

Ahmad, Shazia (2015) A new dispensation in Islam : the Ahmadiyya and the law in Colonial India, 1872 to 1939. PhD Thesis. SOAS, University of London.

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A New Dispensation in Islam: the Ahmadiyya and the Law in  
Colonial India, 1872 to 1939

Shazia Ahmad

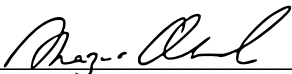
Thesis submitted for the degree of PhD

2015

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## Abstract

This thesis makes the Ahmadiyya a case for examining how colonial law in India defined Muslims, from the late nineteenth century through the 1930s. Contrary to the mainstream discourse on Muslim in India, which examines sectarian Muslim identity but discounts social stratification among Muslims, this thesis shows that there was a material basis for how the law differentiated Muslims that contributed to the creation of sectarian difference. First, it examines structures of landownership and social relations in personal law in colonial India. In the Punjab, customary law created a legal distinction between urban and rural Muslims, while blurring the legal distinction between rural Hindus and Muslims. Second, it examines the emergence of the Ahmadiyya among Muslim landowners in central Punjab within this legal context. Third, it looks at the Ahmadiyya's inclusion within Punjab's structure of political representation, which maintained the rural and urban distinction, privileged rural Muslims, and marginalized urban Muslims. Fourth, it looks at an all-India structure of political representation, which subverted the legal distinction among urban and rural Muslims in the Punjab and delegitimized the Ahmadiyya as representative of Muslims. Finally, it examines all-India legislation introduced in the 1930s by Indian Muslims. These legislative reforms would have restructured Muslim personal law into a distinct legal system but were impeded by structures maintained through Punjab customary law. Ahmadis gave primacy to freedom of belief in Islam, including to conversion, which depended upon porous social boundaries between Hindu and Muslim personal law, as well as between caste communities. It concludes that the Ahmadiyya's 'sectarian' interpretation of Islamic law, contrary to Muslims who claimed 'orthodox' authority, was incompatible with the notion of a Muslim legal system that entailed the construction of impermeable social boundaries between communities in India. This thesis has implications for the discourse on human rights and Islamic law.

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## ACKNOWLEDGEMENTS

I am grateful to many people who have helped me during my research and writing of this thesis. Firstly, I would like to thank my supervisor Shabnum Tejani for her kind encouragement and patience. Her insistence on clarity and straightforward feedback shaped this thesis tremendously. I would like to thank Eleanor Newbigin, who generously took the time to read and give critical feedback on the first draft of this thesis. I would also like to thank the members of my supervisory committee at SOAS, Martin Lau and Peter Robb for their guidance. Martin Lau suggested that I approach my topic of how the law defined Islam in colonial India by examining marriage disputes, which profoundly influenced the direction that this thesis took.

I thank the University of London, Central Research Fund for funding my fieldwork in Pakistan. During my fieldwork in Pakistan, Wardah, Mariam, Roshan and their families hosted me and looked after my wellbeing, and I am grateful to them. I thank the staff at the Khilafat Library in Rabwah and the Library of the India Office in London for all of their help locating sources. I thank Asad Ahmed, Michael Talbott, and Amrita Shodhan for reading sections of my thesis and giving me feedback; Nadir Cheema for his help in the field; Sultan Ahmad and Mujeeb-ur-Rehman for allowing me to consult with them; Tanvir Ahmad and Ahmad Saleem for providing me with sources from their private libraries; Ch. Rukniddin for assisting me in translating Urdu sources into English. I am grateful for the feedback that I received on portions of this thesis presented at the Zentrum Moderner Orient, Berlin; the Punjab Research Group meeting at the University of Wolverhampton, and the SOAS, South Asian history seminar. I am grateful for the support of friends and colleagues: Laila, Christoph, Sotirios, Elly, Sophie, Stella, and Drea; and to my sister Nadia.

Most of all, I thank my parents for their love and support.

All errors are entirely mine.

## Introduction: The ‘Ahmadi Problem’

In 1935, Muhammad Iqbal raised the ‘Ahmadi problem’. In an open letter to the British people, Iqbal claimed that the integrity of Muslim society was held together by the ‘idea of the finality of prophethood alone’.<sup>1</sup> He argued that the Ahmadiyya, as a community that arose from Islam and claimed a new prophet as its basis, was a danger to that integrity. The problem for Iqbal was that the British government in India, as a liberal state, allowed the ‘rebellious group’ to propagate their beliefs without concern for the integrity of the Muslim community. It demanded tolerance from the Muslim community in the face of its own disintegration. As a foreign government, it could not grasp the intensity of feelings felt by Indian Muslims against the Ahmadiyya, which arose from an ‘instinct for self-preservation’. Other Muslims, who preached tolerance to their Muslim brothers, were deprived of this instinct through ‘imperceptible westernization’.

The ‘Ahmadiyya problem’ had an important afterlife in Pakistan, where the Ahmadiyya’s religious status became central to debates around how the Muslim state and political membership are constituted under Islamic law. Abul Ala Mawdudi was prominent among other Pakistani Islamist leaders who demanded that Pakistan’s government declare the Ahmadiyya to be non-Muslim.<sup>2</sup> Like Iqbal, he argued that the

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<sup>1</sup> Muhammad Iqbal, ‘Qadianis and Orthodox Muslims’, *The Statesman*, 14 May 1935.

<sup>2</sup> For analysis of the Jaamat-i-Islami and Mawdudi’s political theories, see: Seyyed Vali Reza, *Mawdudi and the Making of Islamic Revivalism* (Oxford: Oxford University Press, 1996); Roy Jackson, *Mawlana Mawdudi and Political Islam: Authority and the Islamic State* (London: Routledge, 2008).

Ahmadiyya's belief in continuous prophecy threatened the integrity of the Muslim community.<sup>3</sup> During its first decades, Pakistan's government treated such demands as subversive to the principles upon which it was founded. According to the government's view, Muhammad Ali Jinnah (d. 1948) envisioned Pakistan to be a state that would protect the secular and religious rights of its citizens regardless of their religion. Islamists who demanded that Ahmadis be declared non-Muslim assumed Pakistan to be an Islamic state in which citizens' rights would be determined by their religious status.<sup>4</sup> Ahmadis' right to propagate their beliefs was protected under Pakistan's 1956 constitution, which included a fundamental rights chapter that guaranteed the right to religious freedom for all Pakistani citizens.<sup>5</sup> This fundamental rights chapter aligned Pakistan's domestic law with international human rights norms embodied in the Universal Declaration of Human Rights (UDHR), while Pakistan's government promoted a 'modernist' interpretation of Islamic law that accorded with these rights.<sup>6</sup>

In 1974, however, the Ahmadiyya's religious status changed when Pakistan's National Assembly amended its constitution to define the Ahmadiyya as non-Muslim. President Zulfikar Ali Bhutto, Pakistan's first democratically elected leader, described the amendment as an act of national self-determination, expressing the democratic

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<sup>3</sup> Abul Ala Maududi, *The Qadiani Problem*, (Lahore: Islamic Publications Limited, n.d. [1953]), 12; The Jamaat-i-Islami in Pakistan was an organization for the establishment of an Islamic state and laws through political and constitutional means.

<sup>4</sup> Muhammad Munir, *Punjab Disturbances of 1953: Report of the Court of Inquiry*, (Lahore: Government Printing, 1954), 149-202; For an analysis of the Munir Report, see Asad Ahmed, 'Advocating a Secular Pakistan: The Munir Report of 1954' in *Islam in South Asia in Practice*, ed. by Barbara Metcalf (Princeton: Princeton University Press, 2009), 424-437.

<sup>5</sup> Martin Lau, *Yearbook of Islamic and Middle Eastern Law*, 3 (1996), 382.

<sup>6</sup> On Pakistan's 'modernist' interpretation of Islamic law see N.J. Coulson, 'Reform of Family Law in Pakistan' in *Studia islamica* 7 (1957), 135-155; N.J. Coulson, 'The State and the Individual in Islamic Law' in *The International and Comparative Law Quarterly* 6, 1 (1957), 49-60.



will of Pakistanis hitherto thwarted by an authoritarian state.<sup>7</sup> The 1974 amendment legitimized a conception of ‘Islamic law’ as laws enacted by the state in defense of Islam, which brought it into conflict with the ‘modernist’ interpretation of Islamic law that Pakistan’s government had promoted in the past.<sup>8</sup> Since then, anti-Ahmadi laws that make it a criminal offense for Ahmadis to ‘pose’ as Muslims have been enacted as ‘Islamic law’.<sup>9</sup> These laws contribute to the violent persecution of Ahmadis in Pakistan and have been used to support the contention that Islamic law and the cultural values it embodies conflict with the international human rights norms embodied in the UDHR.<sup>10</sup>

While recent scholarship has examined the Ahmadiyya’s exclusion from Islam under Pakistani law, this thesis examines how colonial law defined the Ahmadiyya’s inclusion and political membership within the Indian ‘Muslim community’ in the first

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<sup>7</sup> *Dawn*, 7 September 1974.

<sup>8</sup> Pakistan played a prominent role promoting Article 18 (rights related to religious liberty) during the drafting of the Universal Declaration of Human Rights (UDHR). In the 1990s, however, Pakistan led a bloc of Muslim states in forming the Organization of the Islamic Conference (OIC), which has produced the ‘Cairo Declaration on Human Rights in Islam’ that does not recognize religious liberty, conversion, and missionary work as individual rights. See, Susan Eileen Waltz, ‘Universal Human Rights: The Contribution of Muslim States’ in *Human Rights Quarterly* 26, 4 (2004), 817; Ann L. Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder, Colorado: Westview Press, 2012), chapter 7.

<sup>9</sup> For an analysis of these laws, introduced in 1984 by President Zia al-Haq, see: Martin Lau, ‘The Legal Mechanism of Islamization: The New Islamic Criminal Law of Pakistan’ in *Journal of Law and Society*, 11, 1992, 43-58. On the disproportionate targeting of Christian and Ahmadi minorities through anti-blasphemy laws, see: Paula Schrieffer, ‘Remarks by Paula Schrieffer’ in *Proceedings of the Annual Meeting (American Society of International Law)* 106 (2012), 352. A database of newspaper reports of violent attacks on Ahmadis in Pakistan is maintained on the Ahmadiyya website: [www.thepersecution.org](http://www.thepersecution.org). The judgment that the treatment of Ahmadis in Pakistan amounts to persecution by the United Nations High Commissioner for Refugees (UNHCR) is found in: *MN and Others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 389 (IAAC) (14 November 2012)*.

<sup>10</sup> Mawdudi is taken to be an authority on Islamic law and human rights for his writings on the subject in Tibi, ‘Islamic Law/Shari’a, Human Rights’; and as ‘harmonizing’ human rights and Islamic law in Charles J. Adams, ‘Mawdudi and the Islamic State’ in *Voices of Resurgent Islam*, ed. John L. Esposito, 99-133 (New York: Oxford University Press, 1983). For Mawdudi’s writings on human rights and non-Muslim minorities under Islamic law, see: Abul Ala Mawdudi, *Human Rights in Islam*, trans. Khurshid Ahmad and Ahmed Said Khan (Leicester: Islamic Foundation, 1976), and *Rights of Non-Muslims in Islamic State*, trans. Khurshid Ahmad (Lahore, Dacca: Islamic Publications, 1967).

place.<sup>11</sup> This requires examining the legal system under which the Ahmadiyya emerged, and its classification of Indians along religious lines. It requires examining how it determined who was and was not Muslim and, inherent in this process, determined legitimate interpretation of Islamic law and doctrine. In this thesis, the Ahmadiyya become a ‘prism’ through which to examine colonial law in India from the late nineteenth century through the 1930s—from the time when the Ahmadiyya emerged to when Muhammad Iqbal raised the ‘Ahmadi problem’.<sup>12</sup>

The changing legitimacy of the Ahmadiyya’s political membership within the Indian Muslim community reflected political developments in colonial India during this period. These political developments provide an overarching narrative for this thesis and the context in which the Ahmadiyya’s contested religious status is examined. The Ahmadiyya emerged in a political environment in which a colonial administration was concerned with maintaining economic and social stability within the Punjab’s agrarian society. This concern was reflected in policies focused on class relations in the Punjab, especially with protecting landowning classes and a mostly Muslim ‘peasantry’ from land dispossession by restricting a free market in land. These policies continued through the First World War, when the British administration relied heavily on rural Punjabis for recruitment into the Indian army, and the 1920s. After the expansion of representative institutions in India in 1919, they contributed to the creation of the Punjab Unionist Party, a class-based, pro-agriculturalist party that included Ahmadi as Muslim representatives.

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<sup>11</sup> On the Ahmadiyya’s exclusion from Islam in Pakistan see Sadia Saeed, ‘Pakistani Nationalism and the State Marginalisation of the Ahmadiyya Community in Pakistan’ in *Studies in Ethnicity and Nationalism* 7, 3 (2007): 132-152; Ali Usman Qasmi, *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (London, New York: Anthem Press, 2014); Asad Ahmed, ‘Advocating a Secular Pakistan: The Munir Report of 1954’ in *Islam in South Asia in Practice*, ed. Barbara Metcalf (Princeton: Princeton University Press, 2009), 424-437.

<sup>12</sup> The term ‘prism’ was used by David Washbrook in his examination report of this thesis.

Muhammad Iqbal's argument that the Ahmadiyya be excluded from the Muslim community reflected a changed political environment, in which the colonial administration was focused on the constitutional demands of all-India political parties. During the 1930s, Muslim politicians were concerned with political unity among Muslims in India divided by class interests. Iqbal's argument for the exclusion of the Ahmadiyya, which conformed to a conception of the Muslim community as being united in terms of belief, related in fundamental ways to legal debates that were taking place during this time, including debates over the legitimacy of customary law over Muslims (which vested Punjabi 'agriculturalist' Muslims with ancient land rights and protection from land dispossession, but also defined them as belonging to pre-Islamic village communities),<sup>13</sup> different conceptions of sovereignty among Muslims (whether Muslims formed a political community or belonged to diverse political communities),<sup>14</sup> and the legitimacy of international law (whether a higher command over Islamic law was legitimate for Muslims). In the Punjab, this argument appealed to urban politicians and ulama who had been politically marginalized by the colonial administration.

This thesis takes an approach to examining the law that focuses on the operation of personal law in civil suits brought before colonial courts in the Punjab,

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<sup>13</sup> For these debates see Nelson, *The Shadow of Shari'ah*; David Gilmartin, 'Customary Law and Shari'at in British Punjab' in *Shari'at and Ambiguities in South Asian Islam*, ed. Katherine P. Ewing (Berkeley: University of California Press, 1988), 43-62.

<sup>14</sup> Ayesha Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam Since 1850* (Oxford: Oxford University Press, 2001); Chitralekha Zutshi, *Languages of Belonging: Islam, Regional Identity, and the Making of Kashmir* (London: Hurst and Company, 2004); Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton: Princeton University Press, 2004); David Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (London: I.B. Tauris & Co Ltd., 1988); Ian Talbot, *Punjab and the Raj, 1849-1947* (Manohar: New Delhi, 1988); David. Page, *Prelude to Partition: the Indian Muslims and the Imperial System of Control, 1920-1932* (Delhi: Oxford University Press, 1982).

the province where the Ahmadiyya emerged.<sup>15</sup> A system of personal law in India defined an individual's civil rights, including property rights, according to the caste and religious community into which he or she was born. Many of the cases examined in this thesis involve conversion between religions, which gave rise to civil or property disputes. They illustrate how judges interpreted the boundaries between religious communities, and the economic and social implications inherent in their construction. In the Punjab, judges had a large amount of discretionary power, especially in deciding whether a litigant followed custom or religious law.<sup>16</sup> At the same time, an entire group's caste or religious identity might be called into question when making this determination.

Examining these civil suits brings Islamic law from the realm of abstraction down to the material level. They show what brought Punjabis to court, the kinds of claims that they made over property or their relations with other Indians, and what was at stake if they won or lost their cases. For example, in a few cases examined in this thesis, professing Muslims argued in court that they followed customary law and not Muslim personal law. In these cases, their being determined as following customary law would have prevented the alienation of their agricultural lands by leading to their recognition as having protected land rights. In other cases, the 'punishment' for apostasy from Islam under Islamic law, which operated in colonial India to automatically dissolve the marriage of an apostate, was used by Muslim women as a strategy to obtain divorce.

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<sup>15</sup> For this approach see: David Washbrook, 'Law, State, and Agrarian Society in Colonial India' in *Modern Asian Studies* 15, 3 (1981), 649-721. For recent studies that adopt this approach see: Eleanor Newbigin, Leigh Denault and Rohit De, 'Introduction: Personal Law, Identity Politics and Civil Society in colonial South Asia' in *Indian Economic Social History Review* 46, 1 (2009), 1-4.

<sup>16</sup> Matthew Nelson, *The Shadow of Shari'ah: Islam, Islamic Law, and Democracy in Pakistan* (New York: Columbia University Press, 2011).

This approach also allows us to examine the legal arguments of Punjabi Muslim lawyers who would become prominent politicians in India during the 1920s and 1930s (including the Ahmadi lawyer Zafrullah Khan who would become the Muslim member of the Viceroy's council and Pakistan's first foreign minister). It allows for a multidimensional examination of colonial law: on one level, the thesis considers colonial law as a law that was articulated by a British administration over an Indian subject population and aligned with its administrative concerns; on another level, it considers colonial law as a law that was practiced by men who were also colonial subjects (and recognized as legitimate by Indians who used colonial courts to settle their disputes).<sup>17</sup> The judgments and arguments in these cases, furthermore, direct us to the sources of law and 'fact' that Punjab courts relied upon in reaching their judgments, including digests on Islamic law and ethnographic descriptions of Muslims in the Punjab.

Implicit in these judgments, arguments, and sources were also prevailing theories of law. These theories, important in this thesis's analysis of the law, concerned questions of how the law functioned in society and to what purpose. Evolutionary legal theories that were influential among the Punjab administration in the late nineteenth century, contributed to a sociological view of the law as aiming to bring about a gradual advancement of society. They were based on a historical and comparative approach to the law that considered its economic and social functions.<sup>18</sup>

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<sup>17</sup> Lauren Benton, 'Historical Perspectives on Legal Pluralism' in eds. Brian Z. Tamanaha, Caroline Sage, Michael Woolcock, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge: Cambridge University Press, 2012), 28-29. This view of the law is from: E. P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London: Allen Lane, 1975).

<sup>18</sup> Clive Dewey, 'The influence of Sir Henry Maine on agrarian policy in India.' In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. Alan Diamond (Cambridge: Cambridge University Press, 2006), 353-375; Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010); Karuna Mantena, Law and

Muhammad Iqbal's conception of Islamic law reflected a more Geertzian interpretation of the law as a manifestation of a society's cultural values.<sup>19</sup>

Colonial law in India defined the Ahmadiyya's inclusion within the Muslim community, and also their liability to suffer exclusion from it. In terms of personal law, the Ahmadiyya's classification as a 'Muslim sect' by the colonial administration was legally significant because it signified conscience and belief and was treated by colonial courts as a private matter. An argument that Ahmadis were non-Muslim because of their *beliefs* arose in civil suits in which the loss of their religious status would have resulted in the loss of their civil or property rights. On a theoretical level, the Ahmadiyya's contested religious status reflected countervailing sets of legal principles in colonial law, which supported different conceptions of how Islamic law constituted the 'Muslim community' and defined political membership. While principles derived from evolutionary legal theories contributed to an interpretation of Islamic law that was more inclusive towards the Ahmadiyya, legal principles that recognized the sovereign right of Indian communities to define their laws and membership suggested the potential for their exclusion from Islam at the command of the Muslim community. Muhammad Iqbal's argument that the Ahmadiyya must be excluded from the Muslim community reflected this second set of principles.

### *Chapter Outline and Argument*

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"Tradition": Henry Maine and the Theoretical Origins of Indirect Rule', in *Law and History*, eds. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2003), 159-188.

<sup>19</sup> For this view of the law see: Sally Engle Merry, 'Legal Pluralism and Legal Culture: Mapping the Terrain', in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, eds. Brian Z. Tamanaha, Caroline Sage, Michael Woolcock, (Cambridge: Cambridge University Press, 2012) pp. 70-71; Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 182-183.

This thesis is divided into five chapters. The first two chapters deal with personal law, providing an overview of personal law in India and then examining the Ahmadiyya's position in relation to personal law. The third and fourth chapters relate personal law to questions of how Islamic law defined political membership among Muslims—juxtaposing Muhammad Iqbal's argument for the exclusion of the Ahmadiyya against the Ahmadiyya's inclusion within Muslim politics in the Punjab. The final chapter bridges personal law with ideas of political membership by examining the debates surrounding apostasy and conversion in Islam. Only the *universal* principle of freedom of conscience and belief removed the Ahmadiyya's liability to be excluded from the Muslim community (which included the potential loss of property and life). However, this principle conflicted with the notion of sovereignty as community right over internal laws and membership expressed by Muslims and Hindus in legislative debates during the 1930s.

Chapter 1, 'Community Boundaries in Personal Law', introduces the framework through which personal law is understood within this thesis. It first maps out personal law in colonial India across caste and religious categories, and then the legal order created by personal law in the Punjab. Personal law is understood as having a social and economic function: directing the devolution of wealth within communities and fixing religious and caste boundaries. In the Punjab, evolutionary legal theories underpinned a fundamental legal distinction between 'urban' Punjabis and 'rural' Punjabis, and guided the Punjab administration in its codification of customary law over Hindu, Sikh, and Muslim 'agriculturalist' tribes. These same theories underpinned interpretations of Islamic law that were amenable to progressive reform. In contrast to caste and religious categories recognized in personal law, the

religious identity of ‘Muslim sects’ signified conscience and belief, rather than a category of social belonging, and was treated as a private matter.

Chapter 2, ‘The Ahmadiyya: a Muslim Sect’, examines how the Ahmadiyya fit within this legal order, providing the legal context for early arguments that Ahmadis were apostates from Islam as they appeared in civil suits. The Ahmadiyya’s founder Mirza Ghulam Ahmad was a landowning Muslim in a similar but different position than Sufi religious authorities in the Punjab. He articulated the Ahmadiyya’s doctrines in opposition to the ‘orthodox’ Islamic doctrines enunciated by Christian missionaries and the Arya Samaj. In civil suits in which it was argued that Ahmadis were non-Muslim by virtue of their doctrines, their loss of religious status would have carried with it the loss of civil and property rights had not a court determined that Ahmadi doctrines were derived from legitimate interpretations of Islamic sources. This determination was based on ‘evolutionary’ rather than ‘orthodox’ legal principles.

Chapter 3, ‘Divisible Sovereignty: Customary Law and Islamic Law’, examines how Punjab customary law and Muslim personal law were associated with different ideas of political membership by the Punjab administration. While ‘rural’ Muslims (defined by customary law) were associated with obedience to British laws, ‘urban Muslims (defined by Muslim personal law) were associated with obedience to Islamic law and political power. In the 1920s, Ahmadi politicians were incorporated into a structure of political representation in the Punjab that privileged ‘rural’ classes by linking political rights with land rights. During the Non-Cooperation movement, these classes maintained their political privilege by demonstrating their loyalty to colonial rule. With the expansion of Ahmadi missions abroad, the Ahmadiyya interpreted their loyalty to the British as implying the protection of their lives and right to freedom of conscience and belief under an emerging international law.



Chapter 4, ‘Muhammad Iqbal’s Concept of the Muslim Community and Exclusion of the Ahmadiyya’, examines Iqbal’s 1935 argument for the exclusion of the Ahmadiyya from the Muslim community within its historical context. This argument functioned as a legal construct that opposed the principles upon which the structure of political representation in the Punjab was based. It appealed to urban Muslim politicians and *ulama* whose political, social, and economic interests had been marginalized in the Punjab. It asserted the authority of the *ulama* to determine membership within the Muslim community over the principle of religious tolerance that the British government professed to uphold.

Chapter 5, ‘Conversion and Apostasy’, traces the legal debates surrounding apostasy and religious conversion, examining first a series of civil suits in the Punjab and then 1930s debates in the Indian legislative assembly around legislation to reform personal law over Indian Muslims. During these debates, the Ahmadi official Zafarullah Khan argued that there was no punishment for apostasy in Islamic law. This argument had clear implications for the Ahmadiyya, in light of Muhammad Iqbal’s argument that they be excluded from the Muslim community. However, the universality of the principle of freedom of conscience and belief also had broader implications in altering social relations between Muslims and non-Muslims in India.

## Chapter 1: Community Boundaries in Personal Law

### Introduction

This thesis is concerned with how personal law in colonial India determined the boundaries that defined the ‘Muslim community’ and, inherent in this process, how it determined the legitimacy of contested interpretations of Islamic law. This chapter examines the guiding principles by which personal law defined community boundaries across categories of caste and religion. It examines late nineteenth-century evolutionary legal theories that underpinned the codification of customary law in the Punjab, differentiating rural and urban Punjabi Muslims along caste lines, and also legitimizing interpretations of Islamic law that were amenable to progressive reform. It also examines the ‘Muslim sect’ as a category that did not conform to the logic of personal law, but was rather conceptualized as formed of Muslim dissenters who expressed liberty of conscience and belief. Unlike minority Muslim communities, including rural Punjabi Muslims, who were conceptualized under personal law as retaining their pre-Islamic customs, Muslim sects were not recognized as having their own personal law.

The first section of this chapter sets out the logic by which the law in colonial India defined community boundaries through personal law. It examines how personal law circumscribed caste and religious communities and fixed their position within India’s economy in two ways: by determining the permeability of community boundaries through marriage restrictions and by directing the devolution of wealth within communities through defining inheritance and property rights.<sup>20</sup> According to the logic of personal law, Muslim minority communities in India were indigenous Indian communities who had converted to Islam before the advent of colonial rule in

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<sup>20</sup> For the social function of personal law, see: Washbrook, ‘Law, State, and Agrarian Society’; Goody, *Family and Inheritance*.

India, but retained their caste customs and identity. The second section of this chapter examines how the logic of personal law operated in the Punjab to create what became known as the ‘urban and rural distinction’, which was schematic for a complex set of legal classifications meant to differentiate land rights among Punjabis.<sup>21</sup> According to this schema, ‘urban’ Punjabis followed Hindu or Muslim personal law while ‘rural’ Punjabis followed ancient customary law. Thus rural Punjabi Muslims were conceptualized in a similar manner as Muslim minority communities elsewhere in India: as tribal groups who had converted from Hinduism but retained their tribal customs and identity. The ‘urban and rural distinction’ had important economic implications: it was the basis for legal interventions aimed at maintaining the economic position of rural landowners in general and Muslims landowners in particular. Like the ‘urban and rural distinction’, these interventions were underpinned by evolutionary legal theories, which provided a rationale for conserving traditional institutions against the operation of a free market in land.<sup>22</sup>

These same evolutionary legal theories also supported a progressive interpretation of Islamic law among colonial officials in the late nineteenth-century, which will be examined in the third section of this chapter. According to this interpretation, Islamic law developed from a rational and socially adaptive set of legal principles into a rigid code of law that restricted social progress. Its progressive potential lay in returning it to its original principles. For these officials, codified Islamic law was implicated in the economic backwardness of Muslims and deemed

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<sup>21</sup> See Gerald N. Barrier, *The Punjab Alienation of Land Bill of 1900*, Monograph and Occasional Paper Series Number Two (Durham: Duke University Program in Comparative Studies on Southern Asia, 1966); David Gilmartin, ‘Customary Law and Shari’at in British Punjab’, in *Shari’at and Ambiguities in South Asian Islam*, ed. Katherine P. Ewing (Berkeley: University of California Press, 1988), 43-62.

<sup>22</sup> Clive Dewey, ‘The influence of Sir Henry Maine on agrarian policy in India.’ In *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. Alan Diamond (Cambridge: Cambridge University Press, 2006), 353-375.

particularly unsuited to agrarian society. However, despite their retaining customs in common with rural Sikhs and Hindus, colonial ethnography also described rural Punjabi Muslims as being more prone to economic backwardness than other religious groups as a consequence of cultural attitudes that they acquired after converting to Islam.

The last section of this chapter examines the category of ‘Muslim sect’ in colonial ethnography and an important legal judgment at this time. ‘Muslim sects’ were conceptualized differently than Muslim minority communities and rural Punjabi Muslims in personal law. Rather than having a religious identity that reflected the material and historical conditions from which they emerged, the religious identity of members of Muslims sects was interpreted according to a liberal conception of religion as individual, private, and based on conscience and belief.<sup>23</sup> Their identification within colonial ethnography as Muslim dissenters from the traditional authorities of Islamic law suggested their potential for reforming Islamic law.

By examining the contested status of the Ahmadiyya as a Muslim sect, subsequent chapters will show how the mapping of community boundaries through the logic of personal law, existing alongside an alternative conceptualization of Muslim sects that transcended this logic, defined inclusion within the Muslim community according to alternative criteria. The legal identity of Muslims in the Punjab was alternatively defined by the material and historical conditions of the group

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<sup>23</sup> I use ‘liberal’ as a term only to distinguish the meaning of religion for Muslim sects from the meaning of religion for Muslim communities (i.e. ‘agriculturalists’ and Kutchi Memons) examined in this chapter. I do not do so to place it in a different discursive tradition from Islamic law as does Asad Ahmed when tracing the genealogy of Pakistan’s blasphemy laws in his PhD thesis. Rather, the ‘liberal’ interpretation of religion is relevant here because it leaves the personal law of the Muslim sects (i.e. Wahabis, Ahmadis) unaltered from Muslim personal law or caste custom. See, Ahmad, ‘Adjudicating Muslims’, 58-79.

that one was born into, and a core set of beliefs and cultural attitudes that one held in common with other Muslims.

### Personal Law

Colonial law in India conceptualized Hindus and Muslims as being two distinct normative communities over whom two separate bodies of ‘personal law’ operated. Hindu and Muslim personal law operated in civil suits ‘regarding inheritance, marriage, caste and other religious usages and institutions.’ In such matters, courts adhered to scriptural law: ‘the laws of the Koran with respect to the Mahomedans and those of the Shaster with respect to the [Hindu] Gentoos.’<sup>24</sup> Additionally, religious law modified by custom defined normative communities based on caste. Colonial courts applied a similar logic as used to define caste communities to interpret the personal law of minority religious communities that were not Hindu or Muslim. Jains, Buddhists, and Sikhs were conceptualized as arising from Hinduism and following Hindu personal law modified by custom.

As David Washbrook has argued, personal law produced spheres of ‘moral and community obligations to which the individual was subject’ that cut against legal principles based on individualism, utility and equity, which were embodied in statutory law in India.<sup>25</sup> Personal law had material implications: it differentiated individual property rights according to the community to which an individual was born into and it regulated the devolution of wealth within communities through rules

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<sup>24</sup> Warren Hastings 1772 framing of the Regulation of 17 April 1780, section 27. Cited in Faiz Badruddin Tyabji, *Principles of Muhammadan Law*, 2d ed. (Calcutta: Butterworth & Co., 1919), 36. For personal law in colonial India, see: ; Duncan Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968); B. Hooker, *An Introduction to Colonial and Neo-colonial Laws*. Clarendon Press, Oxford, 1975), ch. 1.

<sup>25</sup> Washbrook, ‘Law, State, and Agrarian Society’

of property inheritance and succession. This opposed economic principles that were embodied in the 1793 Permanent Settlement, which established the foundation of real property law in the Bengal.<sup>26</sup> This property law reflected European economic theories in which private ownership and a free market in land were to be the basis for economic prosperity in India.<sup>27</sup> Hindu personal law operated against these principles by recognizing property rights to be shared among members of the 'Hindu joint family.'<sup>28</sup> Interpreted as a sacred institution under Hindu personal law, the Hindu joint family functioned to create something like a trust in property that impeded the individual's absolute right over property.<sup>29</sup>

Muslim personal law had different economic implications than Hindu law because it recognized individuals' absolute ownership rights and distributed them widely among heirs.<sup>30</sup> Raymond West, a Bombay judge and eminent authority on Hindu law, wrote in 1900 that this distribution of wealth arrested economic and political development within Islamic societies: 'the centrifugal dispersive character of the Mohammedan laws of family, and of inheritance, afford[ed] another striking instance of the powerful effect of a religious system on the social and political

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<sup>26</sup> Ibid., 649-721.

<sup>27</sup> Ranajit Guha, *The Rule of Property in Bengal* (Paris, 1963).

<sup>28</sup> Washbrook, 'Law, State, and Agrarian Society,' 653-655.

<sup>29</sup> Ibid., 669; Derrett, *Religion, Law and the State*, 113-114.

<sup>30</sup> Muslim inheritance laws were derived from the Hanafi text *al-Sirajiyya*. See, Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985), 128-131. For how the Islamic legal tradition was codified by the British, see Scott Alan Kugle, 'Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' in *Modern Asian Studies* 35, 2 (2001), 257-314; Michael Anderson, 'Islamic Law and Colonial Encounter in British India' in *Institutions and their Ideologies: A SOAS South Asia Reader*, ed. David Arnold and Peter Robb (Richmond, Surrey: Curzon Press, 1993), 165-185; Scott Alan Kugle, 'Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' in *Modern Asian Studies* 35, 2 (2001), 257-314.

organization, and on the economic condition of a community.<sup>31</sup> ‘Dispersive’ elements within Islamic law included laws allowing up to four wives, legitimizing the offspring of concubines, and placing sons on equal legal standing. Instead of channeling wealth through one line of descent ‘amongst the great men of a lower grade’, Islamic law contributed to the impoverishment of Muslim countries and prevented the rise of ‘a territorial aristocracy which might serve as a bulwark against the sovereign’s tyranny.’<sup>32</sup> Islamic law opposed the law of primogeniture upon which English economic theories on the wealth of nations were based. According to these theories, succession of property through patrilineal descent promoted security in land by keeping large estates intact.<sup>33</sup>

Although Muslims living under Islamic rulers in the Middle East and South Asia had long kept their estates intact by creating endowments called *waqfs*, colonial law did not recognize these endowments as valid until 1913.<sup>34</sup> For centuries, *waqfs* had allowed their creators to place their estates under the management of a designated heir, bypassing Muslim rules of inheritance. Colonial law interpreted Islamic institutions in a manner that fundamentally altered how *waqfs* functioned in India by making a novel distinction between ‘private’ *waqfs* and ‘public’ *waqfs*. Only ‘public’ *waqfs* in which income was designated for charitable and public use were recognized as valid. ‘Private’ *waqfs*, endowments made for the benefit of family members, were

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<sup>31</sup> Raymond West, ‘Mohammedan Law in India: Its Origins and Growth’ in *Journal of the Society of Comparative Legislation* 2, 1 (1900), 40.

<sup>32</sup> *Ibid.*, 41.

<sup>33</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Electric Book Co., 2001), 507-510. For a background on the European debate relating to primogenitor see Joan Thirsk, ‘The European Debate on Customs of Inheritance, 1500-1700’ in eds. Jack Goody, Joan Thirsk, and E. P. Thompson, *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge: Cambridge University Press, 1976), 177-191.

<sup>34</sup> Kozłowski, *Muslim Endowments*.

understood as invalid because they violated the Islamic law of inheritance.<sup>35</sup> This distinction also allowed colonial courts to interpret Islamic law in a manner that accorded with British law: private waqfs were also understood to violate British laws against perpetuities.<sup>36</sup> Private waqfs became valid after 1913 with the passage of Muhammad Ali Jinnah's *Mussalman Wakf Validation Act*.<sup>37</sup>

British Indian law recognized caste difference among Indians, which cut across religious difference and further differentiated property rights.<sup>38</sup> Hindu Pandits in Bengal and British interpreters of Hindu scripture derived an interpretation of caste in India from *varna*, a term found in Vedic sources that designated some form of social differentiation in ancient India.<sup>39</sup> They understood Indian society to be ordered hierarchically into four castes. The 'twice born' Brahmins, Kshatriyas and Vaisyas were organized on top and Sudras below them in what was conceptualized as being a more or less holistic caste system. Dalits (those who were described in colonial sources as 'Untouchables' or 'depressed classes'), pastoralists, and forest dwellers, fell outside of this system.

From the mid-eighteenth century, colonial officials based their understanding of caste in India on racial theories.<sup>40</sup> This racial understanding of caste was based on the notion that higher caste Hindus were of superior Aryan stock, the product of ancient migration into the subcontinent, while Sudras and Untouchables were

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<sup>35</sup> Ibid., 194-196.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., 156-187. Prior to this legislation, Raymond West and prominent Muslims Syed Ahmad Khan and Ameer Ali had argued for the recognition of private waqfs.

<sup>38</sup> Washbrook, 'Law, State, and Agrarian Society', 655.

<sup>39</sup> Romila Thapar, *History and Beyond* (New Delhi: Oxford University Press, 2000), 4-5.

<sup>40</sup> Ibid., 4.



indigenous people of 'Dravidian' stock. This racial dichotomy developed similarly to theories that produced the concept of an Aryan-Semitic dichotomy in the European context. Caste ideologies were understood as a mechanism for maintaining racial purity by creating exclusionary conventions, such as restrictions on marriage and food handling, which distanced racially superior people from racial outsiders.<sup>41</sup> As late as 1901, H.H. Risley's census described Indian society through the prism of this racially constructed caste system.<sup>42</sup>

Colonial courts relied on legal commentaries to provide guiding principles in the application of personal law, including commentaries that interpreted inter-caste relations in terms of race. In his 1906 commentary on Hindu law, for example, Jogendra Chandra Ghose interpreted the treatment of Sudras under Hindu law in such terms: 'The rules about Sudras, as found in the Smritis [Hindu scripture], are a relic of the barbarism of ancient nations who considered slavery right and lawful. The contempt of the white races for the black ones, which we find in the Vedas was, however, not more intense than what is now to be found in South Africa and other countries.'<sup>43</sup> Ghose's earlier commentary on Rammohun Roy, the founder of the Brahmo Samaj (f. 1828), suggests that he interpreted caste relations in Hindu law with an impulse towards legal reform. Ghose wrote that Roy's mission was to liberate the Sudra from the 'thralldom that had enchained them body and soul' and restore the

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<sup>41</sup> Susan Bayly, *Caste, Society and Politics in India* (Cambridge: Cambridge University Press, 1999), 127.

<sup>42</sup> Bernard Cohn, 'The Census and Objectification in South Asia', in *An Anthropologist among the Historians and Other Essays* (New Delhi: Oxford University Press, 1990), 247.

<sup>43</sup> Jogendra Chanda Ghose, *The Principles of Hindu Law*, 2d Ed. (Calcutta: S.C. Ruddy & Co., 1906), 844.

‘life-giving’ religion of the Upanishads.<sup>44</sup> However, regardless of the intention behind Ghose’s commentary of Hindu law, colonial courts relied upon legal digests to provide guiding principles for their application of Hindu and Muslim personal law while reform was left to legislation that could be shown to reflect the will of the community.<sup>45</sup>

Racially constructed caste ideologies influenced how courts interpreted Hindu personal law as separating caste ‘communities’ by imposing impermeable social boundaries.<sup>46</sup> The colonial administration defined Hinduism broadly as the native religion of India. In the 1881 census, any Indian who was unable to define his creed or described his creed by a name not recognized by tabulators was classified as Hindu.<sup>47</sup> This classification encompassed caste Hindus and ‘Untouchables’ However, the mixture of Hindu personal law based on scripture and legally sanctioned caste custom stratified the ‘Hindu community’ socially. British Indian courts maintained a social order separating caste communities by invalidating marriages and adoptions between castes and recognizing caste communities to be regulated by separate rules of succession, adoption, and marriage.<sup>48</sup> These courts applied Hindu personal law in its purest sense to Brahmin Hindus and the other twice-born castes while interpreting

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<sup>44</sup> Jogendra Chandra Ghose, introduction to Rammohun Roy, *The English Works of Raja Rammohun Roy*, ed. Jogendra Chandra Ghose (Calcutta: Srikenta Roy, 1901), ix.

<sup>45</sup> For analysis of the legislation introduced by Muslims and Hindus see, for example: Sturman, *The Government of Social Life*, ch. 5; Newbiggin, ‘Personal Law and Citizenship in India’.

<sup>46</sup> Bayly, *Caste, Society and Politics*, 127.

<sup>47</sup> Denzil Ibbetson’s *Outlines of Panjab Ethnography being extracts The Panjab Census Report of 1881 treating of Religion, Language, and Caste* (Calcutta: Government Printing, 1882), 101.

<sup>48</sup> *Ibid.*, 187-232.

caste customs to modify and relax social restrictions amongst Sudras.<sup>49</sup> Severe restrictions on commensality between castes, based on conceptions of purity and pollution, were validated in both criminal and civil court cases.<sup>50</sup>

The legal distinctions that formalized a separation of caste communities also carried with them the threat of economic sanctions should they be transgressed. According to William Rattigan's authoritative digest on custom in the Punjab, inter-caste marriage resulted in the loss of caste status for twice-born Hindus and thus separation from the Hindu joint family.<sup>51</sup> The Caste Disabilities Removal Act (XXI of 1850) legislated that Hindu or Muslim law could not cause the loss of property or inheritance rights due to apostasy or loss of creed.<sup>52</sup> Conflicting court rulings in the Punjab interpreted the 1850 enactment differently, sometimes but not always interpreting it as protecting property against loss of caste status. As a consequence, the law was unclear about whether separation from the Hindu joint family led to the forfeiture of property held within the Hindu joint family.<sup>53</sup>

The colonial administration denied property ownership rights to individuals designated as belonging to one of the depressed classes. The Punjab administration's policy of not settling Sansi people with property ownership rights in canal colonies, but rather interning them as labourers on reformation colonies, was justified on the basis of their status outside the caste system.<sup>54</sup> These semi-nomadic people occupied

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<sup>49</sup> Marc Galanter, 'Changing Legal Conceptions of Caste,' in *Structure and Change in Indian Society*, eds. Milton Singer and Bernard Cohn (Jaipur and New Delhi: Rawat Publications, 1968), 299-310.

<sup>50</sup> Ibid.

<sup>51</sup> William Rattigan, *A Digest of Civil Law for the Punjab* (Lahore: Wildy and Sons, 1909), 43.

<sup>52</sup> Tyabji, *Muhammadan Law*, 36.

<sup>53</sup> Rattigan, *Digest of Civil Law*, 43.

<sup>54</sup> Michael O'Dwyer, *India as I Knew It* (London, Constable, 1925), 61-63.

lands that the administration defined as ‘waste lands’ and belonging to the colonial state. They were denied property ownership rights after these lands were transformed into agrarian land through canal colonization.<sup>55</sup>

Although caste was understood as a Hindu institution, colonial law saw caste extending beyond religious boundaries and understood Muslims to have been socially defined by the caste system. By the late nineteenth century, British ethnography had come to interpret the majority of Muslims in India as descended from Hindu converts.<sup>56</sup> Many of these converts did not come from the gentry classes who had served under Mughal rule, and many Muslims living under rural conditions experienced the same structural conditions as lower-caste and depressed class Hindus.<sup>57</sup> The law interpreted Muslim ‘converts’ (Muslims of indigenous descent) as carrying their caste status with them after conversion.

In the Punjab, the colonial administration classified Muslims belonging to indigenous agriculturalist tribes as Sudra along with Hindus and Sikhs who belonged to agriculturalist tribes.<sup>58</sup> This had implications for how the rules that governed intermarriage and inheritance were applied. For instance, in the civil suit *Dalip Kaur v. Mussamat Fathi* (1911), the Lahore High Court first determined that a Sikh

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<sup>55</sup> Neeladri Bhattacharya, ‘Remaking Custom: The Discourse and Practice of Colonial Codification’ in *Tradition, Dissent, and Ideology: Essays in Honour of Romila Thapar*, eds. R. Champakalakshmi and S. Gopal (New Delhi: Oxford University Press, 1996), 20-51.

<sup>56</sup> Peter Hardy, ‘Modern European and Muslim Explanations of Conversion to Islam in South Asia: A Preliminary Survey of the Literature’ in *Journal of the Royal Asiatic Society of Great Britain and Ireland* 2 (1977), 178-179; Cohn, ‘The Census and Objectification’, 249.

<sup>57</sup> Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001), 273; Peter Hardy, *The Muslims of British India* (Cambridge: Cambridge University Press, 1972), 41.

<sup>58</sup> Ibbetson, *Panjab Ethnography*, 142-150; For an explanation of the caste status as Sudra of agriculturalist Indians, see: Rosalind O Hanlon, *Caste, Conflict, and Ideology: Mahatma Jotirao Phule and Low Caste Protest in Nineteenth-Century Western India* (Cambridge: Cambridge University Press, 1985), 4-14.

landowner and his Muslim tenant were Sudra before ruling that their marriage was valid under Hindu law.<sup>59</sup> According to the ruling, Sikhs were governed by Hindu law modified by custom, which removed the caste barriers to conversion to Sikhism of the Muslim tenant. Had the Sikh landowner been governed purely by Hindu personal law, as was argued during the suit, the marriage would have been invalidated.

There were also barriers within Muslim personal law to inter-religious marriage. In the above-mentioned case, for example, the court also needed to determine that the Muslim woman's conversion to Sikhism was valid in order to determine the validity of her marriage. Under Muslim law, a Muslim woman was only permitted to marry a Muslim man. A Muslim man, however, was permitted to marry women 'of the book,' which was interpreted within standard textbooks on Islamic law to mean Christian and Jewish women.<sup>60</sup> According to this interpretation of Muslim law, inter-marriage between Muslims and Hindus was forbidden. Ameer Ali's digest on Muslim law did permit intermarriage between Muslims and Hindus by recognizing the Brahmo Samaj to be 'of the Book.' However, colonial courts did not validate this interpretation.

A civil marriage allowed couples to transgress these caste and religious restrictions. However, it required that both parties formally renounce their religions before marrying.<sup>61</sup> The civil marriage law (Act III of 1872) allowed a state-appointed registrar to solemnise the marriage rather than a 'clergyman.' Until 1923, couples were required to sign a declaration stating: 'I do not profess the Christian, Jewish,

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<sup>59</sup> *Dalip Kaur v. Lal Kaur* (1911) 14 PLR 100. The Bombay Regulation (IV of 1827) was construed by court rulings to mean that the term 'caste' was not restricted to Hindus: Tyabji, *Muhammadian Law*, 37.

<sup>60</sup> Neil B. E. Baillie, *The Digest of Moohummudan Law* (London: Smith, Elder, & Co., 1875), 40.

<sup>61</sup> Perveez Mody, 'Love and the Law: Love-Marriage in Delhi' *Modern Asian Studies* 36,1 (2002), 223-256.

Hindu, Muhamedan, Parsi, Buddhist, Sikh, or Jaina religion.’<sup>62</sup> This declaration was to placate Hindu and Muslim opponents of civil marriages, who feared that civil marriage would allow inter-religious marriage, seduction, elopement, and marriage to immoral women.<sup>63</sup>

Within a ‘Muslim community’ governed by Muslim personal law, British Indian law recognized Khojas and Kutchi Memons to be minority Muslim communities that followed customs that were at variance with Muslim personal law.<sup>64</sup> Erskine Perry’s 1847 Bombay Supreme Court ruling found that both communities diverged from Quranic injunctions and followed rules of succession ‘nearly analogous to the Hindu rule of succession.’<sup>65</sup> In this case, that meant that property once held by a deceased Khoja man succeeded in its entirety to his brother’s widow according to custom, excluding his daughter from her share of inheritance required under Muslim personal law.

The status of the Khoja and Memon ‘communities’ under personal law was understood according to an occupational interpretation of caste, which existed alongside racial interpretations. An occupational interpretation of caste emphasized local conditions, ‘diversity and historicity in the making of caste.’<sup>66</sup> Perry’s ruling interpreted both the Khojas and Memons as having been originally Hindus who

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<sup>62</sup> Ibid., 232.

<sup>63</sup> Ibid., 237.

<sup>64</sup> Masselos, J.C. ‘The Khojas of Bombay: The Defining of Formal Membership Criteria During the Nineteenth Century’ in *Caste and Social Stratification Among Muslims in India*, ed. Imtiaz Ahmad (Delhi: Manohar, 1978), 97-116. For the internal politics within the community see also: Amrita Shodan, *A Question of Community: Religious Groups and Colonial Law* (Calcutta: Samya, 2001).

<sup>65</sup> *Hirbae and Others v Sonabae, Rahimatbae v Hadji Jussap and Others* (1847), *Cases Illustrative of Oriental Life*, ed. Erskine Perry (New Delhi, Madras: Asian Educational Services, 1988), 110-129. However, the term ‘minority community’ in the context of communities governed by customary law does not appear in this case.

<sup>66</sup> Bayly, *Caste, Society and Politics*, 139.

converted to Islam but retained their customs.<sup>67</sup> These customs reflected their economic position within Indian society before and after conversion. Both communities were associated with trade, the Khojas ‘for the most part confined to subordinate departments of trade’<sup>68</sup> and the Memons ‘originally Loannas, a Hindu commercial caste in Kutch’.<sup>69</sup> For both communities, conversion to Islam took place before British rule. Khojas were recorded in the case commentary as settled amongst Hindu communities in Bombay, Kutch, and Kathiawar and as tracing their conversion to Islam to 200 to 300 years ago.<sup>70</sup> Memons were recorded as seated in Kutch, with communities in Malabar and Bengal, and their conversion dated hundreds of years in the past.<sup>71</sup>

A historical understanding of Khoja and Memon as converts from Hinduism persisted into the 1930s. By 1882, Justice Scott at the Bombay High Court remarked about Memon custom that it was ‘a well-known principle of law in India’ that when a Hindu converted to Christianity or Islam, the conversion did not necessarily change his or her rights and powers over property.<sup>72</sup> In 1935, a Bombay magistrate recognized Memons to be converts to Islam rather than ‘the original Moslem invaders’ of India.<sup>73</sup> They remained distinct, he explained, because they retained Hindu customs

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<sup>67</sup> Perry, *Oriental Cases*, 113 and 115.

<sup>68</sup> *Ibid.*, 113.

<sup>69</sup> *Ibid.*, 115.

<sup>70</sup> *Ibid.*, 113.

<sup>71</sup> *Ibid.*, 115.

<sup>72</sup> 9 IL Bombay 158 (1882), quoted in Ameer Ali, *Mahommedan Law*, Vol. 2, 3d. ed. (Calcutta: Thacker, Spink, 1908), 168.

<sup>73</sup> Opinions of K.B. Vali Adam Patel and a Bombay district, *Précis of opinions for the Moslem Personal Law (Shariat) Application Bill*, Paper II (opinion 12), IOR L/PJ/7/943.

that prevented intermarriage or intermixing with other Muslims. Legal principles conceptualized the boundaries between Hindus and Muslims to have been once porous, with custom among Indians Muslims being evidence of their movement between them. However, this principle did not infer that an individual who converted from Hinduism to Islam could continue to follow Hindu personal law while professing to be Muslim.<sup>74</sup> Colonial courts applied this legal principle to a community's status rather than that of an individual. As will be shown in chapter five, there was no unified principle that governed how conversion altered the personal law of an individual religious convert. The effect of conversion varied depending upon such factors as his caste, gender, religion, and the religion to which he was converting into.

### The Rural and Urban Divide in the Punjab

In the Punjab, the concept of the ancient 'village communities' provided the basis for the codification of customary law in the province.<sup>75</sup> The Punjab administration gave primacy to the custom of ancient 'village communities' over Hindu and Muslim personal law. It designated certain tribes as 'agriculturalist' and recognized these tribes as following customary law. In doing so, it differentiated the property rights of Punjabis who belonged to designated 'agriculturalist' tribes from

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<sup>74</sup> On conversion under personal law and interreligious boundaries, see: Chandra Mallampalli, 'Meet the Abrahams: Colonial Law and a Mixed Race Family from Bellary, South India, 1810-63' in *Modern Asian Studies* 42,5 (2008), 929-970. Individual conversion to Islam in the Punjab will be examined in chapter five.

<sup>75</sup> For an analysis of the concept of the 'village community' in the Punjab see Clive Dewey, 'Images of the Village Community: A Study in Anglo-Indian Ideology' in *Modern Asian Studies* 6, 3 (1972), 291-328. On the codification of customary law, see Bhattacharya, 'Remaking Custom'. For the relation between customary law and Muslim personal law, see Nelson, *The Shadow of Shari'ah*; Gilmartin, 'Customary Law and Shari'at'.



non-agriculturalists, who continued to be governed by Hindu and Muslim personal law. In addition to protecting the economic status of agriculturalists, Punjab land laws were underpinned by evolutionary legal theories that inferred that agriculturalists had greater potential for progressive social development than non-agriculturalists. According to these theories, colonial officials interpreted Punjabi agriculturalists to exist at an earlier stage of development along the same evolutionary continuum upon which European society had progressed. These legal theories inferred that Punjab agrarian society was a starting point in the development of progressive laws and that the linking of law and religion had arrested progressive development in urban areas.

Prior to the annexation of the Punjab by the British in 1849, the territory had been held first under Islamic and then under Sikh rule.<sup>76</sup> Islamic rule in the Punjab began in the early thirteenth century under the Delhi Sultanate, a series of Muslim dynasties that ruled northern India until the rise of the Mughal Empire in 1526. The Punjab, which was only loosely controlled under the Delhi Sultanate, was brought under tighter control during the reign of Mughal emperor Akbar (r. 1556 to 1605) and his successor Jahangir (r. 1605 to 1627). Under the Mughals, Jats and other local groups like Rajputs, were slowly converted from warrior tribes to quasi-officials. Mughal control in the region waned thereafter, and in its place emerged independent Sikh chiefdoms in central Punjab. The majority of Jats came to identify themselves as Sikhs.<sup>77</sup> Sikh chiefdoms held power through confederation until the end of the eighteenth century. In 1799, the Sikh ruler Ranjit Singh (d. 1839) consolidated power away from them and established a kingdom from Lahore. He appropriated lands taken by usurping Sikhs during Mughal times and he built his kingdom around an army of

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<sup>76</sup> The following description of the Punjab is adopted from Ayesha Jalal and Anil Seal, 'Alternative to Partition: Muslim Politics between the Wars' in *Modern Asian Studies* 15, 3 (1981), 423.

<sup>77</sup> Ibbetson, *Panjab Ethnography*, 107.

small *deras* (platoons) led by *deradars* (local heads) recruited from separate villages. He also reestablished the Mughal policy of building a religiously composite army, which continued under the British administration.

After its annexation in 1849, the British began to incorporate Punjabis into the Indian army.<sup>78</sup> In 1857, Punjabis made up a quarter of the Indian army and supported the British in putting down the Indian mutiny and related uprisings. Thereafter, the British began to shift army recruitment away from high caste Bengali Brahmins towards favouring the recruitment of rural Punjabi peasants. By 1904, Punjabis, less than 10% of the population of British India, contributed to over half of the Indian army.<sup>79</sup> Racial theories identified agriculturalist tribes from the Punjab such as Jats and Rajputs, as well as Afghans and Gurkhas, as belonging to ‘martial races’ that were more suited to combat than other kinship or caste groups in India—a designation for Jats that is found in pre-colonial, vernacular sources as well.<sup>80</sup> Punjab land laws were grounded in a policy that rural contentedness was prerequisite to peace and order in the province.<sup>81</sup> Heavy army recruitment from the rural Punjab also meant that this contentedness was prerequisite for stability within British India and the Empire.

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<sup>78</sup> For Punjab recruitment in the Indian army, see: Ian Talbot, ‘British Rule in the Punjab, 1849-1947: Characteristics and Consequences’, in *The Journal of Imperial and Commonwealth History* 19, 2 (1991); Clive Dewey, ‘The Rural Roots of Pakistani Militarism’, in *The Political Inheritance of Pakistan*, ed. D. A. Low (London: Basingstoke, Macmillan, 1991), 255-284; David Omissi, *The Sepoy and the Raj: The Indian Army, 1860-1940* (London: Basingstoke, Macmillan, 1994); Syed Soherwordi, ‘“Punjabisation” in the British Indian Army 1857-1947 and the Advent of Military Rule in Pakistan’ in *Edinburgh Papers in South Asian Studies* 24 (2010), 1-33.

<sup>79</sup> Soherwordi, ‘“Punjabisation” in the British Indian Army’, 8.

<sup>80</sup> See also Nonica Datta, *Forming an Identity: A Social History of the Jats* (New York: Oxford University Press, 1999). Datta examines Jats in southeast Punjab from the nineteenth century, when they identified as ‘warrior-cultivators’, using vernacular sources.

<sup>81</sup> Barrier, *Alienation of Land*.

From the 1870s, Henry Maine's theories shaped the Punjab's agrarian policies and land laws.<sup>82</sup> Maine was the legal member for the Council in India following the mutiny, from 1862 to 1867. After his appointment, he returned to England and lectured at Oxford, Cambridge, and the Inns of Court in London to future civil servants and policy makers of India. Denzil Ibbetson, S. S. Thorburn, Lewis Tupper and William Rattigan were among the most influential administrators of the Punjab and frequently cited Maine to support their policy recommendations. Maine's principles provided the Punjab administration an evolutionary schema of legal development by which to redraw community boundaries erected in personal law.<sup>83</sup>

Maine based his legal theories on a comparative and historical approach to understanding the law.<sup>84</sup> He looked at Roman law to understand various legal systems existing within the British Empire, and by doing so he found what he interpreted to have been vestiges of ancient law co-existing beside a modern legal system. This led him to adopt an evolutionary understanding of legal development. He theorized that the legal diversity he found in the Roman and British empires reflected different stages of development. He summed up this development in terms of private law: the legal development of progressive societies was the movement of the individual from a position of status to that of contract in private law. Private law encompassed rules of inheritance, marriage, divorce, and the like, as did its equivalent personal law in British India. Private law in traditional societies, according to Maine's view, was

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<sup>82</sup> Dewey, 'The Influence of Sir Henry Maine', 353-373.

<sup>83</sup> Bhattacharya, 'Remaking Custom', 20-54.

<sup>84</sup> For Maine's theories and their policy applications, see also Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010); Karuna Mantena, 'Law and "Tradition": Henry Maine and the Theoretical Origins of Indirect Rule', in *Law and History*, eds. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2003), 159-188.

defined by the individual's relationship to a patriarchal head. At the other end of the developmental spectrum, private law in modern societies was defined by contract.<sup>85</sup>

Maine's theories conceptualised the movement towards 'contract' as not necessarily progressive, cautioning the application of Utilitarian legal principles.<sup>86</sup> He understood society to be made up of institutions in interaction with one another and individual mentalities. If any of these institutions were modernized ahead of others, or before individual mentalities were ready, they would malfunction.<sup>87</sup> Maine's theories also did not suppose that the laws of traditional societies were necessarily static. According to Maine, modern legal systems evolved from ancient laws based on time-honoured customs. Whereas modern law evolved through legislation to meet the changing needs of society, ancient law also evolved but through different mechanisms.<sup>88</sup> In traditional societies, ancient laws evolved through 'legal fictions' that preserved the illusion of continuity with the past. So long as impediments were removed, the evolutionary potential of custom existed. The role of a progressive government in a traditional society was to guide the law in its natural course, to bring about a controlled evolution of the law rather than radical social reform through the introduction of a modern legal system based on abstract and absolute principles.

According to Maine, unlinking religion from the law was a necessary precondition for social advancement. India had not progressed beyond the stage in

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<sup>85</sup> This schema is described in: Henry Maine, *Ancient Law* (London: John Murry, 1906).

<sup>86</sup> For Maine's theories as they related to Utilitarian theories, see Eric Stokes, *The English Utilitarians and India* (Oxford: Oxford University Press, 1959), 312-313.

<sup>87</sup> Henry Maine, *Village-communities in the East and West* (London: Murray, 1887), 1-30.

<sup>88</sup> Maine, *Ancient Law*, 19-38.

European history when the ‘rule of law’ was separated from the ‘rule of religion.’<sup>89</sup> For Punjab colonial officials, Islamic law in particular presented an impediment to social progress. William Rattigan understood religious and political authority to be inseparable in the Muslim world, where it was united first in the person of Muhammad and then in that of the *khalifs* who succeeded him. The Quran was ‘not only a compendium of religious dogma, but a code of rules regulating civil, criminal, political, administrative, and economic matters; covering the whole domain of the private and public life of the citizen’.<sup>90</sup> Denzil Ibbetson attributed the economic backwardness of Punjabi Muslims in part to Islamic law being inelastic and rigid compared to Hindu law and described Hinduism as being more dynamic owing to its being ‘essentially a cosmology rather than a code of ethics’.<sup>91</sup> Ibbetson pointed to the Islamic law of inheritance as a prime example of the inelasticity of Islamic law: it was suited for seventh century Arabia where wealth was measured in livestock and movable property but unsuited to nineteenth-century agrarian Punjab where wealth was measured in immovable property.<sup>92</sup>

Maine theorized that social development varied depending upon the penetration of state structures, which accounted for the absence of Islamic law in agrarian society in India. Punjab civil officer Lewis Tupper found—and Maine cited him to support his theories—that Hindu (meaning native Indian) institutions in the Punjab were in the state that they had existed in before Brahmanical influence. It was

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<sup>89</sup> Ibid., 16-23.

<sup>90</sup> William Rattigan, ‘The Scientific Study of the Muhammadan Law’ in *The Law Quarterly Review* (October 1901), 403.

<sup>91</sup> Ibbetson, *Panjab Ethnography*, 111.

<sup>92</sup> Denzil Ibbetson, note on the ‘Present Condition of Muhammadans in the Punjab’, Punjab Proceedings, Home Department, A Proceedings (April 1883), IOR P/2004.

not that the Punjabi villager ‘negligently violates his Hindu sacerdotal law, but that neither he nor his forefathers ever knew anything like its integrity.’<sup>93</sup> Lahore Chief Justice William Rattigan concurred: in the habits and customs of the rural population ‘neither the shara [Islamic law] nor the shastras [Hindu law] really exercised any direct influence among them’.<sup>94</sup> Religion did not bind rural society together, the village community did. It united Muslim and Hindu Punjabis together ‘by the same common rules regulating the devolution and disposal of property’.<sup>95</sup> While this schema understood customary law in villages to be more primitive than religious law, the absence of religious sanction inferred that it was more conducive to reform.

For the majority of ‘agriculturalists’ who were Muslim, Maine’s evolutionary legal theories supported inheritance customs that conflicted with Muslim personal law.<sup>96</sup> As communities bound together by their contiguity to the land, William Rattigan understood the customs of ‘village communities’ to be aimed at keeping land intact.<sup>97</sup> This was often interpreted by Punjab officials to mean that custom favoured agnatic theories of land succession, according to which agricultural land passed through a line of male descendants. Lahore High Court judge Meredith Plowden found that there was an affinity between the Hindu joint family and agnatic theories, which confirmed to him that agriculturalist tribes were bound to agnatic theories of

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<sup>93</sup> Maine, *Early Law and Custom* (London: John Murray, 1883), 8-9.

<sup>94</sup> W. H. Rattigan, preface to 1st. ed. *A Digest of Civil Law for the Punjab*, 7th.ed. (Lahore: Civil and Military Gazette; London: Wildy and Sons, 1909), ix.

<sup>95</sup> *Ibid.*, 1

<sup>96</sup> Nelson, *In the Shadow of Shari’ah*, 13-112.

<sup>97</sup> W. H. Rattigan, ‘The Land Laws of India: The Bengal Presidency, the Permanent Settlement and its Evils’ in *The Law Magazine and Review*, vol. 11, no. 1 (November 1885), p. 4; Hanock Pentecost, ‘Custom in the Punjab II,’ *Journal of Comparative Legislative & International Law*, vol. 6 (1924), 80.

land succession through their ancient adherence to Hindu law.<sup>98</sup> These theories influenced how Punjab civil servants determined ‘authentic’ customs within village communities and may have strengthened claims to inheritance based on agnatic theories.<sup>99</sup> But Punjab ‘custom’ also came to reflect interests that emerged over time within the village coparcenary and challenged the initial objectives of the British administration to strengthen cultivator rights over kinship rights. They were shaped by rising land prices and agrarian debt.<sup>100</sup>

Late nineteenth century legal reforms in the Punjab were based on the notion that the British administration had mistakenly introduced Hindu and Muslim personal law into the countryside.<sup>101</sup> From 1854 until 1872, the Punjab Civil Code had assumed the existence of Hindu or Muslim personal law in the Punjab unless it could be proven that custom persisted from time immemorial. The Punjab Laws Act of 1872 replaced this assumption with one that custom existed everywhere in agrarian society unless proven otherwise. The majority of Muslims in the Punjab, recognized as belonging to ‘agriculturalist’ tribes like Jats and Arain, were now assumed to follow custom. So too were their Sikh and Hindu tribesmen. These reforms dissolved a differentiation over agricultural land rights based on religious law, and instead differentiated land rights between ‘urban’ (non-agriculturalist) and ‘rural’ (agriculturalist) Punjabis.

The 1872 Act recognized a right of pre-emption over village lands, which meant that specified people belonging to ‘village communities’ had the right to

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<sup>98</sup> Penter, ‘Custom in the Punjab II,’ 223.

<sup>99</sup> Bhattacharya, ‘Remaking Custom’.

<sup>100</sup> Nelson, *In the Shadow of Shari’ah*.

<sup>101</sup> Justice G. R. Elsmie, note on ‘Present Condition of Muhammadans in the Punjab’, Punjab Proceedings, Home Department, A Proceedings (April 1883), IOR P/2004.

acquire property within the village in preference to other people.<sup>102</sup> Court decisions over the right of pre-emption gave legal precision to how ‘village communities’ and ‘towns’ were defined. A ‘village community’ consisted not simply of members of one family or clan holding village lands in common, but a body of people bound together by residence. It was not confined to landowners, but ranked below them were lower-caste and depressed class occupancy tenants.<sup>103</sup> Determining where the law of pre-emption operated meant distinguishing between ‘villages’ and ‘towns’ and differentiating rural from urban populations. The law defined a ‘village’ as having an economy based on agriculture, whereas the economy of a ‘town’ was based on trade.<sup>104</sup>

The Punjab Land Alienation Act of 1900 reified this differentiation by restricting the transfer of land from ‘agriculturalist’ tribes to non-agriculturalists.<sup>105</sup> An agrarian society in the Punjab defined by the concept of ‘ancient village communities’ was threatened by high rates of peasant indebtedness and land transfers that resulted from mortgages and sales. By 1876, most of the mortgages of agricultural lands were held by urban moneylenders. In 1888, 1,300,000 acres of land were transferred to new owners. Most land transfers were between ‘agriculturalists’, but 500,000 acres were transferred to urban traders.<sup>106</sup> Policy makers in the Punjab interpreted the Land Alienation Act as preserving traditional society according to

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<sup>102</sup> SECTION 9, ACT IV of 1872 in *The Punjab Code*, 2d. ed. (Calcutta: Office of the Superintendent of Government Printing, 1888), 125.

<sup>103</sup> *Rahim-ud-din v. Rewal* (1903) 4 PLR 90.

<sup>104</sup> *Shankar Das v. Mathra Das* (1918) 21 PLR 56.

<sup>105</sup> Barrier, *Alienation of Land*. The proper name of the act is the Punjab Alienation of Land Act, but it is commonly referred to as the Punjab Land Alienation Act.

<sup>106</sup> *Ibid.*, 23.



Mainian principles, and the problem of peasant land dispossession as stemming from British recognition of proprietary rights over agricultural lands.<sup>107</sup> Increased political stability and low revenue demands contributed to greater profitability of land cultivation and raised the value of agricultural property. A peasantry, unaccustomed to systematic revenue collection and putting away profit from one season to meet a shortfall in the next, were compelled to borrow from moneylenders to make ends meet or finance weddings and funerals. As land became more valuable, moneylenders began to demand it as collateral and convert mortgages to sale when landowners were unable to meet the terms of their debt. Traditionally, village headman and panchayats (village councils) might have prevented agricultural lands from being transferred to village outsiders. However, the British had introduced a system of courts and lawyers who were detached from village customs that would have kept village communities intact.

The debate among government officials over high rates of land alienation drew upon two competing principles of administration, that of paternalism and laissez faire.<sup>108</sup> According to principles of laissez faire, the dynamics of ‘political economy’ should have been allowed to operate without the government intervening on behalf of the cultivating class. Paternalists, on the other hand, insisted on the duty of the government to protect rural peasants. Maine’s evolutionary principles made a strong case against laissez faire by cautioning against too rapid a development through free market principles. The free market in land had the potential to stir political discontent by both dispossessing the peasantry, upon whom the Indian army was increasingly

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<sup>107</sup> ‘Proceedings for the extension of the Indian Arbitration Act IX of 1899, setting up *panchayats* for reconciliation’, Punjab Proceedings, Home Department, IOR P/6070; Barrier, *Alienation of Land*, 1-14.

<sup>108</sup> Barrier, *Alienation of Land*, 16.

reliant, and introducing into the countryside urban classes.<sup>109</sup> In the late nineteenth century, these urban classes—particularly Khatri, Arora, and Bania Hindu commercial castes—were also associated with anti-British, Indian nationalism.<sup>110</sup>

The Punjab Land Alienation Act also protected ‘landed gentry’, a category that included landowners with aristocratic land tenures and Muslim families whose land rights were connected to Sufi shrines.<sup>111</sup> The western region of the Punjab was crisscrossed with dense networks of these shrines, to which agricultural lands were held as religious endowments. Their custodians (*sajjada nashin*) and the descendants of the shrines’ founding saints (*pirs*) inherited their religious offices and rights over agricultural lands endowed to the shrine.

Colonial judges had a large amount of discretionary power in their application of the act. The privileges brought to families protected under the act were liable to be taken away by the judiciary. This is illustrated in a land dispute involving a Koreshi family in the Jhelum district that had mortgaged ancestral lands as collateral for debt.<sup>112</sup> A suit was brought by a member of the family to set aside the alienation of these mortgaged lands under the provisions of the act, according to which all Koreshis in the Jhelum district were classed as members of agriculturalist tribes. However, while acknowledging that their inclusion under the act was politically expedient for the Punjab government, the court excluded the family from its protection. Justice Henry Rattigan, Justice William Rattigan’s son, presided over the case. The plaintiff’s

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<sup>109</sup> Denzil Ibbetson note on alienation, 7 March 1889, in Barrier, *The Punjab Alienation*, 107-109, Appendix C.

<sup>110</sup> Kenneth W. Jones, *Arya Dharm: Hindu Consciousness in 19th-century Punjab* (Berkeley; London: University of California Press, 1976), 177.

<sup>111</sup> David Gilmartin, ‘Religious Leadership and the Pakistan Movement in the Punjab’ in *Modern Asian Studies* 13, 3 (1979), 485-517.

<sup>112</sup> *Jawahir Singh v Yaqub Shah* (1904) 7 PLR 59, at 168-172.

father, who had mortgaged his lands, was depicted in his ruling as being ‘all that is vile and vicious’ and a ‘dissipated spendthrift’ who lived off the security of his lands.<sup>113</sup> This uncertainty, the ability of the Punjab court to set aside legislative provisions, would have made conforming to the norms embodied in property law more compelling for those classes protected under the Act.

Punjab laws reflected a colonial understanding of Punjab society as being shaped by the interaction between urban classes and rural classes, rather than a rigid caste system. In his description of Punjab society, colonial official Denzil Ibbetson collapsed the four-tier caste system into a distinction between upper-caste Brahmins (including ‘trading’ castes) and lower-caste Sudras (including ‘agriculturalist’ castes): Khatri, Arora, and Bania were identified as Brahmin trading castes, while Jats, Rajputs, and Arain were identified as Sudra agriculturalist castes according to his classification.<sup>114</sup> Ibbetson conceptualized caste difference as the result of an interaction between urban and rural classes, which reflected a trend in European scholarship towards examining interactions between capital and labour.<sup>115</sup> He interpreted caste structures in the Punjab not in terms of racial theories, but as arising from the material and political conditions that existed in the Punjab before the annexation. His occupational interpretation of caste inverted the racially based interpretation of Sudras as indigenous people who were conquered by Aryan invaders. Rather, he described agriculturalist castes as being of Scythian and Aryan origin.

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<sup>113</sup> Ibid., at 172.

<sup>114</sup> Ibbetson, *Panjab Ethnography*, 172-173. ‘Caste’ here is used by Ibbetson synonymously with tribes. I am using ‘caste’ rather than ‘tribe’ because I think it is more meaningful in legal terms.

<sup>115</sup> Bayly, *Caste, Society and Politics*, 141.

However, these same agriculturalist castes continued to be identified as Sudra under Hindu personal law.<sup>116</sup>

Punjab laws did not reflect an understanding of Punjab agrarian society that conformed to pre-modern European society, in which a rigid class structure separated large landowners from agricultural labourers.<sup>117</sup> The application of customary law over agricultural tribes validated marriages that recognized a large degree of social mobility between people at different ends of the socio-economic spectrum. Customary law allowed landowners with tenures that equated with baronetcies in England to marry cultivators whose position equated with European peasants because they fell under the umbrella of 'Sudra' under Hindu personal law and were regulated by caste customs that permitted their intermarrying.<sup>118</sup>

By invalidating marriages between caste Hindus and Sudras, however, colonial courts regulated social relations between urban capital and rural property. The first attempts at large-scale commercial banking in the Punjab resulted from the cooperation of educated, higher caste Hindu elites of the 'trading castes' who belonged to Hindu reformist organizations the Arya Samaj and the Brahmo Samaj.<sup>119</sup> The Punjab National Bank was established in 1895 under the management of Lala Dalpat Rai, the brother of Arya Samaj leader Lajpat Rai. The Punjab Brahmo Samaj centred around Harikshen Lal, who established the Bharat Insurance Company and

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<sup>116</sup> For example in *Dalip Kaur v Lal Kaur* (1911) 14 PLR 100. As touched upon in the first section, this case decided the validity of marriage between a Sikh landlord and his Muslim tenant, both of 'agriculturalist' castes and both defined under Hindu law as Sudra.

<sup>117</sup> Robert Brenner, 'Agrarian Class Structure and Economic Development in Pre-Industrial Europe' in *Past & Present* 70 (February 1976), 30-75.

<sup>118</sup> *Dalip Kaur v Lal Kaur* (1911). This is conforms with the kinship networks *biraderis* in west Punjab villages as described in Hamza Alavi, 'Kinship in West Punjab Villages' in *Contributions to Indian Sociology* 6, 1 (1972), 1-27.

<sup>119</sup> Jones, *Arya Dharm*, 177.

the People's Banking and Commercial Association shortly afterwards. As higher caste Hindus, the law recognized these groups to be governed by Hindu personal law and their financial assets held within the Hindu joint family. Punjab laws kept the members of this corporate body from acquiring agricultural land, while Hindu personal law restricted their marriage to agriculturalists. According to principles regulating the Hindu joint family and agnatic theories inherent in customary law, both of which directed the devolution of wealth to male heirs, a marriage uniting capital and property wealth was unlikely in practice anyway.

The Punjab Land Alienation Act was associated with the social and economic interests of Muslims in the province. One of the enactment's main drivers, Septimus Thorburn, publicized the need to restrict alienation of agricultural land as the need to protect Muslim peasants from Hindu moneylenders in *Mussalmans and the Moneylenders in the Punjab* (1886).<sup>120</sup> The problem—that of the 'natural lords' being sunk into serfdom to the moneylender—was to do with British law: 'In the eyes of the law [the peasant and the moneylender] were equal. In sober truth, the peasant was in money-matters a crass and hardly-intelligible simpleton; the moneylender, a sharp and unscrupulous business-man, whose sole study was self-interest.'<sup>121</sup> The enactment resembled a similar identification of economic behaviour with religious identities in Europe.<sup>122</sup> On a policy level, Denzil Ibbetson was concerned with the economic

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<sup>120</sup> Septimus Thorburn, *Mussalmans and the Moneylenders in the Punjab* (Edinburgh; London: William Blackwood, 1886).

<sup>121</sup> *Ibid.*, 57.

<sup>122</sup> For example, Karl Marx, 'On the Jewish Question' in *The Marx-Engels Reader*, 2d. ed., ed. Richard Tucker (New York: W. W. Norton & Co., 1978 (orig. 1844)), 26-52.

conditions of Muslims in particular, fearing that Muslims unsettled from their lands would be politically restive.<sup>123</sup>

This identification of Muslims with agriculture and Hindus with trade was imprecise. While the majority of ‘agriculturalists’ in the Punjab were Muslim, at least 40 per cent of them were not. Rural Hindus, such as Hindu Rajputs prominent in eastern Punjab, and about 70% of Sikhs in the Punjab were also classed as belonging to agriculturalist tribes.<sup>124</sup> Nor did the Act simply protect ‘agriculturalists and other ignorant and illiterate people’ against higher caste Hindu moneylenders.<sup>125</sup> As B. R. Ambedkar would argue in 1930, the Punjab Land Alienation Act discriminated against depressed class people who cultivated agricultural lands but were denied any right to own them because they did not belong to designated ‘agriculturalist’ tribes.<sup>126</sup> Though it was framed in communal terms as protecting Muslims in particular, the legislation also restricted land from transferring to ‘urban’, non-agriculturalist Muslims as well.

## Evolutionary Legal Theories and Islamic Law

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<sup>123</sup> Barrier, *Alienation of Land*, 32.

<sup>124</sup> Letter from Under-Secretary of State R.A.B. Butler to Lothian, 17 May 1934, Public and Judicial Department Records, IOR L/PJ/9/76.

<sup>125</sup> S. S. Thornburn note on ‘Bill to regulate the award of interest in suits of simple money debts and debt mortgages,’ Punjab Proceedings, Home Department, A Proceedings (April 1896), IOR P/4921. Thornburn opposed measures to restrict interests except under the condition that it was to protect agriculturalists from moneylenders.

<sup>126</sup> B. R. Ambedkar, ‘Memorandum on the discriminatory character of the Punjab Land Alienation Act’, 5 January 1933, Public and Judicial Department Records, IOR L/PJ/9/76. Ambedkar’s criticism of the Act will be returned to in chapter 4.

Evolutionary legal theories as articulated by Maine led colonial officials to reinterpret Islamic law. 'Orthodox' Islamic law based on textual sources was interpreted not as sacred and immutable, but as the product of legal codification by Muslim lawyers that was historically contingent. This meant that legal reformers could 'modernize' Islamic law by bringing it back to its original precepts, which would make it more elastic and adaptable to social change. These legal theories were taught at government schools in the Punjab to Punjabi Muslim lawyers who were conscious of the economic backwardness of their religious community.

The Indian census exposed western educated Indians to a sociological interpretation of religion. The census was produced and published every ten years from 1871, and it impacted upon the religious identities of the English literate, Indian subjects whom it classified and described.<sup>127</sup> Denzil Ibbetson's 1881 Punjab census purported to contain descriptions of religion as it was practiced in the Punjab, gleaned from early settlement reports written by district officers and different than their idealized versions found in scriptural texts and authorized by religious scholars.<sup>128</sup> According to Ibbetson, the Punjab was of particular interest to the sociologist because it offered to him a 'virgin field' for investigation into customs and superstitions that the weaker grip of orthodoxy in the province had been unable to dislodge.<sup>129</sup> He conceived of religion as 'a social rather than religious institution', in which

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<sup>127</sup> Kenneth W. Jones, 'Religious Identity and the Indian Census' in *The Census in British India*, ed. N. Gerald Barrier (New Delhi: Manohar, 1981), 72-101; Cohn, 'Census, Social Structure and Stratification', 238-254; Bhattacharya, 'Remaking Custom', 20-54.

<sup>128</sup> Ibbetson, *Panjab Ethnography*, 100.

<sup>129</sup> Ibid.

conversion between religions signalled ‘change in community rather than conduct and inner life’.<sup>130</sup>

Based on this sociological interpretation of religion, the 1881 census defined rural Muslims as economically backward compared to their Hindu and Sikh neighbours. Moving through a tract of land inhabited by Muslims and Hindus, the census identified the property of Muslims by ‘the greater idleness, poverty, and pretension, which mark the Musalman.’<sup>131</sup> Hinduism, which was conceived as being the ‘outcome and expression’ of the native character, was characterized by ‘quiet contented thrift.’<sup>132</sup> The census assumed the rural Muslim Punjabi to be descended from Hindu converts, and described his productivity as a cultivator and economic behaviour in terms of this conversion. His conversion to Islam invariably filled him with ‘false conceit,’ disinclined him from honest toil, and rendered him ‘more extravagant, less thrifty, less contented, and less well-to-do than his Hindu neighbour.’<sup>133</sup> According to the official census, the Punjabi Muslim villager expected God to provide and had a strong tendency to blame government for his problems, while his Hindu neighbour asked little of his gods or his government except to be left alone.

This description of Muslim agriculturalists as economically backward reflected the Punjab administration’s policy concerns. Punjab officials proposed measures to remedy the economic conditions of Muslims that conformed to their own economic principles. The administration attributed some degree of peasant

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid., 101.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.



indebtedness to 'extravagance', taking measures to curb expenditure on weddings and funerals using the influence of local leaders at the level of *panchayats*.<sup>134</sup> According to one commissioner in the Peshawar division, which was incorporated into the Punjab district at that time, hospitality was more ruinous for Muslims than marriages and funerals.<sup>135</sup> He described these practices as suiting the conditions of poverty existing in Peshawar: 'Without [customs of hospitality] the poorer classes could hardly travel, and the poorest would often starve.'<sup>136</sup> He described how a beggar could walk from one end of the Punjab to the other without want of food, warm clothing, and shelter, whereas in Europe his only choice would have been between the workhouse and starvation. But while these practices benefited the community in times of poverty, it impoverished the individual in times of plenty and was not conducive to economic prosperity based on individual wealth accumulation.

At the same time that the Indian census exposed Punjabi Muslims to a sociological examination of the economic backwardness of their community, Indian lawyers were trained in the Punjab understand law as a tool for social reform. They were also trained as potential innovators of European laws. As vice-chancellor of Punjab University in 1901, Lewis Tupper's convocation speech described a role for the study of law in the Punjab for advancing legal studies in general.<sup>137</sup> Tupper said that the basis for jurisprudence was to be found in works of Utilitarian legal

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<sup>134</sup> Memo of Deputy Commissioner of Gujrat, 23 September 1895, on unanimous resolution that all Jats limit wedding expense to half annual income and limit funeral expenses to one-fourth, Punjab Proceedings, Home Department, A Proceedings, IOR P/5141.

<sup>135</sup> F. D. Cunningham, Officiating Commissioner and Superintendent of Peshawar Division, note on 'Reduction of expenditure on marriages and funerals,' March 1897, Punjab Proceedings, Home Department, A Proceedings, IOR P/5141.

<sup>136</sup> Ibid.

<sup>137</sup> Charles Lewis Tupper, 'English Jurisprudence and Indian Studies in Law' in *Journal of the Society of Comparative Legislation* 3, 1 (1901), 84-94.

philosophers Jeremy Bentham and John Austin, who described law as it ought to be across legal systems.<sup>138</sup> He described Henry Maine as equally important to developing jurisprudence into a science. According to Tupper, the science of jurisprudence that Maine introduced through the historical and comparative method was a branch of sociology. Maine's evolutionary legal theories were 'a set of consistent generalizations from known facts in the growth of legal institutions and ideas' that were necessary to understanding the evolution of society.<sup>139</sup> Indian law students were thus taught that evolutionary legal theories were a means of re-writing law as it ought to be. An understanding of their own customary law in parallel with modern laws would lead to a revision of Utilitarian laws, not only progressing Indian society but honing the legal tools of progress generally.<sup>140</sup>

In the late nineteenth century, colonial officials interpreted Islamic law according to evolutionary legal theories. These interpretations reconciled the co-existence of pragmatic land laws and contradictory Islamic injunctions. Justices William Rattigan and Raymond West defined 'orthodoxy' in Islam not as correct belief but the product of the codification of Islamic law by Muslim lawyers during the eighth and ninth centuries, when the traditional schools of law were founded. In accordance with evolutionary legal principles, they understood Islamic law to have developed from an elastic law based on ethical precepts.<sup>141</sup> This elasticity allowed it to adapt to diverse environments and assimilate pre-existing laws. They theorized that

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<sup>138</sup> Ibid., 85.

<sup>139</sup> Ibid., 90.

<sup>140</sup> Ibid., 90-92.

<sup>141</sup> Raymond West, 'Modern Developments of Mohammedan Law' in *Journal of the Society of Comparative Legislation* 2 (1900), 271-275; William Rattigan, 'The Scientific Study of the Muhammadan Law' in *The Law Quarterly Review* (October 1901), 401-414.

the period of elasticity in Islamic law ended when Muslim lawyers assumed authority over Islamic law and, as with Brahmin Pandits in Hindu law, acted as religious clergy.

Rattigan understood Islamic law as capable of developing into a progressive and enlightened legal system. According to him, Islamic law had become inelastic as a result of the curtailment of *ijtihad* by Muslim lawyers. *Ijtihad* is an Islamic legal term that means independent reasoning. Within the tradition of Islamic jurisprudence, it was used to arrive at a legal decision when none could be reached through the Quran and traditions of the Prophet Muhammad (hadith). According to Rattigan, restoring the use of *ijtihad* to Islamic law turned it into a rational science. This interpretation of Islamic law meant that the closer one travelled to the foundations of Islamic law, its originating precepts, the closer one arrived at its rational basis.<sup>142</sup>

The Muslim legal authority Ameer Ali (1849-1928) also adopted an evolutionary understanding of Islamic law. Ali was the only Indian Muslim during colonial times to sit on the Privy Council, reaching the highest level within the colonial legal system that any Indian could attain. In 1904, he wrote that critical and analytical study of Islamic law was lacking and that passages from Islamic legal sources were cited in courts without reference to ‘the evolution of the principle involved in discussion’.<sup>143</sup> He interpreted the crystallization of ‘orthodox’ doctrines as contingent on politics and historical circumstance. This he illustrated with the case of the Mutazilas and the refutation of Mutazilas doctrines in the twelfth century Abbasid court. He described Mutazilas as medieval Islamic ‘dissenters’ or ‘Protestants’ who expressed a liberality of views, rationalist ideas, and a belief in free-

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<sup>142</sup> Rattigan, ‘The Scientific Study of Muhammadan Law’, 412.

<sup>143</sup> Ameer Ali, *Mahommedan Law*, vol. 1, 3d. ed. (Calcutta: Thacker, Spink and Co, 1904), v.

will. Their doctrines were adopted by Abbasid ruler Abdullah al-Muman and his successors but ‘Patristicism’ or the theology of the ulama prevailed.<sup>144</sup>

## Muslim Sects

Colonial courts interpreted sectarian difference in Islam according to a liberal understanding of religion as private belief and conscience.<sup>145</sup> This was reflected in the 1881 census description of Muslim sects. The Government of India instructed census enumerators to classify Muslims as Sunni, Shia, Wahabi, or Farazi.<sup>146</sup> Sunnism was described as the Church of Islam and included four schools of law (fiqh): Hanbali, Shafi, Maliki and Hanafi. While all were considered equally orthodox, Islamic law in India was based on the Hanafi fiqh. The census described the Punjabi peasantry as being 98 per cent Sunni because they knew nothing else, ‘not by deliberate choice or conviction.’<sup>147</sup> They were described as ignorant of the major sectarian divisions within Islam between Shia and Sunni Muslims.

‘Sectarian’ divisions within Islam were described as constituting minor deviations in dogma or forms of ‘protest against modern innovations and a reversion towards the faith in its original purity.’<sup>148</sup> The 1881 Punjab census commissioner

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<sup>144</sup> Ibid.

<sup>145</sup> Asad Ahmed, ‘Adjudicating Muslims’, 58-70: In tracing the genealogy of blasphemy laws in Pakistan, Ahmed argues that the two understandings of religion, the liberal understanding and an understanding of religion that was a form of social order and classification were in constitutive tension with one another.

<sup>146</sup> Ibbetson, *Panjab Ethnography*, 146. The census footnoted information about ‘rationalist’ Syed Ahmad Khan’s followers constituting the Nechari (Nature) sect—which rejected miracles and the supernatural in traditions of Muhammad.

<sup>147</sup> Ibid., 145.

<sup>148</sup> Ibid., 144.

Denzil Ibbetson described sects as ‘schismatics’ and analogous to dissenting bodies from the Church of England within Protestant Christianity.<sup>149</sup> The census defined Wahabis as Muslim ‘purists’ who ‘claim[ed] liberty of conscience and the right to private interpretation’ and rejected the authority of religious intermediaries between God and the individual.<sup>150</sup> Denzil Ibbetson described people who called themselves ‘Ahl-i-Hadis’ (People of the Traditions), ‘Muwahidin’ (Unitarians), and ‘Muhammadi’ as Wahabis under different names. He assumed that they adopted alternative names to escape the political stigma attached to Wahabism, who were associated with rebellion against the British government.

A famous dissenting judgment by Justice Mahmood in *Queen Empress v. Ramzan* (1885) also associated Wahabis with religious liberty.<sup>151</sup> In this case, a mosque in Benares was being used by Sunni Muslims (‘orthodox’ of the Hanafi tradition), according to whose tenets the word ‘amen’ is intoned in a low voice during prayers. Ramzan, a member of the Wahabi sect, joined the congregational prayers and called out amen in a loud tone of voice during prayers. As a consequence, the mosque attendant filed a complaint against him and he was convicted by a magistrate in Benares of voluntarily disturbing a religious assembly under section 296 of the Penal Code.<sup>152</sup>

Upon appeal, Justice Mahmood reframed the case as one relating to religious liberty. Before his judgment, reference in this case had only been made to section 296 of the Penal Code. Instead, he argued that determining whether or not Zaman’s action

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<sup>149</sup> Ibid., 145.

<sup>150</sup> Ibid., 147.

<sup>151</sup> *Queen Empress v. Ramzan* (1885) ILR 7 Allahabad 461. See also treatment of case by Asad Ahmad, ‘Adjudicating Muslims’, 94-101.

<sup>152</sup> Ibid., at 466-468.

was lawful raised a question of civil right, which bound the criminal court to resort to the civil branch of law. Some sections of the Penal Code, including section 296, depended entirely on a correct interpretation of civil law. In this case, if Zaman was justified under civil law to call ‘amen’ aloud, he could not be convicted of a criminal offence under section 296 of the Penal Code.<sup>153</sup>

Mahmood’s judgment established a broad legal definition of who could be counted as a Muslim. In order to determine whether Zaman was within his civil rights, Mahmood first needed to establish that he was a Muslim. According to the mosque attendant’s complaint, by rejecting the four orthodox schools of law, Wahabis (or Muhammadis) intended to ‘set up a new form of worship for themselves’ and were no longer Muslims.<sup>154</sup> Mahmood treated this claim as relevant by first referring to the Muslim law of *waqf*, according to which when a mosque was built and consecrated by public worship, it ceased to be the property of the builder and vested in God. Under British Indian law this meant that every Muslim had the legal right to enter it and to pray according to his own tenets, as long as the form of worship that he took was in accord with the rules established under the Muslim ecclesiastical law.<sup>155</sup>

Mahmood rejected the mosque attendant’s claim because all parties involved in the case claimed to be Sunni, and reciting ‘amen’ aloud was accepted practice within the ‘orthodox’ schools of law. Here, what mattered in determining a Muslim was his or her claim to being so through orthopraxy (correct practice) rather than orthodoxy (correct belief). Zaman’s judgment was not that as a member of a ‘dissenting’ sect, Wahabis or Muhammadis, had the right to worship with an

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<sup>153</sup> Ibid., at 468-469.

<sup>154</sup> Ibid., at 473.

<sup>155</sup> Ibid.

‘orthodox’ congregation. Rather, he determined that it was Zaman’s right to worship in a public mosque according to Zaman’s interpretation of ‘orthodox’ Islam. Mahmood explicitly denied the right of a majority, whose claim to ‘orthodoxy’ was that they maintained the most obvious interpretation of the Quran and traditions, from denying membership into the ‘Muslim community’ to a minority whose interpretation of Islam differed.<sup>156</sup> As will be shown in the following chapter, the Ahmadiyya was defined as a Muslim ‘sect’ in the 1901 census and interpreted within colonial courts in a similar manner.

## Summary

Drawing from late nineteenth-century legal commentaries, this chapter provided an overview of the principles that guided colonial courts in their understandings of personal law across caste and religious categories. It moved from a general overview of personal law in British India to a closer look at personal law in the Punjab. It then examined late nineteenth-century interpretations of Islamic law. These interpretations were underpinned by evolutionary legal theories that were influential among Punjab administrators at the time. The chapter ended by examining the ‘Muslim sect’, a category that the colonial censuses and law conceptualized differently than the caste and religious categories relevant to personal law.

Personal law defined caste and community boundaries through rules of inclusion and exclusion, and intermarriage. Muslim personal law, compared to Hindu personal law, defined boundaries that were open to outsiders and tended to distribute wealth widely, contrary to European principles of wealth accumulation. Within the

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<sup>156</sup> Ibid., at 470.

Muslim community governed by Muslim personal law, colonial courts recognized Khoja and Memon Muslims as belonging to communities that retained their caste customs distinct from Muslim laws of inheritance. In the Punjab, customary law defined Muslims who belonged to designated ‘agriculturalist’ tribes in a similar manner. Muslim ‘agriculturalists’ continued to follow what was understood to be their ancient village customs distinct from Muslim rules of inheritance.

This chapter also examined some of the economic principles behind the law. The codification of customary law created legal boundaries that distinguished Muslim agriculturalists from Muslim non-agriculturalists, and it differentiated their land rights and rules of inheritance. This differentiation was part of a legal intervention aimed to stabilize the position of agriculturalists, threatened by high rates of indebtedness and land transfer. It was underpinned by evolutionary legal theories, according to which orthodox Islamic law was a product of codification by classical Muslim lawyers that impeded social and legal development. While colonial ethnography interpreted Punjab agriculturalists as economically backward and ignorant of Islamic law, Punjabi lawyers were trained to understand legal reform through evolutionary principles as a means of social reform. The religious identity of ‘Muslim sects’ was described differently as based on conscience and belief, and within personal law they were not recognized as following their own customs like Muslim minority communities.

The next chapter will examine how these categories applied to the Ahmadiyya by examining the system of land administration in place where the Ahmadiyya emerged, the class background of the Ahmadiyya founder and prominent leaders within the community, and the Ahmadiyya’s classification as a Muslim sect in the Punjab census. It will examine the Ahmadiyya’s interpretation of Islamic law within



this context, and analyse how colonial courts interpreted the Ahmadiyya's religious status within the Muslim community.

## Chapter 2: The Ahmadiyya: a 'Muslim Sect'

### Introduction

This chapter examines the emergence of the Ahmadiyya in late nineteenth-century Punjab within the context of colonial laws. The Ahmadiyya formed as a religious community with clear doctrinal boundaries and was identified within the colonial census as a Muslim sect. According to the logic by which colonial law interpreted Muslim sects, adherence to Ahmadi doctrines was treated as a matter of private interpretation. Although the Ahmadiyya practiced customs that altered their social relations with other Muslims, a Muslim's conversion to Ahmadiyya was not recognized as altering his or her status under personal law. In the civil suits examined in this chapter, Muslims who wished to legally alter their social relations with Ahmadis could only do so by arguing that Ahmadis were not Muslim in terms of their beliefs. This would have also led to the loss of property rights attached to religious office and civil rights attached to religious identity, had not a court determined that Ahmadis were Muslim and Ahmadi beliefs derived from legitimate interpretations of Islamic sources of law.

The first section of this chapter examines the position of Mirza Ghulam Ahmad, the founder of the Ahmadiyya, within the political economy of the Punjab. Ghulam Ahmad belonged to a landowning class whom the colonial administration recognized as intermediary between the state and the rural majority, a class whose position in rural society late nineteenth-century legal interventions were designed to protect. The second section examines the doctrines that distinguished the Ahmadiyya as a Muslim sect. By claiming authority to reinterpret Islamic law as the Messiah and Mahdi anticipated within Islamic sources, Ghulam Ahmad decreed that armed struggle in the way of Islam was no longer sanctioned under Islamic law. This section

shows his articulation of Ahmadi doctrines in opposition to interpretations of jihad pronounced by members of the Hindu reformist movement Arya Samaj, Christian missionaries, and the ‘sectarian’ Ahl-i-Hadis’. The final section examines how the Ahmadiyya were interpreted under colonial law. Colonial courts distinguished Ahmadis from ‘orthodox’ Sunni Muslims by their beliefs in accordance with its understanding of sectarian difference, and the Ahmadiyya’s status as non-Muslim was contested in court on these grounds.

This chapter introduces two Punjab court cases that demonstrate how religious authority was entangled in land rights in the Punjab, and which have not been examined in secondary literature.<sup>157</sup> The first case is *Hussain Shah v. Gul Muhammad* (1920), which was a family dispute over land in Qadian that determined the legitimacy of a religious endowment there. This endowment established a form of religious authority that the Punjab administration defined as Sunni Muslim religious authority. The second case is *Mir Yad Ali v. Mubarak Ali* (1905), in which a Hanafi Sunni congregation in Sialkot sued to have their mosque’s imam Mubarak Ali removed from his office on the basis of his conversion to Ahmadiyya. The imam’s removal from office was complicated by fact that he had inherited his office and it was attached to lands endowed to the mosque by the colonial administration.

The third court case that this chapter examines is *Narantakath Avullah v. Parakkal Mammu* (1921), which is examined to understand how colonial law interpreted the Ahmadiyya. This judgment has received attention in historical studies because it provided the essential beliefs necessary to be defined as a Muslim according to colonial law.<sup>158</sup> The court in this case was compelled to determine

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<sup>157</sup> I have not encountered any treatment of these cases in historical studies on colonial law.

<sup>158</sup> Ahmad, ‘Adjudicating Muslims’; De, ‘The Two Husbands of Vera Tiscenko’.

whether or not the Ahmadiyya were Muslim as a result of an apostasy law that automatically dissolved the marriages of apostates from Islam. The automatic dissolution of marriage for apostasy from Islam will be examined in greater detail in chapter 5. The ruling demonstrates that colonial law determined that Ahmadi doctrines derived from legitimate interpretation of Islamic sources in accordance with its understanding of Muslim sects. It also described membership within the Muslim community as being grounded on common belief.

These legal cases give insight into the views and strategies of Ahmadi litigants, and they also help to distinguish personal law as it was theorized from personal law as it was experienced. In *Hussain Shah v. Gul Muhammad* (1920), for example, the lawyer Zafrullah Khan argued that the family of the Ahmadiyya founder followed customary law rather than Islamic law in matters of inheritance. In a case one year later, *Narantakath Avullah v. Parakkal Mammu* (1921), Zafrullah Khan argued that Ahmadis were conscientious and believing Muslims. The implication that one could follow customary law and be a conscientious Muslim was not contradictory, though it might contradict the idea of a Muslim community unified by common belief and governed by Islam law. In all of these cases, Ahmadi litigants went to court to defend the rights defined by their status under personal law—whether that be the right of the son to inherit the property of his father, or the marital right of the husband.

## Qadian

Mirza Ghulam Ahmad descended from a family of Mughal Barlas, a tribe of central Asian origin, which held superior land rights in the vicinity of a town called

Qadian.<sup>159</sup> The history of Qadian reflects the broader history of the province under Islamic and Sikh rule. Qadian was part of the agrarian hinterland of the Mughal administration, which was taken over by independent Sikh chiefdoms and later incorporated into Ranjit Singh's kingdom. The British administration's land settlement of Qadian took place shortly after the British annexed the Punjab in 1849. This section begins with an account of the genealogy of Ghulam Ahmad's family, which was compiled along with those of other landowning families in the Punjab by colonial officer Lepel Griffin in 1865.<sup>160</sup> These were the families that the administration treated as rural 'aristocracy', and as such their genealogies are relevant to the land rights that they possessed and their position within the colonial social order in the Punjab.

The history of Ghulam Ahmad's family linked the family's settlement in the Punjab with the establishment of Qadian. Ghulam Ahmad's ancestor Hadi Beg emigrated from Samarkand to the Punjab during the reign of Emperor Babur (r. 1526–1530), the founder of the Mughal Empire. He settled ten miles east of the administrative town of Batala, where he was said to have established the town of Qadian. From there the Mughal administration appointed him as a *qazi* with jurisdiction over an area of 70 villages. The family held government offices under the Mughal administration for several generations after the founding of Qadian. However, it lost its position and its land when Mughal control over the Punjab weakened. The Sikh Ramgharia state took control over Qadian and pushed Ata Muhammad (Ghulam Ahmad's grandfather) to flee south to Kapurthala, also a Sikh state but under different rule.

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<sup>159</sup> Lepel Griffin, *Panjab Chiefs: Historical and Biographical Notices of the Principle Families in the Territories under the Panjab Government* (Lahore: McCarthy Press, 1865), 380-381.

<sup>160</sup> Ibid., 380.

Ghulam Ahmad's family eventually regained their lands under the Sikh ruler Ranjit Singh. Ata Muhammad remained in exile for 12 years, during which time Ranjit Singh consolidated power in the Punjab and appropriated the land in Qadian from the Ramgharia state. Ata Muhammad's sons joined Ranjit Singh's army and received a *jagir*, a land grant for military and administrative service, near Qadian. They continued to serve in the Sikh army under Ranjit Singh's successors and maintained their position after the British annexation of the Punjab in 1849. During the 1857 mutiny, Ghulam Ahmad's cousin fought under British officer John Nicholson.

The British settlement of the Punjab altered the nature of the land rights held by Ghulam Ahmad's family under the Mughals and Ranjit Singh. The British administration took over the family jagir and awarded Ghulam Ahmad's father Ghulam Murtaza and his uncles a pension of 700 Rs. and proprietary rights in seven villages. Qadian continued to be the name of a town, but also designated the agricultural villages that were owned by Ghulam Ahmad's family.<sup>161</sup>

The town of Qadian was ten miles east the commercial centre of Batala, which had developed into a center of trade, administration, and law under Muslim rule.<sup>162</sup> Batala had been founded in the fifteenth century, when the Punjab was still under the rule of the Lodi dynasty, the last dynasty of the Delhi Sultanate before the founding of the Mughal Empire.<sup>163</sup> It was founded by Ram Dev, a Bhatti Rajput who had converted to Islam and was contracted to collect revenue by the Lodi governor in the

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<sup>161</sup> Ibid., 381.

<sup>162</sup> N. T. Singh, *Irrigation and Soil Salinity in the Indian Subcontinent: Past and Present* (Cranbury: Associated University Presses, 2005), 70.

<sup>163</sup> John F. Richards, *The Mughal Empire* (Cambridge; New York: Cambridge University Press, 1993), 194-195 adopted from J. S. Grewal, *In the By-Lanes of History: Some Persian Documents from a Punjab Town* (Simla: Indian Institute of Advanced Study, 1975).

Punjab. From Batala, Dev worked to encourage agrarian settlement in Batala's sparsely populated countryside. Batala and its countryside continued to develop during Mughal times. Privately sunk irrigation wells sustained market gardens cultivated by Arain Muslim Rajputs. Shamshir Khan, a revenue collector in Batala under Akbar, constructed a large water tank in the town. The Shah Nahar canal built under Shah Jahan (r. 1628-1658) carried water from the Beas River into Batala.<sup>164</sup>

Land settlement also encouraged conversion to Islam among cultivators in the region, which resulted from the Mughal policy of settling agricultural land through Sufi saints, men remembered for their social and charitable work.<sup>165</sup> Akbar granted agricultural lands surrounding Batala to Sayyid Muhammad Shah of Bukhar, who used the revenue he collected to build a charitable kitchen for residents and travelers to Batala.

Batala became an administrative center where generations of Mughal appointed revenue collectors were stationed. Locally recruited qanungos, quasi-officials recognized by the Mughal state as revenue record keepers for the area, were also stationed there. It served as a market center, or qasba, where agricultural surplus was sold; manufactured goods such as cotton and silk textiles were produced and exported. It also became a center for Islamic law where judicial officers, qazis, resolved disputes and dispensed justice.<sup>166</sup>

When the British settled of the region surrounding Qadian in 1852, they included Qadian and the town of Batala in the Gurdaspur district, an agriculturally

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<sup>164</sup> These irrigation works were done through private enterprise: Singh, *Irrigation and Soil*, 70.

<sup>165</sup> On the process of conversion in rural areas through Sufis, see: Richard Eaton, *Sufis of Bijapur, 1300-1700: Social Roles of Sufis in Medieval India* (Princeton: Princeton University Press, 1978); Richard Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (Berkeley, London: University of California Press, 1993).

<sup>166</sup> Richards, *Mughal Empire*, 194-195.

rich tract of land that extended to the Jammu province of Kashmir. The Gurdaspur district was divided into four sub-districts, which came to be called tehsils. Qadian and Batala were located in the Batala tehsil, the southernmost tehsil. During the colonial administration of the Punjab, Batala town remained the largest urban center in the Gurdaspur district. The Amritsar-Pathankot railway built in the late nineteenth century passed through it and facilitated a large export of sugar and grain from the countryside.<sup>167</sup> It also continued to produce manufactured goods, including cotton and silk.

Centuries of agricultural development left abundant well irrigation in the countryside surrounding Batala, valuable market gardens and orchards. It also left a large proportion of Muslims in the Batala tehsil compared to other regions in the district. In the Gurdaspur district overall, Muslims made up about 49 per cent of the population, while Hindus made up 40 per cent and Sikhs, 10 per cent of the remaining population.<sup>168</sup> The 1892 revenue settlement report for the Gurdaspur district noted that Hindus predominated the hills and upper submontane regions in the north, while Muslims predominated the lower submontane and plains region where Batala was located. The predominant 'agriculturalist' tribes in the region were Jat and were comprised of Muslims, Sikhs, and Hindus. Arain Muslims, tribes that the British ethnography classified as 'agriculturalist,' were also prominent in the region.<sup>169</sup> The Arains' caste identity was occupationally based on their cultivating market gardens, but also their historic conversion to Islam. Batala town accounted for much of the

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<sup>167</sup> *Gazetteer of the Gurdaspur District*, 1891-92 (Lahore: Civil and Military Gazette Press, 1891-92), 78.

<sup>168</sup> *Imperial Gazetteer of India*, vol. 12 (Oxford: Clarendon Press, 1908), 395.

<sup>169</sup> R.H. Davies, *Report on the Revised Settlement of the Greater Part of the District of Gurdaspur in the Amritsar Division* (Lahore: Punjabee Press, 1859), 72-73.



Muslim population in the tehsil. Almost two-thirds of Batala town's population of 27,365 were Muslim.<sup>170</sup> Muslims in the area of Batala lived in both rural and urban conditions—they were both 'agriculturalist' and non-agriculturalist in terms of personal law and property rights.

Muslims in the Gurdaspur district were described as being particularly prone to indebtedness. The 1892 settlement report for the Gurdaspur district mirrored Denzil Ibbetson's 1881 census description, attributing cultural attitudes to the economic backwardness of Muslims. It noted patterns of 'conversion to Islam' (i.e. agriculturalists who were Muslim) in the region because it held that the land's population was 'as important a factor in its revenue paying capacity as its natural characteristics.'<sup>171</sup> It described Muslims, and only Muslims, as 'indolent and extravagant.' If they appeared industrious, it explained that this was because the pressures of overpopulation in the region made them so. It also described them as 'the least satisfied with British rule of any class in the district.'<sup>172</sup> The report explained that their pride in being the original owners of the country made Muslims loath to sell the land that they were only too ready to encumber with debt.

Attributing the economic backwardness of Muslims to cultural attitudes and behaviors seems to have justified a laissez faire approach to the problem of rural indebtedness. The 1892 settlement report's description of Muslims was produced during a time when, as the report noted, agricultural debt and the transfer of land from

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<sup>170</sup> *Imperial Gazetteer of India*, vol. 7 (Oxford: Clarendon Press, 1908), 133.

<sup>171</sup> Louis W Dane, *Final Report of the Revised Settlement of the Gurdaspur District in the Punjab* (Lahore: The "Civil and Military Gazette" Press, 1892), 6-7.

<sup>172</sup> *Ibid.*

old proprietors to new ones were ‘prominent features of the agricultural horizons.’<sup>173</sup> Eight years before the Punjab administration passed the Punjab Alienation of Land Act, the report concluded that Muslim indebtedness was not a situation that required remedy on the part of the administration.

However, it seems instead that a combination of superior land rights and inheritance customs contributed to land fragmentation and the impoverishment of Ghulam Ahmad’s family estate in Qadian. His family was the only Muslim landowning family of note in the Gurdaspur district that was included in Lepel Griffin’s Punjab Chiefs.<sup>174</sup> It was, along with a proportionately larger population of Muslim ‘agriculturalists’ who resided in its vicinity, assessed at a fuller revenue rate compared to other regions in the district.<sup>175</sup> Despite occupying a socially and politically privileged position in Punjab society, his family was impoverished by the colonial land administration system, and their influence over local Muslims diminished as a consequence.

Ghulam Ahmad’s family estate, as a *talukdari* land tenure, was a rarity among existing patterns of land rights in the Gurdaspur district. It gave them superior land rights over the several villages that they owned in a district characterized by village coparcenary tenures.<sup>176</sup> Most villages in the Gurdaspur district were held in *bhaichara* and *pattidari* land tenures. In both types of tenure, estates were parceled out to shareholders. Shareholders managed only their allotted lands and paid revenue

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<sup>173</sup> Ibid., 11.

<sup>174</sup> Griffin Lepel, *Revised Pedigree Tables of the Families Mentioned in Griffin’s Punjab Chiefs and Massy’s ‘Chiefs & Families of Note in the Punjab’*. (Lahore: Punjab Government Press, 1899), 4-5.

<sup>175</sup> F. W. Kennaway, *Final Report of the Revision of the Settlement of the Gurdaspur District, 1912* (Lahore: Punjab Government Press, 1912), 21.

<sup>176</sup> *Imperial Gazetteer of India: Punjab*, vol. 2 (Calcutta: Government Printing, 1908), 63.

through a village headman. In the Batala tehsil, where the preponderate Jat agriculturalists were considered 'less sticklers for ancestral shares than the highest castes,' the administration tended to assess individuals according to equal shares.<sup>177</sup> Only 55 square miles of the 1,889 square miles that made up the Gurdaspur district were held in superior land tenures.<sup>178</sup>

Their position as Muslim landowners seems to have been recognized by the colonial administration as one of influence over the rural Muslim population in that region. Lepel Griffin described Ghulam Ahmad's father Ghulam Murtaza as having had considerable local influence in Qadian at the advent of colonial rule. This status was also implicit in the family holding a *talukdari* land tenure. In 1891, the Gazetteer of the Gurdaspur District published that the only well noted cases of talukdari land tenures in the Gurdaspur district were 'the Kadian Mughals and of the Talh Khatri of Kalanaur.' These families, the gazetteer explained, were representatives of the old qanugos in Mughal times and as such still received a small allowance [assessed as a cess on land revenue] from the state.<sup>179</sup> The administration interpreted such tenures as markers of a Mughal aristocracy who was granted land and the collection of revenue under Mughal rule. It understood such tenures to have 'in the decadence of Mussulman power' become hereditary offices and sometimes assumed the power of civil government. Ghulam Ahmad's family was described as having had ruling power in Qadian.<sup>180</sup>

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<sup>177</sup> Davies, *Revised Settlement of Gurdaspur*, 72-73.

<sup>178</sup> *Imperial Gazetteer of India*, vol. 12, 390 and 395.

<sup>179</sup> A cess is a tax or levy. *Gazetteer of the Gurdaspur District, 1891-92* (Lahore: Civil and Military Gazette Press, 1891-92), 78.

<sup>180</sup> *Ibid.*

Maintaining some of these tenures was a means for the colonial administration to maintain control over the rural population. The Punjab administration gave these landowners access to government employment, which integrated them into the colonial administration and helped maintain their local influence.<sup>181</sup> This was the case with Ghulam Ahmad's family. Ahmad's elder brother Ghulam Qadir was a superintendent in the Gurdaspur district. When Ghulam Qadir's only son died in infancy, he 'adopted' his nephew and Ghulam Ahmad's youngest son Sultan Ahmad, who the British administration then regarded as the head of the family. Sultan Ahmad held various positions within the Punjab administration.<sup>182</sup>

However, while the colonial state granted his family some political privilege in the form of access to government employment, their economic position began to deteriorate after the first British settlement. Their estate was burdened by a high rate of revenue assessment. This seems to have been the result of revenue divisions created by the British settlement, which did not reflect centuries of uneven agricultural development and the mostly decentralized administration of land in the region before colonial times. The Mughal administration had organized revenue units by pargunnas—groupings of 20 to 200 villages organized around a town center.<sup>183</sup> The British retained the terminology of the Mughal administration, dividing their administration into pargunnas. However, the pargunna signified a larger revenue area—divisions that would come to be called tehsils.

Under the British administration, revenue circles defined the rate of revenue assessment of a given area. Qadian was included within the same revenue circle as

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<sup>181</sup> David Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (I.B. Tauris & Co Ltd: London, 1988).

<sup>182</sup> Friedmann, *Prophecy Continuous*, 3.

<sup>183</sup> Richards, *Mughal Empire*, 79-82.

Batala town despite its past development apart from it. The revenue circle encompassing Qadian and Batala did not conform to previous administrative divisions that separated the two towns. Before the annexation of the Punjab, Batala and Qadian were part of different states within the Sikh confederacy: Batala formed part of the Kanya state, while Qadian formed part of the Ramgurhis state. They were also administrated differently after the British settlement. The 1856 revised settlement report for the Gurdaspur district listed Qadian and Batala as having been separate jagirs under Ranjit Singh. They were incorporated administratively in 1862, when the colonial administration consolidated their control over Batala. They managed to do so by transferring jagirs held by Raja Tej Singh, a dying landowner without heirs, from the North to Batala. The Punjab administration granted 186 villages in the southwest area of Batala to Tej Singh shortly before his death, organizing these villages into their own jurisdiction around the town of Batala. The British administered those villages not included within Tej Singh's jagir separately from Qadian, which had 'escheated' to the state after the death of Ranjit Singh's 'reputed' heir. With Tej Singh's death, the separate jurisdiction around Batala was abolished, and Singh's jagir was amalgamated into what had been the revenue area of Qadian. The administrative headquarters of the new tehsil shifted to Batala.<sup>184</sup> The town of Qadian and the villages around it were included within a single revenue circle with the urban center of Batala—the Bangra circle. As part of an assessment that included the abundant well irrigation and market gardens of Batala, Qadian was taxed at a fuller revenue rate compared to other revenue circles in the district.<sup>185</sup>

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<sup>184</sup> Danes, *Revised Settlement of Gurdaspur District*, 14-15.

<sup>185</sup> Kennaway, *Settlement of Gurdaspur District*, 21.

The judgment in *Hussain Shah v Gul Muhammad* (1920) provides information about how land devolved within Mirza Ghulam Ahmad's family. It was divided among multiple heirs. This may have been in accordance with the family's adherence to Muslim laws of inheritance, which recognized equal shares for sons and shares for daughters at half that of sons.<sup>186</sup> The family owned seven villages, over which at least Ghulam Ahmad's father Ghulam Murtaza and paternal uncle Ghulam Mohi-ud-din had separate shares of land. Upon their deaths, land devolved to their sons in equal shares. The 1852 and the 1865 record-of-rights also entered female heirs as co-sharers of the land.<sup>187</sup>

Individual land shares within the family further diminished through subsequent land alienations. Superior land rights did not place the restrictions to alienation of land that village coparcenaries with shared land rights did. Like so much of the agricultural land in the province, land once owned by the family passed out of their hands. By 1885, a greater portion of the family estate had been sold to a single buyer. Further alienations of land through mortgages, sales, exchanges, and gifts took place after 1885.<sup>188</sup> Qadian thus reflected the broader patterns of economic transformation taking place in the Punjab at the time, which led to legal interventions like the 1900 Land Alienation Act.

As ancestral landowners, Mirza Ghulam Ahmad's family occupied a similar position within the colonial order in the Punjab as rural religious leaders, the pir and

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<sup>186</sup> *Hussain Shah v Gul Muhammad* (1920) 25 PLR 59 at 144. This information was produced in land dispute involving Ghulam Mohi-ud-din's heir. It did not state all of the family members with land rights, only those relevant to the case.

<sup>187</sup> *Ibid.* at 149.

<sup>188</sup> *Ibid.*, at 147.

the sajjada nashin.<sup>189</sup> These were the heirs of the baraka (blessings) of Sufi saints, and as such they exerted a strong influence over the rural majority that made pilgrimage to the saints' shrines. Like large landowners, the Punjab administration's policy treated them as influential intermediaries between the state and the masses and sought to instill loyalty among them to the British government. The British incorporated them into their rural administration, particularly in west and southwest Punjab, where they served as zaildars (revenue officials), magistrates, and district board members.<sup>190</sup> Classed as 'landed gentry' in the Land Alienation Act, they were entitled to government land grants in canal colonies after 1900.

Muslim rulers in the Punjab had long given patronage to Sufi shrines as a way to bring the Punjab countryside within the administrative orbit of the state.<sup>191</sup> In this respect, the British land policies maintained religious structures that already existed. Sultan Muhammad ibn Tughluq (d. 1351) used local revenue to support the successors of the Chishti saint Babi Farid (d. 1265).<sup>192</sup> Babi Farid's successors, in turn, gave patronage to local Jat chiefs. By the early seventeenth century, Jat agriculturalists were initiated into the Chishti Sufi order at the hands of Babi Farid's successors. Thus by giving patronage to Babi Farid's successors, the Sultanate exerted control over the numerous Jat tribes that had settled in the Punjab countryside before the Sultanate was established.

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<sup>189</sup> David Gilmartin, 'Religious Leadership and the Pakistan Movement in the Punjab' in *Modern Asian Studies* 13, 3 (1979), 485-517.

<sup>190</sup> Ibid., 494.

<sup>191</sup> Ibid., 485-490.

<sup>192</sup> Richard Eaton, 'Political and Religious Authority of the Shrine of Baba Farid,' in *Moral Conduct and Authority: the Place of Adab in South Asian Islam*, ed. Barbara Metcalf (Berkeley: University of California Press, 1984), 33-356.

These linkages, which organized the rural population in the Punjab around the spiritual authority of the pir, were formalized through an initiation ceremony called ba'yat. This rite of initiation was performed when the disciple (murid) placed his hands on those of his pir (spiritual guide) and declared his belief in the Islamic creed and his membership in the spiritual order to which his pir belonged.<sup>193</sup> In the seventeenth century, bay'at into the Chishti order carried political and perhaps even military obligations. By the end of the nineteenth century, the Indian census found that the majority of Muslims in the Punjab had entered into ba'yat with a Sufi pir.<sup>194</sup>

However, while Muslim ancestral landowners were in a similar position as the pir and sajjada nashin (custodians of Sufi shrines), their land rights were different under the Punjab administration. While superior land tenures gave Ghulam Ahmad's family the right to alienate their ancestral land (e.g. sell or mortgage it), the sajjada nashin or pir's land right was attached to the Sufi shrine. In the Punjab, these shrines were categorized with other religious endowments as public waqfs, and they functioned as a trust that prevented the alienation of land attached to them. Around 1885, a section of Ghulam Ahmad's family began a process of transferring their individual property shares in Qadian to a type of waqf called a takia. This resulted in the legal recognition of a sajjada nashin in Qadian, and the property rights attached to that office.

Ghulam Ahmad's uncle Ghulam Mohid-ud-din had left his property in Qadian to his three sons in equal shares.<sup>195</sup> One of these sons, Kamal Din, managed cultivation of the land and became a fakir or 'holy man' in the Naushauhi Qadiri order.

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<sup>193</sup> J. Spencer Trimingham, *The Sufi Orders in Islam* (Oxford: Oxford University Press, 1971), 141.

<sup>194</sup> H. H. Risley and E. A. Gait, *Census of India*, vol. 1, pt. 1 (Calcutta: Superintendent of Government Printing, 1903), 375.

<sup>195</sup> *Hussain Shah v. Gul Muhammad* (1920).



In 1894, Kamal Din set up a takia. The takia was classified under British Indian law in the Punjab as a religious endowment in the same category as Sufi shrines (durgahs). It was defined as the residence where a fakir imparted his religious teachings to his followers. Should that fakir reach a high enough stature to attract a large following of disciples, the 'takia' became a 'khankah' while he lived and a 'durgah' after his death. When the takia was set up, Kamal Din and one of his brothers gifted around 23 kanals worth of land to it.<sup>196</sup> This was recorded within the colonial record-of-rights, which named Hussain Shah, a cultivator and disciple of Kamal Din, as manager of the takia. From 1894 and 1901, Kamal Din's brothers transferred property to Kamal Din. From 1907 and 1910, Kamal Din transferred the property into the takia. This protected the land from alienation: as manager of Takia Kamal Din, Hussain Shah was responsible for paying revenue to the state and was entitled to a portion of the produce of the land, but had no power to alienate that land. Upon the death of Kamal Din in 1912, Takia Kamal Din remained a takia to which a total of 82 kanals of agricultural land in Qadian was endowed. *Hussain Shah v Gul Muhammad* (1920) arose as a property dispute between the hereditary heir of this ancestral land and Hussain Shah, its manager. The Lahore high court resolved this dispute by recognizing Hussain Shah as the sajjada nashin of Takia Kamal Din. As such, he had a property right attached to his office that superseded the absolute property right of the hereditary heir.

Takia Kamal Din established a form of religious authority that was rooted in Qadian, centred around the residence of Kamal Din and endowed through his ancestral lands. It was a takia and remained so after Kamal Din's death, suggesting his limited discipleship and the localized nature of his authority. He preached to a

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<sup>196</sup> One kanal equals approximately 605 square yards or 1/8 acre.

following described as ‘sweepers’—a term applied to depressed classes lacking property ownership rights.<sup>197</sup>

Takia Kamal Din also established what the colonial administration defined as ‘orthodox’ religious authority in Qadian. The Naushahi branch of the Qadiri order to which Kamal Din belonged was defined within the official census as part of Sunni orthodoxy. As discussed in chapter one, Ibbetson’s 1881 census interpreted divisions within Islam in sectarian terms: ‘sects’ dissented from the ulama, a class of religious scholars who interpreted Islamic law. The 1891 census maintained the division of Muslims into Sunni ‘orthodox’ Muslims and ‘sectarian’ Muslims. However, it now described Sufi orders, to which a majority of Muslims in the Punjab belonged, as being part of Sunni ‘orthodoxy.’<sup>198</sup> Sunnis belonged to four main orders: the Chishti, Qadiri, Naqshbandi, and Saharwardi orders. The Qadiri order to which Kamal Din belonged was, according to the census, the Sufi order to which most Sunni maulvis belonged. The 1901 census of India maintained this taxonomy by describing the structure of ‘orthodoxy’ in Islam as the twofold priesthood of the ulama and the pir: while the ulama interpreted law and dogma, the pir facilitated spiritual submission and communion with God. This census held that: ‘with the exception of the Ahl-i-Hadis or Wahabbis [sic], almost all Muhammadans of the Sunni sect go through the ceremony of initiation [bay’at] by a pir.’<sup>199</sup>

*Hussain Shah v Gul Muhammad* illustrates how the establishment of certain forms of ‘orthodox’ religious authority depended upon how property rights were configured by personal law. In this case, Ghulam Mohid-ud-din’s heir claimed

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<sup>197</sup> *Hussain Shah v. Gul Muhammad* (1920), at 147.

<sup>198</sup> E. D. Maclagan, *Census of the Punjab and its Feudatories*, vol. 19: pt. 1 (Calcutta: Superintendent, Government Printing, 1892), 193.

<sup>199</sup> Risley and Gait, *1901 Census of India*, 375.

hereditary rights over the land endowed to Takia Kamal Din, a claim that depended upon the court determining that the takia was invalid. Making this determination came down to whether Ghulam Ahmad's family followed customary law or Muslim personal law. Ultimately, the court determined that his family followed Muslim personal law, according to which the alienation of agricultural land away from Ghulam Mohid-ud-din's hereditary heir was valid. Had the court determined that the family followed customary law instead, agricultural land in Qadian would have been restricted to Mughal Barlas.<sup>200</sup> The case illustrates the uncertain nature of personal law and how easily the 'rural and urban distinction' blurred. Despite the hereditary heir's argument that his family followed customary law, the creation of the takia was itself evidence of that the family followed Muslim personal law.

The establishment of Takia Kamal Din as a public waqf protected Kamal Din's land from fragmenting and established what the colonial administration defined as 'orthodox' religious authority in Islam. Around the same time that Kamal Din created Takia Kamal Din in Qadian, the Ahmadiyya community formed around the religious authority of Ghulam Ahmad. This religious authority was defined by the colonial census as 'sectarian', which interpreted Ahmadis as dissenting from the religious authority of the *ulama* according to a liberal understanding of religion as a private matter of belief and conscience.

### The Doctrinal Boundaries of the Ahmadiyya

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<sup>200</sup> *Hussain Shah v. Gul Muhammad* (1920). The court's decision between either customary law or Muslims personal law was not clear cut. While the family followed practices like adoption not recognized under Muslim personal law, their inheritance practices did not conform to principles of inheritance through a single heir that guided customary law.

In 1901, Mirza Ghulam Ahmad petitioned the Punjab administration to have his religious followers recognized as a Muslim sect called the Ahmadiyya in the upcoming census.<sup>201</sup> The census's identification of them as such defined them as a religious group that dissented from the religious authority of the *ulama* as a matter of individual conscience and belief. This section will examine the aspects of the Ahmadiyya that conformed to the colonial administration's definition of a Muslim sect. It will do so by examining the form of religious authority that Mirza Ghulam Ahmad claimed over his followers, which was superior to that traditionally claimed by the *ulama*, and his interpretation of Islamic doctrines. The identification of his followers as a Muslim sect by the colonial administration circumscribed Ghulam Ahmad's religious authority over his followers and identified them with his particular interpretation of Islamic law. This section will examine the social context in which Ahmadi doctrines emerged, relating the Ahmadiyya's identification as a Muslim sect to the social position of its prominent members within this context.

Ghulam Ahmad was known for participating in interreligious debates with Christian and Hindu missionaries.<sup>202</sup> Christian missionaries were particularly successful in gaining converts to Christianity in the Gurdaspur district where these debates took place.<sup>203</sup> The decade between 1881 and 1891 saw a sharp increase in the

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<sup>201</sup> Punjab Proceedings, B Proceedings, Index No. 92-93, 9 January 1901 IOR P/6070: 'Mirza Ghulam Ahmad of Kadian, Gurdaspur District, prays that he may be granted permission to send a deputation consisting of 12 of his followers to wait upon the Lieutenant-Governor for the purpose of submitting a memorial praying that the sect of Muhammadans to which they belong may be officially recognized.' The petitioner was informed that the Lieutenant-Governor is unable to receive the deputation proposed to be sent.

<sup>202</sup> For an account of these religious debates see Lavan, *The Ahmadiyah*, 12-73.

<sup>203</sup> On Christian missionaries in the Punjab, see Avril Powell, 'Processes of Conversion to Christianity in 19th Century North Western India,' in *Religious Conversion Movements in South Asia: Continuities and Change 1800-1900*, ed. Geoffrey A. Oddie (Richmond: Curzon Press, 1996), 15-55.

amount of native Christians in districts including Amritsar, Lahore, and Gurdaspur.<sup>204</sup> During this period, Christian missionaries in the Punjab took to a particularly aggressive form of street preaching, which included playing music to attract large crowds before preaching against Hinduism and Islam.<sup>205</sup> They proselytized through print as well. Missionaries were involved in setting up the first printing press in the province, established in Ludhiana in 1836 by the American Presbyterian Mission.<sup>206</sup> Among Ghulam Ahmad's earliest religious tracts was one written in response to arguments against Islam made by a Christian missionary who had converted from Islam.<sup>207</sup>

The Arya Samaj also competed with Christian missionaries for converts to Hinduism. The Arya Samaj was a Hindu religious organization established in the Bombay in 1874 by Dayanand Saraswati (1824-1883).<sup>208</sup> They were reform minded, stressing monotheism, ritual simplicity, and caste reform of 'orthodox' Hinduism. Dayanand taught that the Arya Samaj was a return to Hinduism's Vedic teachings, which unlike Christianity and Islam were divinely inspired.<sup>209</sup> Arya Samaj missionaries performed what they called shuddhi, a ceremony that was meant to purify lower castes of untouchability and bring them within the fold of Hinduism. Shuddhi brought the Arya Samaj into competition with Christian missionaries and

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<sup>204</sup> Maclagan, *1891 Census of the Punjab*, 189.

<sup>205</sup> Akbar-i-Am (Lahore) 2 May 1884, *Selections*, IOR L/R/5/61

<sup>206</sup> Farina Mir, *The Social Space of Language: Vernacular Culture in British Colonial Punjab* (Berkeley: University of California Press, 2010).

<sup>207</sup> Mirza Ghulam Ahmad, *Three Questions by a Christian Answered* (Lahore: Anjuman Himayat-i Islam, 1891).

<sup>208</sup> For the background of the Arya Samaj, see: Norman Barrier, 'The Arya Samaj and Congress Politics in the Punjab, 1894-1908' in *The Journal of Asian Studies* 26, 3 (1967); Jones, *Arya Dharm*.

<sup>209</sup> T.N. Madan, *India's Religions: Perspectives from Sociology and History* (New Delhi: Oxford University Press, 2004), 28.

Muslims. Like Christian missionaries, the Arya Samaj founded newspapers and engaged in street preaching.

The main thrust of the Arya Samaj's attack against Islam was that it promoted violence and divided the world into believers and infidels.<sup>210</sup> The 'doctrine of jihad' was a frequently occurring topic in Arya Samaj newspapers in the late nineteenth century. Jihad was a term found in the Quran that connoted a Muslim's duty to struggle in the way of Islam and could be interpreted to mean a Muslim's duty to wage religious war against non-Muslims. In British India, it connoted a Muslim's duty to oppose British rule, particularly for the British government's opposition to the Ottoman Sultan. In 1880, newspapers reported that the Amir of Afghanistan had written a treatise on jihad and circulated it amongst his subjects, that he was using jihad to assemble a Ghazi army that was ready to attack the British at any time.<sup>211</sup> When a British woman was attacked and killed by a Pashtun on a railway platform, newspapers called it 'the Ghazi outrage.'<sup>212</sup> One newspaper wrote: 'Let the English...bear in mind that the sacred books of the Muhammadans enjoin the destruction of infidels; that it is unlawful for them to obey an infidel, that the Pathan [Pashtun] have thoroughly learnt the lesson of Jihad, and that the idea of shedding the blood of infidels has taken a strong hold on their minds.'<sup>213</sup>

The Ahl-i-Hadis were concerned with counteracting the Arya Samaj's writings about jihad. Like Mirza Ghulam Ahmad, many came from the class of men intermediary between the colonial state and the masses: approximately ¼ of those

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<sup>210</sup> Jones, *Arya Dharm*, 145-153.

<sup>211</sup> *Punjab-i-Akhbar* (Lahore), 20 March 1880, *Selections*, IOR L/R/5/57.

<sup>212</sup> *Punjab-i-Akhbar* (Lahore), 6 February 1897, *Selections*, IOR L/R/5/181.

<sup>213</sup> *Punjab Samachar* (Lahore), 6 February 1897, *ibid*.

who identified themselves as Ahl-i-Hadis occupied government or princely service.<sup>214</sup> In Amritsar, Ahl-i-Hadis or Wahabis (the two were conflated before 1891) represented propertied Muslims in associations and local government. A prominent figure among the Ahl-i-Hadis was Muhammad Husain of Batala. In 1876, Muhammad Husain wrote a treatise on jihad.<sup>215</sup> His treatise argued that Islam did not permit Indian Muslims to wage jihad against the British government in India because it guaranteed to Muslims religious liberty and security of life and property. Following this treatise, Ghulam Ahmad published a book called *Barahin-i-Ahmadiyya* (Ahmadi Proofs), which also argued that Indian Muslims were not permitted to wage jihad against the British government. Ahmad's position on jihad closely aligned with Muhammad Husain's position, and Husain wrote a lengthy and positive review of the book.<sup>216</sup>

While Ahl-i-Hadis leader Muhammad Husain argued that Muslims in India were bound to obey the British, the British administration associated the Ahl-i-Hadis with violent revolt against non-Muslim rule through its census. As discussed in chapter one, the 1881 Punjab census classified Ahl-i-Hadis, Muhammadi, etc., as 'Wahabis.' This reflected the colonial censuses' tendency to differentiate Muslims using taxonomies that were imprecise and broad. 'Wahabism' designated various groups who did not recognize the religious authority of the ulama and the pir.<sup>217</sup> At the same time, being classified as 'Wahabi' associated these groups with past

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<sup>214</sup> Metcalf, *Islamic Revival*, 268-296.

<sup>215</sup> *Ashaat-ul-Sunnat* (Lahore) for June, September, and December 1879, *Selections*, IOR L/R/5/57.

<sup>216</sup> *Ashaat-ul-Sunnat* (Lahore) for June and July 1884. *Selections*, IOR L/R/5/61.

<sup>217</sup> Ibbetson, *Panjab Ethnography*, 147.

revolutionary movements.<sup>218</sup> Ibbetson's 1881 census traced Wahabism to the teachings of Muhammad Abdul Wahhab, a late seventeenth-century Muslim reformer from the Arabian Peninsula. It traced Wahabism in India to the teachings of Syed Ahmad of Bareilly (1786–1831). In doing so, it associated Wahabis with Muslim uprisings against non-Muslim rule in India: Syed Ahmad had waged jihad against Sikh rule in the Punjab. In 1864, the colonial administration imprisoned a number of people it labeled as Sayed Ahmad's followers for preaching jihad against the British following the 1857 mutiny.<sup>219</sup> However, not all colonial officials had agreed with Ibbetson's broad use of the term Wahabis. Some colonial officials had discerned a line between 'Wahabis' who were 'purely religious' and those that were 'political fanatics.'<sup>220</sup> In *The Indian Mussalmans* (1876), W. W. Hunter made this distinction one between Ahl-i-Hadis purists and Wahabis fanatics.<sup>221</sup>

Muhammad Husain attempted to distinguish his followers as a separate sect from Wahabis. In 1886, Muhammad Husain sent a letter to the Secretary of the Punjab governor asking that the term Wahabi not be used to describe members of the Ahl-i-Hadis in official correspondence. The Government of India took up the matter, and as a result Husain received an official letter requesting that Muslims refrain from calling Ahl-i-Hadis members Wahabi or face criminal prosecution for defamation.<sup>222</sup> Finally, in 1891, the census of India began to classify Ahl-i-Hadis and Wahabis as

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<sup>218</sup> Hardy, *Muslims of India*, 82-85.

<sup>219</sup> Government of Punjab memo on the 'Release of Wahabi prisoners,' Punjab Proceedings, A Proceedings, January 1883, IOR P/2004.

<sup>220</sup> William Muir letter to Lord Mayo dated 18 July 1870, quoted in: Hardy, *The Muslims*, 82.

<sup>221</sup> W. W. Hunter, *The Indian Musalmans*, 3rd. ed. (London, 1876)

<sup>222</sup> *Panjabi Akhbar* (Lahore) 29 January 1887, IOR L/R/5/64.



separate sects.<sup>223</sup> The census's recognition of finer distinctions among Muslims distanced Muhammad Husain's followers from politically subversive interpretations of Islamic doctrines associated with Wahabism.

Mirza Ghulam Ahmad became prominent as a Muslim religious scholar for debating against Pandit Lekh Ram, a member of the Arya Samaj.<sup>224</sup> Lekh Ram published a number of treatises against Islam, including a book arguing that jihad was the foundation of Islam. He also published treaties against Ghulam Ahmad in particular, including a refutation of his *Barahin-i-Ahmadiyya*. This book, called *Takdhib-i Barahin-i Ahmadiyya*, was published in 1886. Because of the abusive language to the prophet Muhammad contained in the book, Muslims called for the prosecution of Lekh Ram and the publisher of *Takdhib-i Barahin-i Ahmadiyya*.<sup>225</sup> That same year, Ghulam Ahmad and Lekh Ram publically debated in Hoshiyapur. In the end, Ghulam Ahmad and Lekh Ram agreed to a *mubahala*, which meant an act of cursing each other: opponents in a debate invoked the curse of God upon the one who was wrong.<sup>226</sup>

Lekh Ram was murdered eleven years later by an unidentified assassin, which led Ghulam Ahmad to publish a notice of the mubahala in an Arya Samaj newspaper.<sup>227</sup> This generated a lot of attention in smaller Urdu newspapers in the

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<sup>223</sup> Risley and Gail, *1901 Census of India*, 375.

<sup>224</sup> This account is drawn from Jones, *Arya Dharm*, 146-153; Friedmann, *Prophecy Continuous*, 8-9; and Lavan, *The Ahmadiyah*, 33-34.

<sup>225</sup> News of this intended lawsuit was published in the Muslim newspaper *Chaudhwin Sadi* (Rawalpindi), 1 September 1896, *Selections*, IOR L/R/5/180.

<sup>226</sup> Definition in Friedmann, *Prophecy Continuous*, 6.

<sup>227</sup> The notice was published in *Bharat Sudhar* (Lahore), 13 March 1897, *Selections*, IOR L/R/5/181. It begins: 'Ten years ago, in accordance with a revelation made to me by the Almighty, I issued a notice on the 20<sup>th</sup> February 1886 to the effect that God had resolved upon punishing Pandit Lekh Ram for his blasphemy (*beadbian* and *gustakhian*). I offered to reveal the form of punishment and the time within

Gurdaspur district, mainly Arya Samaj newspapers (with a circulation of between 100 and 300). It fed into the already simmering tensions between Hindus and Muslims in Lahore and attracted the attention of the larger Lahore newspaper *Paisa Akhbar* (with a circulation of 10,000).<sup>228</sup> Muslim newspapers criticized Ghulam Ahmad for publishing the mubahala because it seemed to feed into allegations made in Arya Samaj newspapers that Lekh Ram's murder had been committed by a Muslim.

The doctrinal boundaries separating Mirza Ghulam Ahmad's followers and Muslims who identified as Ahl-i-Hadis were likely fluid for a time. However, they solidified after Ghulam Ahmad's followers began to pledge allegiance to him formally through the Sufi institution of bay'at, which took place in Ludhyana in 1889. In 1891, also in Ludhyana, Ahmad publicly debated with Ahl-i-Hadis leader Muhammad Husain.<sup>229</sup> In this debate, Ghulam Ahmad used the Quran to argue that Jesus had been alive when he was taken down from the cross and died a natural death in Kashmir. This position was based on the authority of Ghulam Ahmad's own interpretation of the Quran. This interpretation conflicted with traditions held by Muhammad Husain as authoritative. It also did not conform to Muslim eschatological expectations that derived from these traditions, according to which the Mahdi would appear on earth accompanied by Jesus and lead Muslims to redemption. Belief in the

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which it would be inflicted if the Pandit agreed (to such a course). The Pandit gave his free consent. I published another notice, dated the 20<sup>th</sup> February 1893, containing the prophecy in question in detail. This prophecy, which was also published in the *Barkat-ul-Dua* and other books and notices, was to the effect that the death of the Pandit, which would come to him as a punishment, would not result from ordinary fever or other disease, but that he would fall victim to the wrath of the Almighty within six years of the date of the notice.'

<sup>228</sup> *Paisa Akhbar* (Lahore), 17 March 1897, and 23 March 1897, *Selections* 225-226, *ibid*.

<sup>229</sup> Friedmann, *Prophecy Continuous*, 5-6.

Mahdi, the ultimate redeemer for Muslims, was particularly strong among Wahabi (and Ahl-i-Hadis) Muslims in India.<sup>230</sup>

Ghulam Ahmad began to assert a religious authority to interpret Islamic law that was higher than the *ulama* by claiming prophetic status. His earliest claim towards divine communion with God was a *majaddid*, a figure who came every century from a line of reformers to lead Muslims back to true Islam and give them guidance within the contemporary world.<sup>231</sup> He also claimed to have been *muhaddath*, a person spoken to by an angel or God.<sup>232</sup> These claims were less controversial at the time than his later claim to having been the Mahdi and Messiah.<sup>233</sup> According to Ahmadiyya belief, the return of Jesus foretold in Islamic sources was figurative. Ghulam Ahmad appeared in the spirit of Jesus.

Ghulam Ahmad claimed to be a prophet, but did so while making a distinction between law-bearing and non-law-bearing prophets. While he recognized Muhammad as the last prophet to bring a divine law, he held that prophecy continued after him. Accordingly, Ghulam Ahmad interpreted Muhammad's designation as 'Khatam-e-Nabuwat' (seal of the Prophets) in the Quran differently than the Islamic traditions held to be authoritative during his time and afterward, according to which Muhammad was the last prophet. Ghulam Ahmad interpreted 'Khatam-e-Nabuwat' to mean that Muhammad was the stamp of prophets and all prophets after him would bear his stamp. Prophecy after Muhammad continued within the parameters of the law that he founded. Thus Ghulam Ahmad claimed to be a non-law bearing prophet whose

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<sup>230</sup> Account of the debate in Friedmann, *Prophecy Continuous*, 6.

<sup>231</sup> *Ibid.*, 94-101.

<sup>232</sup> *Ibid.*, 109.

<sup>233</sup> *Ibid.*, 11-118.

interpretation was restricted to the Quran, hadith, and sunna. While Ghulam Ahmad's interpretation of Khatam-e-Nabuwat existed in early Islamic traditions, in contemporary times belief in the unqualified finality of Muhammad's prophecy has become a cardinal article of faith for Muslims.<sup>234</sup>

For at least some Muslims at the time, Ghulam Ahmad's claim to being a Mahdi was more controversial than his claims to being a prophet. Muhammad Husain disputed his claim to being the Mahdi in his newspaper *Ishaatur Sunah*, writing: 'he never thought the 'Mirza' being a 'Mogul' would claim 'Mehdi' [Mahdi] who must be a 'Syad' [a descendent of the Prophet].'<sup>235</sup> Husain demonstrated here that he believed in the notion of a Mahdi, and yet he also suggested that belief in the Mahdi was in itself subversive to the British government: he concluded the same article by writing that he no longer considered Ghulam Ahmad loyal to the British. This suggests the political implications attached to claiming to be Mahdi in the late nineteenth century. In the Lahore newspaper *Wafadar*, one writer called on other Muslims to reject Ghulam Ahmad as Promised Messiah and Mahdi because he would not have come during a time of peace and liberty. The writer went on to reject that he is *even* a prophet, suggesting that this is the lesser claim.<sup>236</sup> The appearance of the Mahdi implied political as well as moral disorder prevailed.

In the late nineteenth century, belief in the Mahdi was associated with violent uprisings. Around the time that the Ahmadiyya emerged in the Punjab, Mahdi-inspired uprisings occurred among Muslim tribes in West Africa and the Sudan

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<sup>234</sup> Ibid., 82-83.

<sup>235</sup> *Wafadar* (Lahore), 15 May 1897, *Selections*, IOL L/R/5/181.

<sup>236</sup> Ibid.

against an Egyptian administration.<sup>237</sup> Ghulam Ahmad fulfilled messianic expectations for his followers without the expectation of political revolution through potentially violent means. According to the hadith whose authority he drew upon to support his claim, the Mahdi would destroy the cross, abolish the *jizya* (tax for non-Muslims), slay the pigs, and come during a time when Muslims had adopted Jewish and Christians ways that were contrary to Muslim teachings. Ghulam Ahmad interpreted this hadith not to mean that the Mahdi would go to war against Christianity. Rather, the Mahdi would bring about a trend that would lead to all Christians gradually entering the fold of Islam through conversion.<sup>238</sup> In print, the Ahmadiyya argued against the notion of a 'bloody Mahdi.'<sup>239</sup> This argument was made within the context of religious debate, but it served to define Ahmadiyya doctrine in contradistinction to other expectations of the Mahdi.

Different from Muslim leaders who argued that jihad was not legitimate under the conditions created by British rule, Ghulam Ahmad reinterpreted the meaning of jihad for Muslims as being historically contingent. The historical circumstances under which jihad by the sword was permitted no longer existed anywhere or in any jurisdiction. The arrival of the Mahdi, who signaled the final redemption of Islam, meant that those conditions would never exist again. Jihad through argument, however, was now and would be in the future necessary for every Muslim. Non-violent jihad was part of Ahmadi eschatological expectations for Ghulam Ahmad and linked to Muslim redemption: Ahmad wrote that ending violent jihad was necessary

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<sup>237</sup> See P. M. Holt, *The Mahdist State in the Sudan, 1881-1898: A Study of its Origins, Development and Overthrow* (Oxford: Clarendon Press, 1970).

<sup>238</sup> Lavan, *Ahmadiyah*, 46.

<sup>239</sup> *Al-Hakam* (Qadian), 31 January 1902; *Paisa Akhbar* (Lahore) 28 December 1901, in *Selections*, IOR L/R/5/185.

for Muslim prosperity.<sup>240</sup> He declared that there was ‘no sword except the sword of arguments and proofs.’<sup>241</sup>

The institution of bay’at and the religious authority that being Mahdi conferred on Ghulam Ahmad created a centralized form of religious authority among Ahmadis. In contrast to the Ahl-i-Hadis, this form of religious authority left no room for doctrinal ambiguity over the meaning of jihad among his followers. Muhammad Husain advocated an interpretation of jihad in which the conditions for jihad against the British had not been met. However, while Husain may have represented the beliefs of his own Ahl-i-Hadis followers, the Ahl-i-Hadis were dispersed throughout India without any single religious authority to articulate doctrine. They tended not to recognize hierarchical structures of religious authority, rejecting Sufi *pirs* as spiritual mediums between God and the individual.<sup>242</sup> Muslims in India who identified themselves to be Ahl-i-Hadis expressed a range of doctrinal positions, including religious opposition to the British government. They also expressed different eschatological expectations, which included violent revolution.<sup>243</sup> A centralized authority meant that Ghulam Ahmad defined what jihad meant for his followers. In 1901, he defined his followers as Ahmadiyya through the Indian census. In doing so, he labeled his followers and associated them with a set of doctrines that did not spell certain violent insurrection against British rule among Muslims.

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<sup>240</sup> Mirza Ghulam Ahmad, ‘A Proposal for the Utter Extinction of Jihad’ (presented on the coronation of Edward VII, his Imperial Majesty the King-Emperor, Lahore, 1902) printed in *The Review of Religions*, January 1902, 1-7.

<sup>241</sup> Quoted by Friedmann, *Prophecy Continuous*, 379.

<sup>242</sup> Metcalf, *Deoband*, 265.

<sup>243</sup> *Ibid.*, 268-296.

Different than ‘Ahl-i-Hadis’, Ghulam Ahmad rejected the authority of *ulama* in India to interpret Islamic law without rejecting the Sunni schools of law. The Ahl-i-Hadis identified themselves with the ‘Ahl-i-Hadith’ who emerged during the first centuries of Islam and opposed the schools of law. They instead favoured the direct use of textual sources by individual jurists.<sup>244</sup> According to Ghulam Ahmad the main sources of law were the Quran, followed by the sunna (sayings and deeds of Muhammad) and the hadith (the Islamic traditions). If all three sources of law did not provide a solution, Ghulam Ahmad referred to the Hanafi school of law and *ijtihad* (independent reasoning, interpretation).<sup>245</sup> As will be explained in the next section, the Ahmadiyya developed the institutions to train its own class of *ulama*.

The Ahmadiyya’s interpretation of *jihad* had material implications for Muslims in the same class as Ghulam Ahmad. British fear of Muslim rebellion seemed to correlate with government policies for promoting educational and employment opportunities for Muslims. In 1871, Governor-General Lord Mayo asked Bengal civil officer W. W. Hunter to write on ‘the burning question of the day:’ were Muslims religiously bound to rebel against the Queen?<sup>246</sup> At the same time, there was a growing disparity between Hindus and Muslims in education and government employment. The government attributed the poor showing of Muslims in government schools to religious and cultural reticence to receive an irreligious education. Mayo was concerned that British policy should encourage Muslims to attend government schools. For Indian Muslims in particular, the British government correlated government education with less religiosity, and religiosity with rebellion.

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<sup>244</sup> Ibid.

<sup>245</sup> Lathan, ‘The Relativity of Categorizing,’ 377-378.

<sup>246</sup> Hardy, *Muslims of India*, 83.

Interreligious debates between Muslims and the Arya Samaj also seemed to have material implications in the Punjab, where competition for merit based appointments took the form of competition between religious groups.<sup>247</sup> Western-educated Punjabis organize with their co-religionists rather than as a class. Sikhs organized into Singh Sabhas that tended to focus internally on Sikh orthodoxy and apostasy. Educated Hindus from commercial castes—Khatri, Arora, and Bania—affiliated with the Arya Samaj.<sup>248</sup> Muslims tended to organize into *anjumans* (associations) modeled after associations in Britain, like the Anjuman Islamia (1869). This anjuman was established in Lahore by the British administration with the two-fold aim of protecting Muslim interests and fostering Muslim loyalty to the British.<sup>249</sup> The Anjuman Himayat-i-Islam (e. 1884) in Lahore attracted Muslims in the intermediate elite between the British administration and the masses. Its members included Fazli-Husain, Muhammad Iqbal, and Muhammad Shafi—all of whom would become prominent Muslim politicians in representative government after its expansion in 1919.<sup>250</sup> Until at least 1897, Ghulam Ahmad participated in the Anjuman Himayat-i-Islam and a significant number of his followers were its members.<sup>251</sup>

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<sup>247</sup> N. Gerald Barrier, 'The Punjab Government and Communal Politics, 1870-1908' in *The Journal of Asian Studies* 27, 3 (1968): 531-534.

<sup>248</sup> Ibid., 531-534.

<sup>249</sup> Gilmartin, *Empire and Islam*, 77.

<sup>250</sup> Sh. Ziauddin (ed.), 'Anjuman Himayat-e-Islam, Lahore: Diamond Jubilee, 24-26 March 1967' (Lahore: Anjuman Himayat-i-Islam, 1967); Mian Fazl-i- Husain, 'A Message from England,' read at the 17<sup>th</sup> annual convention of the Anjuman-i-Himayat-i-Islam (Sialkot: City Press, 1902).

<sup>251</sup> *Jafar Zatalli* (Lahore) 28 September 1897, *Selections* IOR L/R/5/181; for information on the anjuman see Lavan, *Ahmadiyah*, 10.



Ghulam Ahmad, who was then known for his religious debates with the Arya Samaj, spoke before the anjuman and published through its auspices.<sup>252</sup>

In the Punjab, there was a low proportion of Muslims to Hindus in government education and professional employment. In 1883, 54 Muslims held the executive post of extra assistant commissioner against 38 Hindus. When included with the administrative posts of tahsildar, munsif, and superintendent of settlements, Muslims occupied 45 per cent of the 312 positions. However, Muslims only occupied 23.1 per cent of positions where professional and examination qualifications were required, such as in medicine and education.<sup>253</sup> Those castes that comprised the Arya Samaj, on the other hand, dominated the colonial education system in the Punjab and filled the majority of professional positions. Anjuman Himayat-i-Islam was established to promote western education among Punjabi Muslims, establishing primary schools among rural Punjabi Muslims as an alternative to the religious education provided by madrasas. These schools followed a curriculum that included compulsory English and emphasized female education.<sup>254</sup>

The Anjuman Himayat-i-Islam's advocacy of mass education among rural Punjabis was in synch with a shift in the colonial government's education policy under Viceroy Lord Curzon (1899-1905). Law council Lord Macaulay's (1835) had established a policy of promoting education as a means by which European culture was inculcated into an Indian elite. By the late nineteenth century colonial officials had come to associate this style of education with the rise of nationalist feelings among Indians, and shifted towards a policy that promoted education as a means to

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<sup>252</sup> Ahmad, 'Three Questions by a Christian.'

<sup>253</sup> Barrier, 'The Punjab Government', 120-121.

<sup>254</sup> Lavan, *Ahmadiyah*, 10.

employment and a vehicle towards social advancement for all classes in India.<sup>255</sup> Unlike *madrasas*, which relied on private donations, these schools were aided by the colonial administration through a system of grants-in-hand, which combined government agency with the private philanthropy of educated and wealthy Indians, who were typically driven by nationalist, sectarian, and caste group interests.<sup>256</sup>

The prospect of social advancement through secular education also brought converts into the Ahmadiyya fold. Conversion to Islam through Ahmadi missionaries was central to the Ahmadiyya's eschatological expectations, as it was to the Ahmadiyya's doctrine of jihad. According to Ahmadiyya belief, missionizing replaced the notion that Islam would spread by force with the notion that Islam would be spread through persuasion. Its missionary activities were directed at various social levels, as was reflected in print: Ghulam Ahmad published prophecies and religious arguments that reflected the religious debates in the Punjab in an Urdu daily, *Al Hakam*, and articles directed at a western educated readership in an English monthly journal called *The Review of Religions*, which was produced from 1902 for distribution abroad.<sup>257</sup> Spencer Lavan described the Ahmadiyya as a 'middle-class religious resurgence' that was aimed towards attracting literate and educated Indians.<sup>258</sup> On the other hand, the Ahmadiyya established schools and internal

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<sup>255</sup> Ibid., 16-17.

<sup>256</sup> Susanne Rudolph and Lloyd Rudolph, 'Introduction' in *Education and Politics in India: Studies in Organization, Society, and Policy*, eds. Susanne Rudolph and Lloyd Rudolph (Cambridge, Mass: Harvard University Press, 1972), 15-22.

<sup>257</sup> For example, the journal's editor Muhammad Ali argued against western Orientalist scholarship on Islam in *The Review of Religions* (May 1906), 214.

<sup>258</sup> Lavan, *Ahmadiyah*, 11.

institutions that provided a material incentive for the less educated and non-literate to join the fold.<sup>259</sup>

### The Ahmadiyya from a Legal Perspective

As described in chapter 1, community boundaries within personal law were constructed through rules of inclusion and exclusion—such as those that placed restrictions on marriage within the community—and rules that regulated the devolution of wealth within the community. Personal law recognized minority Muslim communities that existed within the Muslim community and followed *ancient* marriage and inheritance customs. The Khojas and the Kutchi Memons were paradigmatic Muslim minority communities, as were Muslim ‘agriculturalists’ belonging to ‘village communities’. ‘Muslim sects’, on the other hand, formed out of doctrinal dissent. According to this logic, colonial law defined the Ahmadiyya as a Muslim sect and determined whether Ahmadis were Muslim or non-Muslim on account of their doctrines, but did not treat them in a similar manner as it did minority Muslim community.

The Ahmadiyya community was organized by its own customs of marriage and wealth distribution within the community. From 1898, Ghulam Ahmad restricted Ahmadi women from marrying non-Ahmadi men. In 1905, Ghulam Ahmad established a waqf. This religious endowment functioned as a community trust, and he established an association to oversee its management. Members of the community could gift property to the association, which would be used to fund missions and

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<sup>259</sup> Ibid.; Avril Powell, ‘Duties of Ahmadi Women: Educative Processes In the Early Stages of the Ahmadiyya Movement,’ in *Gurus and their Followers: New Religious Reform Movements in Colonial India*, (ed.) Antony Copley (Delhi: Oxford University Press, 2000), 128-156.

support new converts without sufficient means of livelihood. The trust also provided for a burial ground at Qadian for pious Ahmadis who bequeathed one-tenth of their property to the association.<sup>260</sup>

However, unlike Muslim minority communities recognized under personal law, Ahmadi customs were not sanctioned under the law. Ahmadi marriages conformed to Islamic and customary rules of marriage sanctioned under personal law. When Ahmadi families could not find suitable matches for their daughters from within the Ahmadiyya community, Ghulam Ahmad offered to arrange marriages from within the same caste or between castes that intermarried.<sup>261</sup> He stipulated that gifts made to the Ahmadiyya waqf required consent by the property's heirs and were subject to land laws.<sup>262</sup> Ahmadi customs thus operated within the rules of personal law.

*Hussain Shah v. Gul Muhammad* (1920), which determined that the Mughal Barlas of Qadian (Mirza Ghulam Ahmad's family) were governed by Muslim personal law, illustrates that the distinction between 'orthodox' and 'sectarian' Islam was not aligned with the distinction between Muslim personal law and customary law.<sup>263</sup> While family members who set up the takia belonged to what the administration considered to be an 'orthodox' Sunni order, Ghulam Ahmad was the founder of a 'sect' that dissented from 'orthodox' authority. Yet the court was not concerned with an apparent division within the family between orthodox and sectarian Muslims. The land dispute was settled on the basis that the entire family followed one personal law,

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<sup>260</sup> Mirza Ghulam Ahmad, *The Will* (Surrey: Islam International Publications Ltd., 2003).

<sup>261</sup> *Al Hakam* (Qadian), 16 February 1898, *Selections*, IOR L/R/5/182.

<sup>262</sup> Ahmad, *The Will*

<sup>263</sup> *Hussain Shah v. Gul Muhammad* (1920).

and personal law was determined by their belonging to the same tribe of Mughal Barlas. In the Punjab, where systems of personal law were underpinned by caste categories, the Ahmadiyya were not legally fixed within the Punjab social order as a minority community. Rather, as an emergent Muslim community, the Ahmadiyya admitted Ahmadi converts across caste lines.

At the same time, prominent Ahmadi leaders were aware of the jurisdictional boundaries created by these caste lines. Prominent Ahmadi missionaries were trained as lawyers in the Punjab. The most prominent among them were Muhammad Ali and Khwaja Kamal-ud-din. They received Western educations and legal training in the Punjab. Muhammad Ali was educated at Punjab University and Government College in Lahore, studying English literature before training as a lawyer. There he met Khwaja Kamal-ud-Din (b. 1870), who was a follower of Ghulam Ahmad at the time, and converted around 1899.<sup>264</sup> Kamal-ud-din was educated in Lahore at Forman Christian College and Islamia College, where he trained in law. He converted sometime in the early 1890s.<sup>265</sup> He served as a lawyer on the Lahore High Court circuit.<sup>266</sup> In 1912, he travelled to Britain and established the Woking Muslim Mission in Surrey. Muhammad Ali never practiced law. He instead settled in Qadian, where he wrote for and managed the Ahmadiyya journal.

Another Punjabi Muslim convert to Ahmadiyya was Zafrullah Khan (1893-1985), a prominent lawyer who wrote prolifically on Islam. He was educated at American Mission School in Sialkot, then Government College in Lahore, and trained

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<sup>264</sup> Al-Hajj Mumtaz Ahmad Faruqi, *Muhammad Ali: The Great Missionary of Islam* (Lahore: Ahmadiyya Anjuman Isha'at-i-Islam, 1966).

<sup>265</sup> Muslim Salamat, *A Miracle in Woking: A History of the Shahjahan Mosque* (Chichester: Phillimore & Co., 2008), 23.

<sup>266</sup> *Mir Yad Ali v. Mubarak Ali* (1905) 10 PLR SUPPLEMENT 26.

as a lawyer at King's College in London. He began his career practicing law in Lahore and ended his career as an international jurist at the International Court of Justice. His writings included translations of Islamic texts: he translated the Quran and Riyadh as-Salihin, a thirteenth-century selection of hadith (traditions of the Prophet Muhammad) by the Iraqi religious scholar Imam Nawawi.<sup>267</sup> He wrote in English on what might be described as 'modernist' interpretations of Islam, including writing a book entitled *Islam: Its Meaning for Modern Man*.<sup>268</sup> He wrote in English on Islamic law, including the Islamic punishment for apostasy and a work on Islam and human rights.<sup>269</sup> And he also wrote prolifically on the Ahmadiyya, producing separate biographies of two Ahmadi heads and translations of the writings of Mirza Ghulam Ahmad.<sup>270</sup> As lawyers and Islamic scholars, Khwaja Kamal-ud-din and Zafrullah Khan conformed well to Mitra Sharafi's description of India lawyers and judges as engaging with the law to form 'cultural portraits' of their community and related communities.<sup>271</sup> As a Muslim sect, Ahmadi lawyers represented their own community's beliefs. In doing so, they also represented an interpretation of Islam that colonial courts upheld as valid.

As lawyers within the colonial judicial system in the Punjab, these men assumed a role that more closely approximated the 'ulama' under Mughal rule than

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<sup>267</sup> *The Quran: the eternal revelation vouchsafed to Muhammad, the Seal of the Prophet*, (trans.) Muhammad Zafrulla Khan (London: Curzon Press, 1975).

<sup>268</sup> Zafrullah Khan, *Islam: its meaning for modern man* (London: Routledge and Kegan Paul, 1980).

<sup>269</sup> Zafrullah Khan, *Islam and Human Rights* (London: London Mosque, 1967); Zafrullah Khan, *Punishment of Apostacy in Islam* (London: London Mosque, 1980).

<sup>270</sup> Zafrullah Khan, *The Head of the Ahmadiyyah Movement* (London: The London Mosque, 1944); Zafrullah Khan, *Hazrat Maulvi Nooruddeen Khalifatul Masih I* (London: The London Mosque, 1983); Mirza Ghulam Ahmad, *The Philosophy of the Teachings of Islam*, trans. Zafrullah Khan (Tilford: Islam International Publications, 2010).

<sup>271</sup> Sharafi, 'A New History of Colonial Lawyering', 1059-1094.

the ulama that emerged as a new class of Islamic scholars under colonial rule.<sup>272</sup> Learned men in the past were trained to fill state functions, such as judicial roles. The ulama during colonial times trained in madrasas to seek their own employment as teachers, religious debaters, and the guardians of mosques and shrines. Their judicial opinions, fatwas, guided Muslims in their daily lives but did not hold up as evidence within a court of law because they seldom reflected a consensus.<sup>273</sup> Khwaja Kamal-ud-din followed in his family's tradition: his role as a scholar and lawyer approximated that of his grandfather Khwaja Abdur Rasheed, who was a poet and qazi in Lahore under Sikh rule.<sup>274</sup>

By recognizing the authority of colonial courts, western trained Ahmadi lawyers recognized separate spheres for religious law and temporal law. The Ahmadiyya recognized a separation between spheres of personal law and criminal law, and opposed the introduction of Islamic law within the sphere of criminal law in India (e.g. the Ahmadiyya head opposed reforms to colonial law that would criminalize alcohol consumption among Muslims).<sup>275</sup> At the same time, the Punjab judicial administration gave the Ahmadiyya a degree of autonomy over personal law through its policy of allowing arbitration courts to operate. The Punjab administration's policy was to allow arbitration courts called *panchayats* to operate on the village level or, as was the case in the North West Frontier Provinces, shar'ia courts.<sup>276</sup> As in Africa, the

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<sup>272</sup> On the ulama as a 'modern' class of religious scholars, see: Barbara Metcalf, *Traditionalist' Islamic Activism: Deoband, Tablighs, and Talibs* (Leiden: ISIM, 2002).

<sup>273</sup> See below in explanation of *Narantakath Avullah v. Parakkal Mammu* (1921).

<sup>274</sup> Salamat, *A Miracle in Woking*, 23.

<sup>275</sup> Bashir-ud-din Ahmad, *Non-Co-operation and Islam* (Lahore: Mercantile Electric Press, n.d.), 8.

<sup>276</sup> 'Proceedings for the extension of the Indian Arbitration Act IX of 1899, setting up *panchayats* for reconciliation,' Punjab Proceedings, Home Department, 14 December 1900, IOR P/6070.

British allowed ‘traditional’ courts to operate because they did not challenge the legitimacy of British rule, being expressly subordinate to and subject to the intervention of the colonial state.<sup>277</sup> As the Ahmadiyya developed institutionally, it also established seminaries that trained scholars in Islamic law and set up arbitration courts that adjudicated between Ahmadis.<sup>278</sup>

As a consequence of how religious authority was entangled in land rights in the Punjab, sectarian disputes between Ahmadis and Hanafi Muslims took the form of land disputes and vice versa.<sup>279</sup> *Hussain Shah v Gul Muhammad* (1920) was likely a religious dispute within Ghulam Ahmad’s family that took the form of a land dispute.<sup>280</sup> As discussed above, Mirza Ghulam Ahmad’s cousins transferred their land shares into a religious endowment which functioned like a public *waqf*. The lands attached to this *waqf* came under the management of his cousin Kamal Din, who was a *pir* within a Qadiri Sufi order (defined under the umbrella of Sunnism according to the census), before passing to his religious disciple. In validating the religious endowment, the court determined that the lands attached to it were under the management of Kamal Din’s religious disciple, disinheriting Kamal Din’s hereditary heir. Ahmadi lawyer Zafrullah Khan represented Kamal Din’s hereditary heir (his adopted son and nephew) in this case, arguing against his religious disciple having

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<sup>277</sup> See Mahmoud Mamdani, *Citizen and Subject* (Princeton: Princeton University Press, 1996); for an article by a Punjab administrator demonstrating a theoretical link between British policies in the Punjab and Africa, see: Lewis Tupper, ‘Customary and Other Law in the East Africa Protectorate’ in *Journal of the Society of Comparative Legislation* 8, 2 (1907): 172-184.

<sup>278</sup> Lavan, *Ahmadiyah*, 113-116. A formal training college for Muslim missionaries was established in 1915 and an arbitration court was established in 1925; both in Qadian under the leadership of Mirza Ghulam Ahmad’s son.

<sup>279</sup> This conforms to Lauren Benton’s description of ‘jurisdictional politics’ in which conflicts over cultural difference in the law were intertwined with disputes focusing on the control of property and its legal definition in Benton, *Law and Colonial Culture*, 10. For the Punjab: Gilmartin, *Empire and Islam*, 46-72.

<sup>280</sup> *Hussain Shah v. Gul Muhammad* (1920) 25 PLR 59.



proprietary rights over Kamal Din's land. This case may have been an attempt to recover the land for Kamal Din's hereditary heir, or it may have been an attempt to oust a Qadiri *pir* from Qadian.

Similarly, in *Mir Yad Ali v Mubarak Ali* (1905), it was argued before the Lahore High Court that Ahmadis were not Muslim in a case that had implications for land rights. In this case, Khwaja Kamal-ud-din represented Mubarak Ali, an imam (a leader of a Muslim congregation) who had converted to Ahmadiyya. Mubarak Ali's Hanafi Sunni congregation sued to have him removed from his hereditary position on the basis that Mubarak Ali's belief in Ghulam Ahmad's prophetic claims constituted apostasy from Islam.<sup>281</sup> However, the court held that Mubarak Ali was not merely a servant of the congregation and that the mosque's congregation did not have the right to remove him from his office at their will. In this case, Mubarak Ali's right to his religious office was also attached his right to lands endowed to that office. While the mosque and Mubarak Ali's house were built by funds raised by the Hanafi Sunni congregation, these buildings were attached to lands endowed to the mosque through free grants by the government. Mubarak Ali's office was inherited from his father and included in his office was the management of lands attached to the mosque.

The court in this case did not consider the argument of Mr Beecher, the lawyer representing the Hanafi Sunni congregation, that Ahmadis were non-Muslim. As evidence, Mr. Beecher had produced a fatwa that declared Ahmadis as non-Muslim for their belief that Mirza Ghulam Ahmad was a prophet. Rather, the court dismissed the case on a technicality, finding that the suit had exceeded the statute of limitations from the time of Mubarak Ali's conversion. In accordance with its understanding of sectarian difference in Islam, the imam's belief in the prophetic claims of Mirza

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<sup>281</sup> *Mir Yad Ali v. Mubarak Ali* (1905) 10 PLR SUPPLEMENT 26.

Ghulam Ahmad did not infringe upon the civil rights of his Hanafi Sunni congregation.

In discounting the argument that it was the civil right of a congregation to pray behind an imam with the same sectarian beliefs, this judgement was in accordance with another court's judgement that Ahmadis did not have the right to pray separately from a Hanafi Sunni congregation behind its own imam. In *Hakim Khalil Ahmad v. Malik Israfi* (1917), a small Ahmadi community in Monghyr town, Monghyr district had been prevented from entering a public mosque after they started forming a separate congregation behind their own imam. They brought a suit against the Hanafi congregation to restore their right to worship at the mosque and form a separate congregation, while the council on behalf of the Hanafi congregation argued that the Ahmadis were not Muslim. The subordinate judge ruled in this case that the Ahmadiyya were Muslims but did not have the right to form a separate congregation from Hanafi Muslims.<sup>282</sup>

A colonial court did not take it upon itself to determine whether or not Ahmadis were Muslim until *Narantakath Avullah v. Parakkal Mammu* (1921).<sup>283</sup> According to colonial law's interpretation of Islamic law, apostasy from Islam automatically dissolved the marriage of a Muslim apostate.<sup>284</sup> As a consequence of her husband Narantakath converting to Ahmadiyya, a Moplah woman sought the advice of a Muslim religious teacher. The religious teacher advised her that by becoming an Ahmadi her husband was no longer a Muslim and her marriage dissolved as a consequence. She then remarried and Narantakath brought a criminal

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<sup>282</sup> *Hakim Khalil Ahmad v. Malik Israfi* (1917), 2 PLJ 108. The description of this case is based on that in Ahmad Asad, 'Adjudicating Muslims,' 110-111.

<sup>283</sup> *Narantakath Avullah v. Parakkal Mammu* (1921) ILR 45 Madras 986.

<sup>284</sup> The law of apostasy will be examined in chapter five.

suit against her for bigamy. She was acquitted when a North Malabar court determined that Ahmadis were non-Muslim based on the testimony of a Hanafi Sunni Muslim religious teacher. *Narantakath Avullah v. Parakkal Mammu* (1921) was the result of Zafrullah Khan moving the government to revise the court's decision because it affected the status of Ahmadis as Muslims.

The court's ruling in the case involved first determining what tests could be used to legitimately determine who was or was not Muslim. Two non-dissenting, non-Muslim judges, Justice Oldfield and Justice Krishnan, presided over the case. They eliminated three such tests in their ruling: the opinion of Hanafi Sunni religious scholars, the consensus of the community at large, and individual interpretation. While not invalidating the first two tests as means of ascertaining legitimate interpretations of Islamic belief, both judges found them inappropriate for the case at hand. Oldfield dismissed the testimony of Hanafi Sunni religious scholars, including two qazis, because they had only local authority; Krishnan found them to be interested in denouncing a new sect. They also dismissed a Hanafi Sunni fatwa that pronounced Ahmadis to be non-Muslim. As for the second test, that of the Muslim community reaching a consensus about Ghulam Ahmad's teachings, Oldfield found that sufficient time had not passed since his death (he died in Lahore in 1908). Krishnan added that consensus as a source of law or doctrine was not universally accepted in Islamic jurisprudence. Eliminating these tests allowed the court to judge Ahmadiyya belief on the basis of its own interpretation of textual sources. It allowed Zafrullah Khan to represent Ahmadiyya beliefs as legitimate interpretations of Islam before the court. Oldfield and Krishnan pinpointed the areas where Ahmadi beliefs diverged from those beliefs generally held by Muslims by relying on an Ahmadi pamphlet that had been

submitted as evidence: ‘What distinguishes Ahmadees from Non-Ahmadees’ by Sher Ali.<sup>285</sup>

The two rulings, though reaching the same judgment, arrived at very different conceptions of how Ahmadi belief differed from that of other Muslims. Yet both adhered to the Indian census’s conception of sectarianism in Islam. Krishnan’s judgment listed the points of difference between Ahmadis and Non-Ahmadis and concluded that these differences were only over minor points of doctrine that were not essential to being Muslim. From that he reasoned that Muslims, in adopting these beliefs, could not be considered apostates from Islam.<sup>286</sup> In contrasting Ahmadis with non-Ahmadis, this judgment described a non-permeable, doctrinal boundary separating the two—which described Ahmadi identity as distinct from Muslims.

The differences that Krishnan listed were: 1.) Non-Ahmadis believed that Muhammad was the last prophet to whom God spoke; Ahmadis believed that God continued to speak to holy men as he had in the past; 2.) Non-Ahmadis interpreted the reference to Muhammad in the Koran (33:40) as ‘Khatam-e-Nabuwat’ (seal of the Prophets) to mean that Muhammad was the last prophet; Ahmadis interpreted ‘Khatamun-Nabiyyin’ to mean that prophets arising after Muhammad must be followers of him and bear his seal; 3.) Non-Ahmadis did not recognize prophets that Ahmadis recognized: Zoroaster, Buddha, Krishna, and Ramachandra; 4.) Non-Ahmadis believed that Jesus was physically delivered to heaven before his crucifixion and that he would return to earth during the time of the Mahdi; Ahmadis believed that Jesus was crucified but did not die on the cross. Rather, he was taken down alive and travelled to Kashmir, where he died and was buried. They believed that he came back

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<sup>285</sup> Cited in Krishnan’s judgment in *ibid.*, at 999.

<sup>286</sup> *Ibid.*, at 1000-1002.

in spirit in the person of Ahmad; 5) Non-Ahmadis believed Islam would spread through religious war after the arrival of the Mahdi; Ahmadis believed that Islam would spread through arguments and heavenly signs.<sup>287</sup>

Like the 1881 census's sociological understanding of Muslim sects, Oldfield's judgment described sects as creating elasticity that was vital to the development of religion in synch with the development of society.<sup>288</sup> Oldfield found that contemporary interpretations of Islamic sources were necessary to maintain the vitality of Islam: 'every creed must be subject [to reinterpretation], so long as it retains life and growth and adapts itself to altered conditions.'<sup>289</sup> According to Oldfield, the Ahmadiyya interpretation of jihad was an example of Islam's adaptation to modern conditions: 'since the cessation of militant conditions [between Muslim countries and non-Muslim countries] and the permeation by Muhammadans of [non-Muslim] countries to whose law they owe allegiance.'<sup>290</sup>

Oldfield's judgment emphasized the use of ijtiḥād in judging Ahmadiyya theology. According to his understanding of ijtiḥād, it was a legitimate means to interpret Islamic theology as it was acknowledged to be a legitimate means to arriving at legal solutions.<sup>291</sup> Ahmadiyya theology was to be judged by whether, in the exercise of ijtiḥād from Islamic sources, it retained the fundamental principles of Islam. He reasoned that Ahmadi doctrines derived from legitimate interpretations of Islamic sources.

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<sup>287</sup> Ibid., at 1000-1001.

<sup>288</sup> Ibbetson, *Panjab Ethnography*, 144.

<sup>289</sup> Ibid., at 994.

<sup>290</sup> Ibid.

<sup>291</sup> *Narantakath Avullah v. Parakkal Mammu* (1921) at 993, citing Amir Ali, *Muhammadan Law*, Vol. II, 11-14; and Abdur Rahim, *Muhammadan Jurisprudence*, 25.

Krishnan's judgment mentioned but did not address a 'point that ha[d] been most pressed before [the court],' which was that Ghulam Ahmad had by the act of having 'set himself up as a prophet' become an apostate—and that his followers, as followers of an apostate, were also apostates.<sup>292</sup> Ghulam Ahmad's making of a new community of followers, the Ahmadiyya, emerged out of an interpretation of jihad. This in turn was a product of legislative innovation, or *ijtihad*, that his claims to being a non-law bearing prophet gave him authority to make. However, controversy over Ahmadiyya doctrine on jihad became secondary to the controversy over the Ahmadiyya's status as Muslim in the early twentieth century. Adherence to any one interpretation of jihad is not today considered essential to Muslim identity whereas an acceptance of Muhammad as being the last prophet is.<sup>293</sup>

## Summary

This chapter examined the emergence of the Ahmadiyya within the context of the colonial administration of land in central Punjab, against the backdrop of interreligious debates over Islamic doctrines taking place there at this time, and as being defined according to the logic of personal law that guided colonial courts. This analysis demonstrated some of the legal complexity inherent in the Ahmadiyya's identity as Muslim. Examined in the context of the colonial administration of the land, Islamic law as 'Muslim personal law' contributed to the economic impoverishment of Muslim landowners like Ahmadiyya founder Mirza Ghulam Ahmad, while the codification of customary law was designed as an intervention to stabilize their

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<sup>292</sup> Ibid., at 1002.

<sup>293</sup> Friedmann, *Prophecy Continuous*, 82-83.

position. The Ahmadiyya's identification as a 'Muslim sect' defined them as dissenting from orthodox authority; however, examined against the backdrop of interreligious debates, Ahmadiyya doctrines were articulated in opposition to interpretations of Islamic law put forward by Christian missionaries and the Arya Samaj. This suggests a linking of 'orthodox' doctrines with polemical interpretations of Islamic law. Examined according to the logic of personal law, a number of civil suits involving the Ahmadiyya demonstrate that Muslim religious authority might be entangled in land rights, while Ahmadi civil rights were attached to their religious identity as Muslim.

The next chapter will examine the Ahmadiyya's inclusion as Muslim political representatives within the structure of political representation in the Punjab. It will argue that this structure was underpinned by the same principles that underpinned evolutionary legal theories and the codification of customary law in the Punjab and an evolutionary interpretation of Islamic law.

## Chapter 3: Divisible Sovereignty: Customary Law and Islamic Law

### Introduction

This chapter examines how the Punjab administration related ideas of ‘divisible sovereignty’ to personal law. The idea of ‘divisible sovereignty’, first used by Henry Maine to define sovereignty under international law as states’ rights over their internal laws and administration, came to be associated by the Punjab administration with the right of Indian communities to retain their personal laws. Punjab governor Michael O’Dwyer (1912-1919) described the right of rural Punjabis over customary law, including rural Muslims, as being opposed to attempts by ‘majority communities’ to impose religious law over them. This chapter examines how customary law and Muslim personal law connoted different forms of sovereignty: one shared between village community and the British government in India, the other shared between Muslim community and Muslim political power.

This chapter also examines how, in the writings of Punjab administrators, principles derived from evolutionary legal theories cut against claims by Muslims to interpret Islamic law over a unified Muslim community, and charted a course of political development that implied the inclusion of Indian Muslims under an emerging international law. It examines a style of Muslim representation in the Punjab, demonstrated by the Unionist party and the Ahmadiyya, which reflected these principles. These Muslims represented the social and economic interests of agriculturalists in the Punjab provincial legislature, and described separate electorates and representation for Muslims as analogous to such reservations for lower-caste Hindu communities in India—as a temporary measure to remedy social and economic inequalities between communities rather than as a reflection of the sovereign rights of



the Muslim community in India over their laws and administration.<sup>294</sup> These principles and the idea of divisible sovereignty were reflected in how the Ahmadiyya understood the sovereign rights of Islamic states to be restricted by an emerging international law. The Ahmadiyya understood their allegiance to the British government in India as implying the duty of the British and its Western allies to protect their lives, even as this meant the intervention of Western powers into the laws and administration of Islamic states.

This chapter examines these political principles within the historical context in which they were expressed. The first section of this chapter examines the idea of ‘divisible sovereignty’ and political development in India expressed in the writing of Punjab administrator C. L. Tupper in the late nineteenth century. Principles of divisible sovereignty and double allegiance defined political relations between Indian communities and the British, while evolutionary legal theories charted a path of political development in India that decentralized political power away from all-India groups. These theories conceived of the Punjab to be comprised of heterogeneous societies of ‘tribe’ and ‘caste’ that existed at different stages of political development. They were reflected in a style of politics in which Punjabis demonstrated allegiance to the British government in exchange for land rights, which is examined in the second section. This section examines the Ahmadiyya’s inclusion within the Punjab Unionist party after First World War, a Muslim-led and cross-religious alliance that represented agricultural interests.<sup>295</sup> The Ahmadiyya recognized the legal authority of

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<sup>294</sup> Punjab ‘provincialism’ has become axiomatic: See, Jalal and Seal, ‘Alternative to Partition’; and the retrospective analysis of the development of a Pakistani nationalism lacking ‘egalitarian pluralism’ in Iftikhar H. Malik, ‘Identity Formation and Muslim Party Politics in the Punjab, 1897-1936: A Retrospective Analysis’ in *Modern Asian Studies* 29, 2 (1995), 294; Gilmartin, ‘Customary Law and Shari’at’, 51.

<sup>295</sup> Ian Talbot, *Punjab and the Raj, 1849-1947* (Riverdale: The Riverdale Company, 1988); Gilmartin, *Empire and Islam*; and Jalal and Seal, ‘Alternative to Partition.’

the British government over that of competing legal authorities (i.e. that of the Ottoman sultanate and the ulama) during the First World War and the first Non-Cooperation Movement in India. The final section examines the Ahmadiyya's obedience to British laws in India as interrelated with their interpretation of international law. During the 1920s the Ahmadiyya sent missionaries trained in Qadian to various countries in Africa, the Middle East, Central Asia, and to England and the United States. It adopted an interpretation of Islamic law that was compatible with private international law, allowing for the migration of Muslims to non-Muslim countries, and with emerging human rights norms that included the right to freedom of belief and conscience.

### Divisible Sovereignty

Punjab administrator C. L. Tupper, who had codified Punjab customary law according to Henry Maine's legal theories, applied Maine's legal theories on international law to articulate what he called Indian political law: the rules and principles that governed political relations between the British government and Indian princely states.<sup>296</sup> Indian princely states were 'quasi-sovereign' polities that covered nearly one-third of Britain's Indian territories and were indirectly ruled through native rulers.<sup>297</sup> Ostensibly, princely states were kept from being amalgamated into British India through treaty agreements between princely rulers and the British government and a pledge from Queen Victoria in 1858 to 'respect the rights, dignity and honour of

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<sup>296</sup> C. Lewis Tupper, *Our Indian Protectorate: An Introduction to the Study of the Relations between the British Government and its Indian Feudatories* (London and New York: Longmans, Green and Co., 1893), v-xi.

<sup>297</sup> Benton, *Quasi-Sovereignty*, 600-607.

the native princes as [her] own.’<sup>298</sup> These rules and principles charted a path to political development in India, and mirrored principles upon which an emerging international law in Europe was built.

Tupper’s Indian political law was based on the principle that the sovereignty was divisible. The idea of divisible sovereignty was a necessary building block to laying a theoretical foundation for international law among late Victorian legal scholars.<sup>299</sup> From the 1830s, international law had been closely associated the legal philosopher John Austin’s (1790-1859) positivist conception of law.<sup>300</sup> Proper laws according to Austin emanated directly by command and/or a determinate source (as in God’s law or positive law) ‘which oblige[d] a person or persons to a *course* of conduct.’<sup>301</sup> This conception of the law led Austin to dismiss international law as a ‘law improperly so called.’<sup>302</sup> International law did not emanate from either command or a determinate source, but rather consisted of a set of positive moral rules established by the general opinion of an indeterminate source. Though Austin allowed room for certain positive moral rules being considered proper laws because of their imperative nature, international law was expressly not among them.

Austin’s dismissal of international law related to how he understood sovereignty as indivisible. He defined sovereignty as a person or a determinate body of persons who commanded obedience from a population and was not under the

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<sup>298</sup> Mridu Rai. *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (London: Hurst & Company, 2004), 10-14.

<sup>299</sup> Sylvest, 'The Foundations of Victorian International Law', 47-66.

<sup>300</sup> Ibid.

<sup>301</sup> John Austin, *The Province of Jurisprudence Determine* (London: John Murray, Albemarle Street, 1832), 18.

<sup>302</sup> Ibid., 146-147.

command of any other person. All independent political communities possessed a 'sovereign'.<sup>303</sup> The indivisibility of sovereignty meant that the sovereign's authority to command a population necessarily resided in one source or would cease to be sovereign. This obviated the development of international law because there could be no determinate source from which a law between nations would develop. This notion of sovereignty, which granted absolute and unlimited power to state governments, is not consistent with the contemporary usage of the term by modern jurists'.<sup>304</sup> Although Austin was concerned with the sovereign power of constitutional governments, his conception of sovereignty suggested the absence of constitutional law as a restraining force to the executive powers of a state's government.

The divisibility of sovereignty was core to Maine's argument that international law had existed in the past among primitive men and was certain to develop among modern nations in the future.<sup>305</sup> According to Maine, sovereignty in international law designated a collection of clearly defined rights. They included the right to make war and peace, the right to administer criminal and civil law, and the right to legislate new laws. A sovereign state that possessed all of these rights was an independent sovereign state. However, sovereignty could also be divided between one state and another. It was, therefore, distinguishable from independence. A sovereign state retained autonomy over its internal laws and administration. Other rights, such as the right to make war, might then be lodged with a superior power without the state losing its sovereignty. Those individuals belonging to a community whose sovereignty was divided (e.g. Indian princely states) were bound by obey both their own state's

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<sup>303</sup> Ibid., xvii.

<sup>304</sup> Pavlos Eleftheriadis, 'Law and Sovereignty' in *Law and Philosophy* 29, 5 (2010), 535-569.

<sup>305</sup> Tupper referring to Henry Maine's Kathiawar States minute from 22 March 1864 for a description of sovereignty, *Our Indian Protectorate*, 14-18.

command and that of the superior power's (e.g. laws enacted by British government). Tupper, citing Maine's approval, wrote: 'If the sovereignty is divided, then obedience must be divided, and in like proportion.'<sup>306</sup>

The idea that sovereignty was divisible was used by Tupper to describe the system of Indian protectorate, which defined the superior position of the British government over 'sovereign' princely states. Tupper modified Maine's theories to distinguish between an international law, which he applied to European nation states, and 'political law' that applied to British colonies.<sup>307</sup> International law defined relations between equal nations, not the superior position of the British government over princely states—although they developed according to the same principles. Political law did not infer that princely states had a uniform set of codified rights that limited the paramount powers of the British government. Rather, Tupper noted that treaties between them and the British gave them varying degrees of autonomy over their laws rather than uniform rights among them.<sup>308</sup> Moreover, this autonomy over their laws was not absolute, and Tupper pointed out that princely states were always subject to British laws, whether enacted in the British parliament or the Indian councils.<sup>309</sup> Rather, their most definite sovereign rights were over collecting revenue. In that sense, princely rulers were British subjects who possessed privileged land rights.

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<sup>306</sup> Ibid., 14.

<sup>307</sup> Ibid., 8-9.

<sup>308</sup> Ibid., 17.

<sup>309</sup> Ibid., 18-19.

Tupper envisioned India as comprised of not one but ‘numerous heterogeneous societies’ that existed at various stages of political development.<sup>310</sup> These boundaries separating these societies created ‘innumerable dividing lines’ that ignored political boundaries.<sup>311</sup> This vision of India was evolutionary. It came out of Maine’s theory that the early phases of sovereignty were non-territorial: sovereignty without a ‘definite portion of the earth’s surface,’ like that of a tribe not settled upon the land was, according to Maine, an ancient idea that preceded the association of political communities with land. Tupper identified this non-territorial, nascent form of sovereignty in the Punjab among the Baluchis and Pathans. These groups were to him ‘specimens’ if not of early kingship, then at least of semi-political groups from which early kingship would arise.<sup>312</sup>

This conception of Indian society obviated the development of all-India nationalism. The British Empire in India, analogous to the Roman Empire, would develop into not one but many nations.<sup>313</sup> Tupper described expressions of an anti-British, all-Indian nationalism as idiosyncratic to the sentiments held by the vast majority of Indians who belonged to societies defined by tribe or caste. Nationalism was associated with the Indian National Congress and came from a discontented, Western educated elite.<sup>314</sup>

This conception of Indian society also suggested that decentralized government was not only expedient, but also suited to India’s natural course of

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<sup>310</sup> Ibid., 321.

<sup>311</sup> Ibid., 402.

<sup>312</sup> Ibid., 131.

<sup>313</sup> Ibid., 321.

<sup>314</sup> Ibid., 405-411.

development. According to Tupper, the devolution of political power to local agents, including to native rulers of princely states, allowed India to develop along these social contours. Central government might be inclined to apply laws better suited to European societies than India. Local governments and princely rulers, on the other hand, could enact laws appropriate to their localities. This view was in line with a policy of decentralization already in place in India. Decentralization of political power towards provincial governments began in 1861 with the Indian Councils Act, which established provincial councils in Bengal, Madras, and Bombay. In 1882, municipal and local boards were established in the provinces.

The notion of nascent forms of non-territorial sovereignty in India also supported a notion of non-territorial representation for Indians in legislative assemblies.<sup>315</sup> A move towards decentralization of political power in India was accompanied by an expansion of representative government. In the late nineteenth century, the policy of the government of India was against territorial representation despite Indian political opinion's insistence on it.<sup>316</sup> Non-territorial representation was perceived to cut against the development of Indian nationalism. Any scheme of territorial representation, including a scheme for setting up electoral colleges that was devised by Secretary of State John Morley in 1909, would have returned large numbers of Congress lawyers. Instead, the government favoured separate representation for closely circumscribed interests. The Punjab legislative council established in 1897 applied the principle of non-territorial representation by circumscribed urban and rural interests. The Morley-Minto reforms of 1909, on the

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<sup>315</sup> For the legislative debates around minority representation before the Morley-Minto Reforms, see: Shabnum Tejani, *Indian Secularism: a Social and Intellectual History, 1890-1950* (Bloomington: Indiana University Press, 2008), ch. 3.

<sup>316</sup> Dietmar Rothermund, 'Constitutional Reforms versus National Agitation in India, 1900-1950' in *The Journal of Asian Studies* 21, 4 (1962), 506.

other hand, recognized separate electorates and representation for Muslims, circumscribing the interests of an all-India religious community.<sup>317</sup>

Indian nationalist histories since 1909 have theorized that the introduction of separate electorates by the British was a strategy to foment inter-communal conflict and prevent the development of Indian nationalist resistance to foreign rule.<sup>318</sup> In contrast to this ‘divide and rule theory’, colonial officials positively interpreted separate electorates as a means of preserving the autonomy of interests of communities to safeguard them against upper-caste dominance.<sup>319</sup> H. H. Risley, a colonial administrator whose understanding of caste difference in India was based on a racialist interpretation of caste, advocated separate electorates as a way to circumscribe the interests of India’s various social groups against upper-caste oppression—he argued that without separate electorates caste groups would become political machines that could threaten voters with social ostracization.<sup>320</sup> Similarly, according to Tupper, except for a small minority of western educated Indians, Indians were as yet unable to develop civic feelings that would transcend caste difference.<sup>321</sup>

Ameer Ali advocated separate electorates and representation for Muslims. Adopting the positive inferences of non-territorial representation, he understood them to be a necessary and temporary measure to redress inequalities suffered by a minority community:

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<sup>317</sup> Francis Robinson, ‘Municipal Government and Muslim Separatism in the United Provinces, 1883 to 1916’ in *Modern Asian Studies* 7, 3 (1973), 389-441.

<sup>318</sup> The applicability of the divide and rule theory to late nineteenth century administration in the Punjab is challenged by N. Gerald Barrier, who argued that the administration’s policy was concerned with maintaining communal harmony: Barrier, ‘The Punjab and Communal Politics’.

<sup>319</sup> Rothermund, ‘Constitutional Reforms’.

<sup>320</sup> Ibid., 506.

<sup>321</sup> Tupper, *Our Indian Protectorate*, 394.



Any attempt at amalgamation [of Indians] at the present stage would mean the submergence of an ill-organized, badly equipped, and badly trained minority under a majority vastly superior in numbers, and immensely better organized. No one acquainted with the social, religious, and moral conditions of the Muslims can view such a contingency without the greatest misgivings...unity of sentiment and consciousness of identity of interest which in due course will remove the necessity of special representation is clearly developing at the top and if details are rightly handled it should not take long before it reaches the bottom.<sup>322</sup>

According to Ali, separate electorates for Muslims were not intended to create disunity among Indians. Rather, it was a temporary measure that guaranteed the development of an Indian unity that was based on more equal relationships between its communities of people. Importantly, this understanding of ‘special representation’, which would be adopted by the Punjab Unionist Party and the Ahmadiyya,<sup>323</sup> was not analogous to the sovereign right of a political community. It did not conflict with a notion of India as a sovereign state, projected into the future, or a notion of village communities as having quasi-sovereign authority, projected into the past.

In his legal textbook for Indian students, William Rattigan placed a particular emphasis on the sovereign authority of village communities in the Punjab. Rattigan wrote that John Austin’s conception of law as contingent on the existence of political sovereignty was qualified by knowledge of societies like the Punjab, in which rules emanating from village communities were as absolute as any from a political sovereign.<sup>324</sup> According to Rattigan, Austin’s conception of law was only strictly accurate when applied to a political community that conformed to ‘the modern notion of a civilized state’ in which new laws were created by a legislature. However, rules that emanated from more ‘traditional’ sources, like customary rules of inheritance in

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<sup>322</sup> Quoted in Azim Husain, *Fazl-i-Husain: A Political Biography* (Bombay: Longmans, Green and Co. Ltd., 1946), 98.

<sup>323</sup> Their advocacy of separate electorates will be examined in chapter 4.

<sup>324</sup> Rattigan, *Science of Jurisprudence*, 7.

village communities, governed people as absolutely as any set by a political superior. Though these rules could not be called laws, they were not merely moral rules either. Austin's narrow conception of international law and sovereignty 'failed to take into account the Customary Law of archaic communities.'<sup>325</sup> Rattigan description of village communities and agricultural tribes was in a pre-modern sense 'international'.

In summary, evolutionary theories underpinned theories of political development that supported decentralized government in India and a system of separate electorates that weakened the representation of higher caste Hindus in India. The core principles that guided political development along evolutionary lines were those of divisible sovereignty and double obedience to the law, which defined the paramount power of the British government over its protectorates as well as the relationship between equal states within a federation.<sup>326</sup> In addition to having political implications in India, suggesting the development of not one Indian nation but a federation of Indian nations, evolutionary principles also suggested India's inclusion within a developing international law. Evolutionary principles implied that what were unequal political relations now between European countries and the colonies that they ruled would at one point in the future be levelled out in tandem with the levelling out of social and economic inequalities between diverse communities within the colonies.

### Muslim Political Allegiance

In 1915, Punjab judicial administrators met in Simla to discuss the desirability of codification to bring about greater uniformity in customary law governing

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<sup>325</sup> Ibid., 255.

<sup>326</sup> Ibid., 337-338.

agricultural lands.<sup>327</sup> The codification carried out by Tupper had recorded a significant degree of variation in the customs practiced between agriculturalist tribes. The judicial administration in the Punjab was now to review the mass of collected custom to determine regions where they operated in common, restricting codification to customs governing land (i.e. the enjoyment, devolution, and alienation of agricultural lands). This manner of codification, which would bring about greater uniformity of custom and more centralized legislative powers, would also leave less discretionary powers to local agents.<sup>328</sup> Punjabi political representatives for whom the perpetuation of diversity and decentralization meant more discretionary power opposed this project. One the other hand, the application of a more unified customary law over agriculturalists was attractive to judicial administrators who sought to reduce litigation and ease the administration of land in the Punjab. Justice T. P. Ellis (1873-1936) favored greater uniformity in custom rather than ‘the perpetuating of diversity’<sup>329</sup> Justice Shadi Lal proposed that under no circumstances should a female be entitled to sue an alienation of land, believing that this conformed to custom. However, Muhammad Shafi, who himself came from an agriculturalist caste, disapproved of measures that might limit the rights of female heirs. According to Muhammad Shafi, greater uniformity of customary law through codification inferred the extension of the agnatic theory of land succession, which he felt had been too zealously applied by past judicial administrators. He opposed Shadi Lal’s limits to a

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<sup>327</sup> ‘Proceedings of the Punjab Codification of Customary Law Conference’, on 27-28 September 1915, IOR V/27/134/49.

<sup>328</sup> Stokes, *English Utilitarians*, 173-174.

<sup>329</sup> Justice T. P. Ellis, ‘Proceedings of the Punjab Codification of Customary Law Conference’, 28 September 1915, at 18-22, IOR V/27/134/49.

female's right to contest land alienations as being contrary to the customs of tribes that recognized absolutely superior rights of females.<sup>330</sup>

In his report on the conference, Punjab governor Michael O'Dwyer (1912-1919) framed the codification of customary law in the Punjab as protecting the rights of agriculturalist tribes against the claims of religious communities.<sup>331</sup> O'Dwyer defined the rural population as 'minorities' belonging to 'classes who [were] admittedly governed by custom.'<sup>332</sup> Their rights were protected against the claims of urban population, who 'as a rule' were governed by Hindu or Muslim law.<sup>333</sup> According to O'Dwyer, 'a section in the urban population' was 'under the delusion' that the government intended to upset the rights of agriculturalists by replacing their time honoured traditions with Hindu and Muslim personal law.<sup>334</sup> By defining rural Punjabis as minorities, O'Dwyer implied that urban Punjabis belonged to a majority. Because rural Muslims were numerically greater than urban Muslims in the Punjab, this implied that urban Muslims belonged to a community that extended beyond provincial boundaries (i.e. an all-India community of Muslims) and that rural Muslims belonged to communities that did not (i.e. village or tribal communities). O'Dwyer also framed codification as protecting community rights against individual rights. Alienation of land *inter vivos* or by will, through registered declaration or contract, could not supersede customary law. To allow this would be to allow the

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<sup>330</sup> Muhammad Shafi and Shadi Lal, 'Proceedings of the Punjab Codification of Customary Law Conference', 28 September 1915, *ibid.* at 18-22.

<sup>331</sup> *Report on the Punjab Codification of Customary Law Conference* (Lahore: Government Printing, 1915), *ibid.*

<sup>332</sup> *Ibid.*, at 1-2.

<sup>333</sup> *Ibid.*, at 1.

<sup>334</sup> *Ibid.*

individual to ‘go against the sentiments and traditions on which social relations in India are based’ and allow the individual to take the law into his own hands.<sup>335</sup>

O’Dwyer’s comments on codification asserted the autonomy of ‘minority communities’ to determine their customary laws in principle, but the sovereignty of the British government in practice. He noted the conflicting views towards codification expressed during the conference—a negative view of codification as creating a ‘caste-iron jacket’ that restricted development, and a positive view of codification as the only means of providing legal certainty and thus necessary for modern development.<sup>336</sup> O’Dwyer referred to a resolution passed during the 1915 conference: ‘The declaration by a large majority of a community as to its wishes regarding the customs which it will follow in the future, irrespective of those followed in the past, should be accepted as having the force of law.’<sup>337</sup> He stated that the spirit behind this resolution was to maintain elasticity in private law despite codification. However, O’Dwyer backtracked on what he called a ‘flight of verbal inexactitude’.<sup>338</sup> The community did not have the power to change its laws, but could only initiate legislation to be undertaken by the British government in India. Contrary to evolutionary theories, codification of customary law in the Punjab was concerned with maintaining the position of ‘communities’ within a social order.

Michael O’Dwyer framed codification of customary law in a manner that distinguished the rights rural minority communities from the claims of all-Indian urban majority communities during the First World War, when the administration

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<sup>335</sup> Ibid., at 4.

<sup>336</sup> Michael O’Dwyer, ‘Proceedings of the Customary Law Conference’, on 27 September 1915, at 18-20, *ibid.*

<sup>337</sup> Michael O’Dwyer, *Report on Punjab Codification*, *ibid.*, at 3.

<sup>338</sup> Ibid.

depended upon the political allegiance of rural Punjabis. During the war, army recruitment continued to be tilted towards the Punjab, and in the Punjab towards the rural population.<sup>339</sup> On behalf of the British Empire, Britain committed its colonies to contributing financial and military assistance to the war effort. The largest contribution came from India, which contributed 683,149 combat troops and war investments and donations amounting to the equivalent of £700,000 in 1918. The largest share of that contribution came from the Punjab. Sixty per cent of those recruited during the war from India (349,688 recruits) were Punjabi.<sup>340</sup> To meet the demand for troops, the Punjab administration relied upon and reinforced rural structures. In order to tap more of the rural population for recruitment, the administration shifted from class based recruitment to territorial recruitment. Regional catchments were replaced by district level recruitment units, which interfaced with the civil administration. Local officials, from village headmen to tehsildars, were responsible for recruitment from all classes, including landless rural labourers who had been previously excluded.<sup>341</sup>

Land rights provided a material basis for an allegiance between rural Punjabis and the British government.<sup>342</sup> The Punjab administration used terminology and symbols of divisible sovereignty—*darbars*, feudal titles, and *sanads*—to reward men for their demonstrated allegiance during the war.<sup>343</sup> Rather than symbolizing the

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<sup>339</sup> For the experience of the First World War in the Punjab, see Rajit Mazumder, *The Indian Army and the Making of Punjab* (Delhi, Oxford: Permanent Black, 2003).

<sup>340</sup> Tan Tai-Yong, 'An Imperial Home-Front: Punjab and the First World War' in *The Journal of Military History* 64, 2 (2000), 372.

<sup>341</sup> *Ibid.*, 379

<sup>342</sup> Mazumder, *The Indian Army*, 148-201.

<sup>343</sup> See, Nicholas Dirks, "From Little King to Landlord: Property, Law and the Gift under the Madras Permanent Settlement," *Comparative Studies in Society and History* 28, 2 (1987), 307-333.

nesting of miniature sovereigns into imperial rule, as had been the case under Indo-Muslim and Hindu rulers before the British, these symbols represented privileged land rights. Colonial officials met with rural men of influence at district darbars, awarded titles of nobility (i.e. Khan, Raja, etc.) for services rendered, and granted *sanads* that entitled their recipients to cash rewards, revenue free land grants, and tax exceptions for village communities.<sup>344</sup> The administration allocated 180,000 acres of land from canal colonies to Indians who served during the war with distinction and 150,000 acres for Indians who aided the government in recruitment.<sup>345</sup>

The Punjab administration's recruitment policies fostered a localized, cross-religious Punjabi identity. Hindus, Sikhs, and Muslims were carefully distributed across regiments in the Indian army, which was made up of uniform companies as their basic unit.<sup>346</sup> Punjabis were recruited during the war into companies formed on a local and tribal basis: for example, a special company of Niaza Pathans, Awans and Jats from the Mianwali district attached to the Baluchistan Infantry, a special company of Bishoi Jats.<sup>347</sup> The administration also organized a battalion of Indian Christians, but did not form other units that were based on supra-tribal and religious identity.

A recruitment policy that fostered Punjabi identity over religious identity was expedient during the war in part because of the Punjab administration's reliance on Muslims to fight opposite the Turkish sultanate, which was interpreted to be in contravention of Islamic law. Half of the soldiers recruited from the Punjab were

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<sup>344</sup> Michael O'Dwyer, *India as I Knew It* (London: Constable & Company Ltd., 1925), 224.

<sup>345</sup> *Ibid.*, 22.

<sup>346</sup> Robin Jeffrey, 'The Punjab Boundary Force and the Problem of Order' in *Modern South Asia* 8, 4 (1974), 491-492.

<sup>347</sup> Punjab Proceedings, Home Department, September 1917, [Part B, Mil], IOR P/10259.

Muslim.<sup>348</sup> In the predominantly Muslim western regions of the Punjab, large landowners and influential pirs were able to secure large numbers of recruits more easily than smaller peasant proprietors in central and eastern regions. A single *pir*, Pir Ghulam Abbas of Makhad, enrolled 4,000 of his followers.<sup>349</sup> These soldiers were dispatched abroad, including to Muslim lands. By 1915, more than 80,000 Indian combat troops were sent from India to France, Mesopotamia, Palestine, and Egypt. The Indian army was responsible for holding the Persian oil fields and the Suez Canal, areas crucial to the Britain's war strategy.<sup>350</sup> Muslim involvement in the war contradicted an 'orthodox' interpretation of Islamic law that made the allegiance of Indian Muslims to the British government conditional on Britain's support of the Ottoman Sultanate. This interpretation was endorsed in the 1880s by a group of Sunni Hanafi *ulama*, who published it and other conditions of allegiance in an English newspaper printed in British India. It was held to be authoritative and applicable to the majority of Indian Muslims by N. B. E. Baillie, the eminent scholar of Muslim law in India at the time.<sup>351</sup>

However, O'Dwyer described the British opposition to the Sultanate as not compromising the allegiance of rural Muslim Punjabis to the British. O'Dwyer wrote that the wartime services of Punjabi Muslims demonstrated their loyalty to the British and willingness to fight against a Muslim ruler. He attributed any apprehension that they would not be loyal to the British to a lack of understanding of the rural

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<sup>348</sup> O'Dwyer, *India as I Knew It*, 216.

<sup>349</sup> Tai-Yong, 'Imperial Home-Front', 401.

<sup>350</sup> *Ibid.*, 376.

<sup>351</sup> N.B.E Baillie, 'On the Duty Which Mohammedans in British India Owe, on the Principles of their Own Law, to the Government of the Country' in *Journal of the Royal Asiatic Society of Great Britain and Ireland* 13, 3 (1881), 429-436.



population in the Punjab.<sup>352</sup> If this understanding was based on the empirical data gathered by Denzil Ibbetson, as O'Dwyer's memoir suggests it was, their loyalty to the British was partly due to their ignorance of Islamic law and partly due to their customary allegiance to tribal leaders rather than Muslim rulers. The implication was that while rural Muslim Punjabis could be trusted, the loyalty of urban Muslims might reasonably have been doubted.

During the First World War, the Ahmadiyya community demonstrated its allegiance to the colonial state in a similar manner as pirs and village headmen in the Punjab. Ghulam Ahmad died in 1908, leaving his community to be led by a line of *khalifas* (spiritual successors). A close disciple of Ghulam Ahmad, Hakim Noor-ud-din, led the community from 1908 until his death in 1914. In 1914, Ghulam Ahmad's son Bashir-ud-din Ahmad became the second khalifa. Bashir-ud-din Ahmad drew army recruits from within his own community. However, unlike tribal groups, the Ahmadiyya was not organized into separate companies, but was organized along the regular pattern of recruitment.<sup>353</sup>

After the First World War, the Montagu-Chelmsford reforms of 1919 introduced a system of diarchy that distributed powers between the central government and provinces, and between provincial governors and Indian representatives.<sup>354</sup> It reserved powers at the centre for the British government that

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<sup>352</sup> O'Dwyer, *India as I Knew It*, 216.

<sup>353</sup> Letter from Punjab Government to E. A. Estcourt, Deputy Commissioner, Gurdaspur, No. 6006, dated 21 March 1917, in response to 'Memorial from the Anjuman Ahmadiya, Qadian, for raising a Double Company from their followers', Punjab Proceedings, General and Military files, IOR P/10258. Offer declined.

<sup>354</sup> John Gallagher and Anil Seal, 'Britain and India between the Wars' in *Modern South Asian Studies* 15, 3 (1981), 387-414.

were indisputable, indivisible, and unitary.<sup>355</sup> Powers reserved at the centre included external defence and internal law and order. Other specified powers devolved to provincial governments, giving them greater autonomy over their finances and legislative concerns. This ‘polarized responsibility’ and devolution of power implied federalist development.<sup>356</sup> Thus it implied the same potential that Indian political law did for Tupper. The Montagu-Chelmsford reforms expanded representative government, forming Indian majorities in the central and provincial legislatures and introducing Indian ministers in eight of the nine provinces. By reserving powers for the provincial government, diarchy diverted political power away from all-India political organizations. Diarchy ensured that less essential powers to imperial rule were distributed to Indian representatives and ministers.

Diarchy allowed the Punjab administration to maintain continuity in its agrarian policies after 1919. Land administration continued to be directed towards maintaining political stability and appealing to the material wellbeing of rural Punjabis. This was reflected in the distribution scheme of the Lower Bari Doab Colony, the largest tract of land colonized from 1905 to 1925.<sup>357</sup> Colonization maintained the agrarian social order: 68 per cent of land grants were awarded to landholding peasants belonging to agriculturalist tribes, while large land grants were reserved for landowning families listed in Lepel’s genealogies of Punjab chiefs. While the political exigencies of the time changed, the administration continued to award land grants for demonstrated allegiance to the colonial state. Within this colony,

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<sup>355</sup> The states represented an anomaly to the political and economic development of India within reforms towards representative government: See, Frederick Sykes, ‘The Indian States and the Reforms’ *International Affairs* 14, 1 (1935), 48-86.

<sup>356</sup> Rothermund, ‘Constitutional Reforms’, 509.

<sup>357</sup> Imran Ali, *The Punjab under Imperialism, 1885-1947* (Princeton: Princeton University Press, 1988), 29-38.

75,000 acres of land were allocated to army veterans after the start of First World War. After the war, land grants required recipients to make a loyalty oath and were awarded by the administration for work to counter agitation against the Rowlatt Act and the Non-Cooperation Movement (1920-1922).<sup>358</sup> This compelled rural leaders within the Punjab to demonstrate their allegiance to the colonial state. Both sections of the Ahmadiyya community, prominent *pirs*, and the Sikh Khalsa College Staff Association were among those who vocally opposed the Non-Cooperation movement.<sup>359</sup>

Diarchy contributed to the development and later regional dominance of the Punjab Unionist Party, a Muslim led but cross religious community alliance that represented rural interests and included Ahmadis as well as Hindus and Sikhs.<sup>360</sup> The 1919 reforms worked in the Punjab to tilt representative government towards rural interests and away from centres of all-India politics—Lahore, Jullundur and Ambala. The reforms overwhelmingly favoured Muslim landowners in western Punjab, where the majority of large landowners were located. Twenty-nine seats went to the rural areas, of which 23 were in Muslim-majority districts west of Lahore.<sup>361</sup> Two Ahmadis held seats in the newly configured provincial legislative assembly, both in rural constituencies east of Lahore in central Punjab. Pir Akbar Ali from Ferozpur was elected into the first legislative assembly in 1921, and Zafrullah Khan was elected into the assembly in 1926. Both joined the Punjab Unionist Party after their election.

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<sup>358</sup> These were protest movements against colonial laws that will be returned to later in this chapter.

<sup>359</sup> Punjab Proceedings, Home Department, General and Military files, January 1919-May 1919, IOR P/10699.

<sup>360</sup> Jalal and Seal, 'Alternative to Partition'. On Sikh's in the Unionist Party see: Stephen Oren, 'The Sikhs, Congress, and the Unionists in British Punjab, 1937-1947' in *Modern Asian Studies* 8,3 (1974), 397-418. Sikhs did not join the Unionist party until 1937. Rural Sikhs were instead represented by the Akali Dal, which allied with the urban Hindus belonging to the Indian National Congress.

<sup>361</sup> Jalal and Seal, 'Alternative to Partition', 425.

The Punjab Unionist party comprised of a loose alliance of rural landowners who agreed upon a set of existing principles.<sup>362</sup> Voters generally voted not on party lines but based on personal or tribal considerations. Among Ahmadis, candidates who desired to obtain votes from electors made a written request to an official at Qadian, who then directed Ahmadi electors to vote accordingly. In legislative and local governments, Bashir-ud-din Ahmad instructed Ahmadi electors in any particular constituency to vote together and to avoid wrangling.<sup>363</sup> Candidates joined the Unionist party after being elected if their political outlook was in line with Unionist principles.<sup>364</sup> The Unionist principles were: it was open to all communities; worked for the uplift of backward rural areas; sponsored measures to protect backward people of the Punjab. Its political objectives included: to attain Dominion status for India within the British Commonwealth by constitutional means; provide special government assistance to backward classes and rural areas; fair distribution of taxes between urban and rural areas; and to check exploitation of economically backward classes by economically dominant classes.<sup>365</sup>

The dominance of the Unionist party depended upon non-communal alliances between Muslim and Hindu politicians, and to a lesser extent Sikh politicians, who supported of rural interests.<sup>366</sup> Because most legislative seats were allocated to western Punjab districts after the 1919 reforms, the Unionist Party was made up primarily of Muslim landlord families and Muslim *pirs*. However, it also included

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<sup>362</sup> On the Punjab Unionist Party, see: Talbot, *Punjab and the Raj*; Malik 'Identity Formation'; Gilmartin, *Empire and Islam*, Jalal and Seal, 'Alternative to Partition.'

<sup>363</sup> Zafullah Khan letter to Fazli Husain, 15 April 1936. IOR Mss Eur E352/23.

<sup>364</sup> Ibid.

<sup>365</sup> Malik 'Identity Formation', 313.

<sup>366</sup> Talbot, *Punjab and the Raj*; Jalal and Seal, 'Alternative to Partition.'

mostly Hindu Jat landholding cultivators from eastern districts. Pir Akbar Ali and Zafrullah Khan were socio-economically and ethnically more akin to Hindu Jat landholding cultivators than Muslim landlords and *pirs* within the Unionist party ranks. They represented a constituency in central Punjab of smaller landowners who cultivated their lands or managed the cultivation of the lands.

The socio-economic makeup of Punjab constituencies was reflected in the British codification of customary law, which varied by region and thus varied rural structures of influence by region. The evolutionary theories that underpinned codification of customary law recognized its development as the outcome of historical processes.<sup>367</sup> Eastern Punjab's proximity to 'Hindustan proper' was thought to have steered custom there in the direction of Hindu personal law, interpreted by Punjab administrators to be similar to the customary law of village co-parcenaries. Central Punjab's preponderate Jat and Rajput tribes and the historical conditions that gave rise to the Sikh religion were understood to have favoured the preservation of village customs against the influence of Hindu and Muslim personal laws. By 1924, the project of codification proposed by the 1916 report was only carried out in central Punjab—a region that included ten out of the twenty-nine districts in Punjab: Lahore, Amritsar, Gurdaspur, Sialkot, Gujranwala, Sheikhupura, Ferozepore, Jullundur, Ludhiana and Hoshiarpur. Codification brought about greater uniformity in customary law among Hindu, Muslim, and Sikh agriculturalists in this region by validating agnatic theories of land succession. For rural Muslim politicians from central Punjab,

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<sup>367</sup> N. Hancock Prenter, 'Custom in the Punjab,' *Journal of Comparative Legislation and International Law* 6, 1 (1924), 67-80.

village communities provided an alternative source of political representation than that of an all-India, Muslim community.<sup>368</sup>

Customary law in central Punjab also inferred conversion from Hinduism—imbuing central Punjabi Muslims with a different religious identity and ethnicity than that of Indian Muslims from western regions. The origins of much of the western region's population were ascribed to migration from Muslim lands such as Afghanistan and Iran, rather than conversion among lower-caste Hindus.<sup>369</sup> Sir Umar Hyat, a large landowner from Western Punjab, saw Muslim legislative assembly representatives from central Punjab as the only true representatives of Muslim agriculturalists.<sup>370</sup>

The Unionist party founder Fazli Husain came from a similar socio-economic and ethnic background as Pir Akbar Ali and Zafrullah Khan, originating from central Punjab and descending from Bhatti Rajputs in the region, a designated 'agriculturalist' tribe.<sup>371</sup> His ancestor, Qaimuddin, was a revenue officer for religious endowments who settled in Batala around 1500.<sup>372</sup> Husain was born in Peshawar, where his father was stationed as a civil service officer, and was educated in Oxford. He too aspired to enter the civil service but, having failed his qualifying examination, became a lawyer. Upon returning to India, he joined the Anjuman-i-Hamayat-i-Islam in Lahore, which had also attracted Ghulam Ahmad's followers towards issues of rural education of social uplift. In 1904 and 1907, he joined the Indian National Congress and the All-

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<sup>368</sup> In an imagined sense, as Benedict Anderson described nationalism as imagined communities: *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London, New York: Verso, 2006).

<sup>369</sup> Ibbetson, *Panjab Ethnography*, 143-144.

<sup>370</sup> Letter from Sir Umar Hyat to Punjab government, undated (from 1930s), IOR L/PO/6/48.

<sup>371</sup> Husain, *Fazl-i-Husain*, ch. 1.

<sup>372</sup> *Ibid.*, 1.

India Muslim League, holding dual membership with both organizations. At this time, he also worked as a lawyer in Sialkot and the Lahore High Court circuit, representing a string of lawsuits that dealt with issues of conversion and gave him popular recognition among Muslims.<sup>373</sup> He was appointed to the Punjab legislative council in 1916. In 1921, he was a member of the reformed Punjab legislative assembly and appointed minister of education. In 1923, he founded the Unionist party with Chhotu Ram, who represented Hindu Jats from eastern Punjab.<sup>374</sup> In 1930, he was appointed as a member of Viceroy Willingdon's executive council with the Education, Health, and Lands portfolio.<sup>375</sup>

Compared to the large Muslim landowners from western districts, Husain came from a relatively modest background and at least identified the Unionist party's aims with alleviating peasant indebtedness and improving their lot. According to his son, who wrote his biography and published his diaries, he followed the tradition of paternal administration in the Punjab: 'he indicated how necessary it was for the state to take the initiative in raising the standard of living of the man behind the plough, and how this could be done by legislation and governmental machinery long before the masses were able to help themselves.'<sup>376</sup> In line with this aim, the Unionist party introduced compulsory primary education and built schools and dispensaries in rural areas.<sup>377</sup> Husain supported measures to introduce formal education of vernacular languages in 'Anglo-Vernacular' schools so that western educated Punjabis could

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<sup>373</sup> These lawsuits will be analyzed in chapter 5.

<sup>374</sup> Husain, *Fazl-i-Husain*, 47-54.

<sup>375</sup> *Ibid.*, 240-252.

<sup>376</sup> *Ibid.*, 240.

<sup>377</sup> Jalal and Seal, 'Alternative to Partition', 426.

continue to communicate in their mother tongues.<sup>378</sup> He supported measures to establish vernacular medical institutions to train students to practice medicine in rural areas. According to Husain, villages were unable to afford to keep western trained medical doctors or hospital assistants. Traditional *hakims* were replaced by men who ‘possess but little intelligence’ and no knowledge of basic hygiene and they needed to be destroyed and replaced by another class of medical men.<sup>379</sup> He suggested further measures to produce medicine in India that would be affordable to the rural poor, which would combine cheaper traditional medicine with and western scientific expertise.

Importantly, Fazli Husain expressed dissent from ‘orthodox’ religious authority in Islam. Speaking before the Anjuman-Himayat-i-Islam in 1902, he said:

[English] priests, allow me to tell you, are incomparably superior to your ignoramus Mullahs. They are men of culture who take orders after having obtained good Varsity Degrees, and having studied Divinity. Their churches are far better taken care of than ours. With Mullahs so ignoramus, with mosques tottering, with youths ignorant of religion, with no adequate arrangement for the spiritual and religious welfare of the people, with no effective organized charity, am I to understand that you consider yourselves superior to the British in religious affairs?<sup>380</sup>

This suggests that Husain did not consider the *ulama* (i.e. ‘ignoramus’ Mullahs’) as legitimate interpreters of Islamic law. They did not effectively distribute resources to the poorest: they had no ‘effective organized charity.’ Husain’s negative comparison of Muslim mullahs to British priests and his lamenting a general lack of religion or spiritual training, rather than specifically Islamic training, also suggests an ecumenical

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<sup>378</sup> Husain, *Fazl-i-Husain*, 63-64.

<sup>379</sup> Fazli-Husain, 23 January 1917, ‘Opinion of the Punjab government on the question of the advisability of establishing institutions for the purpose of giving medical students a special course of training conducted in vernaculars so as to qualify them for ordinary medical practice in rural areas.’ Punjab Proceedings, Home Department, October 1917, IOR P/10259.

<sup>380</sup> Mian Fazl-i- Husain, ‘A Message from England read at the 17<sup>th</sup> annual convention of the Anjuman-i-Himayat-i-Islam.’ (Sialkot: City Press, 1902).



conception of religion. This is important as it reveals something of the nature of Fazli Husain's political representation of Muslims, which was not religious representation particular to Muslims only.

The measures that Fazli Husain and Ahmadi politicians supported in the Punjab legislative assembly concerned improving the showing of Muslims in professions created through western education. While Fazli Husain was Minister of Education in the reformed Punjab council, Pir Akbar Ali put before him questions about communal representation in the medical college in Lahore (only 33 out of 103 students were Muslim) and communal representation in educational service (only 19 out of 74 posts were Muslim).<sup>381</sup> He put before the administration questions on communal representation in medical services in the Punjab for permanent assistants (20 out of 91 were Muslim) and sub-assistant surgeons (105 out of 463 were Muslim).<sup>382</sup> The Unionist party under the leadership of Fazli Husain pushed for measures that gave Muslims a protected quota in educational and medical services.<sup>383</sup>

Fazli Husain and Ahmadi politicians advocated separate electorates for Muslims be maintained on an all-India level, which they argued was a temporary measure to redress institutional inequalities that disadvantaged Muslims.<sup>384</sup> In doing so, they adopted the positive inferences of separate electorates as protecting minorities against upper-caste dominance in the professions and civil services, rather than its

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<sup>381</sup> Punjab Legislative Council Debates, 1 November 1921, Vol. II, no. 4 (Lahore: Government Printing, 1921), at 445 and 457.

<sup>382</sup> Ibid., at 455.

<sup>383</sup> Jalal and Seal, 'Alternative to Partition,' 426.

<sup>384</sup> Letters from Fazli Hussain to Zafrulla Khan, 8-28 May 1933, IOR Mss Eur E352/23; Memo prepared by Zafrullah Khan, IOR Mss Eur B 362.

negative inferences as a colonial strategy to divide and rule.<sup>385</sup> Reflecting their common viewpoint, Fazli Husain recommended Zafrullah Khan as a Muslim delegate to the Round Table Conferences in London (1930-1932) to advocate separate electorates be maintained for Muslims in under the scheduled constitutional reforms. In 1932, he helped secure Khan's appointment to the Viceroy's council.<sup>386</sup>

Like Fazli Husain, Zafrullah Khan publicly identified Muslim interests with those of rural Muslims in the Punjab. Khan described his religious views as having been influenced by researching land records while working in his father's law practice in Sialkot:

[My father] told me that I could best use my time with him by making myself familiar with the system of land records and the method of tracing the history of every plot of land backwards to 1855, i.e., almost to the advent of the British administration into that part of India. That was one great benefit that I derived from my association with considerable influence over my outlook on life, particularly over my religious views.<sup>387</sup>

Although he left his meaning vague in this statement, Khan frequently attributed the economic backwardness of Muslims in India to the interaction of Islamic laws with other laws. In a 1935 public speech, Khan interpreted economic principles in Islamic law in terms of class issues that were not restricted either to Muslims or to Indians. He recounted a discussion that supposedly took place between him and an unnamed Muslim delegate to the Joint Select Committee of the Round Table Conference in London in 1933, which related to the Quranic prohibition of interest (*riba*). The delegate's view was that Muslims must accept the interest in order to improve their economic position. Khan's view was that if that meant 'there should be a member of the millionaires in every community, and the poor working classes should live in

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<sup>385</sup> Husain, *Fazl-i-Husain*, 98.

<sup>386</sup> Diary entry for 17 May 1932, reproduced in Husain, *Fazl-i-Husain*, 242.

<sup>387</sup> Wilcox and Embree, *The Reminiscences of Sir Muhammad Zafrulla Khan*, 2.

distress from day to day, Islam has no solution.’ According to Khan, Islam aimed ‘at a state where wealth revolved and did not accumulate at any time within a few hands’ and did not aim at those rules of economic society developed during the nineteenth and twentieth centuries. As an example of the manner by which Islam revolved wealth, Khan said that the Islamic system of inheritance allowed one-third of an individual’s wealth to be given away while requiring that two-thirds be distributed among a very large number of heirs.<sup>388</sup> It might be inferred from Khan’s story that Muslim leaders who were concerned only with raising the economic position of the Muslim community were compelled to depart from fundamental principles of Islam that prevented wealth from accumulating.

Khan understood the ‘communal problem’ between Hindus and Muslims as resulting from economic and social inequality within Indian institutions and laws.<sup>389</sup> Because these inequalities worked to the benefit of those representing the predominantly Hindu majority, Khan argued, they would not be redressed without structural adjustments and constitutional provisions to balance the interests of Muslims against those of Hindus. Khan described what he believed was a separation between Hindus and Muslims in Indian society into ‘water-tight compartments’ despite close physical proximity. This separation was due to restrictions observed by Hindus, ostensibly for religious reasons but with economic effect, that discriminated against Muslims (e.g. he interpreted restrictions against eating food handled by Muslims as a form of economic boycott). Muslims experienced discrimination in their everyday lives because they were easily identified by their names, the manner of their

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<sup>388</sup> Khan, *The Message of Ahmadiyyat*, 30.

<sup>389</sup> Memo prepared by Zafrullah Khan, IOR Mss Eur B 362, at 7-9.

dress, and their physical features. Furthermore, this discrimination was entrenched in commercial associations, educational and government institutions.

Contrary to signifying separatism or communalism, Khan described the recognition of religious distinctions as necessary to bring about a social unification that transcended religious, racial, and national boundaries. The organization of Muslims in the All-India Muslim League and the Muslim demand for separate electorates was, according to Khan, not to draw indelible communal or separatist lines across the Indian nation.<sup>390</sup> Rather, it was necessary to organize Muslims in order to speed their progress in 'fields of activity' in which they lagged behind other communities in India. Muslims lagged behind other communities because of the universal nature of Islam. According to Khan, Islam sought to extend beyond racial and national communal boundaries and unite the entire human race. As a result, Muslims were 'apt to forget their immediate communal needs and requirements.'<sup>391</sup>

In a similar manner, Khan described Muslims who identified themselves as Ahmadis as doing so not because they intended to separate themselves from other Muslims, but so as to bring about greater unity between different groups of men.<sup>392</sup> He described the Ahmadiyya not as a new interpretation of Islam, but as a new dispensation of the original message of Islam that was suited to a 'new universe.' He went on to describe Islam's role in the new universe as one of reconciliation between the factors that led to discord.<sup>393</sup> He blurred the distinction between Islam and other religious traditions by describing all spiritual teachings as having one common

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<sup>390</sup> 'Chaudhri Zafrullah Khan's Presidential Address,' *The Sunrise*, 8 January 1932, 9.

<sup>391</sup> Ibid.

<sup>392</sup> Khan, *The Message of Ahmadiyyat*, 5.

<sup>393</sup> Ibid., 15-19.

source.<sup>394</sup> As will be shown, Khan's interpretation of Islam accorded with the Ahmadiyya's view that international law and the recognition of universal human rights was in accordance with Islamic precepts.

### Ahmadis Across Political Boundaries

Legal theories prevailing in Europe during the late nineteenth century, which theorized the development of a law between nations, placed permanent boundaries between European societies and Islamic societies.<sup>395</sup> These theories inferred that people in the Islamic world were incapable of developing to an equal position with European people because of innate and biological differences between them. In contrast, Maine's historical and comparative approach invited comparison between ancient village communities that had existed in Europe and those existing in India, including those to which Punjabi Muslims belonged. Maine found that Indian village communities resembled the Teutonic mark that had existed in Germany, displaying similar rules governing in-group and out-group relations, patterns of co-sharing, and exclusion of female heirs. He theorized that European societies had progressed from status to contract in private law because circumstance had allowed them to move beyond the stage in development when custom had been given a 'sacred caste, and

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<sup>394</sup> Ibid., 26.

<sup>395</sup> See Jennifer Pitts, 'Boundaries of Victorian International Law' in *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, ed. Duncan Bell (Cambridge: Cambridge University Press, 2012), 67-88.

rendered unchangeable.’<sup>396</sup> This suggested a potential for rural Punjabi Muslims to progress along the same evolutionary schema under the right circumstances.

Indian students of law were trained at Punjab University to seek out similarities between their customary laws and the laws from which modern European laws developed using evolutionary legal theories. Justice William Rattigan, who served as vice-chancellor of Punjab University in 1887, wrote a legal textbook designed for Indian students of law that fashioned an awareness of the place of India and the Punjab within an international and comparative legal framework, and included a chapter on international law.<sup>397</sup> According to one reviewer, Rattigan’s textbook fulfilled the need for Indian law students to ‘be constantly reminded of parallelisms or contrasts between Indian Law and Western Jurisprudence.’<sup>398</sup>

They were also trained as potential innovators of European laws. As vice-chancellor of Punjab University in 1901, Lewis Tupper’s convocation speech described a role for the study of law in the Punjab for advancing legal studies in general.<sup>399</sup> Tupper said that the basis for jurisprudence was to be found in works of Utilitarian legal philosophers Jeremy Bentham and John Austin, who described law as it ought to be across legal systems.<sup>400</sup> He described Henry Maine as equally important to developing jurisprudence into a science. Tupper went on to say that the science of jurisprudence that Maine introduced through the historical and comparative method

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<sup>396</sup> Calvin Woodward, ‘A Wake (or awakening?) for historical jurisprudence’ in *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. Alan Diamond (Cambridge: Cambridge University Press, 1991), 217.

<sup>397</sup> W. H. Rattigan, *The Science of Jurisprudence: chiefly intended for Indian students* (Lahore: ‘Civil and Military Gazette’ Press, 1888).

<sup>398</sup> ‘Rattigan’s Jurisprudence’ in *Law Magazine and Law Review* 13, 4 (1888), 382-393.

<sup>399</sup> Charles Lewis Tupper, ‘English Jurisprudence and Indian Studies in Law’ in *Journal of the Society of Comparative Legislation* 3, 1 (1901), 84-94.

<sup>400</sup> *Ibid.*, 85.

was a branch of sociology. Maine's evolutionary legal theories were 'a set of consistent generalizations from known facts in the growth of legal institutions and ideas' that were necessary to understanding the evolution of society.<sup>401</sup> Indian law students were taught that evolutionary legal theories were a means of re-writing law as it ought to be. An understanding of their own customary law in parallel with modern laws would lead to a revision of Utilitarian laws, not only progressing Indian society but honing the legal tools of progress generally.<sup>402</sup>

However, racial distinctions in colonial law created an international boundary between India and Europe that implied that India would not develop to a position of equality with the British.<sup>403</sup> This, in turn, suggested that societies within India would not develop to a position of equality with one another. A legal distinction between Indians and Europeans was made salient to the Indian elite by the failure of the Ilbert Bill (1883), which sought to repeal a law that gave Europeans the right to be tried by a British jury in criminal trials.<sup>404</sup> Tupper had argued that this racial separation in criminal courts was justified by the distinctions observed by Indian communities, such as rules that separated Sudras from Brahmins.<sup>405</sup>

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<sup>401</sup> Ibid., 90.

<sup>402</sup> Ibid., 90-92.

<sup>403</sup> Pitts, 'Boundaries of Victorian International Law'. See also Gerrit Gong, *The Standard of "Civilization" in International Law* (New York: Oxford University Press, 1984), which examines international relations between European countries within the 'family of nations' and Turkey, China, Japan, and Siam in the mid-nineteenth century. The status of these non-colonialized nations as not meeting the standard of civilization justified their non-membership as equal to European nations and their 'extraterritoriality', in which European subjects residing in these countries were immune to their jurisdiction.

<sup>404</sup> Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2011), 97-103.

<sup>405</sup> Tupper, *Our Indian Protectorate*, 396.

In 1917, Secretary of State Edwin Montague and the Viceroy Lord Chelmsford met with representatives of various associations and communities in India, who were invited to submit memorials with their views on the future constitution of India. Zafrullah Khan, accompanying the Ahmadiyya head Bashir-ud-din Ahmad, presented the Ahmadiyya community's memorial to the administration.<sup>406</sup> Their memorial seemed to reconcile this contradiction between the theories of political development prominent in the Punjab, which suggested equality between India and European countries, and the distinction within colonial law between Indians and Europeans, which suggested continuing inequality. At the same time, their memorial recommended maintaining special representation for minorities.

The Ahmadiyya memorial claimed 'exceptional opportunities for obtaining direct information concerning the lives of all classes throughout India.'<sup>407</sup> The memorial attributed popular discontent among Indians to four causes: a lack of sympathy from English officials, the distinctive treatment given to Europeans under the law, changes in social and economic conditions caused by decreased productivity of the soil and high prices, and the lack of education suited to the needs of the agriculturalist classes.<sup>408</sup>

The Ahmadiyya memorial emphasised the rights of minority communities, adopting the positive inferences of separate electorates. It recognized Indian society as being characterized by social differences of a kind that made representative government undesirable for minority communities. It stated that 'a nation labouring

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<sup>406</sup> Edwin Montagu, *An Indian Diary* (London: Hienemann, 1930), 33-36; Wilcox and Embree, *The Reminiscences of Sir Muhammad Zafrulla Khan*, 4

<sup>407</sup> Printed summary of the memorial submitted by the Ahmadiyya Community, Judicial and Public (Reforms) Papers (1918), IOR L/PJ/9/1.

<sup>408</sup> Ibid.



under disadvantages in the face of acute religious and racial differences would be cursed and not blessed by self-government.’ According to the memorial, the Ahmadiyya’s own experience of religious bigotry was testimony to this. The Ahmadiyya was a small community that ‘believ[ed] in the truth of all prophets’ and yet was ‘persecuted by the followers of the different religions which flourished in India’.<sup>409</sup> Thus it advocated for the cautious introduction of representative institutions accompanied by separate electorates and weightages for minority communities within legislative and executive councils. In addition to politically significant minority communities like Indian Muslims, it advocated that special arrangements should also be made for the representation of small minorities. It did not recommend that Muslim law be administered within an Islamic legal system by *ulama*, as memorials submitted by delegates from the Muslim seminary in Deoband and the Muslim organization Majlis Muid-ul-Islam in Lucknow did.<sup>410</sup>

While the Ahmadiyya memorial agreed with Tupper’s analysis that religious and racial inequalities in India made national self-rule undesirable in the immediate future, Bashir-ud-din Ahmad recommended the repeal of the laws that made a racial distinction between Indians and Europeans. Montagu recorded in his diary that during his conversation with Bashir-ud-Din Ahmad, the religious leader objected to the right of Europeans to claim British juries.<sup>411</sup> The Ahmadiyya memorial pointed to the

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<sup>409</sup> Ibid.

<sup>410</sup> Printed summaries of the memorials submitted by the ‘Maulvis of Deoband, United Provinces’ and the ‘Majlis Muid-ul-Islam, Lucknow’, Judicial and Public (Reforms) Papers (1918), IOR L/PJ/9/1.

<sup>411</sup> Montagu, *An Indian Diary*, 36.

Indian Arms Act of 1878 as exemplifying racial inequality in the law.<sup>412</sup> This act made it legal for Europeans to carry arms in India, while making it illegal for Indians.

The removal of this racial distinction within the law suggested India's inclusion within a developing international economic order. The Ahmadiyya head described race as an economic barrier to India's development. In 1930, Bashir-ud-din Ahmad wrote that there were no essential differences between the east and west that would send them on alternative paths of legal and political development.<sup>413</sup> India's equality with nations that had once been British dependences (i.e. the Commonwealth of Nations) depended upon British people remaining in India 'proud to serve India in the capacity of a citizen of the country and not as a foreigner'.<sup>414</sup> Racial feelings would serve to bond Britain to settler colonials (i.e. New Zealand, Australia, the United States, and Canada), but in the case of India, they were an impediment to maintaining such a connection. Without this connection, Ahmad wrote that the independence of India would leave it in a position of dire economic dependence on the West, which he described as worse than slavery. Furthermore, while religious distinctions existed in Islamic law, racial distinctions did not. According to Zafrullah Khan, Islam differed from other systems in how it regulated racial relations, the most important of which was marriage, regarding it as a private matter.<sup>415</sup>

The Ahmadiyya interpreted Islamic law as commanding the obedience of Indian Muslims to British laws, but this obedience was predicated on Indian Muslims

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<sup>412</sup> Printed summary of the memorial submitted by the Ahmadiyya Community, Judicial and Public (Reforms) Papers (1918), IOR L/PJ/9/1.

<sup>413</sup> Bashir-ud-din Ahmad, *Some Suggestions for the Solution of the Indian Problem* (Qadian, 1930), 355.

<sup>414</sup> Ibid.

<sup>415</sup> Zafrullah Khan, *The Message of Ahmadiyyat*, 42-43.

being able to move across political boundaries. Following the Montagu-Chelmsford reforms, Mohandas Gandhi (1869-1948) initiated the Non-cooperation movement (1920-1922) to protest British laws like the Rowlatt Act, a martial law ordinance that defined post-war India to be in a state of emergency and allowed the British to hold Indians without trial.<sup>416</sup> The movement supported a mass boycott of British institutions and goods. *Ulama* joined the All-India Khilafat Committee and the Jamiat al-Ulama e Hind (JUH) in support of the movement and expressed their opposition to British rule as religious duty. The Ahmadi head opposed Muslim participation in the Non-cooperation movement, arguing that only those countries whose people had an innate reverence to the law could progress. In the case of an unjust or tyrannical government, it was a Muslim's duty to 'sacrifice all worldly advantages to the conscience and leave the country.'<sup>417</sup>

The Ahmadiyya's obedience to British laws in India was also justified by the presence of Ahmadi missionaries in Britain. It was thus predicated not only on Muslims' ability to migrate across political boundaries, but also their right to spread Islam across those boundaries. He argued that Muslims must show obedience to British laws as long as they did not force Muslims to leave Islam. Ahmadi missionaries in Britain demonstrated that this was not the case.<sup>418</sup>

During the 1910s and 1920s the Ahmadiyya sent missionaries from Qadian around the world. In 1912, Khwaja Kamal-ud-Din left India for England, setting up the Woking Muslim Mission in Surrey. His mission emphasized the universality of

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<sup>416</sup> Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy* (New Delhi: Oxford University Press), 137.

<sup>417</sup> Hazrat Mirza Bashir-ud-din Mahmud Ahmad, *Non-Co-operation and Islam* (Lahore: Mercantile Electric Press, n.d.), viii.

<sup>418</sup> *Ibid.*, 8.

Islam and its permeability across cultural borders through its monthly journal *The Islamic Review*. In 1913, his message led directly to the conversion of Lord Headley. Together with Headley, he wrote that ‘compassionate regard for the welfare and happiness of others is a characteristic feature of the Buddhist, Christian and Islamic Faiths, and the last named, being the simplest and most free from dogmatic encumbrances, is most likely to be the universal religion of the world.’<sup>419</sup> Lord Headley’s conversion was significant. Firstly, Headley was a prominent member of British peerage and an outspoken representative of Islam, founding in 1914 the British Moslem Society. His conversion meant that not only could Islam cross racial lines, but the conversion of one of the British ruling aristocracy meant that it had crossed an important class line as well. In British India, these were lines that separated a subject population from a foreign ruling class.<sup>420</sup> British Muslim converts could represent the interests of Indian Muslims in Britain as members of the same religious community, even identifying with the same class interests. This was the case with Lord Stanley (1827-1903), who was a member of the House of Lords and professed to be Muslim. He was a staunch proponent of legal reforms in India that would allow wealthy Muslims to keep their estates intact through private *waqfs*.<sup>421</sup>

In 1914, the Ahmadiyya community split into two branches. As provincial agrarian policies moved rural and urban populations apart, so too could the split within the Ahmadiyya movement be characterized as one between urbanized and rural Ahmadis. While one section continued to direct its allegiance towards Qadian and recognized the authority of Mirza Ghulam Ahmad’s son and the institution of

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<sup>419</sup> Khwaja Kamal-ud-Din and Lord Headley, *The Strength of Islam* (Woking: Woking Muslim Mission & Literary Trust), 21.

<sup>420</sup> *Advertiser* (Adelaide), 24 June 1935, 15.

<sup>421</sup> Kozlowski, *Muslim Endowments*, 168.

Ahmadiyya *khilafat*, Muhammad Ali separated and established a new organization in Lahore. While recognizing the claims of Mirza Ghulam Ahmad as Mahdi, the Lahore Ahmadis disassociated from any concept of a central authority in the form of *khilafat*. With Muhammad Ali also went Khwaja Kamal-ud-Din, Lord Headley, and the Woking Muslim Mission. While emphasizing the universal nature of Islamic teachings, the Lahore Ahmadis also tended to emphasize the sectarian nature of the Qadian Ahmadis, arguing that ‘sects’ impeded Islam on its way to being recognized as a universal truth.<sup>422</sup> In this manner, their polemics fed into political expressions of Islamic unity, in which sectarianism was conceived of as politically divisive and negative.<sup>423</sup> However, despite these polemics the two groups kept good relations in London. By the time that the Qadian Ahmadis built a mosque in Southfields in 1924, the Woking mission and the British Moslem Society were centres of the Muslim community at the metropolis.<sup>424</sup>

Returning to our focus on the Qadian Ahmadis, the Ahmadiyya mission in America was particularly successful among African-Americans. The historian Richard Turner has accounted for the success of the Ahmadiyya movement in America as owing to its timing, when the ‘internationalist’ perspective of Marcus Garvey’s Universal Negro Improvement Society (UNIS) in the 1920s influenced African-Americans to view themselves in solidarity with the ‘darker races of the world’ against white Europeans Americans.<sup>425</sup> Black leaders were given leadership

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<sup>422</sup> Kamal-ud-Din and Headley, *The Strength of Islam*, 22.

<sup>423</sup> This will be analyzed in the next chapter.

<sup>424</sup> Indian Political Intelligence Reports, July 1927 to June 1946, Intelligence Bureau (Home Department) Records, IOR L/PJ/12/468.

<sup>425</sup> Richard B. Turner, ‘The Ahmadiyya Mission to Blacks in the United States in the 1920s’ in *The Journal of Religious Thought* 40, 1 (1983), 50.

roles within the movement, including a prominent Garveyite James Conwell from Chicago. Garveyites joined the movement and retained their identification with UNIS, with at least six converts pictured attending Friday service at the mission in Chicago wearing Garveyite uniforms.<sup>426</sup> Yet Ahmadiyya offered African-Americans aware of a 'colour-line' a non-racialist interpretation of Islam among other forms. Turner finds that the Ahmadiyya represented a 'heterodox and universalist Islam,' that competed with 'heterodox and racialist' forms of Islam that emerged from within the African-American experience.<sup>427</sup> The Ahmadiyya mission in America lauded the conversion of a white man, Alexander Russell Web, as the first known convert to Islam in the country, and Web assisted the Ahmadis in translating the Qur'an in 1911.<sup>428</sup>

Other missions that the Ahmadiyya set up included a mission in Mandate Palestine and a mission in Sierra Leone, which was positively received by the 'orthodox' Muslim leader Ahmed Alhadi and the Aku people. An attempt to set up a mission in Freetown, on the other hand, was defeated by the hostility of local men.<sup>429</sup> Lahore Ahmadis set up a mission in Berlin in 1923, which led Egyptian nationalists in Berlin to oppose them. Leaders of the Egyptian National Party, on the basis that

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<sup>426</sup> Ibid., 59.

<sup>427</sup> Ibid., 50-51

<sup>428</sup> Ibid., 51

<sup>429</sup> For Ahmadiyya missions in Africa, see: L. Proudfoot, 'Towards Muslim Solidarity,' *Journal of the International African Institute*, 31, 2 (1961), 147-157; Humphrey Fisher, *Ahmadiyyah: A study in contemporary Islam on the West African coast* (London: Oxford University Press, 1963); May Yacoob, 'Ahmadiyya and urbanization: Easing the integration of rural women in Abidjan,' in *Rural and Urban Islam in West Africa*, (ed.) Nehemia Levtzion and Humphrey J. Fisher (Boulder: Lynne Rienner 1987), 119-134.

Ahmadis had separated themselves from the community of believers because they kept aloof, in turn began instigating anti-Ahmadi propaganda in India.<sup>430</sup>

The movement of Ahmadiyya missionaries across political boundaries depended upon their belonging to a religious organization whose obedience to territorial laws was tested. After WWI, missionaries operating within the British Empire were required to obtain a permit from the India Office that was subject to their ‘undertaking to co-operate loyally with the Government of the country’ in which they operated.<sup>431</sup> The British government formulated this scheme during WWI, when the India Office’s attention was drawn to the ‘exceptional facilities for influencing for good or evil the peoples of India’ that missionaries possessed.<sup>432</sup> During the war, it was feared that philanthropic institutions or missionary societies might exert political or cultural influence contrary to ‘public interest’.<sup>433</sup> As Under-Secretary of State Lord Islington pointed out, issuing licenses to ‘cosmopolitan’ organizations such as those under the Roman Catholic Church was impolitic because ‘racial recognition [was] practically obliterated’.<sup>434</sup> The fidelity to British laws of an individual Jesuit from Sweden or an individual Jesuit from Switzerland, for example, could not be tested by his nationality. However, Catholic and Protestant leaders wanted organizations and not individual missionaries to be held accountable. They held that requiring licenses

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<sup>430</sup> Indian Political Intelligence Reports, Intelligence Reports, August to October 1923, Intelligence Bureau (Home Department), IOR L/PJ/12/102.

<sup>431</sup> India Office ‘Memorandum C’, 8 February 1918, Public and Judicial Department Records, IOR L/PJ/12/353.

<sup>432</sup> Memorandum to the Governor-General of India on policy to be adopted after the War towards foreign religious and foreign philanthropic enterprises in India, 29 March 1918, Public and Judicial Department Records, IOR L/PJ/12/353.

<sup>433</sup> Ibid.

<sup>434</sup> Memorandum by Lord Islington on conference between representatives of the India Office, Foreign Office and Colonial Office and Representatives of Roman Catholic Missionary Bodies held at the India Office on 14 December 1917, Public and Judicial Department Records, IOR L/PJ/12/353.

for individual missionaries infringed upon religious liberty.<sup>435</sup> The British initiated a tiered system of licensing missionaries that attempted to balance the principle of religious liberty with powers of the state. The first tier included missionary societies under strong central bodies that were trusted to ‘exercise effective moral control.’ This tier included mainly British societies under the National Missionary Council. The second tier included societies under unrecognized central bodies, which were required to take out permits or licenses. The third tier included ‘unrecognized societies’, in which individual missionaries were required to take out permits. This tier included ‘non-Christians of all sorts’. Under this system, individual Ahmadi missionaries as British subjects in India were required to obtain permits to operate in London under close surveillance by British intelligence agencies.<sup>436</sup>

The right of missionaries to operate across political boundaries was also recognized within the international legal framework established by the Mandate system. It was a particular right of nations within the League of Nations to send missionaries to fellow League nations.<sup>437</sup> This right still had force in the 1960s in a case involving the Mandate territory of South West Africa, which had been brought before the International Criminal Court of Justice (ICCJ) by Ethiopia and Liberia. Though Ethiopia and Liberia had no direct interest in the case, the court determined that violation of their particular right (i.e. to send missionaries to South West Africa) was valid grounds to bring legally binding litigation before the court. In this case,

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<sup>435</sup> Ibid.

<sup>436</sup> Indian Political Intelligence Report, Simla, 23 August 1927, Intelligence Bureau (Home Department) Records, IOR L/PJ/12/468.

<sup>437</sup> Zafrullah Khan was a judge at the ICCJ at the time and asked by the then president of the ICCJ to withdraw from the case. His absence is believed to have tipped the bench to dismissing the case. Rosalyn Higgins, ‘The International Court and South West Africa’ in *International Affairs* 42, 4 (1966): 573-599.



litigation was meant to challenge the trusteeship of apartheid South Africa over South West Africa.

Ahmadiyya missions also benefited from the British consulate system and being centrally organized from Qadian. During political instability in Syria, the Ahmadi missionary headquarters at Qadian kept in contact with their missionaries through the British consulate in Damascus.<sup>438</sup> The consulate in Moscow assisted in tracing and repatriating an Ahmadiyya missionary arrested in Bokhara, with the assurance that the Ahmadiyya headquarters would repay the cost incurred.<sup>439</sup>

This movement of Ahmadi missionaries across political boundaries required an interpretation of Islamic law that was allowed for the presence of Muslims under non-Muslim governments. The conversion of people in non-Muslim countries to Islam conflicted with an 'orthodox' interpretation of Islamic law expressed by N. B. E. Baillie, which separated the 'Muslim world' from the 'non-Muslim world' by making Muslim religious identity dependent upon nationality:

But though foreigners are all deemed to be of one religion as opposed to Mohammedans, their division into separate nationalities is distinctly recognized by the law. Mohammedans, on the other hand, though living under separate governments, are held to be of the same nationality; insomuch, that when a Mohammedan goes to a foreign country, he is supposed to have the *animus revertendi* [with intention to return], however long he may continue to reside in it, until he actually apostatizes from the faith.<sup>440</sup>

A similar interpretation of Islamic law as dividing the world into Dar-ul-Islam ('the country of safety and salvation') and Dar-ul-Harb ('country of the enemy') was also

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<sup>438</sup> Letter to the Foreign Office from the Consul in Damascus, 24 December 1925, Political and Secret Department Records, IOR P/PS/11/4399.

<sup>439</sup> Memorandum from the Under-Secretary of State, Foreign Office, 12 March 1927, Political and Secret Department Records, IOR L/PS/11/677.

<sup>440</sup> Baillie, 'On the Duty which Mohammedans in British India Owe', 429.

included in Baillie's textbook on Islamic law.<sup>441</sup> Baillie defined the Dar-ul-Islam as the country under the government of Muslims or, in the absence of a Muslim sovereign, a territory where people were bound together by Islam. Baillie's textbook can be considered 'orthodox' because colonial courts frequently deferred to it. It precluded Muslims from adopting European nationality, or European nationals from adopting Islam as their religion. They either ceased to be Muslims or were compelled to immigrate to Muslim countries.

In contrast, Ameer Ali understood the 'orthodox' interpretation of nationality under Islamic law as historically contingent. The presumption that a Muslim domiciled in the 'Dar-ul-Harb' was an apostate from Islam was, according to his understanding, the natural result of the hostilities that developed between Muslims and neighbouring countries following the death of the Prophet. However, the rigour of this stricture had relaxed as hostilities between Muslim sovereigns and European powers had ceased. According to Ali, this was due to treaty agreements between Muslim sovereigns (the Ottoman Empire) and European powers, and to 'Christendom' renouncing its former bigotry towards Muslims. Muslims were now able to acquire a foreign domicile without renouncing Islam. Muslims born within the British Empire could settle in Britain and Ireland.<sup>442</sup> Private international law determined what personal law governed a Muslim domiciled in Europe. Under Italian or French laws, that meant a Muslim carried his personal law with him. In England, it meant that he continued to be bound by the moral and religious portions of Islamic law but was governed by English common law.<sup>443</sup>

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<sup>441</sup> Baillie, *Digest of Moohummadan Law*, 169.

<sup>442</sup> Ali, *Mahommedan Law, Vol. II*, 178.

<sup>443</sup> *Ibid.*, 180.

As a consequence of the expansion of Ahmadi missions across political and jurisdictional borders, the Ahmadiyya adopted an interpretation of Islamic law that was compatible with private international law. The Ahmadi missionary Mufti Muhammad Sadiq's took a legal position similar to that of Ameer Ali to reconcile Muslim personal law and territorial laws. Upon arrival in the United States in 1920, Sadiq was detained for seven months and released on the condition that he not preach polygamy. He responded by distinguishing commandments from permissions in Islam. Because Islam did not command polygamy, Muslims in lands where polygamy was outlawed relinquished their right to practice it.<sup>444</sup>

The Ahmadiyya interpreted Islamic law as being compatible with the international norms established by the League of Nations, to which India was a founding member in 1919. Bashir-ud-din Ahmad wrote:

Unfortunately we are so taken up with the questions of countries and nationalities that we have clean forgotten that we are all fellow beings united in the chain of one common brotherhood of humanity...Nations are intermixing and their angularities are being fast smoothed out and not only is there a lip desire to meet each other but the world is actually passing through a tribulation which is forcing all contending factors to fuse into one harmonious whole. A sort of unity is evolving. One of the most important harmonizing agents which Almighty God is bringing into action in this connection is the League of Nations.<sup>445</sup>

The principle of international protection of minority rights is traced to the treaty of Westphalia in 1648. Concerning religious minorities, who were vulnerable to persecution after being transferred from one ruler to another, the treaty put in place vague and ultimately unenforceable terms of foreign intervention for their protection. However, it established a consensus among European powers that preventing violence against minorities or their expulsion from within nation states was necessary to

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<sup>444</sup> Turner, 'The Ahmadiyya Mission to Blacks', 51-52.

<sup>445</sup> Bashir-ud-din Ahmad 'Is India Fit for Full Responsible Government,' *The Sunrise*, 21 November 1930.

maintaining stability between nations. This principle was extended to national groups in central, eastern and southern Europe following the Congress of Vienna treaty of 1815, but again the terms of its enforcement were left vague. The Paris Peace Conference of 1919 created minority treaties, which put in place an international system for the protection of minorities in Germany and Soviet Russia.<sup>446</sup>

The League of Nations provided a mechanism for the implementation of minority treaties, which included the establishment of a Permanent Court of International Justice (PCIJ) to determine disputed complaints against governments accused of treaty violations. This system, which remained in place until WWII, sought to balance conflicting principles. On the one hand, the treaties affirmed the principle of modern democracies (majority rule) and theoretically unlimited state sovereignty. On the other hand, the League sought to curtail states' power by enforcing that they extended basic rights over their citizens including 'national minorities' and in some instances special rights, as was the case with Jews in Poland and Romania who were provided with religious and linguistic rights under the treaties.<sup>447</sup> The treaties legitimated 'friendly intervention' by outside forces. Bashir-ud-din Ahmad's support for the League of Nations, as well as his denial of the essential difference between east and west, suggests that he inferred that the political development of India along federalist lines would parallel its inclusion within an emerging international law as a nation with equal rights to other nations. Federation, and the development of equality between Indians, preserved minority community rights and depended upon a central government in India devolving power to its parts (i.e. communities, provinces, states). International law, hypothetically and as

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<sup>446</sup> Carole Fink, 'Minority Rights as an International Question' in *Contemporary European History* 9, 3 (2000), 385-400.

<sup>447</sup> Ibid., 389-390.

envisioned within the League of Nations, similarly restricted the powers of sovereign nations through treaty agreements.

According to Bashir-ud-din Ahmad, Islam laid down rules for the settlement of international disputes that contemplated a body like the League. This was based on his interpretation of the Koranic verse 49:9. The parenthetical statements in the passage below are commentary added by Ahmad that function like *tafsir*, or Koranic exegesis:

If two Muslim nations fall out, make peace between them (i.e., other Muslim nations should try to prevent war between them, and should try to remove the causes of friction and should award to each its just rights). But if one of them still persists in attacking the other (and does not accept the award of the League of Nations) then all must fight the former, till it submits to the command of Allah (i.e., till it is willing to abide by an equitable settlement) and when it so submits, make peace between them, and act with justice and equity, for God loves the just.<sup>448</sup>

Although this verse specified Muslim nations, Ahmad did not distinguish between Muslim nations from non-Muslim nations. This may have been a product of the Ahmadiyya's messianic expectation that Islam would spread throughout the world. Rather, he wrote that the League did not function properly because it was not Islamic enough. That is, it was not in accordance with the Koranic rules laid down by verse 49:9. He also suggested that wars were immoral, and that they violated Islamic injunctions. According to Ahmad, international disputes arose because the conduct of nations was not judged by the rules of morality. He wrote that the international court of arbitration should settle disputes on Islamic principles.<sup>449</sup>

However, India's inclusion with Britain in a federation of nations under international law was controversial in Britain. In the 1920s, various schemes of world

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<sup>448</sup> Bashir-ud-din Ahmad, 'Islam on International Relations: The League of Nations,' *The Sunrise*, 1 April 1944. Reprinted from *Ahmadiyyat or the True Islam* (1924).

<sup>449</sup> Ibid.

federation were envisioned and popularly debated in Britain.<sup>450</sup> British historian John Seeley offered an early model of federation between the British Isles and its settler colonies (i.e. New Zealand, Australia, and Canada) in 1883 that would equalize relations between these colonies and the British Empire.<sup>451</sup> This scheme excluded India and tropical Africa, colonies inhabited by ‘alien’ people under British rule rather than people of the British nation. Seeley expressed this scheme of federation when Maine’s legal theories were most influential among Punjab civil servants.<sup>452</sup> In contrast to Maine’s evolutionary theories that compared the customs of the Punjab village to those of the German Teutonic mark, Seeley euphemistically distinguished between connections that were ‘organic and enduring’ (settler colonies) and those that were ‘mechanical and thus easily sundered’ (India and African colonies).<sup>453</sup>

More inclusive ideas of world federation were also advocated by popular British intellectuals. The writer H. G. Wells’ concept of world federation, on the other hand, did include India. Wells was expressly anti-nationalistic and espoused a cosmopolitan ideal.<sup>454</sup> He envisioned the development of a world government based on free federation that would break down national barriers.<sup>455</sup> He also worked towards the universal recognition of fundamental rights of man, which included freedom of

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<sup>450</sup> See Seymour Cheng, *Schemes for the Federation of the British Empire* (New York: Columbia University Press, 1931).

<sup>451</sup> Daniel Deudney, ‘Greater Britain or Greater Synthesis? Seeley, Mackinder, and Wells on Britain in the Global Industrial Era’ *Review of International Studies* 27, 2 (2001) 193-194.

<sup>452</sup> Dewey, ‘The Influence of Sir Henry Maine,’ 353; Maine *Village Communities*.

<sup>453</sup> Deudney, ‘Greater Britain,’ 197.

<sup>454</sup> *Ibid.*, 201.

<sup>455</sup> John Partington, ‘H.G. Wells and the World State: A Liberal Cosmopolitan in a Totalitarian Age,’ *International Relations* 17, 2 (2003), 233-246.

worship.<sup>456</sup> He drafted a declaration of the Rights of Man in 1939, and included it in his book *The New World Order*. This draft was completed with the collaboration of others and its final version came to be called the 'Sankey Declaration.' Wells campaigned to give the declaration international exposure, personally having it translated and published in multiple languages. In addition to a preamble, the declaration included ten clauses that dealt with rights to nourishment, work, education, and worship

In 1924, an affinity between this strand of thinking and the Ahmadiyya's expectation to be included under universal norms was demonstrated when an Ahmadiyya missionary was executed in Afghanistan. In 1919, the Ahmadi missionary and Afghan subject Neymatullah Khan left Qadian to set up a mission in Kabul.<sup>457</sup> Ahmadi leaders felt assured that the missionary would be safely received: King Amanullah Khan (r. 1919-1929) was committed to modernization and toleration of minority religious communities. An Ahmadiyya delegation had received assurances that the community would be safe in Afghanistan by the Afghan foreign minister Sardar Mahmood Tarzi during his visit to India. However, Neymatullah Khan was stoned to death in 1924 as a capital offense for apostasy from Islam. Though instigated by religious leaders in the country, the Afghan government sanctioned the stoning.

Bashir-ud-din Ahmad and Zafrullah Khan were in London participating in a world conference on religions when Neymatullah was executed. Bashir-ud-din Ahmad sent telegrams to the President of the League of Nations, Premiers of Britain,

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<sup>456</sup> Jan Herman Burger, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' in *Human Rights Quarterly* 14, 4 (1992), 464-468.

<sup>457</sup> This account synthesizing information from various files, September 1924 to January 1925, Political and Secret Records, IOR L/PS/11/250.

France, and Italy, and the president of the United States asking that they make a formal protest to the Afghan government, which had proclaimed that it supported liberty of conscience.<sup>458</sup> The Foreign Office deferred responsibility to the Government of India, which decided against making any formal or informal complaint. The British officer in Kabul consulted the Amanullah Khan and Tarzi about the incident. Though they expressed their horror at the stoning, they felt compelled to capitulate to a religious establishment whose support they needed. The situation in Afghanistan resulted in two more murders of Ahmadis in 1925. Following these murders, H. G. Wells, the Orientalist scholar R. A. Nicholson, A. Conan Doyle, and Francis Younghusband were signatories to a protest resolution that condemned Afghanistan's conduct as being 'so repugnant to notions of the civilized world' and affirmed the principle that freedom of conscience was the birth right of humanity.

The protest campaign against the killing of Ahmadis in Afghanistan also demonstrated an affinity between the Ahmadiyya and religious leaders who understood religious difference as alternative expressions of the same universal principles. Following the stoning of Neymatullah, a meeting of religious leaders in London resolved that 'this meeting of representatives of all classes and creeds strongly affirms the principles that freedom of conscience is the birth right of humanity and desires to convey to the Afghan Government its emphatic disapproval and condemnation.'<sup>459</sup> Walter Walsh, the leader of the Free Religious Movement, moved the resolution, and Zafrullah Khan supported it. Walsh was a Christian minister whose interest in historical criticism in Bible studies had led him to reject the New Testament, preach a universal religion, and invite his parish to abolish the

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<sup>458</sup> *Times* 5 September 1924; *Morning Post* 5 September 1924, in *ibid*.

<sup>459</sup> 'Resolution by Walter Walsh, Leader of the Free Religious Movement (London)', 20 September 1924, *ibid*.



characteristically Christian elements from their church's constitution. He founded the Free Religious Movement after a lawsuit was brought against him by a section of his congregation and a Scottish Court of Sessions ruled that in recognizing a universal religion his church ceased to be Christian.<sup>460</sup>

## Summary

From evolutionary legal theories, Henry Maine articulated principles of international law to define relations between the British government and princely states. As the Punjab administration developed these theories, they also defined relations between the British government and Punjab agriculturalist tribes. These theories were based on notions of divisible sovereignty and double allegiance: Indian communities relinquished sovereign rights to wage war and engage in foreign relations, retaining a right to their administrations (in the case of princely states) or customs (in the case of Punjab agriculturalist tribes). Indian subjects owed allegiance to the British government and either their princely rulers or tribal leaders. During WWI and the non-cooperation movement, these theories inferred the allegiance of rural Punjab Muslims to the British and the allegiance of urban Punjabi Muslims to Muslim rulers. The administration's policy army recruitment and awarding land grants among rural Punjabis materialized this divide.

After 1919, representational government in colonial India expanded through a political system that decentralized political powers and circumscribed rural interests in the Punjab and Muslim interests in India through separate representation. This system contributed to the dominance of the Punjab Unionist Party: a Muslim led, non-sectarian, cross-communal political alliance that represented agricultural interests. It

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<sup>460</sup> Walter Walsh, *My Spiritual Pilgrimage* (London: n.p., 1925).

also perpetuated a style of political representation in which rural Muslim Punjabi leaders, including the head of the Ahmadiyya community, represented local and caste based interests.

Evolutionary legal theories inferred that India would evolve into an independent federation that was politically equal to Britain as inequalities between caste and religious communities levelled out. Punjabi Muslim leaders including Ahmadis adopted the positive inferences that evolutionary legal theories inflected upon the unequal relations between Indian political communities and the British government. Separate electorates for Muslims and other minorities were necessary to weaken the powers of a Hindu-majority central government because those inequalities were institutionalized. For the Ahmadiyya, evolutionary legal theories inferred the development of an international law that extended beyond racial lines and restricted states from persecuting religious minorities. According to the Ahmadiyya's interpretation of Islamic law, there was no legal boundary that separated a Muslim world from a non-Muslim world and Islam was compatible with this international law.

The next chapter will tie principles of international law in the Punjab to Muslim agriculturalist land rights in princely states, which were defined through land revenue settlements carried out by Punjab administrators. It will examine how British paramountcy was interpreted by Muslim political leaders in the Punjab and the Ahmadiyya as inferring the duty of the British government to protect the economic and religious rights of Muslim agriculturalists in princely states. In contrast to this interpretation of paramountcy, this chapter will introduce Muhammad Iqbal's argument that the colonial state must recognize the feelings of Muslims and define the Ahmadiyya as non-Muslim for their belief in prophecy after Muhammad.



## Chapter 4: Muhammad Iqbal's Concept of the Muslim Community and Exclusion of the Ahmadiyya

### Introduction

This chapter examines Muhammad Iqbal's 1935 argument that the British government must define the Ahmadiyya as non-Muslim for their belief in prophecy after Muhammad within its political context.<sup>461</sup> This argument asserted the legal authority of the ulama over that of the British government to define membership within the Muslim community, and it was based on a conception of the Muslim community as unified, bounded by common belief, and weakened by foreign influences. This chapter will examine how Iqbal's argument functioned as a legal construct that opposed principles of international law, undermined an interpretation of Islamic law that accorded with the principle of right to religious freedom, and upset the conceptual foundations upon which personal law defined the economic and political structure of representation in the Punjab. It will examine the economic implications that followed from it.

The first section of this chapter examines the 1911 Punjab census, which replaced Ibbetson's ethnographic description of Muslims in the Punjab with passages from works by Muhammad Iqbal on Islam. It also examines Iqbal's argument that the British must define the Ahmadiyya as non-Muslim, which he published as an open letter in the Indian newspaper *The Statesman* in 1935. It looks at a number of political and legal assertions that Iqbal made concerning Islamic law the Muslim political constitution, which were consistent throughout these writings.

The remainder of this chapter examines how Muhammad Iqbal's argument functioned within the context of colonial law and administration in the Punjab. The

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<sup>461</sup> Muhammad Iqbal, 'Qadianis and Orthodox Muslims', *The Statesman*, 14 May 1935.

second section examines the Punjab administration's settlement of land rights to Muslim agriculturalists living in Kashmir, Alwar, and Bharatpur, all of which were Hindu ruled princely states bordering the Punjab. Like in the Punjab, Muslim agriculturalists were understood as having ancient land rights through customary law. Iqbal's interpretation of the Muslim community undermined the ideological basis for these land rights. It also undermined a style of politics adopted by Punjabi Muslims, including the Ahmadiyya, who used their influence in the Punjab to lobby the British government to intervene in Kashmir and Alwar to negotiate constitutional rights for Muslims with princely rulers. The final section of this chapter examines an alternative style of politics adopted by urban Muslim politician in the Punjab who formed an organization called Majlis-i-Ahrar (e. 1928). It examines the manner in which they represented Kashmiri Muslim interests in 1931 and their campaign during the Punjab legislative assembly elections in 1934. Ahrar campaigned on the religious issue raised by Iqbal, that Ahmadiyya doctrines were a danger to Islam, rather than the economic and social issues represented by the Unionist party.

### Muhammad Iqbal's Argument

Muhammad Iqbal's argument that the colonial state must define the Ahmadiyya as non-Muslim mirrored a tendency within the European legal tradition that ran counter to notions of international law and universal human rights. On the one hand, Henry Maine's comparative approach to understanding the legal systems under colonial rule contributed to the development of international legal theories that

restricted state powers.<sup>462</sup> On the other hand, his emphasis on custom as a source of law was influenced by German historical jurisprudence, which contributed to the development of legal theories that asserted the sovereignty of nations against third-party restrictions imposed by international law.<sup>463</sup> This tendency in historical jurisprudence was exemplified in the legal and political theories of German philosopher Carl Schmitt (1888-1985). In *The Concept of the Political* (1927 and 1932) Schmitt posited that people constituted a political community through distinguishing friends from enemies: that is, by distinguishing themselves from outsiders who threatened their existence.<sup>464</sup> Schmitt critiqued the liberal state and notions of international law that restricted the autonomous power of political communities and, he argued, threatening their very existence. If the state were to survive, Schmitt believed, it must be allowed to draw its legal boundaries so that citizenship coincided with membership within the political community.<sup>465</sup> The liberal state, because of its failure to properly distinguish friends from enemies, extended membership rights to people who did not truly belong within it. This failure would result in the death of the liberal state through de-politicization, internal strife, or its being overwhelmed by more politically unified external enemies.<sup>466</sup> Schmitt

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<sup>462</sup> Casper Sylvest, 'The Foundations of Victorian International Law,' in *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, (ed.) Duncan Bell (Heinemann, Cambridge, 2007), 47-66.

<sup>463</sup> Calvin Woodward, 'A Wake (or Awakening?) for Historical Jurisprudence' in *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, (ed.) Alan Diamond (Cambridge: Cambridge University Press, 2006), 224-225. For Carl Schmitt's theories on international law see: R. Axtmann, 'Humanity or Enmity? Carl Schmitt on International Politics' in *International Politics* 44, 5 (2007), 531-551; W. Hooker, *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge University Press, 2009).

<sup>464</sup> Carl Schmitt, *The Concept of the Political*. 1932 ed. (trans.) G. Schwab (Chicago: University of Chicago Press, 2007), 26-35.

<sup>465</sup> Ibid., 19.

<sup>466</sup> Ibid., 69-79.

concluded that the existence of political communities depended upon their own ability to make the friend-enemy distinction and to go to war to maintain that distinction if necessary, without the restraining interference of a third party.<sup>467</sup>

Iqbal's argument also conformed to a colonialist interpretation of Islamic law that conceived of Muslims as forming a distinct political community over which a third party (in this case a non-Muslim legal authority) could not legitimately govern. This ran counter to interpretations of Islamic law that conceptualized it as part of a plural legal system and thus able to accommodate international law. As discussed in the previous chapters, Lahore Chief Justice William Rattigan understood Islamic law to have been based on a rational science that could be learned by non-Muslim legal practitioners and incorporated into a plural legal system. Justice Oldfield's judgement that Ahmadis were Muslim in *Narantakath vs. Parakkal Mammu* (1922) also validated an interpretation of Islamic law that was compatible with international law: by understanding the Ahmadiyya's interpretation of jihad as a necessary adaptation to the proliferation of Muslims in Europe, he interpreted Islamic law as allowing Muslims to live as a minority community in Europe under European legal systems. In contrast to these interpretations, N.B.E Baillie interpreted Islamic law as defining those living beyond the jurisdiction of Islamic states as enemies. According to Baillie, non-Muslims were termed kafir under Islamic law, and any kafirs not subject to Muslim rule were 'generally treated by Muslim lawyers as hurbees, or enemies.' He held that this distinction regulated the relations between Muslims and non-Muslims, whether they were natives of the same country or resided in different countries.<sup>468</sup> Baillie's interpretation of Islamic law did not allow Muslims to live as a minority

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<sup>467</sup> Ibid., 45-53.

<sup>468</sup> Baillie, *Moohummudan Law*, 169.

community in Europe because any Muslim who took up residency outside of the jurisdiction of Muslim rulers became apostates.

Iqbal conceived of Muslims as having a ‘peculiar form of nationality’,<sup>469</sup> which aligned community boundaries with religious belief. According to Iqbal, nationality in Islam was ‘non-temporal’ and ‘non-spatial’.<sup>470</sup> Muslims shared the same ‘mental outlook’ and a worldview that was created through their participation in the same historical tradition.<sup>471</sup> They were ‘members of the society founded by the Prophet of Islam.’ According to him, dogma was ‘the point of universal agreement on which [Muslim’s] communal solidarity depend[ed].’ Iqbal described Muslims as having a distinct culture, which was a ‘cross-fertilization’ of Semitic and Aryan cultures.<sup>472</sup>

By defining Muslims as having distinct communal boundaries, Iqbal redefined relations between Muslims and non-Muslims in rural Punjabi society. In the 1881 census, Ibbetson had described ‘tribe’ as a more significant marker of identity and mode of social organization than religion in the Punjab. He described the lack of inner conviction among Punjabi villagers as making it difficult to ‘draw the line between one Indian creed and the other’.<sup>473</sup> In contrast, Iqbal described religion as manifestations of core beliefs: freedom from suffering in Buddhism, salvation from sin in Christianity, the ceaseless struggle between good and evil in Zoroastrianism.

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<sup>469</sup> Extract from Muhammad Iqbal’s lecture on ‘Muslim Community,’ quoted in Pandit Harikishan Kaul, *Census of the Punjab, Vol. xiv, pt. I* (Lahore: ‘Civil and Military Gazette’ Press, 1912), 162.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Ibbetson, *Panjab Ethnography*, 101.



According to Iqbal, the core of Islamic belief was the attainment of freedom from fear and individual empowerment.<sup>474</sup>

Iqbal described Islam as manifesting a distinctly ‘Muslim political constitution’ that was based on two ‘propositions’: the law of God was absolutely supreme and there was no authority in the social structure of Islam except for interpreters of Islamic law.<sup>475</sup> In 1932, Iqbal translated this political ideal into a recommendation for constitutional reforms in India that would centralize legal authority over Islamic law and create greater uniformity in how Islamic law was interpreted. Iqbal proposed that an assembly of ulama be created, which would include Muslim lawyers trained in modern jurisprudence. The assembly’s purpose would be ‘to protect, expand and, if necessary, to reinterpret the law of Islam in light of modern conditions, while keeping close to the spirit embodied within the fundamental principles.’<sup>476</sup> He proposed that all legislation affecting Muslim personal law be passed through this assembly before being considered by the Indian legislature.

According to Iqbal divergent interpretations of Islamic law weakened the Muslim community from within and were to be guarded against if Muslim political power was to be preserved. Sectarianism was the influence of Hinduism: ‘one of the quiet ways that conquered nations revenge themselves on their conquerors.’ ‘Dissenting forces in [Islam]’ were to be carefully watched and the influx of foreign elements was to be ‘checked and permitted to enter into the social fabric [of Muslim

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<sup>474</sup> Extract from Muhammad Iqbal’s article ‘Islam as a Moral and Political Ideal’ in the *Hinduism Review*, quoted in Kaul, *1911 Census of Punjab*, 173.

<sup>475</sup> Ibid.

<sup>476</sup> Muhammad Iqbal, speech delivered at the All-India Muslim Conference, Lahore, 21 March 1932 in *Speeches and Statements of Iqbal*, Compiled by A. R. Tariq, (Lahore: Sh. Ghulam Ali and Sons, 1973), 33-55.

society] slowly'.<sup>477</sup> The purpose of education was to produce a character that 'excludes from it all that is hostile to its cherished traditions and institutions.'<sup>478</sup> Iqbal warned 'fight not for the interpretations of the truth, when the truth itself is in danger.'<sup>479</sup> Rationalism posed a threat to the Muslim community according to Iqbal. It was opposed to dogma and threatened to 'disintegrate the communal synthesis.' Converting religion into a speculative system was 'absolutely useless' and 'absurd'.<sup>480</sup>

In 1935, Iqbal argued that the British government in India should define the Ahmadiyya as non-Muslim in an open letter published in the Indian newspaper *The Statesman*.<sup>481</sup> He framed the Ahmadiyya's inclusion within the Muslim community as a political issue, arguing that the Ahmadiyya identified as Muslim to accrue political advantages because their small size (56,000 according to the 1931 Indian census) did not entitle them to a single seat in any legislature in India. This argument signalled a shift away from Iqbal's previous position towards the Ahmadiyya, in which he treated Ahmadis as legitimate political representatives of Muslims.<sup>482</sup> Iqbal was elected as a member of the Punjab legislative assembly from Lahore in 1926 and joined with the Unionist party,<sup>483</sup> which under Fazli Hussain's leadership included Ahmadis and followed a principle that party members not be excluded based on their religious

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<sup>477</sup> Iqbal, 'Muslim Community,' in Kaul, *1911 Census of Punjab*, 162.

<sup>478</sup> Ibid. See also, Iqbal Singh Sevea, 'Schooling the Muslim Nation: Muhammad Iqbal and Debates over Muslim Education in Colonial India' in *South Asia Research* 31 (February 2011), 69-86.

<sup>479</sup> Quote from Muhammad Iqbal, *ibid.*, 165.

<sup>480</sup> Iqbal, 'Muslim Community', *ibid.*, 162.

<sup>481</sup> Muhammad Iqbal, 'Qadianis and Orthodox Muslims,' *The Statesman*, 14 May 1935.

<sup>482</sup> Jalal, *Self and Sovereignty*, 290-297.

<sup>483</sup> Ibid.

belief.<sup>484</sup> He was involved in forming the All-India Kashmir Committee (c. 1931), in which prominent Muslims from the Punjab represented the religious, political, and material interests of Kashmiri Muslims to the British government. Nine of its 36 members were Ahmadi, and Iqbal nominated Bashir-ud-din Ahmad to be president of the committee.<sup>485</sup> However, his attitude shifted in 1933, when he took over as president of the AIKC, resigned, then invited its members to reorganize without Ahmadis.<sup>486</sup> Yet despite Iqbal's shift in attitude, the logic by which he excluded the Ahmadiyya was consistent with the logic by which he understood nationality in Islam.

Iqbal's argument for the exclusion of the Ahmadiyya from the Muslim community reinforced his conception of the Muslim community as being unified by common belief and culturally distinct from other religious communities. According to him, the doctrine of Finality of Prophethood was 'perhaps the most original idea in the cultural history of mankind.'<sup>487</sup> The doctrine separated Islam from what Iqbal called pre-Islamic Magian culture, which included Zoroastrianism, Judaism, and Jewish Christianity. According to Iqbal, Magian 'creed-communities' believed in continuity of prophethood and lived in a state of expectation as a result, which led to the continual disintegration of old communities and founding of new ones by 'religious adventurers'.<sup>488</sup> Iqbal considered the Ahmadiyya to have been 'a modern revival of pre-Islamic Magianism' that outwardly conformed to Islam but was

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<sup>484</sup> Letter from Fazli Husain to Zafrulla Khan, 26 June 1933, IOR MSS Eur E 352/23.

<sup>485</sup> Jalal, *Self and Sovereignty*, 275.

<sup>486</sup> Husain to Khan, 26 June 1933, IOR MSS Eur E 352/23.

<sup>487</sup> Iqbal, *The Statesman*, 14 May 1935.

<sup>488</sup> Ibid.

inwardly ‘wholly inimical to the spirit and aspirations of Islam.’<sup>489</sup> Rather, the ‘idea of the continuity of the spirit of the Messiah’ in Ahmadi belief made it easy for him to regard the Ahmadiyya as a return to early Judaism.<sup>490</sup>

Iqbal made a comparison between Islam and Rabbinical Judaism that suggested that the Ahmadiyya threatened the notion of a Muslim state and Islamic law. He compared the emergence of the Ahmadiyya in colonial India to the emergence of Christianity as a Jewish heresy in Roman Judea and compared Mirza Ghulam Ahmad to the Dutch Jewish philosopher Spinoza (1632-1677).<sup>491</sup> His comparison of Ahmad to Spinoza was politically as well as religiously suggestive: suggesting that the Ahmadiyya threatened not simply religious orthodoxy, but Iqbal’s notion that Islam manifested a distinct political constitution. Unlike Iqbal, Spinoza argued that a higher political ideal was attainable only as a manifestation of ‘true laws’, or laws emanating from nature, which were universal rather than specific to a people—an idea that was understood to accord with liberal democratic states rather than states founded on religious identity.<sup>492</sup> Spinoza distinguished between Moses as a law bearing prophet and Jesus as a philosopher in order to posit a distinction between human law and divine law. According to Spinoza, Moses introduced Mosaic law in order to raise the condition of Hebrews who had been enslaved in Egypt and were in need of social order and laws. He introduced the concept of divine election to appeal to their mentality not because it was true, but because it was necessary for the creation of the

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<sup>489</sup> Ibid.

<sup>490</sup> Ibid.

<sup>491</sup> Muhammad Iqbal, *Speeches and Statements of Iqbal*, 109-139.

<sup>492</sup> William MacCall, translator’s preface to Baruch Spinoza, *A Treatise on Politics* (London: Holyoake and Co., 1854), 10; Steven Frankel, ‘The Invention of Liberal Theology: Spinoza’s Theological-Political Analysis of Moses and Jesus’ in *The Review of Politics* 63, 2 (2001), 281-315.

state. Jesus as a philosopher introduced true laws, which were in accordance with nature and intelligible to any rational man. In making this distinction, Spinoza elevated universal law above religious law.

Iqbal's argument that the Ahmadis were non-Muslim accorded with Schmitt's critique of international law, which challenged the legitimacy of a third party to interfere in a political community's right to make the friend-enemy distinction. He argued for the right of Muslims to exclude the Ahmadiyya over the demand of the British government for religious tolerance. Iqbal described the Ahmadiyya's remaining within the fold of Islam as threatening to disintegrate the Muslim community. According to him, the Muslim community was more sensitive to disintegrating forces than communities whose membership was based partly on race. It was instead 'secured by the Idea of the Finality of Prophethood alone.'<sup>493</sup> The animosity that the 'average Muslim' felt towards Ahmadis arose from an instinct towards self-preservation.<sup>494</sup> The British in India were unable to grasp the feelings of Muslims and unfair in demanding tolerance from Muslims 'against the forces of disintegration'. Iqbal wrote that the only recourse open to Muslims was self-defence in order to preserve their community.

Iqbal's argument that Ahmadis threatened the Muslim community's existence had important implications for the targeting of Ahmadis through violent means. Iqbal argued that the Ahmadiyya's interpretation of the doctrine of *jihad* and accommodating attitude towards colonial rule was the basis for the political subjugation of Indian Muslims.<sup>495</sup> It might be inferred from this that for Iqbal an

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<sup>493</sup> Iqbal, 'Qadianis and Orthodox Muslims.'

<sup>494</sup> Ibid.

<sup>495</sup> Iqbal, *Speeches and Statements*, 109-139.

interpretation of *jihad* that sanctioned violent struggle in defence of Islam was legitimate, in contrast to Ahmadi doctrine in which violent jihad was not religiously sanctioned in modern times. If this interpretation of Islam was legitimate and the Ahmadiyya threatened the Muslim community's existence, this might suggest that violence against Ahmadis was legitimate according to Islam. Iqbal's argument that Ahmadis were non-Muslim meant that Ahmadi missionaries who preached to Muslims might be interpreted as encouraging apostasy from Islam. This was the case in Afghanistan in 1924 when an Ahmadi missionary was stoned to death according to the decree of *ulama*. Iqbal interpreted the Islamic political constitution as not recognizing as legitimate any authority higher than Islamic law interpreted by the *ulama*. This delegitimized the Ahmadiyya's appeal to the League of Nations as a higher authority over the Afghan government, which had allowed these stoning to be carried out. Furthermore, Iqbal's exclusionary logic also bore a resemblance to anti-Semitic literature in Europe. From the late nineteenth century, anti-Semitic sentiment was treated academically as a consequence of the separation of religious identity from national identity among Jews and the construction of racial binaries (Semitic and Aryan).<sup>496</sup>

Iqbal's construct of the Muslim community had implications for economic development in India. Iqbal did not account for the interaction of caste structures in Indian society on Muslims. Rather he detached religion from the local social structures through which Ibbetson had interpreted it. Ibbetson described 'conversion from Hinduism to Islam [as having] not necessarily the slightest effect upon

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<sup>496</sup> Morris Jastrow Jr., 'The Jewish Question in Its Recent Aspects' in *International Journal of Ethics* 6, 4, (1896), 457-476.

[caste].<sup>497</sup> Viewed in this way, the egalitarian principles in Islam were a factor in accounting for the economic backwardness of Muslims as a community in India. Islam, Christianity, and Buddhism were commonly associated with low-caste and Dalit membership because they did not recognize caste barriers to conversion.<sup>498</sup> Iqbal, to the contrary, described Islam's egalitarian principles as a source of political power: 'the general principle of equality of all believers made early Mussulmans the greatest political power in the world.'<sup>499</sup> According to him, religions' transmitted beliefs that influenced the economic and social behaviour of the adherents. Christianity and Buddhism valorised 'modes of activity which tend to weaken the force of human individuality': these were 'self-renunciation, poverty, slavish obedience' which concealed themselves under 'the beautiful name of humility and unworldliness.'<sup>500</sup> Islam, on the other hand, looked upon poverty as a vice, an ethical principle that Iqbal discovered in the Quranic verse: 'Do not forget thy share in the world.'<sup>501</sup> Islam 'gave the individual a sense of his inward power; it elevated those who were low.'<sup>502</sup>

Iqbal's construct of the Muslim community inferred that Muslim political representation of economic interests was not the Islamic ideal. According to Iqbal, nationality in Islam was not based on an 'identity of economic interests'.<sup>503</sup> Iqbal did

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<sup>497</sup> Ibbetson, *Panjab Ethnography*, 178.

<sup>498</sup> Nicholas Dirks, *Castes of Mind*, 134-135.

<sup>499</sup> Iqbal, 'Islam as a Moral and Political Ideal,' in Kaul, *1911 Census of Punjab*, 164.

<sup>500</sup> Ibid.

<sup>501</sup> Ibid., quoting 'Surat Al-Qasas' (28:77).

<sup>502</sup> Ibid.

<sup>503</sup> Ibid., 162.

not take into consideration the operation of economic rules in Islamic law (e.g. the prohibition of interest and inheritance rules) as contributing to the economic conditions experienced by Muslims.<sup>504</sup> Nor did Iqbal understand Muslim political power as enforcing such rules. In 1930, Iqbal described the Islamic conception of a state as ‘a contractual organism’ that was ‘animated by an ethical idea which regard[ed] man not as an earth-rooted creature...but as a spiritual being.’ Thus the Muslim state in India had never regulated rates of interest, and to do so was against its character. Iqbal stated: ‘in ancient India, the state framed laws that regulated the rates of interest; but despite Islam clearly forbidding interest, Muslim states imposed no restrictions on interest rates during Muslim times.’<sup>505</sup>

Iqbal argument that the British government define the Ahmadiyya as non-Muslim had implications for economic development in the Punjab because it subverted the urban and rural legal distinction. The distinction had been legitimized by the administration on economic grounds, as protecting the economic position of rural Punjabis against the operation of a free market in land. Iqbal closed his argument by calling for an end to the distinction, which he described as having ‘cut up the Muslim community into two groups and the rural group into several sub-groups

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<sup>504</sup> Timur Kuran, ‘The Genesis of Islamic Economics: A Chapter in the Politics of Muslim Identity’ in *Social Research* 64, 2 (1977), 301-338. Kuran locates the development of ‘Islamic economics’ to India and the thought of the Islamist reformer Abul Ala Maududi. In contrast to the Ahmadiyya, Maududi’s Islamic solution to disparities in wealth concerned moral reform of the individual and voluntary alms (*zakat*). See Abul Ala Maududi, *The Economic Problem of Man and Its Islamic Solution* (Lahore: Islamic Publications, 1992 [1947]).

<sup>505</sup> Muhammad Iqbal, *Speeches, Writings, and Statements of Iqbal*, 2n ed., compiled by Latif Ahmed Sherwani (Lahore: Iqbal Academy, 1977), 3-26. Iqbal referred to an article that discussed interest laws in India as a class issue that concerned cultivators. The Indian Central Banking Inquiry Committee, ‘*The Times of India*, 15 July 1930. It reported on recommendations to the Indian Central Banking Inquiry Committee, which was in progress at the time, and compared laws regulating economic relations between agriculturalists and moneylenders in the Deccan to the operation of usury laws under Hindu and Islamic rulers in India According to the article, Hindu law placed its own limits on rates of interest depending upon the caste status of the borrower. Islamic rulers in India placed no limits on rates of interest.



constantly at war with one another.’<sup>506</sup> According to him, the distinction created disunity among Muslims and prevented real Muslim leaders from emerging.

To briefly summarize, Iqbal’s construction of the Muslim community the 1911 census was not compatible with international law, a plural legal system in which power was vested in a legal authority higher than the ulama. His demand that the British government define the Ahmadiyya as non-Muslim asserted the right of the Muslim community to distinguish friend from enemy over the British government’s claim to uphold the universal principle of religious tolerance. When contextualized in terms of legal currents prevailing in Europe at the time, Iqbal’s argument bore a resemblance to Schmitt’s concept of the political and critique of international law. Furthermore, a concept of a Muslim community unified in terms of belief rather than diversified by economic interests particular to each locality was more amenable to the principle of a unified Islamic law over Muslims rather than a universal law in which Muslims were included among other communities.

#### Muslim Political Representation in the 1930s

Muhammad Iqbal’s argument functioned within the context of colonial law and administration in the Punjab to undermine the ideological basis of Muslim agriculturalists’ land rights through customary law, which extended beyond the political boundaries that separated British India from princely states but were uncertain. British land settlements carried out in Kashmir, Alwar, and Bharatpur—Hindu ruled princely states bordering the Punjab—described Muslim agriculturalists as having these ancient land rights through customary law, while also recognizing the ‘quasi-sovereignty’ of princely states as their absolute land right within their

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<sup>506</sup> Iqbal, *The Statesman*, 14 May 1935.

territories. Iqbal's argument undermined a style of politics adopted by Punjabi Muslims, including the Ahmadiyya, who in the 1930s used their influence in the Punjab to lobby the British government to intervene in Kashmir and Alwar to negotiate constitutional rights for agriculturalists with princely rulers.

In the late nineteenth century, the Punjab administration intervened in the administrations of neighbouring princely states. They carried out land settlements that ostensibly raised the position of Muslim agriculturalists within these states to a level more on par with their fellow tribesmen in the Punjab. They did so by identifying them with village communities and vesting them with land rights according to custom. However, these interventions also recognized princely rulers as having absolute ownership over all lands within their states, which perpetuated laws and systems of administration that buttressed Hindu ruling classes against the rise of lower classes among whom Muslim agriculturalists were included. These laws also preserved inequalities among Muslims, buttressing Muslim groups in a higher social position against those in a lower position. In the 1930s, the aim behind British interventions into the administrations of princely states was ambiguous, resulting in conflicting notions of the rights and duties of princely states and their Muslim subjects.

British settlements of Alwar and Bharatpur seemed to be recognizing Jat and Meo Muslim agriculturalists as having rights similar to those of Muslim agriculturalists in British India by raising their status. The first British settlement of Alwar state, a princely state ruled by a Hindu Rajput dynasty, was carried out by P. W. Powlett in 1876.<sup>507</sup> Powlett settlement classified Hindu Rajputs and a small number of

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<sup>507</sup> 'Note on the Assessment of the Alwar State', Demi-official letter from Lieutenant-Colonial G. D. Ogilvie to Charles Watson, 13 December 1932, Foreign and Political Department Records, IOR R/1/1/2323.

Muslim Rajputs as a ruling class of land proprietors and cultivators.<sup>508</sup> It classified most of the state's rural population as Chumar—depressed class cultivators—and understood higher caste agriculturalist groups as having proprietary rights to land through ancient custom. The largest group of such agriculturalists inhabited Mewat, the state's most fertile region that extended into the Bharatpur State and Gurgaon province in the Punjab. These agriculturalists, called the Meo, made up 90 per cent of Alwar's Muslim population (Muslims comprising 27 per cent of the total).<sup>509</sup>

As with Muslim agriculturalists in the Punjab, the vesting of ancient land rights with Meo agriculturalists came with their identification as a convert community. They were understood to have been converted to Islam in the fifteenth century but retained their Rajput caste identity by continuing to observe Hindu rituals and caste rules.<sup>510</sup> The 1872 census described them as ignorant of Islam—few knew the *khalima* (profession of faith) and fewer still the Muslim prayers.<sup>511</sup> It also described the distinction between the Meo and lower caste tenant cultivators as blurred: Meo men intermarried with women of other castes and Meo women tattooed their bodies like lower caste Hindu women.<sup>512</sup>

The 1898 settlement of Alwar was carried out by future Punjab governor Michael O'Dwyer, who at the same time carried out the first British settlement for Bharatpur state, which had a Hindu Jat ruling dynasty. In Bharatpur, O'Dwyer's

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<sup>508</sup> Ibid. at 39

<sup>509</sup> Ian Copland, 'The Further Shores of Partition: Ethnic Cleansing in Rajasthan 1947' in *Past & Present*, no. 160 (1998), 216-218.

<sup>510</sup> Ibid.; Partap C. Aggarwal, 'Islamic Revival in Modern India: the Case of the Meos' in *Economic and Political Weekly* 4, 42 (October 18, 1969), 1677-1679.

<sup>511</sup> P.W. Powlett, *Gazetteer of Ulwar* (London: Trubner & Co., Ludgate Hill, 1878), 37-39.

<sup>512</sup> Ibid., 39. Quoting the 1871 census report.

settlement was concerned with raising the status of the Meo and Jats to a level on par with their fellow tribesmen in surrounding areas.<sup>513</sup> This involved making a clearer distinction between the rights of Meo and Jat agriculturalists and those of tenant cultivators, whose rights according to him had been rendered indistinguishable as the result of the state's heavy revenue assessment.<sup>514</sup> His description of the Meo in Bharatpur raised their caste pedigree from the previous settlement. He described them as a cross between the Aryan Rajputs and indigenous Minas, who had been described in Powlett's settlement as the former rulers of Alwar state and of good social position: 'Rajputs eat and drink from their hand.'<sup>515</sup> O'Dwyer's diminished the value of privileged land tenures among an 'aristocratic' caste of Hindu Rajputs in Bharatpur, whose pedigree was traced to Jaipur's ruling class. He described their lack of jagirs as making them better agriculturalists than their fellow tribesmen in Rajput States.<sup>516</sup> By contrast, O'Dwyer described the gradual loss of power and privilege of Jat jagadirs in Bharatpur as making them 'less energetic and successful as agriculturalists than Jats usually are'.<sup>517</sup>

The British intervened in Kashmir state's administration in 1889 in a manner that seemed to raise the position of Kashmiri Muslim agriculturalists to a level more on par with agriculturalists in the Punjab. Rather than the fluid religious identities that characterized Meo and Malkani (landowning) Rajputs, there was a salient distinction in Kashmir between a Hindu ruling class and administration and an overwhelmingly

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<sup>513</sup> Ibid.

<sup>514</sup> Michael O'Dwyer, *Assessment Report of Tahsils Gopalgarh, Pahari, Kama, and Dig, Bharatpur State, 1898-1899* (Simla, Government Central Printing Office, 1898), i.

<sup>515</sup> Ibid.; Powlett, *Gazetteer*, 41.

<sup>516</sup> O'Dwyer, *Assessment of Bharatpur*, 29.

<sup>517</sup> Ibid., 28.

Muslim agriculturalist or cultivating population. Kashmir state, which bordered the Gurdaspur district in the Punjab, was ceded by the British to Gulab Singh (1792-1857) and his male heirs in 1846, creating a Hindu Dogra dynasty.<sup>518</sup> The vast majority of Kashmir's population was Muslim: it was 76 per cent Muslim and 22 per cent Hindu according to the 1921 census. The census classified Hindus as either high caste (16.1 per cent) or Untouchable (3.6 per cent),<sup>519</sup> and by most accounts high caste Hindus were entirely Brahmin.<sup>520</sup> Kashmiri Muslim agriculturalists were not identified as higher caste, as were the Muslim Rajputs in Alwar and Bharatpur. The proportionately smaller population of Hindus in Kashmir and lack of social stratification among them meant that Muslims assumed the roles of lower caste Hindus among Kashmiri Brahmins, who depended upon them to perform duties necessary to maintain ritual purity.<sup>521</sup>

The manner in which Kashmir society was organized meant that the British intervention into Kashmir's administration on behalf of its subjects was apparently an intervention on behalf of Muslims against a Hindu administration. Kashmir's administration was blamed for the famine of 1877-1879, which affected Muslims to the exclusion of Hindu Pandits and was reported to have killed three-fifths of the population in the Kashmir valley while pushing other agriculturalists to flee into the Punjab.<sup>522</sup> Kashmiri land laws that encouraged Pandits and Dogras to settle

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<sup>518</sup> The Dogras were a kinship group that extended across Jammu into the Punjab, was of Rajput status, and spoke a dialect similar to Punjabi called Dogri. See, Rai, *Hindu Rulers, Muslim Subjects*, ch. 1.

<sup>519</sup> Matin-uz-Zaman Khan, *Census of Kashmir*, Vol. XX, pt. 1 (Lucknow: Newul Kishore Press, 1912), 88.

<sup>520</sup> T. N. Madan, 'Religious Ideology and Social Structure: The Hindus and Muslims of Kashmir', in Imtiaz Ahmad (ed.), *Ritual and Religion Among Muslims in India* (New Delhi: Manohar, 1984), 23.

<sup>521</sup> Madan, 40.

<sup>522</sup> Rai, *Hindu Rulers, Muslim Subjects*, 156.

agricultural land were understood to have contributed to the misery of Muslim agriculturalists. These lands included village lands left fallow during the famine. In 1889, the British administration installed a British resident and State Council to assist the maharaja in the administration of his state and Punjab civil servant Walter Lawrence carried out a settlement in the Kashmir valley. This settlement recognized Kashmiri cultivators as having hereditary land rights through membership within the village community.

However, the vesting of absolute land rights in princely rulers maintained unequal social relations despite the language of customary rights in British settlements. As Mridu Rai has pointed out, the Kashmir settlement vested all landholders with hereditary land rights including Hindu Pandits and Muslim cultivators ‘without levelling the playing field.’<sup>523</sup> Under Kashmir’s Pratap’s Code of 1894, Dogras were given greater access to land and preferential revenue assessments, which included revenue exemption for five years after acquiring land and half the rate of other Kashmiris thereafter. Rather than alleviating the plight of Muslim cultivators, the British settlement contributed to peasant indebtedness by converting a portion of the state’s revenue demand from kind to cash. During the agricultural depression of the 1930s, indebted cultivators who were unable to meet the revenue demand relinquished their occupancy rights to the state. Privileged landowners who could afford to pay off arrears were permitted to assume ownership of the land from the state, which led to the consolidation of large estates and the conversion of small landholders into landless labourers.

Similarly, O’Dwyer’s settlement in Bharatpur recognized the state as having ‘the final right of ownership’ while recognizing landholders as holding subordinate

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<sup>523</sup> Ibid., 168.

proprietary rights (Hakk Malikana), which they were entitled to possess as long as they paid the state demand.<sup>524</sup> In 1932, Punjabi Muslim political leaders represented the granting of village lands as jagirs to Rajputs by Alwar state as infringing upon the rights of Meos as 'Muslim landowners' there, whose revenue assessment was burdened by the granting of these superior rights over their village lands.<sup>525</sup> However, the British administration interpreted jagadirs in all Indian states to be virtual proprietors and there to be no other landowner in a jagir village. Proprietary rights in villages were not the result of land grants made by the princely ruler, but arose through uninterrupted possession of land.<sup>526</sup>

While British administrative interventions did not elevate the position of Muslim agriculturalists in princely states to the level of Muslim agriculturalists in the Punjab, they contributed to the creation of a class of Muslims across the region who were government educated and expressed similar aspirations for social advancement and employment.<sup>527</sup> British-imposed reforms on Kashmir's administration in 1889 brought an influx of Punjabis into the state's civil service. The state introduced a modern, salaried bureaucracy, changed the language of its administration from Persian to Urdu, opened up government employment to competitive examination, and lifted immigration restrictions.<sup>528</sup> The state's education policy shifted from promoting

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<sup>524</sup> O'Dwyer, *Assessment of Bharatpur*, xviii.

<sup>525</sup> Presidential address delivered by Khan Bahadur Haji Rahim Bakhsh at All India Alwar Conference, Ferozepur Jhirka, 3 December 1932. Foreign and Political Department Records, IOR R/1/1/2323.

<sup>526</sup> Demi-official letter from Lieutenant-Colonial G. D. Ogilvie to Charles Watson, 13 December 1932, 'Note on the Assessment of the Alwar State', Foreign and Political Department Records, IOR R/1/1/2323.

<sup>527</sup> 'Class' is meant here not as a theoretical construct or structure, but as E.P. Thompson described it, a historical phenomenon: E. P. Thompson, *The Making of the English Working Class* (London: Gollancz, 1980), 9.

<sup>528</sup> Rai, *Hindu Rulers, Muslim Subjects*, 134-137.

religious education among Muslims to mass education among all levels of Kashmir society, which allowed Kashmiri Muslims to advance to higher education in British India.<sup>529</sup> Princely subjects and Punjabis sought out education and employment across porous boundaries between princely states and the Punjab. The Brayne-Meo High School in the Punjab, which was founded in 1923 by the Deputy Commissioner of Gurgaon and had an entirely non-religious curriculum, attracted a growing number of Meo villagers from the Alwar state, which lacked primary schools because of the state's restrictions on the establishment of private schools and reticence to establish state-aided schools.<sup>530</sup>

In Kashmir, Ahmadis were prominent among this emerging class. In 1902, 43 Ahmadis resided in Kashmir. The Kashmir census attributed their presence, as well as that of Arya Samajists, to the appointment of Punjabis in government service.<sup>531</sup> By 1931, the Ahmadiyya in Kashmir had grown into a small minority of 2,955.<sup>532</sup> Prominent Kashmiri Ahmadis shared similar educational backgrounds and expressed Muslim interests in a similar manner as their co-religionists in the Punjab.<sup>533</sup> Nooruddin Qari Kashmiri (1894-1948) and Muhammad Vakil (1865-1948) converted to the Ahmadiyya while pursuing higher education in the Punjab. Qari translated Islamic legal texts into Kashmiri and was concerned with breaking the dependence of

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<sup>529</sup> Zutshi, *Languages of Belonging*, 179.

<sup>530</sup> Majid Hayat Siddiqi, 'History and Society in a Popular Rebellion Mewat, 1920-1933' in *Comparative Studies in Society and History* 28, 3 (1986), 447-449.

<sup>531</sup> Ghulam Ahmed Khan, *Report of the Census of Jammu and Kashmir, vol. XXIII: Part I* (Lahore: Civil and Military Gazette Press, 1902), 32.

<sup>532</sup> Anant Ram and Hira Nand Raina, *Census of Jammu and Kashmir, Vol XXIV, pt. I* (Jammu: Superintendent, the Ranbir Government Press, 1933), 288.

<sup>533</sup> These backgrounds are examined in chapter 2.



Muslim Kashmiris on the *ulama*.<sup>534</sup> He also wrote poetry that was widely recited in primary schools and aimed to facilitate mass education. Vakil trained as a lawyer in the Punjab and practiced law in Srinagar, where he also established an Ahmadi association and was a founding member of the Reading Room Party, which drew together western-educated Kashmiri Muslims—Ahmadi and non-Ahmadi—to discuss issues of social uplift among Muslims. S. M. Abdullah (1905-1982), who was not Ahmadi, was another prominent member of the Reading Room Party who was educated at Aligarh University in the United Provinces. He rose to political prominence in Kashmir in the 1930s and 1940s, becoming Kashmir's first prime minister in 1947.

From the late nineteenth century, the princely states surrounding the Punjab allowed Arya Samaj and the Ahmadiyya missionaries from the Punjab to operate according to a universal principle of religious liberty. In Kashmir, Arya Samaj missionaries carried out *shuddhi* campaigns in Jammu among 'Untouchable' Meghs and Doms against the interests of Kashmiri Dogra and Pandit ruling classes. These classes began to view their economic and religious interests as opposed to those of the Arya Samaj, who competed with them for government jobs and sought to reform the Hindu institutions that they as Sanatan Dharmi Hindus (Hindus of the 'original' or 'pure' religion) upheld.

In 1923, the Arya Samaj began a *shuddhi* campaign among Malkana Muslim Rajputs in Bharatpur and Agra, which the Ahmadiyya protested against as infringing upon the religious liberty of these Muslims. This campaign was based on the notion that Muslim agriculturalists had been forcibly converted from Hinduism into Islam

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<sup>534</sup> Customary law in Kashmir was configured differently than in the Punjab, with religion as the primary marker of identity and religious authority centralized. Zutshi, *Languages of Belonging*, ch. 5.

and must be allowed back into the fold. Within a few months, a considerable number of Malkanas from 30 Muslim villages had been 'reclaimed' by the Arya Samaj. The reclamation campaign garnered much attention in Muslim newspapers in the United Provinces and the Punjab, particularly from the Aligarh Gazette and through published letters from Ahmadi missionaries reporting it.<sup>535</sup> Ahmadis attended Arya Samaj meetings and alleged that police and local state officials were active participants in the campaign.<sup>536</sup> They alleged that these officials had helped organized social boycotts against villagers who remained Muslim. They appealed to the British government to pressure the state administration to transfer one sub-inspector of police in particular for his involvement.

The Ahmadiyya sent missionaries from the Punjab to Bharatpur during the Arya Samaj's reclamation campaign. They travelled to a village called Ikran in numbers, pitched a tent there, and invited the villagers to feast with them. This mission was centred on an elderly Muslim woman named Jumia, who according to the Ahmadiyya was a victim of a social boycott as a consequence of her refusal to convert to Hinduism. In addition to providing Jumia with material assistance, the missionaries stated that they were there to teach Jumia principles of Islam and see to it that she had a Muslim burial if she died.<sup>537</sup> There was some evidence that Muslim agriculturalists might have felt pressure to renounce Islam. While Ahmadis were encamped in Jumia's village, a document was submitted for registration in the court of the Nazim Bharatpur on behalf of Jumia's son Sohbra. Sohbra had apparently 'reconverted' to

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<sup>535</sup> Ibid.

<sup>536</sup> Letter to G. D. Ogilvie from Rajputana Agency on Activities of the Shuddhi Sabha in the Bharatpur State, 9 July 1923, Foreign and Political Department Records, IOR R/1/1/1430; Note from Zulfiqar Ali Khan to Highness the Raja of Bharatpur State, 12 August 1923, Foreign and Political Department Records, IOR R/1/1/1430.

<sup>537</sup> Note from Foreign and Political Secretary Bharatpur, 23 June 1923, *ibid*.

Hinduism. However, he willed away his ancestral house to Jumia for her to live in and to allow meetings and prayer to be held there.<sup>538</sup>

The mass conversion Malkana Muslim Rajputs to Hinduism had material implications for the vesting of land rights through customary law. The existence of such communities, whose identity as converts from Hinduism was emphasized in British settlement reports that described them as more Hindu than Muslim, validated the notion that village communities persisted from ancient times. Malkana Muslim Rajputs continued to be vested with land rights as members of the village community despite their conversion to Islam, and their Hindu tribesmen continued to be vested with the same land rights. Their conversion by Arya Samaj missionaries from the Punjab, who tended to come from commercial castes, may have had similar inferences for Muslims from the Punjab who represented agriculturalist interests.

By 1928, on the eve of constitutional reforms towards increasingly responsible government in India, the relationship between the British government as a paramount power in India and princely states was ambiguously defined. A bloc of princely rulers interpreted their relationship with the British government as being governed by codified law. They held that their states' internal sovereignty had been legally defined through treaty agreements entered into with the British from a position of equality. This view saw sovereign powers as resting in the first place with states, except for those that had been delegated towards the British by their consent. It assumed definite rights and obligations on the part of both the states and the British, and little discretionary powers in the hands of the British government as the paramount power in India. Colonial officials within the political and legal department in India interpreted paramountcy differently. According to their view, relations between the

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<sup>538</sup> Ibid.

states and the British government were governed by the necessity of keeping the paramount power paramount. Princely states had no absolute rights over their internal administration and laws, while the British government had unrestricted powers of interference under undefined conditions.

The ideology upon which paramountcy was interpreted determined the course of economic development in princely states and India generally. Unlike Tupper's interpretation of paramountcy, the political and legal department's position towards paramountcy did not infer the evolution of unequally powerful polities (i.e. princely states and the British government) towards an equal balance of power between independent political communities under international law. Colonial officials explicitly dismissed any implication that the foreign relations of princely states would be regulated by international law after British paramountcy was replaced by a Dominion government in India.<sup>539</sup> Nor did its view infer the evolution of unequal social relations between Indian communities towards greater social equality. Rather, maintaining the paramount power of the British government depended upon maintaining these inequalities. Sir John Malcolm 1823 argument held in 1928: paramountcy was guided solely by the concern for strengthening the links in Indian society (i.e. the ruling classes) necessary for maintaining order under British rule and conciliating the lower classes to that rule.

In the early 1930s, Punjabi Muslim political leaders represented the interests of princely subjects in Alwar and Kashmir to British officials in a manner that asserted the duty of the British government as a paramount power in India to intervene in the administrations of these princely states on behalf of Muslim subjects

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<sup>539</sup> Note from I. C. Watson from the Political Department on the Joint Opinion of the Standing Committee of the Chamber of Princes, 9 November 1928, Foreign and Political Department Records, IOR R/1/1/4673 (2).

there. In doing so, they gave legitimacy to international legal principles that limited the autonomy of states' over their internal administrations, while still recognizing non-democratic states as having sovereign rights.<sup>540</sup> This form of representation assumed a political structure in British India in which political power continued to be decentralized to the provinces: Punjabi Muslim leaders used political influence that devolved to them through diarchy to represent the interests of Muslims in princely states who were outside of official channels of patronage, and they represented local and caste-based interests rather than the cultural interests of Muslims. The Ahmadiyya was prominent among other Muslims in representing Kashmiri Muslim interests in this fashion, but more prominently advocated the extension of religious liberty as a universal norm throughout India, including the right to convert.

In 1930, Bashir-ud-din Ahmad interpreted the conditions experienced by Muslim agriculturalists in Hindu-ruled princely states as being analogous to the future conditions of Muslim agriculturalists in British India should power devolve to a central government elected by a Hindu majority population. According to him, the economic conditions that would result from this political development would lead to the dispossession of Muslim landowners by Hindu moneylenders, their indebtedness under exorbitant rates of interest, and social and economic discrimination against Muslims and other minorities.<sup>541</sup> He claimed that Muslims would also suffer the loss of religious liberty, which was evident in Hindu princely states that prevented missionaries from preaching Islam and subjected Muslim converts to lengthy investigations. Alluding to Bharatpur in 1923, Bashir-ud-din Ahmad described Muslim villagers as having been forced to convert to Hinduism through shuddhi.

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<sup>540</sup> Seyla Benhabib, 'Carl Schmitt's Critique of Kant: Sovereignty and International Law' in *Political Theory*, 40,6 (2012), 704.

<sup>541</sup> Ahmad, *Some Suggestions*, 74-80.

Ahmad advocated a political structure in India that would continue to maintain the autonomous interests of Muslims against the majority population in India, which included constitutional provisions for separate electorates, a federalist structure in which powers were delegated from provinces to a central government, and the creation of autonomous provinces in Baluchistan, N.W.F.P, and Sindh with Muslim majority populations.<sup>542</sup> He advocated a legal order in India in which legislative powers over personal law would be transferred from the central legislature to the provincial legislature,<sup>543</sup> maintaining local diversity and the discretionary powers of local government officials. This was the position represented by Muslim delegates to the RTCs, who included Muhammad Shafi, Zafrullah Khan, and the Aga Khan. It was also the position of the Unionist party leader Fazli-Hussain, who remained in close touch with them throughout the conferences.<sup>544</sup> These Muslims operated through official channels and sought to secure their position through constitutional means. During this time, Husain was appointed to the executive council under Viceroy Willingdon (1931-1936), whose natural sympathies lay with constitutionalist Muslims like Husain rather than the Congress who during the conference advocated joint electorates and engaged in Civil Disobedience against the colonial government.<sup>545</sup>

Kashmir Muslims made political demands that were interrelated to those made by Muslims at the RTCs. In 1931, S. M. Abdullah and other Kashmiri Muslims who

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<sup>542</sup> Bashir-ud-din Ahmad, *Some Suggestions for the Solution of the Indian Problem* (Qadian: n.p., 1930), 437-455.

<sup>543</sup> Ibid. 379.

<sup>544</sup> K. K. Aziz, *The All-India Muslim Conference, 1928-1935: A Documentary Record* (Karachi: National Publishing House Ltd., 1972); Private Papers of Fazl-i Husain, 1931-1933, IOR Mss Eur E352/23; 'Confidential memo' prepared by Zafrullah Khan, n.d., IOR Mss Eur B 362; Jalal and Seal, 'Alternative to Partition,' 434-439.

<sup>545</sup> Helen Nugent, 'The Communal Award: The Process of Decision-Making' in *South Asia: Journal of South Asian Studies* 2, 1/2 (1979), 118.

were members of the Reading Room Party began to petition Kashmir's maharaja Hari Singh for constitutional rights, and Muslims within British India who were in a position of political influence lobbied the British government on their behalf. The constitutional demands presented to the maharaja by Kashmiri Muslim leaders included that land revenue in Kashmir be assessed in line with the Punjab. They also demanded full religious freedom, freedom to assemble, and freedom of speech and press as existed in British India. Rather than full representative government, they demanded that 70 per cent of the legislature be elected, 30 per cent nominated, and 10 per cent Dogra.<sup>546</sup>

Muslims in British India formed the All-India Kashmir Committee (AIKC) to lobby the British government to assist in the settlement of these demands through constitutional means. AIKC member K. B. Rahim Bakhsh, a retired district judge from Lahore, petitioned the British government to establish an inquiry led by a British officer to look into the grievances of Kashmiri Muslims, which had led to mass protests in Kashmir's capital city Srinagar, and recommend a settlement with the Kashmiri state.<sup>547</sup> With Bashir-ud-din Ahmad presiding over the AIKC, the Ahmadiyya played a prominent role on the committee.

After continued pressure from Muslims in British India and Kashmir, maharaja Hari Singh established a commission to make constitutional recommendations under the supervision of British officer Bernard James Glancy.<sup>548</sup>

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<sup>546</sup> Kashmir resident's report, 20 October 1931, Foreign and Political Department files, IOR R/1/1/2155.

<sup>547</sup> K. B. Rahim Bakhsh, Retd. District and Sessions Judge from Lahore conversation with Sir Charles Watson 21 August 1931, 'Report of the Riots Enquiry Committee appointed by Kashmir Darbar to enquire into the events which took place in Srinagar in July 1931' Foreign and Political Department Records, IOR R/1/1/2154.

<sup>548</sup> Fortnightly report from the Kashmir resident, 26 November 1931, Foreign and Political Department Records, IOR R/1/1/2064.

The Glancy commission was supported by Muslim political representatives in British India and Kashmir, including the Ahmadiyya. AIKC supported the Glancy Commission, and Bashir-ud-din Ahmad financed and organized lawyers to travel from the Punjab and assist Kashmiri Muslims in formulating their position before the commission.<sup>549</sup> He did so by drawing upon resources within his own community, including recruiting Ahmadi lawyers to work pro-bono in Kashmir. The constitutional recommendations of the Glancy commission were supported by S. M. Abdullah and 20,000 of his supporters,<sup>550</sup> Muhammad Yakub of the All-India Muslim League,<sup>551</sup> and Muslim nationalist leader Shaukat Ali.<sup>552</sup>

The Ahmadiyya also represented economic and religious grievances of Kashmiri Muslims to the British government through an AIKC member who had served as a missionary for the Ahmadiyya's mosque in London. According to him, Kashmiri cultivators were aggrieved that the state did not give them the same rights to mining forests and erecting buildings as was given to their fellow tribesmen in the Punjab and United Provinces.<sup>553</sup> He also stated that Kashmiris resented the state law that made conversion to Islam punishable through the confiscation of goods and complete separation from the family.

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<sup>549</sup> Ibid., Bashir-ud-din Ahmad, 'Requirements of the Kashmir Muslims', *The Sunrise*, 11 December 1931.

<sup>550</sup> S.M. Abdullah gave his public support to the commission by passing a resolution in its favour, which was then unanimously supported at a mass meeting attended by 20,000 of his supporters: Fortnightly report from the Kashmir resident, 12 November 1931, Foreign and Political Department Records, IOR R/1/1/2064.

<sup>551</sup> 'Kashmiri Muslims Unite', *The Times of India*, 25 April 1932.

<sup>552</sup> 'Kashmir Durbar and Moslems', *The Times of India*, 15 February 1932.

<sup>553</sup> Notes on meeting between Political Secretary and Abdul Rahim Dard, Secretary to Mirza Basiruddin Mahmood Ahmad, Head of the Ahmadiyya Community, 30 July 1931, 'Report of the Riots Enquiry Committee appointed by Kashmir Darbar to enquire into the events which took place in Srinagar in July 1931', Foreign and Political Department Records, IOR R/1/1/2154.



The Ahmadi representative was referring to anti-apostasy laws. Hindu and Muslim personal law in Kashmir enforced apostasy laws that had clear material implications for Muslims because of the manner in which Kashmir personal law ordered Kashmir society into a Hindu ruling class and Muslim subject population. According to an 1892 enactment, a person who forsook his religion could not inherit ancestral property in accordance with ‘ancient law and usage’. As late as 1931, a sub-judge in Jammu ruled that the property of a Hindu man who converted to Islam was to be confiscated according to the ‘law of the Dharam Shastar.’<sup>554</sup> The state supported this ruling as being in accordance with Hindu law based on the joint family system, in which a Hindu who renounced his religion went out of the joint family as if he had died. The Muslim law of apostasy had a similar effect of forfeiture of property. However, apostasy laws tended to act as a disability for high caste Hindu converts to Islam, since caste barriers in Hindu law prevented conversion to Hinduism except among Dalits who lacked land rights to begin with.<sup>555</sup>

In 1932, Rahim Bakhsh presided over the All-India Alwar Conference, which sought to bring about constitutional reforms for Alwari Meo agriculturalists. The Ahmadiyya were not visibly involved in Alwar, but the conference presided over by Rahim Bakhsh represented similar grievances for the Meo as the AIKC presided over by Bashir ud-din Ahmad did for Kashmiris. Rahim Bakhsh described the conditions experienced by the Meo in Alwar as amounting to ‘religious persecution and economic depredation’. Religious grievances represented by Punjabi Muslims were that the state was appropriating mosques, restricting Muslims from establishing

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<sup>554</sup> ‘Memorandum from the Kashmir Resident’, 6 October 1931, Foreign and Political Department Records, IOR R/1/1/2055 (1).

<sup>555</sup> Ian Copland, ‘Islam and Political Mobilization in Kashmir, 1931-1934’ in *Pacific Affairs* 54, 2 (1981), 234.

secular and religious private schools within the state, and allowing campaigns to forcibly convert them to Hinduism.<sup>556</sup> Bakhsh described the religious grievances of the Meo as being directed against the state rather than its Hindu subjects, who were according to him sympathetic with Muslims. He described most of Muslim grievances as being economic and shared by the majority of Hindus against the Alwar state. These grievances resulted from heavy assessment of land revenue in the state, grazing taxes, and custom duties. They were caste-based: they resulted from the state granting village land 'belonging to' Muslim agriculturalists to Thakar Rajputs through jagadirs.<sup>557</sup>

As in Kashmir, Bakhsh evoked the paramount power of the British government to intervene on behalf of the Meo through constitutional means. He described the British government as having a duty towards the subjects of princely states that was a 'necessary corollary of its treaties with the states.'<sup>558</sup> According to Bakhsh, the position of the paramount power towards the states was embodied in the words of Lord Mayo to an assembly of rulers of Rajputana States:

If we support you in your power, we expect in return good government. We demand that everywhere through the length and breadth of Rajputana justice and order shall prevail that every man's property shall be secure, that the traveller shall come and go in safety, that the cultivator shall enjoy the fruits of his labour and the trader the produce of his commerce, that you shall make roads and undertake the construction of those works of irrigation, which will improve the condition of the people and swell the revenue of your states, that you should encourage and provide for the relief of the sick.<sup>559</sup>

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<sup>556</sup> Note by Zia Uddin Ahmed to Wingate, 13 December 1932, Foreign and Political Department Records, IOR R/1/1/2323.

<sup>557</sup> 'Presidential Address delivered by Khan Bahadur Haji Rahim Bakhsh of the All-India Alwar Conference', 3 December 1932, *ibid.*, 1.

<sup>558</sup> *Ibid.*, 7.

<sup>559</sup> *Ibid.*

Bakhsh described his role and that of ‘influential Muslims’ in British India as one of arbitration, offering the administrations of Indian states help and advice to arrive at settlements with their Muslim subjects.<sup>560</sup> According to him, members of the All-India Kashmir Committee played a similar role in achieving a just settlement through the Glancy commission. He described the procedure of influential Muslims putting the grievances of Muslims within princely states before the British government and demanding an independent inquiry into them as their ‘acting through the Paramount Power.’<sup>561</sup>

### The Muslim Community in Punjab Politics

Muhammad Iqbal put forward his argument that the Ahmadiyya were non-Muslim during provincial and all-India legislative assembly elections. His argument conformed to a style of political representation adopted by urban Muslim politicians and ulama in this election. This style contrasted with that of the Punjab Unionist party, which had accommodated the Ahmadiyya and used official channels and constitutional means to protect the interests of Muslim agriculturalists. The Unionist style of representation did not necessarily represent the interests of all Muslims in British India. Urban Muslims, like the ulama, were marginalized within Punjab’s structure of representation and some understood their interests as being aligned with commercial castes.

An alliance between Muslim politicians and the ulama seemed to coalesce around the Ahmadiyya’s involvement in Kashmir, which during the 1930s was a

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<sup>560</sup> Ibid., 4.

<sup>561</sup> Ibid., 8.

place of contestation between the rights of Kashmiri Muslim subjects and those of the state.<sup>562</sup> This section looks at the political strategies of the Majlis i Ahrar (c. 1928), which comprised of urban Muslim politicians and ulama from the Punjab and United Provinces. During legislative assembly elections in the Punjab, Ahrar organized into a political party and campaigned against Ahmadi doctrines as a danger to Islam. These Muslims did not represent the same interests as Unionist politicians and they followed a different procedure, Civil Disobedience rather than constitutionalism, in pursuit of their interests. The campaign against the Ahmadiyya undermined the Unionist party's position because it made belief, rather than shared economic interests, the basis for Muslim political solidarity. It was also rhetorically anti-British, undermining the procedure of acting through the paramount power of the British government, and appealed to ulama whose legal authority had been replaced by Muslim lawyers like Fazli Hussain.

There were a couple of paradoxes within the politically dominant Muslim position during the RTCs, which Ahrar's style of political representation avoided. Unionist party politicians in the Punjab demanded constitutional safeguards that would protect Muslims from caste discrimination. However, the influence that they used to lobby the British government was the result of a social and political order that discriminated against people on a tribal and caste basis. This paradox was demonstrated by B. R. Ambedkar's criticism of the Punjab Land Alienation Act. Like the Muslim demand for separate electorates at the RTC, Ambedkar had also

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<sup>562</sup> See Lavan, *The Ahmadiyah*; Ayesha Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam Since 1850* (Oxford: Oxford University Press, 2001); Chitralekha Zutshi, *Languages of Belonging: Islam, Regional Identity, and the Making of Kashmir* (London: Hurst and Company, 2004); Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton: Princeton University Press, 2004).

demanding separate electorates from caste Hindus for dalits.<sup>563</sup> In demanding separate electorates for their communities, Ambedkar and Muslim delegates opposed the Congress's demand for joint electorates, represented by M. K. Gandhi at the RTCs.<sup>564</sup> However, Ambedkar and caste Hindus in the Punjab jointly appealed to the British administration to reform the Land Alienation Act in 1931. Ambedkar supported measures to restrict agricultural land to cultivators, but he opposed how the Act restricted land to designated agriculturalist tribes.<sup>565</sup> He argued that the Act did not do what it purported to do of protecting those who actually cultivated the land against moneylenders who might also belong to agriculturalist tribes. He argued that the Act disadvantaged 'agriculturalist' cultivators by classifying him together with the 'agriculturalist' doctor, moneylender, lawyer, etc. and excluded depressed class tenants from being able to acquire property. More fundamentally, by prohibiting a person from acquiring land by reason of birth, Ambedkar argued that the Act violated a 'principle of civic justice which requires that no man shall be disqualified from holding office or property on the ground of race, caste, birth or religion.'<sup>566</sup>

The Muslim demand for separate electorates also undermined their representation of the economic and caste-based interests of Muslim agriculturalists because it could be inferred that Muslims represented interests particular to Muslims

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<sup>563</sup> Anumpama Rao, 'Arguing against Inclusion' in *Economic and Political Weekly* 32, 8 (1997), 427-429.

<sup>564</sup> In 1932, the Communal Award guaranteed Muslims and other minority communities separate electorates. Under the 1932 Poona Pact, Ambedkar agreed to a compromise with Gandhi in which Dalits were included with Hindus in joint electorates but given reserved seats in the provincial and central legislature. See, Nugent, 'The Communal Award', 112-129.

<sup>565</sup> Government memorandum on Ambedkar's analysis of the Punjab Alienation of Land Act, Public and Judicial Department Records, IOR L/PJ/9/76.

<sup>566</sup> B. R. Ambedkar, 'Memorandum on the discriminatory character of the Punjab Land Alienation Act,' 5 January 1933. *ibid.*

only. While representing the Meo, Rahim Bakhsh alleged that the colonial administration misrepresented the real grievances of the Meo, which were against the state, as being due to 'Hindu-Muslim trouble' or 'communal animosity'. He stated that the majority of Muslim grievances were shared to an equal degree by the Hindu majority in Alwar and described Hindus as being sympathetic to the complaints of Muslims regarding religious persecution by the Alwar state.<sup>567</sup>

However, while stressing the shared interests of Hindus and Muslims in Alwar, Rahim Bakhsh also evoked a notion of an 'Islamic brotherhood in India' and a 'Muslim India' to explain why influential Muslims in British India would lend their help and advice in the settlement of grievances between Muslim subjects and the administrations' of Indian states. He placed princely states under the secular jurisdiction of the British government, which suggests that he did not wish to place Muslims under the jurisdiction of Islamic law. However, the prime minister of Alwar characterized Muslim representation as assuming the existence of Islamic law, which he said conformed to 'the theory of extra-territorial Islamic jurisdiction in regard to the improvement of religious conditions of Muslims in Indian states.'<sup>568</sup> The Alwar administration settled Meo grievances that were particular to Muslims. Of a list of grievances made to the state, the maharaja ignored non-religious grievances but restored four buildings to being used as mosques, introduced Urdu as an optional subject, and sanctioned the appointment of a mufti in the fatwa committee.<sup>569</sup>

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<sup>567</sup> Bakhsh, 'Presidential Address'.

<sup>568</sup> Letter of Prime-Minister of Alwar State to Political Secretary, 14 December 1932, Foreign and Political Department Records, IOR R/1/1/2323.

<sup>569</sup> Letter from Muhammad Iqbal (President of the All-India Muslim Conference) to Merville regarding interview with Viceroy, 4 March 1933. Foreign and Political Department Records, IOR R/1/1/2325.

Furthermore, religiously trained ulama from the Deoband seminary in the United Provinces seemed to have been working at cross-purposes with Muslim who supported the Unionist position. The Deoband seminary had been founded in 1866 to reform Muslim education as an alternative to adopting English education and culture. Deoband advocated a return to the *shari'a*, Quran, and *hadith* to reform Islamic law and promoted its application to Muslim society.<sup>570</sup> In 1917, a delegation of *ulama* representing Deoband had recommended that a Muslim theologian be appointed to each legislative council and reforms in education be made to encourage religious instruction.<sup>571</sup> In 1927, the Deobandi missionary Mohammad Ilyas (1886-1944) began a *tablighi* (educational) campaign that contributed to the sharpening of Muslim identity among the Meo. The campaign sent lay missionaries to Alwar and established Islamic schools to religiously reform the Muslim peasantry.<sup>572</sup>

Ahrar's representation of Muslim interests did not run into the paradoxes inherent within the dominant Muslim position. Rather than advocating a legal and political order that preserved diversity at the local level, Ahrar's founding objectives included complete independence from British rule for India and the establishment of an Islamic system for Muslims. Ahrar drew upon religious symbols that could appeal to an all-India Muslim community, rather than economic and social issues that could divide Muslims along class lines. Prominent members of Ahrar had participated in the first Non-cooperation movement and joined the All-India Khilafat Committee (e. 1919), which espoused pan-Islamic ideologies that called for Muslim unity around the

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<sup>570</sup> Minault, *The Khilafat Movement*, 9.

<sup>571</sup> Printed summaries of addresses presented in India, 'The Maulvis of Deoband, United Provinces'. Judicial and Public (Reforms) Papers (1918). IOR L/PJ/9/1.

<sup>572</sup> Majid Hayat Siddiqi, 'History and Society in Mewat', 442-467; Copland, 'Further Shores of Partition' 218-224.

Ottoman Sultan against Western hegemony. As Gail Minault has argued, this pan-Islamism was proto-nationalist: it used a universal Islamic symbol to draw support from Muslims in India 'divided by regional, linguistic, class, and sectarian differences.'<sup>573</sup> Ahrar's founding president was Ataullah Shah Bokhari, a Deobandi religious scholar. Bokhari was among the ulama who supported the Congress boycott of government schools, colleges, and jobs during the Non-cooperation movement. After Ahrar was founded, he suspended the organization in 1930 to join the Civil Disobedience movement.

In 1931, Ahrar was involved in Kashmir and represented Kashmiri Muslim grievances differently than from how AIKC represented them. Mazhar Ali Azhar led Ahrar's campaign in Kashmir and advocated full representative government for Kashmiris. They used civil disobedience as a means to achieve Ahrar's objectives, organizing thousands of unarmed volunteers from the Punjab to enter Kashmir in order to pressure the maharaja to make concessions. Ahrar was not included in the Glancy Commission, and those Kashmiri Muslim representatives who participated in the enquiry did not press for full representative government.<sup>574</sup> Ahrar called on Kashmiris to boycott the commission and continued to send volunteers into the state during the enquiry.<sup>575</sup>

Ahrar organized as a political party and put up three candidates for the Punjab provincial by-elections in 1933: Afzal Haq, Mazhar Ali Azhar, and Abdur Rahman. They put up two candidates for the Indian assembly elections in 1937: K. L. Gauba from Lahore and Qazi Muhammad Ahmad Kazmi from Meerut in the United

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<sup>573</sup> Minault, *The Khilafat Movement*, 2-3.

<sup>574</sup> Fortnightly report, 19 October 1931. Foreign and Political Department Records, IOR R/1/1/2064.

<sup>575</sup> Ibid.



Provinces.<sup>576</sup> Ahrar openly allied with the Congress, which was unpopular among Muslim voters in the province in part because of Congress's opposition to the 1932 Communal Award, which maintained separate electorates for Muslims.<sup>577</sup> However, all of Ahrar's candidates were successful and had a popular base among urban Muslims. In the Punjab, Ahrar had a significant following among the urban poor in Lahore, Amritsar, Ludhiana and Sialkot through campaigning against the Ahmadiyya as a danger to Islam.<sup>578</sup>

Ahrar represented Muslims whose interests did not necessarily align with the constitutional position adopted by the Unionist party. This was exemplified by the political campaign of K. L. Gauba, who in 1934 campaigned against Rahim Bakhsh for a seat in the Indian legislature. Gauba came from a Hindu commercial caste and converted to Islam in 1933. His conversion upset the identification of Muslim interests as being opposed to Hindu commercial interests, according to which pro-agrarian legislation received a communal inflection. Gauba was the son of Lala Harikshen Lal, who alongside Fazl-i Husain was appointed as a Punjab minister in 1921 (but resigned in 1923). Harikshen Lal was the founder of the Punjab National Bank and the People's Banking and Commercial Association. He had commercial links with the Kashmir state, having been awarded in 1927 a contract to exploit the state's Kishenganga forests for several years for railway and building construction.<sup>579</sup>

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<sup>576</sup> Samina Awan, 'Muslim Urban Politics in Colonial Punjab: Majlis-i-Ahrar's Early Activism' in *Journal of Punjab Studies* 16, 2 (2009), 246.

<sup>577</sup> 'Confidential report on the situation in the Punjab' Punjab Governor's Fortnightly Reports, 2nd half of May 1937. IOR L/PJ/5/238.

<sup>578</sup> Emerson, Governor's fortnightly report, 19 October 1936, in (ed.) Lionel Carter, *Punjab Politics, 1936-1938: The Start of Provincial Autonomy, Governors' Fortnightly Reports and other Key Documents* (Manohar: New Delhi, 2004).

<sup>579</sup> Gauba, *Rebel Minister*, 148-149.

According to Gauba, this lucrative contract with Hari Singh brought twelve lakhs of rupees (1,200,000 rupees) into the state's coffers annually. Lal was also a central figure in the Punjab Brahmo Samaj community. In the Punjab, members Brahmo Samaj were associated with 'orthodox' observance of caste norms as opposed to the Arya Samaj's association with reforming caste norms.<sup>580</sup> Gauba described the 'progressive' role of commerce, which pro-agrarian policies hampered, as dissolving religious difference. He cited Zafar Ali Khan, also a member of Ahrar, as having described the People's Bank as 'calculated to solve the tangle of Hindu-Muslim relations.'<sup>581</sup> He described Lal's belief that commerce was a force of progress that dissolved traditional structures and brought fluidity to Indian society 'upsetting religion, social prejudice and setting in motion currents of civic life.'<sup>582</sup> Gauba described all social struggle—against bureaucracy, among communities, between rural and urban interests--as economic struggles if accurately understood.<sup>583</sup>

Gauba's campaign against Rahim Bakhsh, however, appealed to religious 'orthodoxy' rather than class issues.<sup>584</sup> Electioneering on behalf of Gauba took place during what was ostensibly a religious conference organized by Ahrar. The conference was held during three days in late October on land immediately adjacent to the town of Qadian. Ahrar advertised the conference's objectives as being to refute false doctrines and lay the foundations of an institution that would be called the 'Jamia Muhammadiyya.' An estimated 10,000 people attended the conference, half of

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<sup>580</sup> Jones, *Arya Dharm*, 177.

<sup>581</sup> Gauba, *Rebel Minister*, 130.

<sup>582</sup> *Ibid.*, 137.

<sup>583</sup> *Ibid.*

<sup>584</sup> Demi-official letter from the Punjab Government, 1 November 1934, Public and Judicial Department Records, IOR L/PJ/7/751.

whom were from the vicinity of Qadian, 300 of whom were *ulama* from Deoband and the North West Frontier Province, and a portion of whom were from princely states. Their presence was attributed by the government to the appeal of Ahrar's campaign against the Ahmadiyya orthodox Muslims. Amid electioneering speeches on behalf of Gauba, Ahrar founder Bokhari made speeches concerning the claims to prophecy made by the current head and his predecessors and alleged that the Ahmadiyya were attempting to establish temporal and religious independence in Qadian. Ahrar speeches also strongly attacked the character of Bashir-ud-din Ahmad and Zafrullah Khan, who in 1934 was appointed to the Viceroy's Executive Council.<sup>585</sup>

Ahrar has been taken to be a 'clearly subaltern Muslim movement' that emerged among other nineteenth century Muslim reform movements.<sup>586</sup> Their designation as such connotes that Ahrar was a social group that was politically outside the colonial power structure. Ahrar used anti-British rhetoric and appealed to poorer, urban classes in the Punjab who had been socially and politically marginalized by the British administration. However, Gauba's involvement in Ahrar suggests a more variegated relationship between Ahrar and the colonial state, which drew upon all-India political structures rather than local political structures for support. Gauba's father Harikshen Lal was an outspoken critic of the Punjab administration. In 1918, he testified before the Indian Industrial Commission that the failure of his banks was due to a concerted conspiracy by the provincial government to destroy banking in the Punjab.<sup>587</sup> Gauba continued to oppose the Punjab administration for its handling of his father's business affairs. However, rather than being 'anti-British,' Gauba appealed to

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<sup>585</sup> Extract from Punjab Fortnightly Report, 2nd half of November 1934, *ibid*.

<sup>586</sup> See Ahmed, 'Adjudicating Muslims', 42, fn. 46.

<sup>587</sup> Gauba, *Rebel Minister*, 45-47.

the central government--the India Office--against the actions taken by the Punjab judicial administration against his father.<sup>588</sup>

Ahrar's election campaign against the Ahmadiyya carried with it the increased potential for the violent targeting of Ahmadis, in part because the police and administration was unwilling to protect Ahmadis. Speeches made by Bokhari during the Gauba campaign so stirred one boy from Amritsar that he admitted to intending to assassinate Bashir-ud-din Ahmad when he was found to be in possession of a large knife and asking to interview the head.<sup>589</sup> Ahrar organized a conference in Daska in Sialkot district in September of 1937, in which the British involvement in Palestine was condemned and the Ahmadiyya was attacked as a danger to Islam.<sup>590</sup> Zafrullah Khan alleged that the police were hostile to the Ahmadiyya when intervening to maintain order during the conference and treated his brother Asadullah Khan as the aggressor in the situation. An investigation into the incident revealed that the sub-inspector had falsified police diaries against the Ahmadiyya.

Across the Punjab and the United Provinces, the growth of volunteer armies wielding weapons was further evidence of the breakdown of the previous colonial order. From late 1936, Lord Zetland noted the salience of bands of volunteers

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<sup>588</sup> Files related to Privy Council appeal in case of J.L. Gauba, Public and Judicial Records, IOR L/PJ/7/1294. In 1934, Douglas Young succeeded Shadi Lal as Chief Justice of the Lahore High Court and began expediting criminal and civil cases to clear off large arrears. In 1935, the Lahore High Court began proceedings against the People's Bank of Northern India, which had suspended payments in 1931 and in which Harikshen Lal was heavily involved. Lal's businesses were placed in the hands of a receiver and the official liquidator applied to have Lal adjudicated insolvent. Lal and his son J.L. Gauba were jailed for contempt of court, a sentence that J.L. Gauba appealed to the Privy Council. K.L. Gauba issued letters to the Viceroy and India Office complaining of the methods introduced by Douglas.

<sup>589</sup> Extract from Punjab fortnightly report, 2nd half of November 1934, Public and Judicial Department Records, IOR L/PJ/7/751.

<sup>590</sup> Confidential report on the situation in the Punjab, 2nd half of September 1937. Public and Judicial Department Records, IOR L/PJ/5/238.

attached to political organizations, with some dressed in uniform and drilling.<sup>591</sup> By late 1938, volunteer organizations were increasing in strength and numbers, many drilling and carried lathis. Ahrar organized well-disciplined volunteers corps in the United Provinces, North West Frontier Provinces, and Punjab. In the Punjab, there were an estimated 3,420 Ahrar volunteers by December of 1939. Ahrar volunteers carried hatchets and swords during parades and processions. They organized a body of 350 'shock troops' called Ghazi Corps whose express purpose was to counter Khaksar and Ahmadiyya propaganda.<sup>592</sup> Colonial officials interpreted these formations as presuming the powers to perform police duties, some volunteer corps even professed their intention to function as army and police in a parallel government. However, they hesitated to intervene to prohibit them for fear of a backlash.

By contrast, the Ahmadiyya's expressed obedience to the command of the British administration left them unarmed when thousands of hostile Ahrar supporters convened in Qadian: the local government found that the Ahmadiyya were recruiting volunteers and producing 'sticks of a highly dangerous character shod with iron, and which were for all intents and purposes spears' in anticipation of the event and commanded them to send back volunteers and stop producing sticks.<sup>593</sup> Punjab governor Herbert Emerson explained to Bashir-ud-din Ahmad his reticence to intervene against Ahrar. He wrote in his governor's report: 'I took the opportunity of giving [Bashir-ud-din Ahmad] some advice about the future, and of explaining that a popular Government, dependent on the votes of orthodox Muslims, would find

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<sup>591</sup> Correspondence between Lord Zetland and Lord Linlithgow, December 1936 to October 1940, Public and Judicial Department Records, IOR L/PJ/8/678.

<sup>592</sup> Khaksars were another urban-based Muslim organization outfitted in military-style uniforms but carrying spades.

<sup>593</sup> Copy of a demi-official letter from the Punjab Government, 1 November 1934, Public and Judicial Department Records, IOR L/PJ/7/751.

themselves much embarrassed if they had to defend the Ahmadis against a general campaign of the faithful.’<sup>594</sup>

## Summary

The early 1930s was a turning point for the Ahmadiyya in Punjab politics, when their political representation of Muslims lost legitimacy with the provincial administration. Urban Muslim politicians in the Punjab and Deobandi ulama joined together and campaigned against the Ahmadiyya during legislative assembly elections in the province. Muhammad Iqbal, who had previously allied with Ahmadis as a Unionist party member, demanded that the colonial state define them as non-Muslim as a matter of vital importance to the Muslim community.

The logic by which Muhammad Iqbal excluded the Ahmadiyya from the Muslim community was based on a different conception of religion and society than that upon which the structure of political representation in the Punjab had been based. Iqbal did not interpret religion as existing within a social structure organized by caste, but rather interpreted social structures as emanated from religious beliefs. Not only did Iqbal’s interpretation of religion upset the conceptual foundations up which the Unionist party was organized, it also delegitimized a form of political activism adopted by Punjabi Muslim leaders. These Muslim leaders recognized the British administration as a paramount power over princely states, and used their political clout to lobby the administration to intervene in princely states to safeguard the economic and religious rights of Muslim subjects through constitutional means. The Ahmadiyya, which had highly visible missions in Kashmir and Bharatpur, engaged in

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<sup>594</sup> Governor Report, 21 January 1937 in Carter, *Punjab Politics*.

this form of political activism. They argued that Muslims' freedom of conscience and belief was threatened under Hindu majority rule, particularly the freedom of Hindu converts to Islam, and advocated constitutional measures be put in place to safeguard these rights.

The campaign against the Ahmadiyya asserted the authority of the ulama over that of the British government to determine correct belief in Islam and membership within the Muslim community. It was based on Muslim political representation of religious issues particular to Muslims, rather than economic and social issues linked to caste. It was rhetorically anti-British, undermining the Punjabi Muslims who appealed to British paramountcy. This had implications for economic development in the region because their appeal to British paramountcy assumed that it was the paramount power's duty to level out social inequalities among Muslims through facilitating progressive legal reforms. Because it was based on refuting Ahmadi doctrines as false and a threat to Islam, it undermined the universality of the value of freedom of conscience and belief, which the Ahmadiyya promoted.

This chapter did not interpret Muslim political opposition to the Ahmadiyya as necessarily arising because colonial law and the principle of religious freedom were in conflict with Islamic law. It showed that the logic by which Muhammad Iqbal excluded the Ahmadiyya from the Muslim community mirrored theoretical strands of thought within the European legal tradition, which led to a nationalistic challenge to international law. The final chapter of this thesis focuses on the limitations that the colonial legal system placed on the principle of freedom of conscience and belief that it publically endorsed. It will examine how the punishment for apostasy from Islam was interpreted (as the death penalty) and operated (as the automatic dissolution of the apostate's marriage) under colonial law. It will show how Muslim attempts to

reinterpret the punishment for apostasy were limited by the colonial court, which upheld 'orthodox' interpretations on principle, and non-Muslims.



## Chapter 5: Apostasy and Conversion

### Introduction

This thesis has so far examined two sets of countervailing legal and political principles. The first set of principles, derived from evolutionary legal theories, emphasized diversity and social inequalities among communities in India. These principles focused the attention of ‘lower caste’, politically influential Muslims in the Punjab on the law between communities and reform towards leveling social inequalities among them. They supported a decentralized political system that channeled political authority away from Indian groups who claimed to represent all-India communities, and supported historically contingent interpretations of Islamic law. The second set of principles emphasized an all-India Muslim community, identified by colonial officials with ‘orthodoxy’. These principles focused the attention of urban Muslims in the Punjab and ulama on the law within the Muslim community: the internal sovereignty of these communities to define their own laws, and correct interpretations of religious doctrines as a basis for a unified community.

In 1939, Zafrullah Khan argued that there was no punishment for apostasy in Islam and interpreted Islamic law as being in absolute accordance with the principle of freedom of conscience and belief. In doing so, he swept aside principles that emphasized diversity in interpretations of Islamic law and countervailing principles that emphasized the authority of an ‘orthodox’ interpretation of Islamic law, replacing them with one interpretation of Islamic law that was by definition ‘sectarian’ (an interpretation that dissented from ‘orthodox’ authority). This chapter places Zafrullah Khan’s theological argument within its historical and legal context by tracing the legal debate surrounding conversion and apostasy under colonial law in India. An interpretation of Islamic law that accorded with the right to conscience and belief had

obvious implications for the Ahmadiyya, in light of Muhammad Iqbal's 1935 argument that the Ahmadiyya must be excluded from the Muslim political community for their beliefs. This chapter examines the broader implications of freedom of conscience and belief that are revealed through these debates, which lay in its potential to alter how relations between Muslims and non-Muslims were conceived through the law.

The first section of this chapter examines a series of reported cases from the Lahore High Court, all of which involved religious conversion. These cases are noteworthy because they record the legal arguments of Fazli Husain and Zafrullah Khan, who acted as lawyers in these cases. Their arguments recognized principles of private international law and freedom of conscience and belief, which would have allowed individuals to move between religious communities in India. However, colonial courts upheld 'orthodox' interpretations of Hindu and Muslim personal laws that were opposed to these principles and restricted such movement. The issue of conversion to Islam was linked with the issue of intermarriages between Muslims and Hindus, and non-Muslim opposition to intermarriage reinforced an interpretation of Islam as condoning conversion by force. Colonial courts translated the punishment for apostasy from Islam into the automatic dissolution of the marriage of the apostate, which was popularly interpreted by Hindus as a safeguard for Hindu women 'forced' to marry Muslim men.

The remainder of the chapter examines all-India legislation to reform Muslim personal law, which was introduced in the 1930s by Muslim politicians according to 'orthodox' legal principles. The Muslim Personal Law Application (MPLA) Bill, examined in the second section, sought to replace customary law with Muslim personal law in every instance that it was applied to Muslims. This legislation was

based on a conception of the historical conversion of Hindu agriculturalists to Islam as being a radical change in belief, but also had implication for altering the property rights of Muslim agriculturalists in the Punjab. The third section examines the legislative debates surrounding the Muslim Dissolution of Marriage (MDM) Bill, which sought to expand the grounds for divorce allowed to Muslim women and mend the loophole in divorce laws that was created through the automatic dissolution of marriage for apostasy from Islam. Hindu politicians opposed measures to end the automatic dissolution of marriage for female apostasy from Islam and linked it with interreligious marriages, arguing that it infringed upon Hindu law and facilitated forced conversion to Islam through marriage.

Recent historical studies on colonial law have connected the legal debates surrounding personal law reforms in the late 1930s to earlier legal debates originating in Bombay and continuing into post-partition India, relating principles of liberal individualism and individual rights to the discrete interests of Hindu and Muslim politicians.<sup>595</sup> Connecting the legal debates surrounding these reforms to legal debates around conversion in the Punjab, with implications for the debates surrounding the Ahmadiyya's religious status in Pakistan, necessarily alters how these reforms are interpreted. Previous analysis of these reforms has drawn attention to the concern of Muslim legislators for legal autonomy over a Muslim community.<sup>596</sup> This chapter

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<sup>595</sup> Particularly relevant to this chapter are: Newbigin, 'Personal Law and Citizenship in India'; Sturman, *The Government of Social Life*; De, 'The Two Husbands'. Rohit De's study focuses on conversion to and away from Islam and shares a similar interpretative framework from Lauren Benton. However, the cases examined in this chapter do not fit with his conclusion that MDMA was a moment of crystallization of separate Hindu and Muslim personal law systems in India. He examines cases of conversion and apostasy from 1911 to 1938, while I examine cases from a decade earlier in the Punjab. This suggests regional differences in the manner in which personal law developed in the Punjab and Bombay.

<sup>596</sup> Newbigin, 'Personal Law,' 26; Sturman, *The Government of Social Life*, ch. 5.

draws attention to what might have been a tacit opposition among Muslims to principles that underpinned this legal autonomy.

The legal cases examined in the first section of this chapter give insight into how litigants experienced personal law in their lives, and what ‘international law’ and the right to freedom of conscience and belief meant at the level of family relations. How person law was interpreted, including whether principles of international law or freedom of conscience and belief applied, was significant in determining which family bonds were maintained, and which ones might be dissolved. These cases dealt with how personal law should be applied when a member of a family, or one person in a married couple, converted religions. ‘International law’ in these cases might be a means of resolving legal conflicts that arose within families as a result of conversion, providing a set of principles that could determine which laws to apply. On the other hand, the absence of such principles might restrict such conversions from occurring in the first case, as happened in *Jamna Devi v. Mul Raj* (1906). In this case, Jamna Devi attempted to divorce her husband Mul Raj after converting from Hinduism to Islam. Rejecting Jamna Devi’s lawyer Fazli Husain’s attempt to apply principles of international law to the case, which would have applied Muslim personal also to Devi’s defense, the court restricted Devi from converting to Islam according to its interpretation of Hindu personal law. It maintained a marital bond between Devi and her husband that she wished to dissolve.

In *Imam Din v. Hasan Bibi* (1905) and *Imam-ud-din v. Nur Din* (1908), how Muslim personal law was interpreted to regulate apostasy was also relevant to determining whether a marital bond should be maintained or dissolved. The dissolution of marriage for apostasy appeared to be used as a strategy from Hasan Bibi (aka Nur Din) to divorce Imam Din and remarry. How personal law was

interpreted could dissolve or maintain legal bonds between blood relations as well. In *Jamna Bai v. Gonda Ram* (1923), Gonda Ram's brother's widow argued that Ram's conversion to Islam separated him from the Hindu joint family—it dissolved a family bond that was interpreted as sacred under Hindu personal law. However, from Gonda Ram's argument we can imagine an actual bond between brothers that was maintained despite his conversion to Islam.

### Punjab Legal Cases

The Punjab administration upheld in rhetoric a principle of religious freedom. Upon annexation of the Punjab, its founding father Henry Lawrence issued the administrative order that: 'My men are expected to extend equal rights to all native religions and to align with none.'<sup>597</sup> The Lawrence administration publically proclaimed that all sects would be treated equally. Muslims, Sikhs, and Hindus would be allowed to practice their customs so long as they did not infringe on the rights of others, and communities were encouraged to appeal to the government to redress their grievances.<sup>598</sup> Queen Victoria's 1858 proclamation, which guaranteed her subjects security in the practice of their religion, seemed to extend this principle over all of British India. Mridu Rai described the proclamation as a 'veritable charter of religious freedom.'<sup>599</sup> However, this principle was liable to be interpreted as protecting 'orthodox' interpretations of Hindu and Muslim personal law that restricted an individual's freedom of conscience and belief (or right to convert between religious communities) against interpretations that embodied this principle.

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<sup>597</sup> Quoted in Barrier, 'The Punjab Government', 525.

<sup>598</sup> Ibid., 526-527.

<sup>599</sup> Rai, *Hindu Ruler, Muslim Subject*, 82.

Punjab officials described processes of conversion to Islam in Indian society in a manner that did not blend with the principle of freedom of conscience and belief. Late nineteenth-century colonial ethnography described Punjabi Muslim agriculturalists, like the majority of Indian Muslims not of *ashraf* (foreign) descent, as descended from Hindu converts to Islam. Denzil Ibbetson described Muslim agriculturalists to have converted through coercion rather than choice. They converted during the reign of Aurengzeb (1618-1707) to escape religious persecution under Muslim rule and as a means to maintain their lands.<sup>600</sup> Michael O'Dwyer interpreted conversion to Islam among depressed classes as voluntary but done without religious conviction. He wrote that: "Islam...[was] ready to admit even the lowest out-castes into its fold, provided they recite the *kalima* (confession of faith), avoid forbidden food (*haram*), and restrict themselves to what is lawful (*halal*)."<sup>601</sup> He described movement between religions as fluctuating according to the seasons, with people converting to Islam during plentiful seasons and reverting back to their 'debased cults' at times of drought to avoid Islamic dietary restrictions.<sup>602</sup>

The assumption that conversion to Islam did not occur through choice seemed to work within the law to criminalize intermarriage between Muslim men and Hindu women, punishing Muslim men. Allegations of 'forced' conversion to Islam often took the form of alleged abduction and marriage of Hindu women by Muslim men.<sup>603</sup> This seemed to have been implied by an Arya Samaj leader who, during the reclamation campaign among Malkana Muslim Rajputs in Bharatpur in 1923, spoke

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<sup>600</sup> Ibbetson, *Panjab Ethnography*, 142.

<sup>601</sup> O'Dwyer, *India as I Knew It*, 61.

<sup>602</sup> Ibid.

<sup>603</sup> Mody, 'Love and the Law'; Charu Gupta, *Sexuality Obscenity, and Community: Women, Muslims, and the Hindu Public in Colonial India* (New Delhi: Permanent Black, 2001), 241.

against the ‘highhandedness’ of Muslims for molesting Hindu women.<sup>604</sup> This type of allegation, which divided Hindu and Muslim public opinion, made the question of how ‘Hindus’ (i.e. native Indians) had been converted to Islam politically significant in the Punjab. Before his appointment to the Punjab legislative assembly, Fazli Husain attracted public attention as a lawyer in a criminal trial that involved the elopement of a Hindu woman to a Muslim man named Faujdar.<sup>605</sup> The woman’s family alleged that Faujdar abducted the woman while Faujdar pleaded that she had married him voluntarily. The case divided prominent Hindus and Muslims in Sialkot. While prominent Hindus supported the woman’s family, prominent Muslims provided sureties for Faujdar and Husain defended him *pro bono*. The district magistrate in Sialkot ruled that Faujdar had abducted his wife and he was sentenced to three years imprisonment. However, Husain appealed the verdict and got Faujdar acquitted.

Colonial law in India interpreted Islamic law as punishing apostasy from Islam through death. This interpretation not only conflicted with the principle of freedom of conscience and belief, but the manner in which it was applied by colonial courts fed into allegations of forced conversion to Islam through marriage. The ‘orthodox’ interpretation of apostasy laws in Islam was contained in Hamilton’s *Hedaya*, among other authoritative texts: death for the male apostate and imprisonment for the female apostate. The source for this law was a textualist interpretation of Quranic verse translated by Hamilton as ‘slay the man who changes his religion.’<sup>606</sup> Colonial courts adapted the punishment for apostasy to Muslim personal law by recognizing apostasy

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<sup>604</sup> Extract from the fortnightly memorandum of the internal situation in Ajmer-Merwana, 15 June 1923, Foreign and Political Department Records, IOR R/1/1/1430.

<sup>605</sup> Husain, *Fazl-i-Husain*, 47-48.

<sup>606</sup> *The Hedaya, or Guide; A Commentary on the Mussalman Laws*, Vol. II, (tran.) Charles Hamilton (London: T. Bensley, 1791), 226.

by one or both of a married pair to invalidate their marriage immediately and without requiring a judicial decree.<sup>607</sup> However, although the dissolution of marriage was intended as a punishment, it created an incentive for Muslim women to renounce Islam in order to bypass otherwise restrictive divorce laws.<sup>608</sup> The ‘punishment’ for apostasy was mitigated for the wife apostate by the law recognizing her to be entitled to her full dower.<sup>609</sup> The potential for this law to be used for divorce was made obvious to Muslims in the Punjab by Christian missionaries, who publicized the automatic dissolution of marriage for apostasy as a loophole in Muslim divorce laws.<sup>610</sup> It fed into allegations of forced conversion to Islam through marriage because Hindu associations supported the law as protecting Hindu women from being abducted and forced into marriage by giving them an easy release from their marriage ties.<sup>611</sup>

Ameer Ali interpreted the punishment for apostasy in Islam according to evolutionary legal theories, which meant it was amenable to progressive reform. According to his interpretation, the punishment for apostasy within Islamic law was analogous to the position taken by the Christian churches in Europe, which had condemned heretics to the stake. He understood the automatic dissolution of marriage as replacing the death penalty according to a natural progression that all religious

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<sup>607</sup> Baillie, *Moohummudan Law*, 182.

<sup>608</sup> For an account of how apostasy from Islam was used as a means for obtaining a divorce, see: De, ‘The Two Husbands’.

<sup>609</sup> Baillie, *Moohummudan Law*, 182.

<sup>610</sup> Husain, *Fazl-i-Husain*, 48.

<sup>611</sup> This view will be demonstrated in the last section of this chapter in relation to the Muslim Dissolution of Marriage Bill.



systems passed through.<sup>612</sup> With the expansion of European people's conscience, the death penalty was replaced by the forfeiture of civil rights and social ostracism. This interpretation seemed to imply that all societies would progress towards a norm that valued religious liberty, endorsed by the British administration but not recognized under colonial law as being contained in Islamic law. As has been discussed in chapter one, evolutionary legal theories made Islamic laws amenable to reform because they did not equate 'orthodox' with sacred law, but rather understood 'orthodox' laws as the result of legal codification by Muslim lawyers and colonial scholars of a once fluid legal tradition.<sup>613</sup>

However, colonial courts tended to uphold 'orthodox' interpretations against attempts at progressive reform.<sup>614</sup> This was true in *Imam Din v. Hasan Bibi* (1905), a case in which Fazli Husain attempted to apply an alternative interpretation of the punishment for apostasy. The civil suit came about after Hasan Bibi converted from Islam to Christianity and understood her marriage to Imam Din as having been dissolved as a consequence.<sup>615</sup> Husain argued on behalf of Imam Din for the restoration of his marital rights. Rather than using the standard textbooks on Islamic law--Hamilton's *Hedaya* and Baillie's *Digest of Muhammadan Law* based on the *Fatwa-i-Alamgiri*--Husain relied upon the opinions of eminent Islamic jurists from Samarkand and Balkh and the texts *Durr-ul Mukhtar* and *Rudd-ul-Mukhtar*.<sup>616</sup> According to these sources, apostasy laws that made the life of a male apostate *mobah*

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<sup>612</sup> Ali, *Mahommedan Law*, 429.

<sup>613</sup> Rattigan, 'Scientific Study of Muhammadan Law', 401-414.

<sup>614</sup> Anderson, 'Islamic Law', 165.

<sup>615</sup> *Imam Din v. Hasan Bibi* (1905) 7 PLR 148.

<sup>616</sup> *Ibid.*, at 490-491.

(free to be taken away) did not apply to women. Husain argued that the court should adopt this interpretation and not recognize the marriage of a female apostate as being automatically dissolved. He asked the court to exercise ‘rational faculty to discriminate between the grounds urged in favour of the conflicting views’.<sup>617</sup> According to Husain’s argument, the Samarkand and Balkh opinions would repair the loophole that apostasy laws created in Muslim divorce laws.

The court rejected Husain’s invitation to reason between conflicting views and upheld the ‘orthodox’ interpretation of the punishment for apostasy as a matter of principle. The presiding judge in the case Justice Chatterji upheld ‘divine law’ against amendment in his ruling: ‘Muhammadans do not admit the right of the Sovereign power to amend or alter that law.’<sup>618</sup> In Chatterji’s judgment it was ‘beyond the province of British Courts to deduce that law by such methods from original texts and sources.’<sup>619</sup> Moreover, his judgment equated ‘orthodoxy’ with correctness, and made it the court’s prerogative to apply ‘correct’ laws: ‘There is no allegation that [the Samarkand and Balkh] opinion is accepted by [Muslims] generally as the more orthodox and correct. On the contrary, the authority of *Fatawa-i-Alamgiri* the most important Digest of Muhammadan law of the Hanafite School prepared in India and promulgated under the authority of the most orthodox Muhammadan Ruler India ever had, is against it.’<sup>620</sup> Chatterji’s judgment went against principles derived from evolutionary legal theories, which allowed for the reform of laws that had been interpreted as sacred.

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<sup>617</sup> Ibid., at 491.

<sup>618</sup> Ibid., at 492.

<sup>619</sup> Ibid.

<sup>620</sup> Ibid., at 493.

In contrast to this interpretation of apostasy under Islamic law, the Lahore High Court did not recognize the automatic dissolution of marriage as a result of apostasy from Hinduism by a wife in a Hindu married pair. *Jamna Devi v. Mul Raj* (1906) was a suit brought by Mul Raj for the restoration of his conjugal rights to Jamna Devi, who he had married under Hindu personal law.<sup>621</sup> Devi had separated from Raj after converting to Islam and Raj had applied for a decree from a lower court for custody of Devi as his wife. The lower court ruled against Raj and dissolved his marriage to Devi at its own discretion. It held that Devi was a sincere Muslim who would not willingly reconvert to Hinduism, while Raj was likely to coerce Devi into renouncing Islam and was even a threat to her life should they remain married. Upon appeal, however, the Lahore High Court overturned this ruling and instead ruled in favour of Raj. It held that the lower court's ruling was in conflict with that of *Government of Bombay v. Ganga* (1879), which ruled in a similar suit to uphold a Hindu husband's conjugal rights on the basis that Hindu marriage was indissoluble.<sup>622</sup>

Fazli Husain was also a lawyer in this case and argued in Jamna Devi's defence. He argued for the dissolution of Devi's marriage using legal principles that considered Hindu and Muslim personal law as being component parts of a legal system. He assumed that freedom of conscience was a universal principle protected under colonial law, attempted to compare how Hindu and Muslim personal law operated in a like situation, and argued that principles from 'conflict of laws' (private international law) should be used to determine which law applied to a convert from Hinduism to Islam. However, the court's ruling rejected these principles in favour of what it interpreted as an 'orthodox' interpretation of Hindu law. This interpretation

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<sup>621</sup> *Jamna Devi v. Mul Raj* (1906) 9 PLR 83.

<sup>622</sup> *Ibid.*, at 199, Husain is citing *The Government of Bombay v. Ganga* (1879) ILR, 4 Bombay 330.

conceived of Hindu and Muslim personal law as being distinct legal systems that organized Hindus and Muslims into distinct societies.

Husain argued that the dissolution of Devi's marriage was necessary to protect her religious liberty. He argued that under Hindu law the effect of conversion to Islam was to cast Devi beyond the pale of Hinduism. According to the principles of Hindu law quoted by Husain, Devi's husband lost his conjugal rights as a consequence of her conversion: 'He cannot eat food cooked by her or let her touch his food or drink; he cannot let her join him in any religious ceremony or seat of worship, and so forth'.<sup>623</sup> Devi lost the rights granted to her in marriage but did not relinquish her 'already existing liabilities'.<sup>624</sup> Husain argued that Raj's only recourse to restore his conjugal rights and make Devi fulfil her marital obligations was for him to force her to renounce Islam. This, concluded Husain, was 'tantamount to laying it down that a Hindu woman has no right to freedom of conscience and can never renounce Hinduism, whatever her real sentiments might be'.<sup>625</sup>

Husain attempted to apply the principles of 'conflict of laws' (private international law) to the operation of Hindu and Muslim personal laws in this case.<sup>626</sup> According to Raymond West and Johann Georg Buhler, litigation between a Hindu on the one side and a Muslim, Christian, or a Parsi on the other could result in different decisions according to the law governing one or the other party.<sup>627</sup> British statute enabled the Supreme Court to determine suits involving Calcutta residents that related

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<sup>623</sup> Ibid., at 200. Husain is quoting Ghose, *Principles of Hindu Law*, 664.

<sup>624</sup> Ibid.

<sup>625</sup> Ibid.

<sup>626</sup> Ibid., at 199.

<sup>627</sup> Raymond West and Johann Georg Buhler, *A Digest of the Hindu Law of Inheritance, Partition, and Adoption*, Vol. 1, 3d. ed. (Bombay: Education Society's Press, 1884), 5.

to inheritance and succession of lands, rent, and goods, and matters of contract according to Muslim law in cases involving Muslims, and Hindu law in cases involving Hindus. In cases where one party was Muslim and the other Hindu, the laws and usage of the defendant was to determine the decision.<sup>628</sup> Husain argued that the conversion of Devi from Hinduism to Islam meant that she was now governed by Muslim law, while her husband continued to be governed by Hindu law. If decided according to Muslim law, Devi's marriage to Raj would be invalidated because Islam prohibited the marriage of Muslim women to non-Muslim men. Husain did not approach Hindu and Muslim personal law as distinct systems of law. Rather, while arguing for the dissolution of Devi's marriage he laid some stress on the ruling of the previous suit in which Hasan Bibi's marriage was dissolved as a consequence of her apostasy from Islam.<sup>629</sup>

The case was heard by Justice Johnstone and Henry Rattigan, who both ruled in favour of the restoration of Mul Raj's conjugal rights. Their ruling rejected the principles that Husain had attempted to apply to the case. Johnstone's ruling affirmed the distinctive nature of the institution of Hindu marriage: 'the Hindu law being so entirely opposed to the Muhammadan in this matter.'<sup>630</sup> According to Johnstone, Hindu marriage was defined by an entirely different set of rights and duties that formed the basis of a 'social fabric.' To grant a Hindu wife powers of divorce as a consequence of her conversion to Islam would be to fundamentally alter that fabric by rendering her 'virtually independent of her husband'.<sup>631</sup> Johnstone did not refute

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<sup>628</sup> Statute 21 Geo. III., c. 70, § 17 quoted in *ibid.*

<sup>629</sup> *Jamna Devi v. Mul Raj* (1906) 9 PLR 83, at 201.

<sup>630</sup> *Ibid.*, at 199.

<sup>631</sup> *Ibid.*

Husain's argument that Devi's marriage deprived her of freedom of conscience. Rather, he stated that it was enough to assume that he would 'simply keep her in some part of his house and try to persuade her to abjure her faith'.<sup>632</sup> So long as he was not cruel, this was not ground for divorce. Johnstone acknowledged that Raj had expressed his intention of trying to reconvert her. Justice Rattigan's non-dissenting judgment was also recorded in this matter. He noted that the degradation occasioned by Devi's conversion to Islam 'can be atoned for and the convert re-admitted to her status as a Hindu, if she hereafter renounces Islamism and performs the right of expiation of her caste'.<sup>633</sup> Mul raj, he noted, 'would be entitled, if he so wished, to desert his wife by reason of her apostasy and, under the personal law which must be taken to govern the case, he need do no more than allow her what is called a 'starving maintenance'.<sup>634</sup> Not only did these judges discount the principle of freedom of conscience and belief, but in both Hasan Bibi or Jamna Devi's cases they did not consider as relevant whether their conversions were a matter of conscience or a means of obtaining a divorce. Chatterji's ruling was not concerned with whether Bibi's conversion from Islam to Christianity was sincere or a means of dissolving her marriage. Johnstone and Rattigan's rulings were not concerned that Devi would be forced to renounce Islam.

Husain attempted a second time reinterpret the punishment for apostasy in Islamic law in a manner that would stop its being used as a loophole for divorce. This time he attempted to re-translate Arabic legal terminology, but without success. In *Imam-ud-din v. Nur Din* (1908) Husan Bibi's former husband brought a suit against

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<sup>632</sup> Ibid., at 201.

<sup>633</sup> Ibid., at 202.

<sup>634</sup> Ibid., at 203.

her for the restoration of his conjugal rights.<sup>635</sup> Hasan Bibi (a.k.a. Nur Din) reconverted to Islam and as a consequence Imam Din appealed the previous court decision. In this case, Husain argued that the term ‘farruka’ used in standard texts of Muslim law and interpreted in colonial courts to mean ‘dissolution,’ as in the dissolution of marriage resulting from apostasy, should instead be interpreted as ‘suspension.’<sup>636</sup> He argued that in Muslim law, apostasy led to the suspension of marriage until reconversion. However, the court rejected this argument and upheld an interpretation of Islamic law in which apostasy in an Islamic state would be punishable by death for women as well as men. In Hasan Bibi’s case, apostasy laws allowed her to divorce her husband without ultimately having to renounce her faith.

In 1921, Punjab legislative member Muhammad Amin enunciated principles of religious liberty in an attempt to close the loophole in Muslim divorce laws created through colonial courts’ interpretation of the punishment for apostasy. He moved the Punjab legislative council to legislate for ‘saving marriages under Muslim law from the effects of apostasy from Islam.’<sup>637</sup> Amin expressed an objection to apostasy laws on the principle of religious liberty: ‘Every human soul has the birthright to profess any religion if it satisfies his enquiries and to shake off if it can be replaced with one better suited to his way of thinking. Freedom of thought and belief ought to be the first asset of every Indian and where social bondages interfere with such a change a suitable remedy ought to be provided for lightening the severity of such bondages.’<sup>638</sup> However, he went only so far as to recommend the Samarkand and Balkh

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<sup>635</sup> *Imam-ud-din v. Nur Din* (1908) 11 PLR 77.

<sup>636</sup> *Ibid.*, at 231-232.

<sup>637</sup> Punjab Legislative Council Debates, 28-29 July 1921, Vol. II, no. 2 (Lahore: Government Printing, 1921), at 306-308.

<sup>638</sup> *Ibid.*, at 307.

interpretations to fix the loophole in divorce rules—rather than to legislate against dissolution of marriage for apostasy completely.

Colonial law's interpretation of punishment for apostasy in Islam was controversial among Muslims because it was misused, but it had particular significance for the Ahmadiyya because their status as Muslim was contested. *Narantakath Avullah v. Parakkal Mammu* (1921) was a revision of a North Malabar court's acquittal of a Muslim Moplah woman, who had been accused of bigamy by her husband Narantakath.<sup>639</sup> After Narantakath had become Ahmadi his wife sought the advice of a Muslim *alim*, who advised her that by becoming an Ahmadi her husband was no longer a Muslim and her marriage dissolved as a consequence. She remarried and Narantakath brought a criminal suit against her for bigamy. She was acquitted when the court determined that Ahmadis were non-Muslim based on the testimony of a Hanafi Sunni Muslim *alim*. The revision of this decision by a Bombay High Court, which was examined in chapter 2, was based on Justice Oldfield and Krishnan's determination that Ahmadis were Muslim. However, their judgements left room for the possibility that the Ahmadiyya might be determined to be non-Muslim by the Muslim community through consensus, after sufficient time for such a determination had passed.<sup>640</sup>

In some cases, the law's failure to uphold the principle of religious liberty had material implications, especially in cases of conversion away from Hinduism. Certain provisions within statutory law were ostensibly measures to protect the principle of religious liberty. Under the Caste Disabilities Removal Act (XXI of 1850), any law that inflicted 'personal forfeiture of rights or property or affects any right of

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<sup>639</sup> *Narantakath Avullah v. Parakkal Mammu* (1921) ILR 45 Madras 986.

<sup>640</sup> Their ruling is examined in chapter 1.



inheritance' for religious apostasy was not to be enforced as law in colonial courts. The subsequent ruling *Abraham v. Abraham* (1863) accorded with this principle: the Privy Council determined that the profession of Christianity released the convert from 'the trammels of the Hindu Law,' but did not necessarily involve any change of the rights and relations of the convert in matters that did not concern Christianity, including powers over property.<sup>641</sup> The parties in the suit, Mathew Abraham and his brother, were native Christians whose ancestors had converted to Christianity generations ago but continued to form an undivided family. The Privy Council held that inheritance could be governed by Hindu law or any other law, while the coparcenary was a product of the rights and obligations attached to the Hindu undivided family and necessarily governed by Hindu law.<sup>642</sup>

However, *Abraham v. Abraham* was not interpreted to mean that an individual convert from Hinduism to an 'alien' religion remained within the coparcenary. In *Jamna Bai v. Gonda Ram* (1923), a Lahore High Court overturned a lower court's ruling that interpreted *Abraham v. Abraham* to mean that Gonda Ram, a Hindu convert to Islam, remained within the Hindu joint family.<sup>643</sup> The court ruled that conversion from Hinduism *ipso facto* separated the convert from the Hindu joint family and the coparcenary property attached to it.<sup>644</sup> In this case, Zafrullah Khan had

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<sup>641</sup> N. R. Narisimmiah, *The Principles of Hindu Law: Chiefly Based upon Sir Thomas Strange, Mr. Mayne, Tagore Law Lectures on Hindu Law from 1871 to 1884 and the decisions of several High Courts of India and the Privy Council up to the end of 1884* (Madras: C. Foster and Co., 1885), i; H. J. Tarrant, *A Digest of the Decisions of the Judicial Committee* (Madras: Higginbotham & Co., 1876), 221-223.

<sup>642</sup> This account of the case ruling is in its abstracted form as presented in legal digests. The religious identities of the parties in the case were more ambiguous and complicated by their being a mixed race family. For the full case ruling and a historical account of the persons involved, see: Mallampalli, 'Meet the Abrahams'.

<sup>643</sup> *Jamna Bai v. Gonda Ram* (1923) 25 PLR 16.

<sup>644</sup> Supported by *Ganga Singh v Begam* (1912) 18 PLR 4.

argued unsuccessfully that Gonda Ram (a.k.a. Muhammad Din) was treated as a member of the joint family after his conversion and assumed its rights and responsibilities, and was thus entitled to his share in the coparcenary. Khan's argument that a Hindu convert to Islam was not *ipso facto* separated from the Hindu joint family cut against a notion that Hindu and Muslim laws and society were distinct. One could be part of a family that was mixed.

### The Muslim Personal Law Application Act

The Muslim Personal Law (Shariat) Application Bill (MPLA Bill/MPLA Act), introduced into the Indian legislative assembly in 1935, had implications for the kind of argument that Zafrullah Khan was attempting to make. The Bill sought to apply Muslim personal law in every instance that custom was recognized as law over Muslims in British India.<sup>645</sup> This would have removed the urban and rural legal distinction among Muslims in the Punjab while creating a sharper distinction between Muslims and Hindus. The law would no longer recognize the existence of convert communities, whose identity as such legitimized customs among Muslims in common with Hindus. The change in their status from converts to fully converted would also undermine a sociological interpretation of conversion, as well as an interpretation of Islamic law underpinned by evolutionary legal theories. Supporters of measures to introduce the Bill described conversion to Islam not as arising through historical and material conditions in India, but as a conscious disavowal of Hinduism for Islam on the part of individual converts. A clear distinction between Hindus and Muslims in

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<sup>645</sup> Sturman, *Government of Social Life*, 212. These *ulama* were politically orientated away from the Punjab Unionist party.

personal law undermined Zafrullah Khan's argument that an individual's conversion to Islam did not separate him from the Hindu joint family, an argument intended to prevent the loss of property rights as a result of conversion from Hinduism to Islam.

The MPLA Bill was introduced by H. M. Abdullah, a legislative member from the Punjab, and was the product of a campaign by ulama from the Punjab and the North West Frontier Province who belonged to the Jamiat-i-Ulama.<sup>646</sup> Within the domain of personal law, the Bill was expansive, explicitly covering 'all questions regarding succession, special property of females, betrothal, marriage, divorce, maintenance, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, any religious usages or institutions including *Wakf* (property and trust).'<sup>647</sup> Its stated object was to improve the status a Muslim women under customary law, who had been deprived of rights guaranteed to them under Muslim personal law.<sup>648</sup> However, the Bill had clear political implications: it was commonly perceived to have radical implications for altering the economic and social order in the Punjab, upon which the Punjab Unionist Party's political dominance rested.

When the Bill was circulated for comment, it was understood across India as having far-reaching implications for agriculturalists in the Punjab.<sup>649</sup> In the Punjab, the provincial government opposed it as adversely affecting the economic status of

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<sup>646</sup> Ibid.

<sup>647</sup> 'Bill to make provision for the application of the Moslem Personal Law (Shariat) to Moslems in British India', Introduced to the Legislative Assembly on 26 September 1935 by H. M. Abdullah, Public and Judicial Department Records, IOR L/PJ/7/943.

<sup>648</sup> 'Statement of Objects and Reasons', Moslem Personal Law (Shariat) Bill, 27 March 1935, *ibid*.

<sup>649</sup> Opinion of Justice Abdul Rashid, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper III, *ibid*.

agriculturalist Muslims.<sup>650</sup> In 1929, Mian Abdul Haye, an urban representative within the Punjab Unionist Party ranks, had proposed similar legislation in the Punjab legislative assembly, on similar grounds that it would improve the position of Muslim women.<sup>651</sup> According to Justice Din Muhammad, this legislation had failed before because rural members of the Punjab legislative assembly were not prepared to endorse measures that would remove restrictions on alienations of land and ‘do away with the agnatic theory on which their whole superstructure is founded.’<sup>652</sup> He commented that they feared that their estates would be divided and subdivided over the course of a few successions, which would weaken them economically and politically.

The MPLA Bill was also circulated for comment to Muslim religious bodies and Muslims who represented urban interests. These comments gave expression to the urban and rural divide in the region, which highlighted how the dual systems of religious personal law and customary law translated into opposing sets of interests. Comments in favor of the MPLA Bill and removing the urban and rural distinction schematically expressed these opposing sets of interests as urban and ‘educated’ against rural and ‘backward.’ One member of the debt conciliation board in Jhang noted in his approval of the Bill: ‘Custom is backwards and the urban educated classes oppose it.’<sup>653</sup> According to a deputy commissioner in Gujranwala: ‘The

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<sup>650</sup> Home Secretary of the Government of the Punjab, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper III, *ibid*.

<sup>651</sup> Newbiggin, ‘Personal Law and Citizenship,’ 24-25.

<sup>652</sup> Opinion of Justice Din Muhammad, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper III, Public and Judicial Department Records, IOR L/PJ/7/943.

<sup>653</sup> Opinion of S. Muhammad Hussain Shah, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper III, *ibid*.

educated Mussalmans, living in the cities, are mostly in favor of the restoration of Shariat.’

The removal of this distinction through the universal application of Muslim personal law also gave religious sanction to Muslims who represented urban interests. Khan Bahadur Shaikh Fazl-i-Haq Piracha, a central legislative assembly member from North West Punjab, was in favor of the Bill, proclaiming that Islamic law was ‘a complete and competent law to lead and guide man in all aspects in life.’ According to Piracha, all religious heads and organizations were in favor of replacing customary law with Muslim personal law. Piracha was not concerned with the two main objections to the Bill, that it would lead to land fragmentation and the neutralization of the Land Alienation Act. Rather he commented that the ‘remedy [for agriculturalists’ problems] lies in industrializing the country and teaching the agriculturalists industries subsidiary to agriculture.’<sup>654</sup>

The Ahmadi legislative member Pir Akbar Ali also commented on the MPLA Bill and reflected agriculturalists’ interests. Ali was concerned with the Bill’s impact on agricultural estates, particularly on how it would contribute to Muslim indebtedness and problems germane to the smaller holdings in central Punjab. According to Ali, the immediate consequence of the MPLA Bill was that the ‘facilities and certain rights now allowed to agriculturalists will be taken away.’<sup>655</sup> His comments in this regard were detailed. The Bill would mean the practical repeal of the Punjab Alienation of Land Act of 1900 and the Punjab Debtor’s Protection Act of 1936. It would mean a radical alternation in the manner in which property was conceived under customary law: the removal of the distinction between moveable and

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<sup>654</sup> ‘Extract from Office Report of the Legislative Assembly Debates’, 1 April 1937, at 2537-2539, *ibid*.

<sup>655</sup> Opinion of Pir Akbar Ali, M.L.C., Advocate, Ferozepore City, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper III, *ibid*.

immovable property, between ancestral and self-acquired property. Without these property distinctions, agricultural lands would not be regulated any differently than other forms of property. For Muslims only, there would no longer be any right of representation, which allowed the grandson, or son of deceased son, to succeed to ancestral property. The concept of life estate would be replaced by absolute ownership, meaning that agricultural lands would be used to pay debt and funeral expenses, leaving only a residue to be distributed among heirs. It would also mean some fundamental changes in the collective nature of property laws in the Punjab, an end to the prevailing custom where the son lived with the father and contributed to his father's estate. Muslim law instead recognized even a minor son as having separate property, over which his father acted as a guardian during his minority.

Like Fazli Husain, who attempted to apply private international law to regulate relations between Hindus and Muslims, Pir Akbar Ali was also concerned with how Muslim personal law operated in interaction with other laws in a plural legal system. Ali viewed Muslim personal law as a distinct system of law, but in interaction with other laws. He emphasized the manner in which Islamic institutions functioned in India rather than the religious compulsion of Muslims to be governed by Islamic institutions. According to Ali, *shari'a* was harmonious and socially beneficial when practiced in its entirety. When introduced in parts, as the MPLA Bill proposed to do by introducing Muslim personal law over a minority population, it acted as 'an engine of oppression and inequality, a hybrid product partaking the good properties neither of secular law now obtained nor of the religious one anticipated.' To illustrate this point, Ali used differing concepts of debt in British Indian law and Muslim law. In Muslim jurisprudence debt was conceived to be principal without interest, contrary to how it was applied in British Indian law. The just conclusion of applying *shari'a*, which

would undo legal interventions and debt protection, would have to be that Muslim debtors would only be liable to pay back principal. Ali's opinion reflected the Mainian principles that justified the application of customary law against rapid legal modernization and social reform in the first place. From those principles, Muslim law was evolutionarily more progressive than custom. However, it could bring about greater backwardness than customary law when introduced into an unsuitable environment. Ali's views on interest were similar to those of Zafrullah Khan—while Ali was concerned with how Islam's prohibition on interest operated in the Punjab, Khan was concerned with how it operated within a global economy.<sup>656</sup>

The MPLA Bill would have redrawn the legal boundaries between Hindus and Muslims by no longer recognizing 'convert' communities within the Muslim community.<sup>657</sup> In addition to agriculturalist tribes in the Punjab, the application of Muslim personal law would have altered the customary law of Khojas and Cutchi Memons. These communities were all conceptualized within the law to be converted to Islam from Hinduism. One opinion gathered from Bombay described the Memons of Gujarat and the Khojas and Sunni Bohras of Bombay in these terms:

In Hindu law, joint family system is recognized and a son as soon as he is born acquires rights equal to that of his father in the ancestral property of his father, but this rule does not apply to converts to Islam. Again the theory of joint family business is not applied to them, and the relations between members of Muslim family are governed by the Indian Contract Act and the Indian Partnership Act as in Mahomedan law itself there is no provision as such. Though the Hindu law of inheritance and succession is applied to them, the doctrine of survivorship is not applied to them.<sup>658</sup>

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<sup>656</sup> Zafrullah Khan's views on interest are discussed in chapter 3.

<sup>657</sup> The debate over minority or 'convert' Muslim communities is dealt with in Newbigin, 'Personal Law and Citizenship,' 26.

<sup>658</sup> Opinion of K. B. Vali Baksh, *Précis of opinions on the Moslem Personal Law (Shariat) Application Bill*, Paper II, Public and Judicial Department Records, IOR L/PJ/7/943.

The recognition of customary law among Muslims gave these communities a fixed status as ‘converts to Islam’ as distinguishable from Muslims in personal law. This status positioned these communities between Hindus and Muslims within the imagined social order in India. Their removal projected a more distinct boundary between Hindus and Muslims, which conformed better to notions of Hindus and Muslims forming distinct societies.

The MPLA Bill also had implications for how Islamic law was interpreted because the construction of minority Muslim community boundaries and their continued practice of ‘Hindu’ customs supported evolutionary legal theories. A Bombay district judge opinion on the Bill reflected this interpretation:

Urf” of custom is one of the principle sources on which Moslem lawyers have based the development of their law. The law so obtained would be likely to be best adapted to the varying classes of people who embrace Islam...Thus even in the Personal Law (Shariat) as prevailing today we do find a considerable element of custom.<sup>659</sup>

The universal application of Muslim personal law in place of custom suggested that conversion from Hinduism to Islam was not a slow process, arising out of the material conditions from which conversion occurred. Rather, it suggested that conversion was a flip between Hinduism and Islam. Thus Zafar Ali Khan, in support of the legislation, described conversion from Hinduism to Islam within his family as a sharp break from Hinduism. He described his great-great-great grandfather as a ‘kafir’, an infidel: ‘when Islam came into our family we became the strictest of Muslims.’<sup>660</sup>

The creation of a distinct boundary between Hindus and Muslims altered the potential for conversion without civil disabilities in India. Zafrullah Khan demonstrated this potential in *Jamna Bai v. Gonda Ram* (1923), in which he argued

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<sup>659</sup> Ibid.

<sup>660</sup> ‘Extract from the Legislative Assembly Debates’, Vol. 5, no. 11, 16 September 1937, at 4, *ibid*.



that a Hindu convert to Islam who continued to live and be treated as a member of the Hindu joint family after his conversion should not be legally separated from it.<sup>661</sup> His argument was based on a misreading of the term ‘convert’ in *Abraham v. Abraham*—what was used to describe a family’s conversion generations ago was taken to mean an individual’s conversion within the present. Khan’s misreading of ‘convert’, as well as the lower court’s decision that this case was appealing, potentially allowed conversion to Islam to occur among Hindu individuals without the potential loss of property rights or legally altering the family relations of the convert.

Farzand Ali, an Ahmadi missionary who had been stationed in London previously, commented on the MPLA Bill on behalf of the community. The Ahmadiyya’s opinion on the application of the MPLA Bill seems to have been a pragmatic position for Ahmadi missionaries because it preserved recognition of the status of ‘convert’ within personal law while not opposing the application of Muslim law. Rather than the immediate application of Muslim personal law in place of customary law, Farzand Ali recommended that individual Muslims should be given the right to decide whether legacies left by them, including agricultural lands, be disposed of according to Muslim personal law. Should they opt for Muslim law, their minor children and descendants would have no choice but to follow Muslim law.<sup>662</sup> His position blurred the sharp distinction between Hindu and Muslim personal law that Zafar Ali Khan’s notion of conversion implied.

The MPLA Act also had the potential to alter the position of privileged Muslim landowners not belonging to ‘convert’ communities and Shia landowners. The MPLA Act ultimately left vague what constituted shari’a law and ignored legal

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<sup>661</sup> *Jamna Bai v. Gonda Ram* (1923) 25 PLR 16.

<sup>662</sup> Opinion of Farzand Ali, Précis of opinions on the Moslem Personal Law (Shariat) Application Bill, Paper II, Public and Judicial Department Records, IOR L/PJ/7/943.

differences that existed within the Sunni tradition between the schools of law, or the more substantial differences that existed between the Shia and Sunni legal traditions.<sup>663</sup> Rather, it presented Muslim law as an uncomplicated, religious code of law and ‘project[ed] an image of communal solidarity’ onto Muslims in India.<sup>664</sup> Muhammad Yamin Khan, a Muslim representative from Agra whose constituency included wealthy landlords with *taluqdari* tenures, was concerned about the repercussions of a vaguely defined Muslim personal law leading to the loss of privileged land rights.<sup>665</sup> Muhammad Yamin Khan’s interpretation of *shari’a* was that it did not allow any restrictions to the free transfer property, that it was entirely inimical to the spirit of pre-emption: ‘Muslim law presumes that every Muslim is a sensible man and he must have a free hand to transfer or to dispose of his property in any way he thinks proper.’<sup>666</sup> He was concerned that the MPLA Act would affect the Agra Zamindari Act, an Act not particular to Muslims that was intended to protect a class of landowners in Agra by allowing them to keep their estates undivided. In a similar vein, he was concerned that the MPLA Act would do away with private *waghs* what allowed landowners to keep their estates undivided and restricted the alienation of land.

The MPLA Bill ignored differences within Islamic law between Sunnis and Shias. Muhammad Yamin Khan drew attention to this difference in relation to the inheritance rights of a daughter without siblings: the daughter was entitled to inherit one-half of an estate under Sunni law and an entire estate under Shia law. Muhammad

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<sup>663</sup> Newbiggin, ‘Personal Law and Citizenship.’

<sup>664</sup> Ibid., 28-29.

<sup>665</sup> Sturman, *The Government of Social Life*, 215.

<sup>666</sup> Muhammad Yamin Khan, ‘Extract from the Legislative Assembly Debates’, Vol. V, no. 6, 6 September 1937, at 6, Public and Judicial Department Records, IOR L/PJ/7/943.

Yamin Khan objected to the use of the term ‘shari’a’ in place of Muslim personal law in the Bill because he interpreted *shari’a* to imply one law, while he took Muslim personal law to imply different laws according to different schools within the Sunni and Shia traditions. Muhammad Kazmi (Ahrar, United Provinces) dismissed Khan’s concern and his response suggested that *shari’a* could indeed be interpreted to create one legal code: ‘Whatever he says has to be accepted...If by Shariat he means one law, he must remember that all Muslims who say they are following Shariat are the believers in one Koran and are the believers in one prophet and one God and therefore one Shariat for Muslims means one Shariat.’

The MPLA Bill had the potential to fundamentally alter the legal structure upon which the Unionist party’s political dominance rested. However, it was passed through the legislature in a form that maintained the principle of a unified Muslim community without upsetting this structure that depended upon a distinction between rural and urban Muslims in personal law. Because the Government of India Act devolved any legislation that affected agricultural lands to provincial governments, the Bill was amended to exclude agricultural lands from its scope. The exclusion of agricultural lands in the Punjab from Muslim personal law avoided the potential for vast economic and political change in the province. The ideology behind the Bill was also appropriated by Muhammad Jinnah, who threw his support behind it after the 1937 elections. Jinnah described shari’a not as a common law, but as various legal interpretations stemming from a common source. During the assembly debate over the MPLA Bill, he responded to Muhammad Yamin Khan’s concern that *shari’a* implied one law by emphasizing that ‘interpretation [was] the fountain head of Shariat’. This left a large gap between the interpretation of Muhammad Kazmi, who suggested that these sources led to one interpretation, and that of Jinnah.

## The Muslim Dissolution of Marriage Act

Shortly after the MPLA Bill was introduced, another Bill to reform divorce under Muslim personal law was introduced into the Indian legislative assembly by Muhammad Kazmi. The stated objective of this Bill, the Muslim Dissolution of Marriage (MDM) Bill, was to apply Hanafi and Malaki schools of law to divorce cases in such a way as to provide Muslim women with the widest grounds for divorce allowed under Muslim law. It also included a clause that apostasy from Islam was not in itself grounds for the automatic dissolution of marriage.<sup>667</sup> This clause was intended to remove the loophole in divorce laws created by means of apostasy, as its inclusion within the MDM Bill suggests. The MDM Bill passed without altering the ideologies that underpinned the automatic dissolution of marriage for apostasy, according to which Muslim and Hindu societies were fundamentally different and Islam condoned conversion by force. However, when commenting on the Bill as a government official, Zafrullah Khan appropriated its ideological intents by asserting that there was no punishment for apostasy. Rather, Islam valued freedom of conscience and belief.

The movers of the MDM Bill did not necessarily share Zafrullah Khan's interpretation of Islamic law. Muhammad Kazmi was himself elected to the legislative assembly as a member of Ahrar, a party associated with campaigning against the 'false doctrines' of the Ahmadiyya. The Bill was presented as 'orthodox'

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<sup>667</sup> Muhammad Kazmi, 'Extract from the Legislative Assembly Debate', vol. V, no. 1, 26 August 1938, at 1-3, Public and Judicial Department Records, IOR L/PJ/7/1065.

and endorsed by ulama through a fatwa.<sup>668</sup> It also stipulated that all Muslim divorce cases be heard before Muslim judges, as non-Muslims more likely to misapply Islamic law. However, like the MPLA Bill, the Bill as introduced by Kazmi was significantly altered during its passage through the legislature. The government objected to the Bill's apparently sectarian and communitarian nature—sectarian because it explicitly made reference to the Hanafi and Malaki schools of law and communitarian because it assumed that only Muslim jurists were competent to interpret Muslim law.<sup>669</sup> These provisions were ultimately removed, leaving only the grounds for divorce listed within the Act without reference to the schools from which they derived or the necessity of their being applied by Muslim judges.

The MDM Bill was passed so that apostasy was no longer grounds for the automatic dissolution of marriage, but with an important caveat added: in cases in which the female apostate was returning to her original faith, apostasy still operated to automatically dissolve her marriage. This caveat was the result of intense opposition to the clause relating to apostasy from Hindu members of the legislative assembly, who argued that it would adversely affect Hindus and allow forcible conversion to Islam to take place. Bhai Parma Nand, a Hindu member of the Select Committee for the Bill, objected to the Bill on account of the 'fear prevailing in the minds of Hindus' that it would adversely affect them.<sup>670</sup> Nand quoted from the opinion of the Rajputana Provincial Hindu Sabha that the Bill opposed the principles of Hindu law. According to the Sabha, it also prevented Hindu women 'who have been converted to another faith' from returning to the Hindu fold: Hindu widows, wives, and virgins were

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<sup>668</sup> Ibid.

<sup>669</sup> J. A. Thorne, 'Extract from Legislative Assembly Debate', Vol. 1, no. 4, 3 February 1938, at 2, *ibid*.

<sup>670</sup> Bhai Parma Nand, 'Extract from Legislative Assembly Debate', Vol. V, no. 1, 26 August 1938, at 9, *ibid*.

enticed away from Hinduism by Muslims and married to Muslims immediately after conversion. The Bill would prevent Hindu women from releasing themselves from ‘the clutches of Muslims’.<sup>671</sup>

Babu Baijnath Bajoria, a commerce member from the Marwari Association, stated as fact that rape, seduction, and abduction were ‘of common day occurrence’ in the Bengal and most of the culprits were Muslim and the victims Hindu.<sup>672</sup> Bajoria cited recent court decisions in the Bengal to the affect that conversion to Islam of a Hindu wife automatically dissolved her marriage to a Hindu man—so, departing from the precedent laid down by *The Government of India v. Ganga* (1879). Bajoria took this to mean that a Hindu wife could be abducted, forced to convert to Islam and marry her abductor and the institution of Hindu marriage could do nothing to keep her within the fold. The Bill meant the breakdown of Hindu society according to him: Bajoria read a letter from the Secretary of the Sanatan Dharan Sabha of Philibhit that the Bill if passed would ‘interfere with the established laws of Hindu society and Hindu religion’ and would ‘inject the poison of communal animosities into the body politic of the Indian nation.’

Hindu legislative members interpreted the MDM Bill as interacting with Hindu personal law, while describing Islam and Hinduism as being so fundamentally opposing as to make intermarriage impossible. Bhagavan Deshmukh opposed the Bill and described marriage between a Hindu and a Muslim as unworkable as the marriage in which ‘one is an idol breaker and one is an idol worshipper.’<sup>673</sup> At the same time, he described his own Bill, the Hindu Women’s Right to Property (HWRP) Bill as

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<sup>671</sup> Babu Baijnath Bajoria, *ibid.*

<sup>672</sup> *Ibid.* 20-21.

<sup>673</sup> Bhagavan Deshmukh, ‘Extract Legislative Assembly Debate’, Vol. 1, No. 4, 3 February 1938, at 20, *ibid.*

relevant to marriage between Hindu women and Muslim men. The Bill sought to abolish limited or lifetime estates for women and give them absolute ownership rights over property, including property through inheritance, partitions, settlements and gifts. This would have preserved the Hindu joint family, but reformed it to include women. When Bajoria commented that the MDM Bill would allow Muslim men to forcibly convert Hindu women, Deshmukh replied that it was for this reason necessary to support the HWRP Bill.<sup>674</sup> It may be that Deshmukh understood that by vesting ownership rights with Hindu women and joining them equally to men within the coparcenary, conversion to Islam would have operated as a civil disability for women as it did for Hindu men who converted to Islam. The potential loss of property rights as a consequence of being separated from the coparcenary would have been a disincentive to ‘forced’ conversions that occurred in the form of elopements and love-marriages between Hindu women and Muslim men.

This objection to intermarriage between Hindus and Muslims was also expressed by Muslim legislative assembly member M. Asif Ali (Congress, Delhi). Based on his interpretation of *nas* (the Quran and hadith), he held that Islamic law forbade intermarriage between Hindus and Muslims as it forbade marriage to ‘idolatresses’ and ‘fire-worshippers.’<sup>675</sup> He interpreted the law of apostasy in Islam as the consequence of the incompatibility of marriage between Hindus and Muslims, the outcome of ‘the structure of Hindu society and law [being] completely different.’

Principles from private international law might also have worked to dissolve marriages between Hindu women and Muslim men without maintaining the justification for automatic dissolution of marriage as being the punishment for

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<sup>674</sup> *Ibid.*; For a description of the HWRP Bill see Newbiggin, ‘Personal Law’, 27-29.

<sup>675</sup> M. Asif Ali, ‘Extract from Legislative Assembly Debates’, Vol. I, no. 6, 6 August 1938, at 15-16, *ibid.*

apostasy. Ghulam Bhik Nairang, a Muslim member from the Punjab who helped draft the Bill, commented during its debate that forcible conversion to Islam was against the Quranic precept: ‘There shall be no compulsion in the matter of religion’. However, Nairang interpreted Islamic law commanding Muslim men to marry women of the book (revealed religions) as excluding marriage to Hindus—so under Islamic law, if a woman reconverted to Hinduism her marriage was invalid on account of this commandment anyway.<sup>676</sup> Ultimately, the MDM Act’s proviso that a female apostate’s conversion to her original faith automatically dissolved her marriage maintained the inference that the automatic dissolution of marriage was a safeguard for Hindu women against forced conversion.

Opponents to the MDM Bill who argued that it allowed Muslim men to forcibly convert Hindu women did not espouse freedom of conscience and belief as a universal principle that should be protected under the law. They did not address the underlying principle behind the automatic dissolution of marriage for apostasy: that conversion away from Islam was tantamount to treason and merited the death penalty. Legislative member Muhammad Nauman’s comments within the debates were an exception.<sup>677</sup> Nauman argued that Islam gave full liberty to women to change their religion if a woman thought that some other religion appealed to her mind and conscience. Naumann did not see the sense in compelling her to continue to follow her parents’ faith and contrary to her liberty. Thus he returned back to the justification for dissolution of marriage, punishment of apostasy, and questioned its legitimacy.

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<sup>676</sup> Ghulam Bhik Nairang, ‘Extract from Legislative Assembly Debates’, Vol. V, no. 11, 9 September 1938, at 12, *ibid*.

<sup>677</sup> Muhammad Nauman, ‘Extract from Legislative Assembly Debates’, Vol. V, no. 1, 26 August 1938, at 18-19, *ibid*.



In a similar vein, Zafrullah Khan spoke in the legislative assembly on the punishment for apostasy in a manner that accorded with freedom of conscience and belief with Islamic law.<sup>678</sup> Khan was the Muslim member of the Viceroy's Council when the Muslim Dissolution of Marriage Act passed. In a speech that was commented upon by one legislative members for its religious fervour, Khan set about reinterpreting apostasy in Islamic law by first redefining Islam as a religion of inner conviction rather than social or political belonging: 'faith is a matter of the heart.' In that way he also dehistoricized Islamic law and removed it from the schema whereby 'orthodox' law was defined by it being prior to later innovations—with implications for the law of apostasy as 'orthodox' law. Conversion from Islam [and thus to Islam from Hinduism) was not a matter of leaving one society to join another, but believing one faith to be true over another. According to Khan's interpretation the Quran, any punishment for apostasy was a violation of the Islamic precept that there was no compulsion in Islam—using the same quote that Nairang had used in response to comments that Hindu women would be forcibly converted to Islam from Hinduism.<sup>679</sup>

While British Indian law had not distinguished between sincere and insincere conversion from Islam for automatic dissolution of marriage, the sincerity of conversion was of primary importance in Khan's argument that there was no punishment for apostasy in Islam. Khan quoted Quranic verse to argue that hypocrisy (munafikin) in Islam was morally worse than honest disbelief. According to the

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<sup>678</sup> Zafrullah Khan, 'Extract from Legislative Assembly Debates', Vol. V, no. 11, 9 September 1938, at 13-22, *ibid*.

<sup>679</sup> *Ibid.*, at 18: Khan quoted the following Quranic verses to argue that there was no compulsion in religion: 'say (to these people) the Truth is from your Lord, then let whosoever desires believe, and let whosoever desires disbelieve.' 'Had thy Lord desired to force people to believe, then everyone on earth would have believed. Then dost thou (O Prophet) desire to compel people to believe?' and 'There shall be no compulsion in faith; guidance has become manifest from error.'

Quran, ‘hypocrites shall be consigned to the nether most regions of fire.’<sup>680</sup> To illustrate how the law of apostasy did not conform to the spirit of Islam in this regard, Khan described the conversion to Christianity of a Muslim woman married to a Muslim man. This conversion was based on the woman’s belief that Christianity was the truth. The husband wished to remain married despite the woman’s conversion, and in the spirit of Islam he would accept his wife’s conversion rather than compel her to live as a hypocrite. She also wished to remain married and to keep their family intact. However, the law would operate to either dissolve their marriage as a consequence of her conversion or compel her to live as a hypocrite. This was against their wishes and the spirit of Islam. Moreover, the form of divorce that automatic dissolution of marriage took was a hardship compared to Muslim divorce laws. The couple would be denied the option of a slow divorce allowed under shari’a, which required three declarations of divorce be made one month apart—complete and final divorce *khula* permitted in cases where continuing to live together would be intolerable.

In the context of the legislative debates on the automatic dissolution of marriage, Khan’s interpretation of Islamic law as being in accord with freedom of conscience and religion cut two ways. It cut against the notion that Islam allowed the forcible conversion of Hindus, which criminalized intermarriage between Hindus and Muslims and stoked up Hindu fears against reforming the Muslim law of apostasy. It also cut against an interpretation of Islamic law in which apostasy from Islam was punishable by death. In British India, this punishment translated into the automatic dissolution of an apostate’s marriage. For Ahmadis, the sanctioning of this law within colonial courts meant the potential loss of civil rights for Ahmadis in British India should Ahmadis be defined as non-Muslim. As Zafrullah Khan had experienced when

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<sup>680</sup> Ibid., at 20.

an Ahmadi missionary was executed in Afghanistan, colonial courts that maintained this interpretation of Islamic law also placed Islamic states outside the domain of an emerging universal human rights scheme.<sup>681</sup>

## Summary

Colonial courts interpreted the punishment for apostasy from Islam as the death penalty and translated it into the automatic dissolution of an apostate's marriage under Muslim personal law, which provided a loophole for Muslim women to divorce their husbands within otherwise restrictive divorce laws. On the other hand, the Lahore high court interpreted a Hindu wife's conversion to Islam as infringing upon her husband's conjugal rights and upheld the sanctity of Hindu marriage against dissolution. In a series of cases involving conversion and apostasy, Fazli Husain attempted to interpret Hindu and Muslim personal law in a manner that would have allowed equal movement between religious communities. He did so by using precedents from an alternative tradition within Islamic law that did not prescribe the death penalty for female apostates, thus preventing Muslim wives from using the 'punishment' to dissolve their marriages. He then argued that the non-dissolution of marriage for a Hindu wife's apostasy infringed upon her right to religious freedom. His arguments were concerned with 'international law', or the law between communities. The rulings in these cases, however, reasserted 'orthodox' interpretations of both Hindu and Islamic law, including the punishment for apostasy, and dismissed the right to religious freedom. These rulings were concerned with the law within communities.

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<sup>681</sup> This is dealt with in chapter 3.

Legislation, which was introduced by Muslim politicians in the central legislature during the 1930s, further undermined the principles that Husain derived from international law. The Muslim Personal Law Application Bill attempted to replace customary law with Muslim personal law in every instance it was practiced by Muslims. Underpinning this legislation was a conception of Hindus and Muslims as forming distinct societies with distinct systems of law. Muslim villagers would no longer be understood of as having ancestral land rights in common with Hindu villagers. Their identity as Hindu converts to Islam would not be recognized under personal law, in which customary law had implied gradual conversion of communities over generations rather than an individual's conversion out of conviction. It also undermined economic and political policies in the Punjab that were based on the urban and rural distinction, a structure of political representation that decentralized political influence in the Punjab and encouraged political representation of socio-economic interests. This legislation was thus conducive to the style of politics adopted by urban Muslims and ulama in the Punjab.

The Ahmadi lawyer Zafrullah Khan occupied the Muslim seat in the Viceroy's Executive Council when the Muslim Dissolution of Marriage Bill was passing through the Indian legislature. The Bill attempted to mend the loophole in divorce laws created by the automatic dissolution of marriage for apostasy from Islam by using the same strategy that had been employed by Fazli Husain in court—asserting an alternative precedent from within the Islamic tradition. This legislation was firmly opposed by Hindu politicians because it was understood to infringe on Hindu law, and facilitate 'forced' conversion of Hindu women to Islam through marriage. The Act that passed was a compromise that allowed for automatic dissolution of marriage for female apostates who were converting back to their original religion. While the Bill

achieved its purpose, it preserved an interpretation of Islamic law that prescribed the death penalty for apostasy and reinforced a separation between Hindus and Muslims. Zafrullah Khan, speaking on behalf of the India government as an appointed official, supported the measure to reform apostasy laws. However, he argued that there was no punishment for apostasy from Islam, an interpretation derived from his own study of the Quran and the traditions of the Prophet rather than from the Islamic legal tradition.

## Conclusion

Whether or not the principle of freedom of conscience and belief, including the right to convert between religions, was legitimate to Punjabi Muslims seemed to have depended upon their position within the colonial legal order. It had legitimacy among a class of socially mobile, 'lower-caste' Muslims, for whom it maintained a legal order with porous social boundaries. It seemed to lack legitimacy among Muslims whose economic and social position benefited from a legal order that imposed a clear jurisdictional boundary between Muslims and non-Muslims, which necessarily restricted religious conversion. This was the position of urban Punjabi Muslims, who recognized the legitimacy of the *ulama* to distinguish Muslims from non-Muslims in terms of religious belief. As a missionizing movement and a Muslim sect, the Ahmadiyya depended for its existence on a legal order that did not make this distinction legitimate. Their promotion of the right to freedom of conscience and belief reflected their unique position as a Muslim sect within the colonial legal order, but also had broader appeal to the classes from whom the Ahmadiyya was itself drawn.

Evolutionary legal theories shaped a legal order in the Punjab according to a common set of principles, which contributed to the rise of a class of Punjabi Muslims who recognized the legitimacy of colonial law. This legal order was based on a fundamental legal distinction between landowning 'agriculturalist' tribes and non-agriculturalist Punjabis, which intersected religious categories within personal law and defined the land right of 'agriculturalist' Muslims according to codified customary law in common with Hindu and Sikh 'agriculturalists'. This distinction was

the basis for land laws designed to stabilize the economic and social position of rural landowners, the majority of whom were Muslim, against indebtedness and land dispossession. While these legal interventions suggested that colonial land laws and an interaction between personal laws were detrimental to Muslim landowners, the colonial administration ascribed cultural reasons (e.g. reticence to pursue secular education) for the economic backwardness of Muslims compared to other groups. Colonial policies encouraged upward social mobility among rural Muslims through secular education, professional employment (including in law), military service, and land colonization, which also integrated rural Muslims into the colonial legal order. A structure of political representation in the Punjab allowed rural Muslim leaders to represent their grievances to the colonial administration through formal channels, and directed them towards representing caste-based, social and economic interests. Evolutionary theories made available to them an interpretation of Islamic law that was based on enlightenment principles, which gave legitimacy to their efforts to reform Islamic law as it had been codified by the British a century earlier. Their status as lower-caste Muslims encouraged them to focus legal reform towards redressing inequalities created through the interaction of legal systems in India.

More than just recognizing the legitimacy of colonial law in India, Punjabi Muslim leaders acted to protect their class interests by evoking the duty of the British government to support their 'just claims': claims that were based on principles that legitimized colonial rule. According to principles of international law articulated by the Punjab administration, Indian communities retained rights over their internal laws and administrations (in the case of princely states) or customs (in the case of Punjab agriculturalist tribes), while transferring foreign relations and the right to wage war to the politically supreme British government. These principles inferred that India would

evolve to a position of political equality with Britain as inequalities between caste and religious communities within India levelled out through progressive legal reform facilitated by the British government. Punjabi Muslim politicians adopted the positive inferences that these principles inflected upon a political system that distributed political rights unequally among groups, advocating measures such as separate electorates for Muslims and other minorities as redressing institutionalized inequalities that favoured upper-caste Hindus. They understood themselves as ‘acting through’ the paramount powers of the British administration, lobbying British officials to intervene in the administrations of Kashmir and Alwar to raise the position of Muslim agriculturalists there to a level on par with that of agriculturalists in the Punjab through constitutional means.

The Ahmadiyya emerged from within this legal order and appealed to the class interests of ‘agriculturalist’ Muslims and other upwardly mobile classes. Leaders within the Ahmadiyya, including Ahmadi founder Mirza Ghulam Ahmad, came from a class of Muslim landowners whose status and wealth deteriorated as a result of British laws and administration. Along with ‘pro-agriculturalist’ Muslim leaders, they advocated secular education and competition among Muslims for positions within the civil service and professional fields. The Ahmadiyya was incorporated into the structure of political representation in the Punjab, and represented social and economic interests of rural Punjabis to the British government. After the expansion of representative government, Ahmadi legislative assembly members were included in the pro-agriculturalist, Unionist party. Pir Akbar Ali and Zafrullah Khan interpreted Islamic law in terms of economic rules and as existing in interaction with other laws in a plural legal system, arguing that Islam’s rules on debt and interest were socially healthy within the context of an Islamic legal system but worked to the detriment of



Muslims within a plural legal system. Like other Punjabi Muslim leaders, the Ahmadiyya advocated a decentralized, political structure in India and separate electorates for Muslims. They also acted through the paramount power of the British government, most prominently in Kashmir in the 1930s, by evoking the duty of the British government to intervene in princely states towards setting the just claims of Muslims for economic and social rights.

The Ahmadiyya adhered to doctrines that were conducive to upward social mobility among 'agriculturalist' Punjabi Muslims and movement across jurisdictional boundaries. The Ahmadiyya's identification as a Muslim sect under colonial law allowed their movement across jurisdictional boundaries within personal law. Muslim sects were defined in terms of the dissent from 'orthodox' Sunni belief rather than their divergence from Muslim personal law (i.e. Muslim rules of inheritance and marriage). This meant that, despite organizing as a community, the Ahmadiyya were not recognized as such under personal law in India. Muslims who joined the Ahmadiyya did so without altering their social relations according to the law, and the Ahmadiyya spread across caste boundaries that might have otherwise restricted such movement. While their treatment in the law as no different from Sunni Muslims gave the Ahmadiyya mobility, it also meant that the only means available for Sunni Muslims to legally separate from Ahmadi relations was through arguing that Ahmadis were not Muslim (which would lead to the loss of civil rights attached to their religious status). As early as 1905, a colonial lawyer argued in a civil suit that Ahmadis were apostates because they believed that Mirza Ghulam Ahmad was a prophet, the same grounds upon which their identity as non-Muslim would be based in Pakistan.

Ahmadiyya doctrines facilitated their movement across international jurisdictional boundaries. These doctrines commanded obedience to temporal laws and replaced the rules for waging war against non-Muslims in Islamic law (*jihad*), with a duty to spread Islam through argument. Ahmadi missionaries resolved conflicts between Islamic law and the territorial laws under which they operated through principles of private international law. The Ahmadiyya's adaptation of international law seemed to reflect the prominence of Punjabi lawyers within the movement, as well as their training in legal theories that prevailed in the Punjab. In 1921, a Lahore High Court ruled that Ahmadi doctrines derived from legitimate interpretations of Islamic law and the use of reason (*ijtihad*), which allowed for the adaptation of Islamic doctrines to the presence of Muslims in Europe. This interpretation of the Ahmadiyya may have reflected the argument of Zafrullah Khan, an Ahmadi lawyer arguing that Ahmadis were Muslim in the case. It may have reflected a common theoretical strand for interpreting Islamic doctrines shared by certain judicial administrators and Muslims.

The Ahmadiyya interpreted international law as not only legitimate but in accordance with Islam. In the 1920s, the Ahmadiyya head interpreted the establishment the League of Nations as in accordance with Quranic guidance for the resolution of disputes between *Muslim* nations, and he argued that international law must be based on Islamic morality to function justly. In 1924, when the Afghan government condoned the killing of Ahmadis for apostasy under the decree of Muslim scholars (*ulama*), the Ahmadiyya appealed to the League of Nations and European governments to intervene on behalf of Afghan Ahmadis. The Ahmadiyya, as well as British advocates of human rights, included Muslim countries and colonial subjects within an emerging universal human rights scheme that included the right to freedom

of conscience and belief. The Ahmadiyya did not acknowledge any conflict between the cultural values embodied in universal human rights and Islamic cultural values.

In contrast to an interpretation of Islamic law based on evolutionary legal theories and compatible with international law, Baillie's digest of Islamic law imagined there to be an impermeable jurisdictional boundary between Muslims and non-Muslims: Muslims who moved across this boundary became apostates from Islam and ceased to be governed by Islamic law. The Lahore High Court judgments examined in this thesis interpreted Hindus and Muslims in India as distinct societies with separate legal systems, and their judgments emphasized the law within communities rather than the law between communities. These judgments had the effect of restricting movement between communities (i.e. restricting religious conversion and interreligious marriages) by not recognizing principles of private international law and not validating the principle of freedom of conscience and belief within Hindu and Muslim personal laws. Colonial law 'punished' apostasy from Islam with the automatic dissolution of an apostate's marriage, which worked in a roundabout way to maintain a social separation between Hindus and Muslims. This was in part because it was a translation into Muslim personal law of the death penalty for apostasy from Islam under Islamic law, which preserved an ideology that Islam compelled adherence to the Islamic religion by force. In India, this ideology fed into popular notions that 'indigenous' Muslims (Muslims that were identified with lower-caste Hindus, like 'agriculturalist' Muslims) had been converted by force to Islam under Muslim political powers, and that Hindu women were being forcibly converted to Islam through abduction and forced marriage to Muslim men. Moreover, despite colonial laws to the contrary, punishments for apostasy in both Hindu and Muslim personal law potentially led to the loss of property rights. In the Punjab and

neighboring princely states, the greatest potential for loss of property seemed to be a result of separation from the Hindu joint family as a result of conversion to Islam.

This logic within colonial law, which asserted the internal law of religious communities over principles of international law and the 'universal' right to freedom of conscience and belief, had particular implications for the Ahmadiyya because their status as Muslim was contested. During the 1930s, this logic gave legitimacy to Muhammad Iqbal's demand that the British government must define the Ahmadiyya as non-Muslim in accordance with the sentiments of Muslims. Muslims' belief that Muhammad was the last prophet distinguished them from pre-Islamic religious communities, and clearly marked the Ahmadiyya as non-Muslim. The Ahmadiyya's inclusion within the Muslim community weakened it from within. Underpinning Iqbal's argument was a conception of Muslims as being culturally distinct from non-Muslims and of dogmatic belief as being a cohesive agent among Muslims. These principles—of difference between religious communities and unity within them--were common to an all-India structure of political representation, in which Muslim politicians were compelled to represent the common interests of Muslims in India despite differences in their economic and social positions. What is more, Iqbal's argument for the exclusion of the Ahmadiyya from the Muslim community mirrored theoretical strands of thought within the European legal tradition, which led to a nationalistic challenge to international law.

The functioning of Iqbal's argument as a legal construct also has social implications that were opposed to the interests represented by the Punjab Unionist party. Iqbal did not interpret religion as existing within a social structure organized by caste, but rather interpreted social structures as emanated from religious beliefs. Not only did Iqbal's interpretation of religion upset the conceptual foundations up which

the Unionist party was organized, it also delegitimized the form of political activism adopted by Punjabi Muslim leaders in Kashmir and Alwar. Urban Muslim politicians in the Punjab and Deobandi ulama joined together and campaigned against the Ahmadiyya during legislative assembly elections in the province. Their campaign against the Ahmadiyya asserted the authority of the ulama over that of the British government to determine correct belief in Islam and membership within the Muslim community. It was based on Muslim political representation of religious issues particular to Muslims, rather than economic and social issues linked to caste. It was rhetorically anti-British, undermining the Punjabi Muslims who appealed to British paramountcy.

Legislation, which was introduced by Muslim politicians in the central legislature during the 1930s, also conformed to this set of 'nationalistic' and 'orthodox' principles. The Muslim Personal Law Application (MPLA) Bill attempted to replace customary law with Muslim personal law in every instance it was practiced by Muslims. Underpinning this legislation was a conception of Hindus and Muslims as forming distinct societies with distinct systems of law. Muslim villagers would no longer be understood of as having ancestral land rights in common with Hindu villagers. Their identity as Hindu converts to Islam would not be recognized under personal law. While customary law implied gradual conversion of communities over generations, Muslim politicians who supported the Bill described conversion as radical change by individuals based on religious conviction. It also undermined economic and political policies in the Punjab that were based on the urban and rural distinction, a structure of political representation that decentralized political influence in the Punjab and encouraged political representation of socio-economic interests. It

thus was conducive to the style of politics adopted by urban Muslims and ulama in the Punjab.

The passage of the Muslim Dissolution of Marriage (MDM) Bill, whose movers expressed the same set of principles as those who moved the MPLA Bill, was a result of compromise or reconciliation of ‘Islamic law’ to ‘Hindu law’ through consensus. The Bill attempted to mend the loophole in divorce laws created by the automatic dissolution of marriage for apostasy from Islam by using the same strategy that had been employed by Fazli Husain in court—asserting an alternative precedent from within the Islamic tradition. This legislation was firmly opposed by Hindu politicians who argued that it infringed on Hindu law, and facilitated ‘forced’ conversion of Hindu women to Islam through marriage. The Act that passed was a compromise that allowed for automatic dissolution of marriage for female apostates who were converting back to their original religion. While the Bill achieved its purpose, it preserved an interpretation of Islamic law that prescribed the death penalty for apostasy and reinforced a separation between Hindus and Muslims.

A decade before his appointment as the first foreign minister of Pakistan, Zafrullah Khan was the Muslim member of the Viceroy’s Executive Council. Zafrullah Khan, speaking on behalf of the India government, supported the passage of the MDM Bill as a measure to reform apostasy laws. However, he seems to have misrepresented the intents of its movers. He argued that there was no punishment for apostasy from Islam, an interpretation that he said derived from his own study of the Quran and the traditions of the Prophet, rather than from the Islamic legal tradition. This interpretation of Islamic law accorded with the principle of freedom of conscience and belief. While Khan’s interpretation could be said to reflect his

membership within a 'heretical' Muslim sect, it could also be said to reflect his social and economic background as an 'agriculturalist' Muslim lawyer from central Punjab.

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