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Islamic Law for the Colonists: Muftis in Nineteenth-Century British India

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Abstract

This paper is an exploration of the role of the Muslim law officer, or Mufti, in the legal system of British India. Using 400 cases of homicide adjudicated in the courts of Bengal and the Northwestern Provinces from January 1853 to December 1854, the paper argues that Muftis utilised the Islamic concept of siyāsah to adapt Islamic jurisprudence regarding the establishment of intent and the categorisation of punishment. This was done to both accommodate overlapping British understandings of the law and ensure that criminals were punished according to shifting conceptions of justice during the nineteenth century.

Keywords

Mufti, British India, Islamic law, colonialism.

As the British expanded their political control in the Indian subcontinent following the Battle of Plassey in 1757, they became intimately involved with the administration of justice and, after a brief period of dual government alongside the Naib of Bengal, became solely responsible for the court system and in particular the prosecution of criminals. The British inherited a multi-tiered judicial system from the previous Mughal administration and largely continued to apply that system both in name and structure. Within this system were a number of local actors, chief among them Muftis who issued proclamations of Islamic law (*fatwā*s) for cases, meant to guide the British judge to an acceptable Islamic ruling.

Much of the legal historiography of this period is centered on the impact of British control, slowly replacing and diminishing the role of local actors such as Muftis. Scott Kugle, for example, has described the nineteenth century as one where Islamic law was appropriated by the British, repeatedly limiting

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it in scope and diversity, and eventually "legislated [it] into oblivion" with the introduction of the Indian Penal Code in 1860.[1] Radhika Singha, on the other hand, has described the process of legal change in British India through the colonial desire to control the local penal system and charted how British administrators in the first half of the nineteenth century modified concepts within Islamic jurisprudence to conform with what they perceived as more in line with "equity, justice, and good conscience."[2] With specific regards to the Muftis, little has been written about their activities within the courts. According to Michael Anderson, when faced with a question of law,

> British judges would present the *maulavi* with a question formulated in an abstract, hypothetical manner, often shorn of relevant details. The resulting *fatwa*, necessarily in an abstract form, was then applied to the case at hand. This procedure resulted in a highly formalized and rigid application of legal rules.[3]

Within this system, Muftis in Anderson's view performed a role of "collaborating with colonial rule in the most overt sense."[4] They were often mistrusted by the British, particularly due to the diversity of opinions available within Islamic law. This collaboration continued until 1864, when the Kazi Act removed the position of the Mufti altogether.

This paper seeks to shed light on the role that Muftis played in British courts during the first half of the nineteenth century. Using British case reports in the prosecution of homicide, this paper argues that the Muftis were neither complete collaborators nor passive colonial subjects who had little impact on the development of the law and its application in the courts. Rather, Muftis in British India played an important role in both the development and application of the law. Contrary to the view of Anderson, they were intimately involved in the details of each case in which they were present and used the flexibility of opinions available within Islamic law not to avoid punishment, but rather to give the political authority—in this case the British—more room to implement justice as they saw fit. This was not in contradiction to the history of Islamic law, but a continuation of the Islamic legal concept of *siyāsah*.

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[1] Scott Kugle, "Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001), 258.
[2] Radhika Singha, *A Despotism of Law: Crime and justice in early Colonial India* (Delhi: Oxford University Press, 1998), vii.
[3] Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," *Women Living under Islamic Laws,* occasional paper no. 7 (June 1996), 12.
[4] Ibid.

The paper begins with a general overview of the British criminal law system in the late eighteenth and early nineteenth centuries, the organisation of the courts, and problems in jurisdiction. It then moves to the standardisation of the law used within the courts, with a focus on the compilation and translation of Islamic texts and the Muslim actors involved in this process. The background and role of the Muftis within British courts is then examined in more detail showing that Muftis, although sometimes viewed with a degree of suspicion by British judges, were mostly trusted and relied upon officers of the court. Particularly upon appeal, the cases surveyed for this paper show that when a British judge disagreed with the ruling of his Mufti, the appellate court would in a majority of circumstances side with the Mufti.

Then, the paper examines the case study of homicide by first charting the differences between British and Islamic understandings in this area of the law. When applied on the ground Muftis worked to develop the law and ensure that perpetrators would be brought to justice. They did so by developing new categories of punishment not found in works of Islamic jurisprudence that allowed the British judges to punish offenders as they felt necessary. Additionally, the role of the Mufti ensured the continuity of the influence of Ḥanafī jurisprudence, particularly its objective method of establishing intent of homicide.

Finally, the paper examines the role of Muftis following the abolishment of their official status in British India with the passing of the Kazi Act in 1864. Instead of retreating into the shadows, many Muftis merely shifted their position to act as local religious judges (*qāḍī*s), officiating marriage and commercial contracts. Those who were fluent in English also continued to work within the British courts as advocates for their countrymen.

General Statistics

The cases surveyed for this paper includes 400 instances of homicide brought for review in front of the appellate level Nizamut Adawlut courts of Bengal and the Northwestern Provinces in the period between January 1853 and December 1854. These include three general types of homicide: (1) willful murder, defined as a situation in which the perpetrator(s) were suspected of having pre-meditated the crime; (2) culpable homicide, usually the result of a fight in which the victim was injured and died of his/her injuries several days later; and (3) murder accompanied with other types of crimes, usually theft or affray. Of these cases, 195 (48.75%) included the opinion of a mufti, while the rest were either trials by jury or the records did not mention a mufti's opinion.

As a result of these cases, 99 individuals were sentenced to capital punishment (hanging), 194 sentenced to life in prison, 475 given prison sentences ranging from 1–14 years, 166 acquitted, and 4 placed in insane asylums until medical professionals were assured of their treatment.

Organisation of the Courts: Following in the Mughal Footsteps

The system created by Lord Hastings in 1772 and modified by his successors established a three-tier process of adjudicating cases. In instances of homicide, circumstances would initially be brought to the attention of the local police authority (*thānah*), some of which housed British magistrates that had the power to issue basic punishments. However, their primary responsibility was directing the actions of investigators, recording the testimonies of witnesses and the statements of suspects, and preparing detailed reports that would be forwarded to the courts. One of the most important of these reports were those of the medical officers containing physical facts like the nature of the victim's body and the suspected cause of death. Local (meaning Indian) doctors would usually be the first to evaluate the situation, and their reports were then confirmed or modified by a British civil surgeon located in larger cities.

Once these reports were produced, the case was then referred to the Mofussil Adawlut, or a court of first instance, staffed by a single British judge accompanied by local religious scholars, a Muslim Mufti or a Hindu Pandit, to clarify points of the religious laws of the Indians involved. The British judge, referred to in the records as the "sessions judge," would then evaluate the case, calling witnesses to provide their testimony as well as taking new statements from the defendants. He would then ask the religious representative for their assessment of the situation, and in the case of Muslims a specific religious opinion (*fatwā*) would be issued. Based on this evaluation, the judge would then issue his ruling and sentence the defendants accordingly. For a variety of reasons, including a disagreement between the Mufti and the sessions judge or the request of appeal by the defendants, the case would then be referred to the Sadar Nizamut Adawlut where a bench consisting of one or more British judges would either confirm the opinion of the lower court or issue a new ruling.[5]

The description above represents the "ideal" process through which homicide cases should be adjudicated. However, it is clear from the court records surveyed that this was not always the way things occurred on the ground. For example, a clear distinction can be seen between cases of Bengal

[5] An overview of this system can be found in Mahabir Prashad Jain, *Outlines of Indian Legal History* (Bombay: N. M. Tripathi, 1966).

and the Northwestern Provinces. Courts in Bengal, having been under British judicial administration since the middle of the eighteenth century, operated with much more clarity. Every element of the judicial process is often provided in detail in the law reports, and the opinions of the Nizamut Adawlut rarely provide suggestions to the sessions judge as to how to improve.

Such is not the case in the Northwestern Provinces, where the judges of the Nizamut Adawlut constantly complained about reports that were unclear and reprimanded sessions judges for their incompetence. In a particular case from January of 1853, for example, the sessions judge referenced a prior case in which the Nizamut Adawlut acquitted the same defendant when he had requested capital punishment. "On reference to my letter referring the case," he stated, "the Court will perhaps not be surprised that she should be again on trial for another heinous crime of a similar description very soon after she was set at liberty." The Nizamut Adawlut judge, Mr. H. B. Harington, had strong words for the sessions judge after dealing with the particulars of the case. "Having thus disposed of the case, referred for the Court's orders," he stated

> I proceed to notice the impropriety of the remarks made by the Additional Sessions Judge in his letter referring the present trial. . . . Such remarks must always be considered as foreign to the duty of a Sessions Judge. . . . A copy of these remarks will be communicated to the Additional Sessions Judge with an intimation from the Court, that they will expect him carefully to abstain for the future from indulging in observations of a similar character to those animadverted upon.[6]

The judges in the Northwestern Provinces also had a problem in defining jurisdiction and whether the British were legally allowed to try defendants brought to them. Until the repercussions of the 1857 Uprising were realised, and the areas of Oudh fully incorporated into British territory, the Northwestern Provinces were a patchwork of jurisdictions that bordered princely states and territories still governed by the Mughals. In many cases, crimes were committed in one territory and the perpetrators would flee into another. For example, in one case adjudicated in February of 1853 one Duljeet was accused of murdering two individuals as a result of a fight regarding debt collection. The defendant was reported to have lived in Dholpur, a princely state in contemporary Rajasthan. However, the case was brought by the son of one of the victims who lived in the village of Sumona, in the British district of Agra. The fight took place on the road between the two districts. In his ruling convicting the defendant, the sessions judge questioned whether he qualified as

[6] *Gungabun v. Mussumat Pranee & Doolea* (1853) NA NWP 1 Bareilly 86.

a British subject, citing Section 2 of Act 1 1849 that defined subjects as falling under British jurisdiction if they had lived in British territory for more than six months. Three Nizamut Adawlut judges, A. W. Bebgie, S. S. Brown, and H. B. Harington, argued amongst one another as to whether Duljeet's constant visits back and forth between the two territories constituted residence. After a series of correspondences with the sessions judge, the court eventually affirmed Duljeet's residence, because he had inherited land in British territory and made monthly visits to check on his fields. They confirmed the lower court's ruling and sentenced him to life in prison.[7]

Even within the more streamlined court system of Bengal problems existed. For example, military officers administered certain jurisdictions that fell under the Nizamut Adawlut of Bengal such as Assam. As a result, cases were often brought to appeal with confusing and contradictory details. In one particular case regarding an armed attack against a village where two defendants were brought to trial, the opinion of four different appeals judges was sought. Each viewed the evidence of the case differently and eventually they were able to agree, with great difficulty, on overturning the original conviction of life in prison for both defendants and sentenced one to capital punishment and acquitted the second.[8]

As a result of these and other problems, the organisation of the British courts within Bengal and the Northwestern Provinces was far from the ideal depicted in the regulations set down by colonial regulation, and significant gaps existed in the court's understanding of jurisdiction and their application of the law. It is within this complex multi-layered system that the Muftis found themselves, acting in the Mofussil Adawlat courts.

Translation, Compilation, and Muslim Actors

As the organisation of the courts was administered by the British, colonial officers also began to approach the type of law to be applied. Under the orders of the Governor General of Bengal, a number of colonial officers began commissioning the compilation and translation of texts of Islamic law into English or Persian, languages that the British Orientalists were more familiar with as opposed to Arabic, the academic language of the Islamic World. The most well-known of these projects was that undertaken by the orientalist Charles Hamilton (d. 1792) with the translation of the Ḥanafī *fiqh* text *al-Hidāyah*, composed by the Central Asian scholar al-Marghīnānī (d. 593/1197). In the introduction to the original publication, Hamilton describes that the

[7] *Bujjoo v. Duljeet* (1853) NA NWP 1 Agra 148.

[8] *Chopang Garrow on the part of Gov. v. Rangring & Choran Dobassia* (1854) NA Bengal 1 Muzaffarnagar 743.

only way that the Bengal government had reached what he called a "flourishing state" was by continuing with the system that worked best for the local population,

> The permanency of any foreign dominion (and indeed, the justification of holding such a dominion) requires that a strict attention be paid to the ease and advantage, not only of the *governors,* but of the *governed*; and to this great end nothing can so effectually contribute as preserving to the latter their ancient established practices, civil and religious, and protecting them in the exercise of their own institutes; for however defective or absurd these may in many instances appear, still they must be infinitely more acceptable than any which *we* could offer; since they are supported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity itself.[9]

While *al-Hidāyah* was a general legal text that covered all aspects of the Ḥanafī school, there were other projects in this period specifically composed for criminal law. In the late eighteenth century, the British judge John Herbert Harrington (d. 1828) commissioned the compilation and translation of works on prescribed (*ḥudūd*) and discretionary punishments (*taʿzīrāt*) from a number of scholars including Salāmat ʿAlī Khān (alive in 1212/1797) who produced a compilation of criminal law from Ḥanafī *fiqh* works, Sirāj al-Dīn ʿAlī Khān (alive in 1236/1820) who produced an independent work on discretionary punishment, as well as Najm al-Dīn ʿAlī Khān (d. 1229/1814) and his son Muḥammad Khalīl al-Dīn Khān who produced Persian translations of the criminal sections of the *Fatāwā ʿĀlamgiriyyah*.

Scant biographical information is available regarding the first two authors, but much more is available regarding Najm al-Dīn ʿAlī Khān. Described as one of the greatest jurists of the Northern Indian town of Kakori, he received his religious education at the hands of his family members, all scholarly members of the Farangi Mahal in Lucknow. After a period of working as a judge in Lucknow his colleague, Tafażżul Ḥasan Khān, invited him to join the ranks of the judiciary of the British East India Company in Calcutta in 1205/1790. It is reported that when he arrived in 1793 the then Governor General, John Shore (d. 1834), welcomed the scholar warmly, hugging him and appointing him as the chief judge (*qāḍī 'l-quḍāh*) regarding all the matters of Muslims in areas controlled by the company. In addition to his translations in criminal law, Najm al-Dīn's career of almost 25 years included issuing *fatwā*s and judicial rulings that were applied in "every district from

[9] ʿAlī b. Abī Bakr al-Marghīnānī, *The Hedaya, or Guide: A Commentary of the Mussulman Laws,* trans. Charles Hamilton (London: T. Bensley, 1791), iv; emphasis added.

Kabul to the Deccan."[10] Upon his death in 1814, the then Governor General of Bengal, the Earl of Moira Francis Edward Rawdon-Hastings (1754–1826), issued a letter to Najm al-Dīn's wife expressing the government's gratitude for his service,

> The shock of the death of your husband, the High Judge, has been felt by the Company no less than yourself, given that it has caused the disappearance of such a modest and proficient individual, and such an irreplaceable man of learning. Since in the Workshop of Fate there is no remedy except patience and submission; there is no doubt that in the path of patience you will choose toleration. Though your four children are employed in the highest positions, and thus you shall not be burdened by strain during your period of mourning, the government has decided, in recognition of your husband's worth and reputation, to fix Rs. 150 per mensem as your pension for the remainder of your life.[11]

Once completed and published, these translations were to be used in the British courts, or at least could be referred to by judges in order to understand how their Muslim counterparts, the Law Officers or Muftis, reached particular conclusions in their *fatwā*s. These were also not obscure texts, and various manuscript copies of each can be found throughout the major libraries of Northern India (Khuda Bakhsh in Patna and the Rampur Raza Library). Additionally, printed copies of each of these works were produced throughout the nineteenth and into the first half of the twentieth century and can still be accessed in the libraries of the Muslim seminaries of Nadwat al-'Ulamā' in Lucknow and Deoband. For example, the most recent publication found for this study was an Urdu translation of the work of Salāmat 'Alī Khān produced in 1929 at the request of the head advocate of the princely state of Hyderabad, Mīr Aḥmad Sharīf.[12]

Muhammad Qasim Zaman and others have described these efforts as an attempt to reduce the arbitrary nature of rulings provided by Hindu Pundits and Muslim Muftis and bring more uniformity to the law. Zaman cites the orientalist Sir William Jones (d. 1794) stating, "Pure Integrity is hardly to be found among the Pandits and Maulavis, few of whom give opinions without a culpable bias, if the parties can have access to them. I therefore always make them produce original texts and see them in their own books."[13] These texts

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[10] Muḥammad 'Alī Ḥaidar, *Tadhkirah-i Mashāhīr-i Kākūrī* (Lucknow: Aṣaḥḥ al-Maṭābi', 1927), 432–3.

[11] Ibid., 433.

[12] Salāmat 'Alī Khān, *Islāmī Qānūn-i Faujdārī: Tarjumah-i Kitāb al-Ikhtiyār* (Azamgarh: Maṭba'-i Ma'ārif, n.d.).

[13] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 21.

were, therefore, meant to sideline Muslim scholars and take away their authority and make more room for the British to issue the kinds of rules that they saw fit for their own interests.

However, there are two points that modify the view of Zaman. The first is the degree to which Najm al-Dīn ʻAlī Khān's legal opinions were welcomed and encouraged by the highest levels of the Company administration throughout their Indian holdings, as has already been attested to by the biographical text cited above. The second is the fact that in each of these translated texts the British are not referred to as conquerors but rather given the full Islamic honourary treatment. For example, in the introduction to Salāmat ʻAlī Khān's work the author refers to his patron Harrington as "the Aristotle of his time"[14] and Najm al-Dīn ʻAlī Khān refers to him as the "protector of the scholars (*ʻulamāʾ*)" and asks God that his justice and influence spread across the world.[15] The most glowing of these praises is in the introduction written by Sirāj al-Dīn ʻAlī Khān, who states that he took it upon himself to compose his work

> When I took the position as a Mufti of the great courts during the reign of two great princes, the heads of the courts and the greatest of the [judges] in honour and pride, the most just in morals and disposition, the most complete in organisation and efficiency, the highest in refinement and discipline, the bringers of security and the spreaders of justice and kindness, the shelter of scholars and refuge to the poor and downtrodden, Mr. Henry Corbick and Mr. John Herbert Harrington. May God grant them benefit in their justice and legal understanding (*fiqh*) to what is good and lasting.[16]

Aside from his positive presentation of two non-Muslim British judges, it is particularly Sirāj al-Dīn ʻAlī Khān's use of the term jurisprudence *(fiqh)* when referring to their court rulings that draws the most cause for analysis. Traditionally, *fiqh* was used to represent the rules produced by Muslim scholars and, particularly following the crystallisation of the schools of law around the eleventh or twelfth century, only those rulings constructed by scholars within the school. In the case of South Asia, the overwhelming majority of these scholars followed the Ḥanafī school, and comprehensive works of Islamic law using the Ḥanafī method of interpretation continued to be written until the middle of the nineteenth century ending mostly with the lifetime of the Syrian Ibn ʻĀbidīn (d. 1252/1836). The fact that Sirāj al-Dīnʻ Alī

[14] Salāmat ʻAlī Khān, *al-Ikhtiyār*. MS. 2060, Khuda Baksh Library, Patna.
[15] Najm al-Dīn ʻAlī Khān, *Kitāb-i Jināyāt*, MS. 3829, Khuda Baksh Library, Patna.
[16] Sirāj al-Dīn ʻAlī Khān, *Jāmiʻ al-Taʻzīrāt min Kutub al-Thiqāt* (n.p.: Maṭbaʻ ʻAyn al-ʻAyān, 1820), 2–3.

Khān chose to use such a term to refer to the legal opinions of British judges in the eighteenth century shows that he believed their work fit into an Islamic context, and that their rulings retained some form of Islamic legal legitimacy. Unfortunately, little more is known about Sirāj al-Dīn'Alī Khān's opinions about the British and it is impossible to construct a complete analysis of just exactly how British judges could be considered to produce *fiqh*.

The Background and Role of the Mufti

As they are rarely mentioned by name, little is known about who these Muftis were or their educational background. However, by looking to the information provided by the court records, a few general observations can be made. For example, Muftis were being drawn from a variety of local institutions. The scholars mentioned in the section above came from smaller, local Islamic schools (*madrasah*s) in Kakori and worked in the Muslim-ruled city-state of Lucknow. Some also studied at the major Islamic seminary at Farangi Mahal.[17] Others came from new hybrid institutions developed in cooperation with Muslim and British officials such as the Delhi College. This was most likely because these institutions taught English and Western sciences as well as the standard Islamic curriculum, the Niẓāmiyyah.[18] This hybrid education facilitated work with their British counter parts. For example, just a few years beyond the scope of this paper in 1861 when the British commissioned an Urdu translation of the new Indian Penal Code, all of the translators were from the Delhi College: Munshi Azmat Ullah, Deputy Inspector of Schools in Shahjahanpur, Mawlavi Muhammad Karim Baksh, Head of the Department of Western Education, and Nazir Ahmad, Deputy Inspector of Schools in Allahabad.[19]

Within the court system itself, Muftis were intended to clarify points of Islamic law in cases that involved Muslims, while Hindu Pundits were supposed to do the same when the case involved Hindus. However, in the cases of homicide surveyed for this paper, not a single reference to a Hindu religious figure can be found. Muftis were present in cases involving a range of non-Muslims, and a survey of names mentioned in the records indicate that

[17] See Francis Robinson, *The 'Ulama of Farangi Mahal and Islamic Culture in South Asia* (London: C. Hurst, 2001).

[18] Mushirul Hasan, "Maulawi Zaka Ullah: Sharif Culture and Colonial Rule," in *The Delhi College: Traditional Elites, the Colonial State, and Education before 1857,* ed. Margrit Pernau (Delhi: Oxford University Press, 2006): 261–98.

[19] See the Urdu translation of the Indian Penal Code (IPC) of 1860, *Majmū'-i Qavānīn-i Ta'zīrāt-i Hind* (Lucknow: Munshi Nawal Kishor, 1861).

*fatwā*s were issued in cases involving Hindu, Jain, and Sikh as well as Muslim defendants.

Additionally, Muftis were not always seen as a necessity. Particularly in the Northwestern Provinces, cases usually sought the verdict of a jury—whose members were named along with their professions—that included middle and upper-class lay Muslims and non-Muslims. There are also references, again in the Northwestern Provinces, to unnamed "assessors" whose opinions on the case would be mentioned before the ruling of the judge.[20] Therefore, Muftis were only one form of a local verifier, assuring that the rulings of British judges were in line with local understandings.

There is also evidence that the British were concerned about the competence of Muftis and whether they could view the circumstances of a case without prejudice. For example, in one case from Bengal in 1854 two defendants, Gowhur Ally and Choolahee Singh Rajpoot, were accused of carrying out the murder of Dhoomun Khan. The crime apparently occurred in the middle of a bazaar in broad daylight between an ex-police officer and a dacoit, and numerous eyewitnesses were presented by the prosecution. The Mufti believed that the charges were false and acquitted both prisoners. According to the sessions judge, however, the Mufti "labors very incorrectly and in a very strained manner . . . to discredit the evidence for the prosecution, which, he is of opinion, is got up." He then implies that this was because of the Mufti's connection to the gang of dacoits, and that the gang could have intimidated the Mufti, something they apparently did to other witnesses, torturing them to change their testimony. The Nizamut Adawlut judges agreed and sided with the sessions judge, sentencing both defendants to 14 years in prison.[21] It would be a stretch, however, to suggest that the Muftis were dispensable and not important in the administration of the courts. For example, there are a few instances in Bengal (6 in total) where the official who provided the initial information to the sessions judge was a Mufti acting as either a magistrate or deputy. Muftis were also regularly hired by defendants to represent them at appeal.[22]

The relevance of Muftis to the court system in British India can be seen most clearly in the instances in which a conflict arose between the Mufti and

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[20] For example, see *Gov. v. Mittan Singh* (1853) NA NWP 1 Shahjahanpur 1, where the judgement was confirmed by a jury.

[21] *Rumjoo Khan & Gov. v. Gowhur Ally & Choolahee Singh Rajpoot* (1854) NA Bengal 1Bihar 230

[22] For example, see *Gov. & Another v. Soojat Allee, et al.* (1854) NA Bengal 1 Dinagepore 508. The names of the advocates were listed as Moulvee Aftaboodeen and Moonshee Gholam Ahmud, who represented the defendant Soojat Allee on appeal. The presence of Muftis as advocates as well as lower-court magistrates and judges will continue after the position of Muslim law officer was abolished, as will be seen later.

the sessions judge. Amongst the cases surveyed in which a Mufti's opinion was taken, 53 (27.17% of the total number reviewed) involved a conflict, a reason that required an appellate ruling by the Nizamut Adawlut. However, in a majority of these cases (29 or 54.72%), the Nizamut Adawlut disagreed with the sentence of the sessions judge and sided with the ruling of the Mufti. For example, in one case adjudicated in Bengal in 1854, five defendants were charged with the willful murder of one Manik Bangal in a fight following the discovery of an affair between one of the defendants (Upoorbokis to Mundul) and a widow in the victim's family. The Mufti acquitted all of the defendants based on the fact that the eyewitnesses were questionable, because they had all taken part in covering up the affair, but the sessions judge disagreed and sentenced one to life in prison, and three others to seven years in prison. Upon review, the Nizamut Adawlut judges (A. Dick and B. J. Colvin), remark that the Mufti was correct in his suspicion of the witness testimony and overruled the conviction, acquitting all of the defendants and ordering their immediate release.[23]

The remainder of this paper will now turn to the impact Muftis had in the development of the application of the law in the British-administered courts. It takes the example of homicide, showing how overlapping understandings of homicide and the definition of intent were reconciled through the work of Muftis to impact both the way Muslims, and the British, saw the application of justice.

Understandings of Homicide and Establishing Intent

In the Ḥanafī school, the dominant legal tradition of South Asia, homicide fell into five categories: (1) intentional (*'amd*); (2) semi-intentional (*shibh 'amd*); (3) wrongful (*khaṭa'*); (4) those that followed the characteristics of the wrongful (*mā ujriya majrā 'l-khaṭa'*); and (5) indirect homicide (*al-qatl bi sabab*). Intentional homicide was defined as a killing in which the perpetrator used a deadly weapon and was punished by the death penalty, while semi-intentional was for cases in which a non-deadly weapon was used and only aggravated blood money (*diyah mughallaẓah*) could be prescribed, avoiding the most stringent punishment of execution. The third and fourth types of wrongful (*khaṭa'*) and those that follow the characteristics of the wrongful (*mā ujriya majrā 'l-khaṭa'*), were situations in which the intent to kill a specific person was brought into question or the intent was established but executed upon the wrong victim. Juristic texts describe examples of this type of

[23] *Gov. v. Upoorbokisto Mundul, Dhununjoy Mundul, Prem Chund Chowkeedar, Govind Singh Burkundaz & Mumrez Khan Burkundaz* (1854) NA Bengal 24-Pergunnahs 517.

homicide as instances where a person intended to strike a particular person but struck another or meant to strike an animal but rather killed a person. Unintentional homicide covered cases in which intent to kill was not present, such as someone rolling over while sleeping and suffocating another person. Finally, indirect homicide included cases in which the death was not the direct result of the actions of the perpetrator, such as digging a hole in a public street in which someone fell into and died as a result. [24]

The understanding of homicide created by Ḥanafī jurists was, therefore, based on the physical nature of the act and the presence of a deadly weapon. Acts in which intent to kill was clearly established but a deadly weapon was not present, such strangling a person to death, would fall into the category of semi-intentional (*shibh ʿamd*). Likewise, acts in which direct intent to kill was not established, such as a death that occurred during a brawl between two villages, could fall into the category of intentional (*ʿamd*) because of the presence of swords or other deadly weapons.

This focus on the physical nature of homicide is both an attempt to discover the intent of an individual through external means as well as a manifestation of what Intisar Rabb describes as the "doubt canon." Based on the Prophetic *ḥadīth* and legal maxim "Avoid prescribed punishments in cases of doubt (*idraʾū ʾl-ḥudūd bi ʾl-shubuhāt*)," Muslim jurists attempted to reduce the application of the harshest punishments of Islamic criminal law—stoning of adulterers, cutting off hands of thieves, etc.—due to a lack of certainty in the establishment of the true intent of the perpetrator.[25] In cases of prescribed punishments (*ḥudūd*), this meant strengthening evidentiary requirements. For example, in order for the stoning of an adulterer to be applied, the prosecution had to bring forward four male Muslim witnesses that could testify to having seen the actual act of penetration. In the field of homicide, Ḥanafī jurists applied this maxim by creating the additional category of semi-intentional homicide (*shibh ʿamd*) in which the death penalty could not be applied. This category, not found in the Qurʾān or *sunnah* of the Prophet Muḥammad (peace be on him) and rejected by other early scholars of law, shows the extent to which Ḥanafī jurists desired to limit the application of the death penalty. This is clearly seen in the example of strangulation cited above, which the majority of scholars classify as semi-intentional (*shibh ʿamd*) despite the

[24] Muḥammad Amīn b. ʿĀbidīn, *Radd al-Muḥtār ʿalā ʾl-Durr al-Mukhtār* (Riyadh: Dār ʿĀlam al-Kutub, 2003), 10:155.

[25] See Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (New York: Cambridge University Press, 2015), 1–3.

obvious deadly intent required by the perpetrator to commit such an act.[26] The British in India were well aware of this understanding, with officials such as Lord Hastings noted saying that Islamic law was founded "on the most lenient principle and an abhorrence of bloodshed."[27]

For the British, homicide and other crimes were governed by the Latin maxim *Actus reus non facit reum nisi mens sit rea*, or that an act does not make a defendant guilty without a guilty mind. In the development of the common law in the late eighteenth and early nineteenth centuries, intent for murder was established through the presence of "malice aforethought." In his *Commentaries on the Laws of England*, William Blackstone divides the malice requirement into two categories: express and implied. Express malice, in his view, is when

> one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.[28]

Implied malice, on the other hand, could be interpreted by the law when the external act committed was so egregious that it must have been done with malice. Blackstone elaborates on this point by stating,

> Where a man willfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words, or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.[29]

Such malice could also be transferred to another. As described by Blackstone,

> If one shoots A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The

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[26] 'Ālim b. al-'Alā' al-Andarpatī, *al-Fatāwā al-Tātārkhāniyyah* (Deoband: Maktabat Zakariyyā, 2010), 19:16.
[27] Quoted in Mary Monckton-Jones, *Warren Hastings in Bengal 1772–1774* (Oxford: Clarendon Press, 1918), 331.
[28] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1770), 4:199.
[29] Ibid., 200.

> same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and kills him; this is likewise murder.[30]

Therefore, the British understanding of homicide focused on the search for malice or evil intent, described by some observers as the reflection of the desire of the British government to "reform the moral habits of the nation."[31] This could be understood through the external nature of the act, however could be inferred or assumed by the law, and even transferred to others.

This understanding of malice led to an equally problematic situation in the establishment of culpability when multiple crimes were committed. In what was known as the felony-murder rule, deaths that occurred during the commission of another criminal act such as theft did not require the establishment of intent to kill in order to warrant the death penalty as long as the intent to commit the initial crime was established. This rule was practiced consistently in the British court system until its final removal in 1957.[32]

The overlapping of categories with the physical Islamic understanding of homicide and the search for malice or evil intent in the British system manifests in Indian court records of Bengal and the Northwestern Provinces, and the work of the Muftis, with the question of the weapon, which will be further explored in the following section.

The Question of the Deadly Weapon

As mentioned above, in Islamic legal theory the type of weapon used in the commission of a criminal act is critical in determining intent and separating acts that were punishable by the death penalty (*qawad*) from others that would be punished by enhanced blood money (*diyah*) and/or state-issued punishments (*ta'zīr*) such as prison. According to the majority of scholars, the weapon must be one that is "usually" (*ghāliban*) used to inflict harm such as swords, knives, processed items of wood and stones, or fire. According to 'Abd al-Ḥayy Lakhnavī, the nineteenth century scholar of Farangi Mahal,

> The weapon, or what falls into the category of a weapon, is a condition [for intentional homicide], because such homicide by definition is an intentional act, one done by the heart and cannot be definitively established as it is a hidden issue. Therefore, the use of a deadly weapon takes the place of intent in order to

[30] Ibid., 201.
[31] Lisa Surridge, "On the Offenses against the Person Act, 1828," *BRANCH: Britain, Representation and Nineteenth-Century History*, ed. Dino Franco Felluga, accessed August 22, 2019, https://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828.
[32] Homicide Act 1957, 5 & 6 Eliz.2 c.11.

> facilitate [its establishment], in the same way that travel is used in the place of [establishing] hardship [for the shortening of prayer].[33]

However, the question remains as to whether the use of a deadly weapon was the only way to determine premeditation in British courts. As is present from the data surveyed, this is not the case. In a case adjudicated in the Northwestern Provinces in May of 1853, a woman (Mussumat Oodee) was charged with the murder of her newborn infant. She had gotten into a fight with her husband, Kulloo, and had left him to marry another man unofficially, Goomanee, and had a child with him. Kulloo successfully sued to have the second marriage annulled and forced his wife to return home. One day, Kulloo returned home to find that his wife had strangled her child to death, leaving him wrapped in a cloth on their bed. The *fatwā* of the law officer convicted her of willful murder "on violent presumption," a conviction with which the sessions judge and the Nizamut Adawlut agreed and sentenced her to capital punishment.[34]

In this case, the Muslim law officer followed a minority opinion within the Ḥanafī school, in which strangulation would constitute intentional homicide (*'amd*), and the fact that it was carried out on a child clearly influenced both the Muslim and British officers. Even though there were no witnesses to conclusively prove the circumstances of the child's death, the presence of circumstantial evidence—in this case the medical report—was considered sufficient to pass capital punishment. There are a number of other cases in which willful murder was also established by both the *fatwā* and the sessions judge, and capital punishment was passed, particularly when the victim was a child.[35]

During the latter half of the eighteenth century, significant opposition arose to the idea of intent being tied to the weapon used. According to the British officials, judges were using this, along with other aspects of Muslim jurisprudence, to pass lighter sentences and even dismiss cases altogether. Arthur Aspinall remarks, "Abu Hanifa, whose opinions were generally accepted by the Bengal Judges, had drawn a sharp distinction between the two kinds of homicide . . . the distinction [between which] was based on the method by which the crime was committed."[36] As a result, the administration

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[33] 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, ed. 'Abd al-Ḥayy Lakhnavī (Karachi: Idārat al-Qur'ān wa 'l-'Ulūm al-Islāmiyyah, 1996), 8:3.

[34] *Gov. v. Mussumat Oodee* (1853) NA NWP 1 Delhi 646.

[35] For example, see *Gov. & Munohur Sahoo v. Guddye Sahoo* (1853) NA Bengal 2 Cuttack 750.

[36] Arthur Aspinall, *Cornwallis in Bengal: the administrative and judicial reforms of Lord Cornwallis in Bengal* (Manchester: Manchester University Press, 1931), 54.

of Lord Cornwallis in 1790 issued regulations ordering that crimes were to be judged by their motive and not the weapon used.

For example, in one case adjudicated in Bengal in 1853, three individuals were charged with the murder of one Button Mooshur. There were no eyewitnesses to the case, and as a result the *fatwā* of the law officer classified the charge as "culpable homicide" and ordered the payment of blood money (*diyah*). The sessions judge appears to have agreed with this classification and passed prison sentences of five years for two of the defendants and seven years for the third. Although there seemed to be no conflict between the understanding of the law officer and the sessions judge with regards to the culpability of the prisoners, the Nizamut Adawlut judge, J. R. Colvin, took serious issue with the initial law reports created by the Muslim officers that classified the crime as culpable homicide. He stated that the British have "set aside the distinctions of the Mahomedan law schools as to the particular instrument by which the death is caused" and ultimately confirmed the sentence of the sessions judge based on the merits of the case.[37]

Even with these regulations in place, however, it appears that the question of the weapon used in the commission of a crime was still central to the British to determine intent in the mid-nineteenth century. Particularly in cases adjudicated in Bengal, the details of the weapon used in the commission of the crime are almost always provided, and statements by the sessions judge as to whether this constitutes a "deadly weapon" are usually critical in determining the outcome of the case.

As a result of these overlapping understandings of homicide according to both the British and the Islamic systems, the classification of crime as applied in British India was unclear. For example, in one case adjudicated in Bengal in August of 1853, a defendant (Becha Rai) was charged with culpable murder of Gorbudhun Dosad who, according to witnesses, was attempting to steal the grain of the defendant. The *fatwā* of the law officer, using evidence from the medical reports that indicated the victim was tied up and tortured before being killed, convicted the defendant and held him liable for discretionary punishment (*taʿzīr*). The sessions judge, C. Garstin, disagreed with the *fatwā* and convicted the prisoner of only "culpable homicide." The circumstances of Gorbudhun's death were heavily questioned and a source of confusion for the Nizamut Adawlut, which ordered that a further enquiry take place and another *fatwā* issued, primarily to determine whether the injuries sustained by the victim occurred before or after death. The medical report was inconclusive, and both the second *fatwā* and the second sessions ruling came to the same conclusion as before. Ultimately, the Nizamut Adawlut gave the

[37] *Gov. v. Hulkara Singh, Bhoolia, & Nijabut Khan* (1853) NA Bengal 2 Bihar 544.

defendant "the benefit of the doubt," and sided with the opinion of the sessions judge, sentencing him to seven years in prison.[38]

For the Mufti, this crime constituted semi-intentional homicide (*shibh ʿamd*). The defendant had a clear intent to kill the prisoner (*qaṣd*), proven by tying up the victim and administering wounds. Whether those wounds were sustained before or after the death was immaterial to the establishment of intent. The question for the *fatwā* was whether a deadly weapon had been used in the commission of the homicide, which clearly was not established. The necessary conditions for intent (*ʿamd*) had not been fulfilled and the prisoner was only liable for discretionary punishment (*taʿzīr*). The sessions judge and ultimately the review of the Nizamut Adawlut, however, could not come to the same conclusion, because willful murder required the presence of premeditation. The attempted theft removed the question of premeditation, and therefore only the category of culpable homicide could be applied, which dictated a prison sentence. A stronger sentence was further mitigated by the presence of doubt as to when the wounds were sustained, and that doubt is what ultimately resulted in the significantly reduced prison sentence.

How did the Muftis deal with these overlapping understandings? The basics of Islamic legal theory could not be immediately altered as such changes usually took generations of scholarly debate. However, they found a way to accommodate these rulings through the use of new legal categories of punishment, developing the law, and giving more discretion to the political authority.

Synthesising Understandings through Punishment

The Muftis in their *fatwā*s issued punishments within five different categories, some of which had their place within Islamic and Ḥanafī criminal theory and others were invented by the Muftis in order to handle the demands of the courts and allow for a greater role of the British state. The first three were standard applications of Islamic legal theory:

1. Kisas (*qiṣāṣ*) which referred to the concept of retaliation and, in the case of homicide, meant the death penalty
2. Diyyut (*diyah*) referring to the payment of blood money to the family of the victim
3. Seasut (*siyāsah*), referring to discretionary punishment to be defined by the judge or the state

[38] *Gov. v. Becha Rai* (1853) NA Bengal 2 Sarun 219.

For example, in one case brought in Bengal in 1853 a defendant (Kirtinarain Shaha) was charged with the murder of his niece, after which he attempted suicide. The *fatwā* convicted and called for discretionary punishment (*seasut*), and the sessions judge agreed. In their final review, the Nizamut Adawlut judge (J. Dunbar), took into consideration the fact that the defendant had been repeatedly committed to an insane asylum, and acquitted him of the charge, however ordering his stay in a mental hospital until the doctors were assured of his treatment.[39] In this particular situation, all of the evidentiary requirements of Islamic law had been proven: the defendant had, on multiple occasions, confessed to the crime for which he was charged. However, he was also clearly impacted by the question of the defendant's insanity and deferred the final details of the ruling to the state.

The final two categories of punishment used by the Mufits are not found within standard works of Ḥanafī law; but do find their origins in Mughal records.

4. Uqubat-e shadid (*'uqūbah shadīdah,* severe punishment)
5. Akoobat (*'uqūbāt*, punishments)

For example, in Bengal in 1853 a man (Sooltan Bhueemya) was charged with the murder of his lover's husband, Pauchcowree. The *fatwā*, based on medical evidence and the witness testimony of one individual (Roostom) who reached the scene of the crime and saw the defendant running away, "convicts the prisoner of the murder charged, on strong presumption, and declares him liable to the punishment of akoobut." The sessions judge agreed and issued the death penalty, which was confirmed by the Nizamut Adawlut upon appeal.[40]

In this case, the Mufti cannot directly convict the prisoner of any of the punishments found in Islamic jurisprudence as no eyewitness evidence was provided and absolute certainty could not be established. However, the circumstances of the case were clear, and the defendant provided no witnesses in his defense. Therefore, in order to ensure that the rights of the deceased and his family are preserved and to facilitate the punishment of the British, he issued a conviction, which the sessions judge then recommended the highest punishment available by law. In another instance, the same *fatwā* was issued in order to convict accomplices to a murder, a case in which the sessions judge convicted and the Nizamut Adawlut confirmed a sentence of life in prison.[41]

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[39] *Gov. v. Kirtinarain Shaha* (1853) NA Bengal 2 Tipperah 416.
[40] *Gov. & Zumeerooddeen v. SooltanBhueemya* (1853) NA Bengal 2 Backergunge 480.
[41] *Bunsee Singh v. Goolzar & Musst. Goonjuree* (1853) NA Bengal 2 Tirhoot 487.

However, even when understandings of Islamic law conflicted with the circumstances of the case at hand, the Mufti issued recommendations that supported the British understandings of law. In the case of Government v. Nusseeruddeen, a man was arrested for the murder of his own son. The *fatwā* "declares him liable to discretionary punishment extending to death by akoobut" based on his confession. The Nizamut Adawlut confirmed the verdict, and the man was sentenced to death.[42] In Islamic jurisprudence such punishments would be impossible, based on the Prophetic *ḥadīth* "You and your wealth belong to your father."[43] However, the Mufti here saw no problem in calling for the death penalty and left it to the British judges to make the final decision.

Through the use of these new categories of punishment, the Muftis working within British courts expanded the Ḥanafī conceptions of the law of homicide to incorporate the colonial will to punish. This was not a deviation from Islamic law, but rather an extension of the concept of *siyāsah*. Used from the earliest periods of Islamic legal history and developed theoretically by the fourteenth century scholar Ibn Taymiyyah (d. 728/1328) and his student, Ibn Qayyim al-Jawziyyah (d. 751/1350), *siyāsah* functioned as a complementary method within Islamic law of establishing guilt and applying punishment giving the judge—and the political authority—the ability to punish even though Islamic jurisprudence (*fiqh*) would mitigate the application of punishment due to the presence of doubt. This was designed to facilitate the application of justice. In the words of Ibn al-Qayyim,

> Indeed, God sent His messengers and brought down His books to establish balance amongst humanity, and this is the justice upon which Heaven and Earth are placed. If the signs of justice show themselves in any manner, then there is found the law (*sharī'ah*) of God and His religion.[44]

As a result, Ibn al-Qayyim believed that judges needed to be aware of two forms of legal understanding (*fiqh*): the general Islamic rules (*aḥkām al-ḥawādith al-kulliyyah*) and the lived realities and conditions of the people (*nafs al-wāqi' wa aḥwāl al-nās*).[45] By combining these understandings with the interpretive methods developed by the schools of Islamic law, a political ruler

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[42] *Gov. v. Nusseeruddeen* (1854) NA Bengal 2 24-Pergunnahs 72.

[43] Muḥammad b. Yazīd b. Mājah al-Qazwīnī, *Sunan*, Kitāb al-tijārāt, Bāb mā li 'l-rajul fī māl waladih.

[44] Muḥammad b. Qayyim al-Jawziyya, *al-Ṭuruq al-Ḥukmiyyah fi 'l-Siyāsah al-Shar'iyyah* (Beirut: Maktabat al-Mu'ayyad, 1989), 13.

[45] Ibid., 4.

could better apply God's law, "whose purpose is the establishment of justice amongst the believers, and creating balance between people."[46]

Indeed, many of the legal developments in British India were justified by Muslim scholars as lying within the realm of Islamic law as they complied with the purview of *siyāsah*. In the work of Sirāj al-Dīn'Alī Khān mentioned above, he dedicated the final chapter of his work on discretionary punishment (*ta'zīr*) to defining *siyāsah* and encouraging local (British) leaders to take advantage of it, particularly in cases where literal understandings of Islamic legal norms would not suffice.

> Do you not see that if a man strangled another, threw him into a well, or off a cliff, and that death resulted, then he would be given discretionary punishment (*ta'zīr*) and not retaliation (*qiṣāṣ*), and that if this became a habit and he repeated the crime then he should be killed using political authority (*siyāsatan*)?
>
> The essence of this topic [therefore] is that all serious crimes for which a specific punishment is not outlined, or in cases where a punishment cannot be applied because of the presence of doubt (*shubhah*), and in which there would be a great injustice [in setting the defendant free], the issue is given to the ruler (*imām*) for him to decide. In many instances, which are too numerous to even mention, seeking the opinion of the ruler is primary.[47]

'Abd al-Ḥayy Lakhnavī, when asked about the same issue, gave a similar response and widened the scope further to include not only the Islamic ruler (*imām*), but also secular leaders (*sulṭān*) and governors (*ḥākim*).

> *Siyāsah* is a form of discretionary punishment (*ta'zīr*) and includes all forms of extreme punishment (*'uqūbat-i shadīdah*) such as execution, life imprisonment, and expulsion from the country. Execution as *siyāsah* is not limited to situations of a murderer who has choked a victim to death multiple times, rather it is general, and is [applicable] in every form of crime according to the general benefit [seen] by the *sulṭān* or *Ḥākim*.[48]

Even in the Urdu translation of the Indian Penal Code of 1860, the code's primary translator, Nazir Ahmad, defined the term *ta'zīrāt* in the code's title (*Majmū'-i Qavānīn-i Ta'zīrāt-i Hind*) as "to make laws based on political authority (*siyāsat karnā*), or the issuance of rulings (*ḥukm*) upon the entire ruled population (*ra'āyā*)."[49]

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[46] Ibid., 13.

[47] Khān, *Jāmi' al-ta'zīrāt*, 108–9.

[48] Muḥammad 'Abd al-Ḥayy Lakhnavī, *Majmū'-i Fatāvā* (Lucknow: Yusufi Press, 1911) 2:221.

[49] Bābū Kunj Bihārī Lāl and Munshī Muḥammad Naẓīr, *Sharḥ Majmū'-i Qavānīn-i Ta'zīrāt-i Hind* (Fatehpur: Maṭba' Nasīm-i Hind, 1885), 1.

Elsewhere in the Muslim world, the concept of *siyāsah* was implemented to expand upon the evidentiary rules and procedures devised within Islamic jurisprudence. In Egypt, Khaled Fahmy has documented that during the nineteenth century Egyptian *siyāsah* courts integrated new methods of proof such as forensic medicine to further the cause of justice. In one case cited from 1877, a man by the name of Muḥammad ʻAbd al-Raḥmān was sentenced to one year in prison for killing his mother-in-law. The case had been previously dropped by the victim's son based on witness statements who said that she had died of a stomach illness but was re-opened when the victim's son became suspicious of the son-in-law and insisted that an autopsy be carried out, which confirmed that she had been murdered.[50] As a result, Fahmy argues that "the shariʻa that was implemented in nineteenth-century Egyptian legal system derived its flexibility and adaptability from coupling *fiqh* with *siyāsa*."[51]

Out of the Picture? Muftis after the Kazi Act of 1864

Following the Uprising of 1857, numerous institutional changes occurred within British India that detrimentally effected the role of Muftis and other Muslim officers working in the Indian subcontinent. The educational center of Delhi, for example, was decimated by the British siege, with dozens of religious scholars executed without trial. The Delhi College, a pluralistic university that had trained many of the country's most important reformers including the main translator of the Indian Penal Code Nadhīr Aḥmad, the founder of the university at Aligarh Sir Sayyid Aḥmad Khān, and one of the founders of the seminary at Deoband Muḥammad Qāsim Nānōtvī, was disbanded.[52] Many Muslim scholars left the city for surrounding areas, eventually founding new institutions such as Dār al-ʻUlūm, Deoband in 1866.[53] The seminary at Farangi Mahal, Lucknow, also lost much of its prominence as the Muslim Nawabs were no longer in power, and the locally-run courts were now fully in the control of the British.

In the legal system, the Uprising of 1857 provided the catalyst for the implementation of a new Penal Code in 1860, followed quickly by a Code of Criminal Procedure in 1861. These codes reduced the need for local law officers, as both the letter of the law and the procedure were now fully codified. Additionally, the colonial government's support of education in the

[50] Ibid., 252–3.
[51] Khaled Fahmy, *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* (Oakland, CA: University of California Press, 2018), 124.
[52] Mushirul Hasan, "Maulawi Zaka Ullah."
[53] See Barbara Metcalf, *Islamic Revival in British India: Deoband, 1860–1900* (Princeton: Princeton University Press, 2014).

"native" languages of Persian and Arabic, as well as Sanskrit, was severely reduced.[54] Court procedure would be conducted entirely in English, meaning that only Muftis and other Muslim employees who were fluent in English could continue to perform their duties.

As a result of these changes, British officers began questioning the very need for Muftis within the courts. In a letter by the Chief Justice of the Bengal High Court, Sir Barnes Peacock, Muftis and their Hindu counterparts, Pundits,

> are kept up for the purpose of answering questions of Hindoo and Mahomedan law referred by the mofussil courts. They have never been consulted by the Judges of the High Court; and I think it is very objectionable that they should be referred to by the mofussil courts for opinions. It would be far better and safer that such questions should be referred to the High Court for their opinion.[55]

The colonial government then began drafting a bill to remove the office of Mufti. In a note to the Supreme Council of Bengal written by the appellate judge H.B. Harrington, the very judge who had commissioned the compilation and translation of the criminal law texts mentioned above, he stated,

> It having been determined to abolish the appointments of Hindoo and Mahomedan law officers in the High Courts, the Sudder Court at Agra, and in the subordinate Courts throughout the country, where these officers still exist, and to leave the Judges of the several courts above mentioned in disposing of suits coming before them which involve questions of Hindoo and Mahomedan law, to expound the law themselves after taking evidence, if necessary, or adopting any other means within their reach, to ascertain what the law really is. . . . It should be made clear that the object of the proposed legislation is not to abolish the office of Kazie, which does not rest upon and was not created by a legislative enactment of the British Government, but simply to repeal such of the laws relating to the office as have from time to time been passed by the British Government on the ground that the retention of these laws in our Statute Book is from various causes no longer considered necessary.[56]

The Kazi Act was then passed in 1864, officially removing the positions of Muslim and Hindu law officers. However, the law continued to support the

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[54] See Christopher King, *One Language, Two Scripts: The Hindi Movement in Nineteenth Century North India* (New York: Oxford University Press, 1994).

[55] Cited in Uma Yaduvansh, "Decline of the Qazis (1793–1876)," *The Indian Journal of Political Science* 28, no. 4 (1967): 221.

[56] Cited in ibid., 221–22.

work of a Muslim judge (Kazi/Qāḍī) in carrying out the religious officiation of personal status cases such as marriage and divorce.[57]

The application of this act and the detrimental changes in the Indian education system did not mean the end of the work of Muftis or Muslims within the British system. Instead, they continued to work within the courts despite the new restrictions they faced. In the Northwestern Provinces, for example, the records of appeals to the High Court in 1866, just two years following the implementation of the act and the removal of the position of Muslim law officer or Mufti, shows the presence of Muslims who held the position of Principal Sudder Amins (lower court judges) in Agra (Mahomed Buksh Khan), Aligarh (Syud Ahmad Khan), Allahabad (Khoorshed Ali Khan), Azimgarh (Moulvie Mahomed Abdool Azez Khan), Bareilly (Kasim Ali Khan), Farrukhabad (Kazi Inayat Hussein Khan), Gorakhpur (Moulvie Assud-ool-lah Khan), Jaunpur (Syud Hussun Ruzza Khan), Kanpur (Mahomed Abdool-lah Khan), Meerut (Syud Byghumber Bux), Muradabad (Moulvie Mahomed Hossein Khan), Mainpuri (Mahomed Wajeebollah Khan), and Shahjahanpur (Sheikh Momin Ali Khan). Four of the Sudder Amins for the districts of Azimgarh, Farokabad, Gorkupur, and Muradabad carry the title of judge (Kazi) or traditionally-educated religious scholars (Sheikh and Moulvie), indicating that they had previously worked as Muslim law officers prior to their appointment as judges.[58]

Additionally, many cases also reference former Muftis as attorneys and advocates for appellants to the High Court. In the same collection from the Northwestern Provinces, a civil case from the 6th of July 1866 references two individuals as "pleaders" for the Hindu defendant (RughoburSahai), Mahomed Sumee-ool-lah Khan and Pundit Bishumbher Nath.[59] In another case presented to the High Court on the same day, a one Moulvie Mahomed Hyder Hossein also acted as a pleader for the Hindu respondent Misser Chimmun Lall.[60] Both of these Muslim pleaders appear numerous times in the same collection, acting as advocates for Hindus and Muslims alike in numerous civil and criminal cases.

Conclusions

The purpose of this paper was to discuss the place of Muftis working within the legal system in British India, expanding on the limited secondary literature

[57] Ibid.
[58] See in general Moonshee Hanooman Pershad and Lalla Lalita Persad, eds., *Reports of the High Court of Judicature, for the North western Provinces: 1866* (Agra: Hoossainee Press, 1867).
[59] *Rughobur Sahai & Others v. Chuttraput* (1866) HC NWP 2 Farrukhabad 73.
[60] *Musst. Parbuttee & Others v. Misser ChimmunLall* (1866) HC NWP 2 Agra 82.

available concerning both their background and role within the colonial courts. Through an exploration of the original court records of the period, it is clear that Muslim law officers acted as an integral part of the application of criminal justice in British India. Their activities in the system administered by the British show that Muftis were not merely sitting on the sidelines, watching as their legal system was "legislated into oblivion." On the contrary, Muftis were active participants in the system that they found themselves in.

For the British, Muftis served a dual purpose. Firstly, they were confirmers, ensuring that what they were doing was in line with local (Islamic) understandings. Secondly, Muftis were a critical part of maintaining continuity with the Mughal legal system, one that the British maintained at least on paper that they were the inheritors of. The second purpose would become less important as the century wore on, particularly with the re-organisation of the court system and the issuing of a new penal code in 1860 and a new code of procedure in 1861. However, the first purpose continued on, proven by the fact that many of these law officers continued to work in the courts as advocates and judges.

Inside the courtroom, Muftis were confronted with a myriad of problems, the least of which was a constantly evolving legal environment and a desire of the British to control their subjects through the administration of justice. These changes brought into question their very understanding of the law and challenged concepts within Islamic jurisprudence (*fiqh*) such as that of homicide and the establishment of criminal intent and culpability. In response to these challenges, Muftis chose not to abandon their system wholesale, but rather turned to the Islamic legal concept of *siyāsah* to adapt their *fatwā*s in both conviction and punishment. By doing so, they found a middle ground where they could maintain an Islamic pedigree to the application of justice whilst interacting positively with the changes instituted by the British colonists.

When looking at the variety of legal changes that took place in the nineteenth century, particularly with regards to Islamic criminal law, it is perhaps inaccurate to understand these changes as "legislating law into oblivion" or replacing native Islam-based systems with new, foreign interpretations of the law. Rather, the court records viewed for this study suggest that something more complex was taking place, and that understandings of Islamic law continued on. Local conditions were considered, compromises were made, and actors applied the laws with discretion on the ground in an attempt to provide the closest results to justice that they could, given the circumstances in which they were expected to function.

The full scope of the role of the Mufti and other Muslims within the British court system during the nineteenth century has yet to be fully expounded, and significant work remains to discover who these people were, how they perceived the legal changes that were taking place in their jurisdictions, and how they reconciled these changes with the larger framework of Islamic law. Future studies in the area of colonial law in the Indian subcontinent and particularly its interaction with local (in this case Islamic) understandings of the law should focus on the role of these important actors, creating a picture of the colonial encounter beyond the view of colonial control and the supplanting of local legal systems.