispute was heard about whether a single Muslim could sue a mosque in a small village on behalf of a larger group who were denied access to the place of worship. The case was heard by the full bench of five judges. The Chief Justice, Comer Petheram, gave a pithy, 274 word opinion based on a section of the India's Code of Civil Procedure and a conception of 'custom' derived from

case law. Mahmud agreed with the verdict, but added a lengthy series of ‘observations regarding the Muhammadan Law’, four times as long as the Chief Justice’s opinion. The principle that a mosque was endowed for all Muslims was ‘too well known among Muhammadan lawyers’ for authorities to need to be cited, he said. Mahmud challenged an earlier judgement by British judges in Calcutta which offer a very narrow definition of who could assert an assert ‘interest’ and therefore according to the Code of Civil Procedure. Mahmud suggested that worshippers ‘have the most direct interest in a mosque’. Mahmud’s opinion was concerned with more than simply ensuring the right judgement was made in one case. His opinion challenged previous British case had excluded a group of Muslims from being able to use a mosque, and lay down a legal principle based neither on text or statute but the court’s sensitivity to principles which had been continually consented to by a particular community ¹⁹.

Mahmud’s imagined India’s polity as a collection of social and religious communities, held together by a common set of manners and legal institutions. Governed with the right techniques and temperament, Mahmud believed law was an institution capable of allowing the norms and practices of different Indian communities to speak, and sustaining social cohesion by negotiating their difference. Particularly important for Mahmud were the spheres of Indian, Muslim and Hindu, ‘religious’ law that a succession of legislative authorities in Britain India insisted should govern ‘succession, inheritance, marriage, or caste, or any religious usage or institution’. This provision, which Mahmud suggested ‘first found legislative enactment in the year 1780’ but was confirmed by section 24 of the 1871 Bengal Civil Courts Act was ‘one of the most important guarantees given to the people if India by the British rule’. For Mahmud, religious law wasn’t merely a shrunken domain of ‘personal law’ that governed a limited range of transactions with static, textually transcribed rules. It was the sphere within which the political constitution of India’s pre-colonial past survived into the colonial present.

In contrast to British judges who frequently complained about the incoherence of Hindu and Muslim juridical traditions, Mahmud argued that each offered a complex but certain

¹⁹ *Akbar Husain vs Jawahra and Others*, Indian Law Reports, Allahabad, vol.7, November 22, 1884.

set of procedures for resolving disputes, even in areas which the British since introduced statutes or codes of law to regulate. In an 1884 case about what to do with land belonging to a Muslim man who had vanished without trace, Mahmud spilt pages of ink explaining the different reasons Muslim jurists had given for establishing when a missing person could be considered dead, showing how these arguments relied on ‘logical methods’ from Arabia and ancient Greece which could flexibly accommodate themselves to different social conditions. There was both an apologetic, nostalgic quality to the discussion, as Mahmud’s point was that deciding whether a missing person was dead wasn’t a ‘religious’ question – so the British-authored code of Civil Procedure applied instead. Petheram, the Chief Justice, drew the same conclusion from different premises. Muslim law had, he argued, been superceded by a law better attuned to modern conditions. ‘It was’, he said, ‘to benefit the people of this country by enabling proof to be given of facts which should be known’ that the vagaries of Muslim law had been replaced by a certain, British legal code²⁰.

The 1884 case illustrates well the contrast between the juridical temperament of Mahmud and his British brother judges. Comer Petheram sought legal certainty in a British statute in what was otherwise, for him, an uncertain legal environment. Petheram certainly found no pleasure in delving into the rules of Indian law and social practice. Where a rule had been enacted by the British state in India, the Chief Justice quickly summarized it and left his opinion as that. Mahmud, by contrast, clearly enjoyed his scholarly investigation into the arguments of early Muslim jurists about missing persons. Rather than desperately clinging to sharp, abstract and absolute black-letter rules, here as in other cases he told a nuanced and complex story about the relationship between the rules of law, the principles of logic and changing social practice.

Perhaps this opposition was most sharply drawn in one of Mahmud’s most famous cases, *Govind Dayal versus Inayatullah*, a judgment about whether a neighbor had preference over a Hindu stranger when a Muslim sold land. The case, that came before the

²⁰ *Mazhar Ali and Others vs Budh Singh and Another*, Indian Law Reports, Allahabad, Vol. 7, December 6, 1884.

Allahabad Court in 1883, was heard by the full bench of five judges. It was an issue that had bedeviled British judges in India for a long time. Since the earliest British attempts to administer justice in India, British officials had recognized the Muslim juridical principle of *haq-shafi*, that anyone harmed by the sale of property had a right to object and put a stop to the transaction. But did Muslim law apply when all the parties weren't Muslims? There was, the British thought, no similar principle in any Hindu juridical school. It was a tricky question.

For almost a century, British judicial officials tried to determine this kind question as 'efficiently' as possible, trying to make a decision without getting immersed in the details. The judge in a case in Dhaka in Bengal during the 1790s simply outsourced the decision to his Indian legal officers. Framing the problem in abstract terms, William Douglas asked the court's *qanungu* (record-keeper), *kazi* (Muslim law expert) and *pandit* (Hindu law expert) to declare 'the Custom of the Country when the land of a Talookdar [landholder] is entermised with that of another'. Could 'a Person residing in a different part of the Country' purchase against the wishes of other local proprietors'? Without explaining why, all three said no, so Douglas issued a decree accordingly. What's striking about this early judgement is that the British court didn't pose the issue as a question in specifically Muslim law, and didn't attempt to discover or impose external rules upon the case.²¹

At work in 1793 was an early colonial way of thinking about justice that privileged the concept of custom, and thus which didn't have any problem with a case involved people from different religious communities. But, as I've argued previously, British anxiety about using Indian sources of authority caused them to transcribe Indian juridical traditions into a series of pithy rules, and in the process to disembed the law from the local contexts which once gave it meaning. Rather than being a custom pertaining to a particular place, and thus variable and seemingly indefinite across space and time, the law of pre-emption was deemed to belong to a fixed set of rules that could be printed and

²¹ Judge of Dhaka to Register of Sadr Diwani Adalat, March 16, 1793, IOR P/152/41, Proceedings for 27 June 1793, nos.23-4,

disseminated across space, and which thus belonged to a particular trans-local community. This law was summarised (one might say created) for judges with little knowledge of India's jurisprudential traditions by handy texts such as William H. MacNaghten's 1825 guide, *Principles and Precedents of Moohummudan Law*, which defined pre-emption as 'a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser', which could be claimed by a property's partner, a 'participator in its appendages' or a neighbour. These texts, together with case-law, constituted a coherent because self-referential system of meaning which treated legal subjects as individuals entirely divorced from their particular social situation, and instead the bearer of a particular abstract, Hindu or Muslim, legal identity. The trouble, of course, was that it began to raise the question of which law should apply in cross-community cases²².

Unsurprisingly, the British judges in the Allahabad court tried to resolve the issue by relying on as little Indian law or knowledge as possible. They took refuge in a combination of British-enacted statute law and their own sense of fair play. Because it involved litigants from two different religions, the court 'was not bound to administer Muhammadan law', Justice Oldfield argued in an opinion which was no longer than three sentences. But, he noted that the Bengal Civil Courts Act had, like its predecessors, insisted that when laws were unclear disputes should be resolved with 'justice, equity and good conscience'. It would, the British judges believed, be unjust for 'persons who were not Muhammadans, but who had dealt with Muhammadans in respect of property' to be governed by different laws, so Muslim law applied. The Chief Justice, Comer Petheram, concurred in another three-sentence long opinion. Relying on 'the text-books of Muhammadan law', he said there was 'no doubt what the Muhammadan law was' and insisted it was equitable neighbouring Hindus were subject to the same law.

Syed Mahmud's opinion was a long essay of more than 15,000 words, which considered a combination of history, Muslim legal tradition and case-law. Mahmud's over-riding

²² W.H. Macnaghten, *Principles and Precedents of Moohummudan Law*, Calcutta: Baptist Mission Press, 1825, p.253; Jon E Wilson, *The Domination of Strangers. Modern Politics in Colonial India, c.1780-1830*, Basingstoke: Palgrave Macmillan, 2008, pp.75-104.

concern was that equity not be used as a mechanism to introduce foreign law to India. Against his ‘brother judges’ use of ‘justice, equity and good conscience’ to apply Muslim law in a discretionary way, Mahmud argued that the Muslim law of pre-emption should apply on its own terms. A neighbour’s right to buy land which otherwise would have been sold to a stranger was, he argued, ‘a religious usage or institution’, even where the original purchaser was not a Muslim. Mahmud’s argument was, again, reliant on historical social practice. ‘[F]ounded by the Prophet upon Republican principles’, the Muslim law of inheritance divided property into numerous fractions between its owners’ relatives on his or her death. Unless strangers were excluded from being able to buy land, the dispersal of property would dissolve the relationship between family members and lead to anarchy. Originally established by Muslim jurists, Mahmud nonetheless argued that pre-emption had become accepted social practice amongst Hindus in India too. ‘The administration of law by Kazis’ under the Mughals had given ‘wide currency to haq-i-shufa’, so it became ‘the common law of the country’. British case-law on the subject offered a mix of contradictory opinions. But Mahmud argued that the logic both of the original Muslim law and its continuance through the history of pre-colonial and British times pointed to the legal validity of the rule. Historical practice and political necessity fused in his argument. There was, Mahmud suggested, a compelling political logic to the need to exclude strangers from buying land, recognised by the adoption of similar customs ‘even in some of the most civilized parts of Germany’. The law was a response to social necessity. In a society like India with such varied ‘distinctions of race, caste or creed’, ‘the intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort, if not, as in some cases, lead to breach of the public peace’²³.

To give a final example: in 1892, Mahmud sat on the bench with the new Chief Justice, Sir John Edge as well as Justice Straight, to hear a case concerning another issue which had long vexed judges in British India, whether a Hindu couple could give an only child

²³ *Gobind Dayal vs Inayatullah*, Indian Law Reports, Allahabad, vol.7, February 9, 1885; *Zamir Husain vs Daulat Ram*, Indian Law Reports, Allahabad, vol.5, August 31, 1882; Alan M. Guenther, ‘Syed Mahmood and the Transformation of Muslim Law in British India’, Unpublished PhD Dissertation, McGill University, 2004, pp.234–7.

away for adoption. Both the British judges gave short, pithy verdicts, which relied entirely on previous case-law which itself depended on mid nineteenth century British digests of Hindu law, texts by H.T. Colebrooke and J.C. Sutherland as well as W.H. MacNaghten. These opinions were, in other words, locked within the self-affirming web of texts that allowed British jurists to imagine the law they administered was secure. There was no discussion of the reason for the law or its social context, simply the search for a certain rule of decision. Mahmud's opinion was 14,000 words long, and began by suggesting Edge and Straight's readings was out of date. The scholars of Hindu law who gave the Tagore Law Lectures at Calcutta University in 1883 and 1888, had gone back to the original Sankrit sources of the law. Drawing on their historicist inquiries, Mahmud offered a complex story of the relative place of different authorities in the evolution of Hindu law. Ultimately, Mahmud agreed with Sir John Edge, suggesting that it was not illegal for an adopted only child to inherit their adopted child's estate. But in the process of making that case, Mahmud made an important argument about both the importance of social practice, and the endurance of Hindu rules of interpretation through time. Mahmud quoted Manu, the first great *dharmasastric* text saying that it was the sacred duty of the king to 'enquire into the laws of castes, of districts, of guilds, and of families, and settle (or protect) the peculiar law of each'. Later, he quoted Vasista. 'To import foreign ideas and bring them to bear upon interpreting Sanskrit texts when modes of interpretation sanctioned by Hindu logicians of the highest authority are forthcoming is an obvious error'²⁴.

By the late 1880s, the difference in temperament between Syed Mahmud and the 'foreign' judges on the Allahabad bench, particularly Sir John Edge, had begun to seriously break down. The clash in the style with which the two men delivered their legal opinions had begun to corrode their personal relationship. Edge was frustrated with the length of time it took Mahmud to write and deliver each verdict. Mahmud became increasingly suspicious that the other judges were making decisions without him. Mahmud suggested that the 'English business', matters like filling in statistical data on

²⁴ *Beni Prasad vs Hardoi Bibi*, Indian Law Reports, Allahabad, Vol. 14, February 4, 1892.

cases, answering the government's requests for advice on legislation, and deciding who should judge adjudicate what cause, were conducted in secret meetings he had no access to. 'The matter to which the correspondence related was not of any radical importance', Mahmud noted whilst making one complaint. But it was an 'important matter of principle' that the court's only Indian judge was equally involved in making all decisions. To make sure he wasn't being excluded, Mahmud insisted on checking every letter written from the court as a whole. In a move ostensibly to satisfy but calculated to rile, the Chief Justice asked for *all* the administrative paperwork of the court, however minor, to pass Mahmud's office for his 'consideration' before being signed off. 'The result', as Mahmud noted, 'was that on rising from the bench at 4 o'clock in the afternoon I used to find official files about two feet high in a heap on my table, and sometimes so much that the front seat of my carriage could hardly hold them'.

The judges' response to the crisis tells us something important about the temperament which ruled the court. Instead of working to rebuild trust between the two sides, the British judges insisted on writing a 'Code of Rules' that would systematise the functioning of the court, creating formal equality between the different members of the court, making sure matters that had been dealt with informally before under the gaze of written thus supposedly accountable standards of abstract justice. The new rules created a mechanism for voting on contentious issues. Previously Mahmud thought he had been excluded through the subtle exercise of informal forms of power. But the code merely institutionalised his marginalisation, providing a formal mechanism for him to be outvoted by the other judges without, supposedly any hard feelings. As a way of resolving tension, the code fundamentally missed the point. It was their different attitudes towards the law, their different temperament rather than Mahmud's exclusion from decision-making that had created conflict. Chief Justice Edge continued to argue that Mahmud was 'obstructive and inclined to raise unnecessary obstacles to the discharge of business'.

It was what Mahmud said about the law itself that finally ended his career. Mahmud's long, technical opinions on Muslim law remain amongst the few nineteenth-century legal

judgements still quoted in Indian courts today, but they were a source of conflict during Mahmud's High Court career. Mahmud's British colleagues suggested that the length of time it took him to compile his judgements interrupted the rule of colonial law. Mahmud did not understand that the British regime depended on efficient, quick decision-making. The detail didn't matter as long as a decision was definite. Edge accused Mahmud of being 'dilatatory and inattentive as a Judge, causing much delay in the decision of cases, and not doing his fair share of work'. He was accused of arriving drunk at work, and being plagued by 'intemperate habits of mind'. In response, Mahmud claimed that delays occurred because 'his judgements [we]re very much more careful and elaborate than those delivered by any of the other Judges in the Court'. There's no doubt that they were longer, and that Mahmud worked hard. It wasn't unusual for him to write 20,000 words of legal opinions a week. Mahmud argued that he was ridiculed by his fellow judges for the care and detail he took, and the broader range of sources his judgements relied on. When he quoted Bentham in a long opinion on the law of salvage, the Chief Justice remarked 'You should in future be called Jeremy'. As Mahmud suggested, 'considering my relations with him at the time, this could neither be interpreted as a friendly joke or a compliment, and it was evidently intended as a sneer'. Whatever its cause, Edge argued that Mahmud's tardy practice meant he was 'indifferent to the necessity which existed for clearing off the arrears of business, and for giving prompt decisions As Lieutenant-Governor Charles Crossthwaite noted in a letter recommending he eventually not be allowed to return to the court after taking a period of leave, if Mahmud was not removed there was no hope of clearing the Allahabad court's growing arrears ²⁵.

Allahabad's British judges insisted that the disagreement was purely 'official', and not based on personal animosity or any sense of racial difference. Edge argued Mahmud had been treated *better* because he was Indian; Mahmud wished that 'he [had] only been treated as an ordinary *English* Puisne judge of the Court, without any *halo* of being patronized by Sir John on account of my nationality'. Anxieties on each side stemmed from the different arguments and temperament they brought to the practice of the law and these in turn no doubt stemmed from their relationship with different social worlds. As a

²⁵ Government of NW Province to Government of India, July 11, 1893, IOR L/P&J/355

Muslim Indian judge in a British court, Mahmud straddled two intellectual environments. One, the bureaucratic world of the colonial court was ruled by the 'expedient' logic of rapid judicial decision-making. It nominally administered something called 'Mahomedan' or 'Hindu' law, but privileged short, pithy rules, and did not need to defend the judgements it made before an informed Indian public. This world spilt out from Allahabad's law court into the civil lines with its cantonment, club and masonic lodge, all concerned to defend British power come what may. For the British, Allahabad was the seat of a High Court and a military town, which did not stray past the railway line which divided the city between European and Indian zones. Syed Mahmud lived here, but he also inhabited another world, populated by the friends in Allahabad he sat talking and drinking with late into the night, but also extending outwards, amongst sections of the official Muslim elite in North India and princely states like Hyderabad. This was an Urdu, Persian and Arabic culture where, imaginably, the detailed arguments Mahmud made about law and its relationship with Indian history and society were argued and defended, and mattered in a very different way.

My point is that empire was not only built on the explicit arguments made by its protagonists. It was sustained by tacit, unarticulated assumptions and idioms, sensibilities and temperaments, in the cases we've discussed in this paper about how disputes were to be decided, and how it was appropriate to act in court. The forgotten, unspoken nature of those assumptions and idioms made it possible for someone like Syed Mahmud, who wasn't part of the same social world, to imagine they could take part in imperial justice on equal terms. It allowed, indeed, liberal imperialists – British and Indian - to frame a powerful critique of the exclusive character of imperial justice. But colonial law, like the rest of Britain's imperial administration of India, was constituted by a gap between theory and practice. Mahmud's career, and the life of the law in colonial India more generally were caught in the gap between liberal justice's language of universalism and the visceral, emotional history of Europe's practical effort to wield and protect its power in India.

For us, and perhaps for Syed Mahmud, the tension present in the Allahabad court was the consequence of a complicated set of contradictions contained within the practice of empire. Mahmud's father, Sir Syed Ahmad Khan, told a very different, and far simpler story. In a newspaper article written soon after his son resigned from the court noted that the British might 'brag about their impartiality' Sir Syed said. They certainly had done a lot of that in the correspondence that ended Syed Mahmud's career. But it was impossible for 'the *conquerors* of this country' to sit 'together on the same bench' in 'equal terms of respect of honour' with members of a conquered nation. As Sir Syed argued,

If an Indian in such a position tries to preserve his self-respect which is concomitant to nobility and uprightness, the relations between him and his European colleagues get embittered. On the other hand, if utterly regardless of self-respect he makes himself quite subservient to the wishes of his European colleague, who because he belongs to a conquering race, *naturally* believes in his superiority, he is able to pull on pretty well. But this can never be expected from a man who wishes to remain true to his conscience, and in whose veins runs the blood of his (noble) ancestors. It is no secret that there is as much difference between the Englishman's treatment of his own countryman and that of others as there is between *black* and *white*.

For Sir Syed, tension in the court was the unavoidable after-effect of the honorific violence that underpinned British sovereignty in India. Sir Syed had not wanted Mahmud to be a judge in the first place, or occupy any position involving proximity to Europeans. Mahmud was supposed to become friends with Europeans, but not seek to exercise governmental power jointly with them. Echoing a long-standing Indian critique of British bureaucracy, Sir Syed was glad that Mahmud had been liberated from the demeaning clock-watching of the court and was now 'the master of his own time'²⁶.

²⁶ Selections from Vernacular Newspapers, 1893

With its reference to concepts such as honour and conquest, the language of Sir Syed's article belonged to a different world from the texts produced by the judges of the court themselves. But his comments open up a possible alternative history of the resentments and frustrations of Indian life under British rule. That history wouldn't take colonial rhetoric for the sum total of colonial reality, and wouldn't assume 'difference' only matters when it was asserted in coherently articulated categories. It wouldn't fixate on the internal contradictions of colonial liberalism, but would instead trace the way Indians sometimes learnt to live with, otherwise challenged what many recognised as the fact of conquest. Told as part of the story of the violent and visceral process of British rule in India, moments that have long been forgotten might be seen in a new light. For example: if the public rhetoric of imperial liberalism is all there is to the history of British rule, the Indianisation of the law and civil service in the twentieth century is an unproblematic moment of transition. But if colonial law only made sense to its British practitioners if it part of a culture of European-only conviviality rooted in the fact of violent domination, Indianisation takes on a different completion. It would entail the creation of a different practical form of Indian subjecthood, which dramatically challenged the acts by which the British asserted their power. The rise in the number of Indians on the bench as lawyers in court, just like the increasing employment of Indians in senior government service, might be seen as a profound rupture, a moment that changed the practices as well as the personnel of British rule.

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