

SYED MAHMOOD COLONIAL INDIA'S DISSENTING JUDGE (2022). By Mohammad Nasir and Samreen Ahmed, Bloomsbury India, New Delhi. Pp. 236, Price INR 496.

IN THE administration of justice, an opinion is the judge's or court's stance on a particular legal question, along with an explanation of the rationale behind the stance in an ongoing case. The majority opinion in a case forms the court's decision.¹ The minority opinion, also known as the dissenting opinion or dissenting vote, is the opinion given in the case by one judge or jointly by a number of judges who disapprove of the majority's conclusion. These opinions are given after the majority opinion.² Such a separately expressed opinion may differ from the consensus opinion in terms of its justification and conclusion.

The dissenting opinion serves as a clear demonstration of the fact that judges have differing viewpoints regarding the interpretation of law. It serves as a guarantor of the judiciary's independence.³ Dissenting opinions have great value. Huges J. opines "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may correct the error into which the dissenting judge believes the court to have been betrayed".⁴

Just as majority opinions set the legal framework, dissenting opinions lay the groundwork for the evolution of law. For the proper functioning of a judicial system, talking points must keep emerging and the law must keep breaking new grounds. A key characteristic of a dissenting opinion is that it points out potential flaws in the conclusions of the majority opinion and makes a strong case for the devil's advocate.⁵

A dissent, therefore, is a valuable tool that develops the law. Often, a minority opinion in one case becomes the majority opinion in another. For instance, the dissenting opinion of Fazl Ali J. in *A.K. Gopalan v. State of Madras*,⁶ was adopted later in the case of *Maneka*

¹ Julia Laffranque, "Dissenting Opinion and Judicial Independence" 8 *Juridica International* 163 (2003).

² S Sivakumar, "Judgment Or Judicial Opinion: How To Read And Analyse", 58 *Journal of Indian Law Institute* 292 (2016).

³ William O. Douglas, "The Dissenting Opinion" 8 *Lawyers Guild Review* 469 (1948).

⁴ Bernard L Shientag, "The Opinions and Writings of Judge Benjamin N. Cardozo" 30 *Columbia Law Review* 607 (1930).

⁵ Chinmoy Pradip Sharma, "The Voice of Dissent: Contribution of Dissenting Opinions in Constitutional Law Cases", *Bar and Bench*, May 24, 2019, available at: <https://www.barandbench.com/columns/contribution-of-dissenting-opinions-in-constitutional-law-cases> (last visited on August 21, 2022).

⁶ AIR 1950 SC 27.

Gandhi v. Union of India.⁷ The decision in the former case was overruled and the dissent of Fazl Ali J. led to the adoption of a procedure that must be “just, fair and reasonable”.⁸

Presently, the book which is under review is “Syed Mahmood Colonial India’s Dissenting Judge” published by Bloomsbury Publishing house India. The authors of the biography offer it as neither a hagiography or as an apologia. The book is a piece of narration of Syed Mahmood’s life and his contribution. The book starts with an introduction and is divided into six chapters.

The book seeks to apprise readers with Syed Mahmood’s persona as a dissenting judge. The **First Chapter** deals with the early childhood, educational journey and the family background of Syed Mahmood. Born on May 24, 1850, Syed Mahmood’s initial education started around the first war of independence in 1857 and it impacted his course of education as it was the post 1857 revolt which made Syed Ahmed Khan (Syed Mahmood’s Father) realise the importance of learning English. Due to the transferable job of his father, Syed Mahmood had the opportunity of studying at different educational places and from different private tutors. Having moved to Banaras in 1868, Syed Mahmood was admitted to Queens’ College, which was widely reputed at the time as a seminary of English language and literature.

The Chapter highlights the academic excellence of Syed Mahmood as a student at the Christ College of Cambridge University, London and also his return to India as a barrister. Syed Mahmood’s interest in nurturing young minds and his experiments in doing the same also finds mention in the first chapter. The personal life of Syed Mahmood is highlighted with a brief mention of his marriage and family including a short introduction of his son Ross Masood’s childhood and education.

The **Second Chapter** talks about the contributions of Syed Mahmood in the foundation of the M.A.O. College,⁹ which ultimately transformed into Aligarh Muslim University.¹⁰ Syed Mahmood’s excellence in English language coupled with his dedication to the quest for educational empowerment in India led to the actualization of Aligarh Muslim University.¹¹

⁷ AIR 1978 SC 597.

⁸ Raj Shekhar and Mohd Rameez Raza, “The Value of Dissent in Supreme Court Judgments” *The Leaflet*, September 28, 2020, available at: <https://theleaflet.in/dissent-judgments-supreme-court/> (last visited on August 6, 2022).

⁹ The Aligarh Muslim University, “The AMU Gazette Centenary Special Issue, 2020” (December, 2020).

¹⁰ The Aligarh Muslim University Act, 1920 (Act 40 of 1920).

¹¹ Sanjay Barolia, “Aligarh Movement: an Instrument for Transformation in Muslims” *5 International Journal of Multidisciplinary Educational Research* 112 (2016).

Having been appointed as a High Court judge at the age of thirty-two years and permanent judge at thirty-six,¹² the chapter goes into giving a fleeting account of Syed Mahmood's idea and vision for the educational development of Indians. The Chapter also goes on to trace Syed Mahmood's vision for Education and how it resonates with the National Education Policy 2020. Syed Mahmood's contribution to the administration of the MAO College and the sociocultural life at MAO College are also briefly highlighted.

The peculiar interests of Syed Mahmood for the development of legal education at AMU is traceable from the novel initiatives undertaken by him for the same. He got himself involved in the administrative actions and the appointment of teachers at the law department. Syed Mahmood himself delivered lectures at the law department at MAO College is comprehensively illuminated.¹³

Chapter Three provides readers an account of Syed Mahmood's career in law and as a Judge of the Allahabad High Court. There were various other contributing factors apart from the talent and achievements of Syed Mahmood which lead to his appointment as a Judge of the Allahabad High Court. The atmosphere created post 1857 revolt, where the Colonial government due to circumstances created post revolt inclined towards appointment of native Judges to enhance the legitimacy of the colonial legal institutions. All this coupled with the affinity which Syed Mahmood laboured for the colonial government in India after his appointment to the Civil services, all the events played key chain role in the finality of the result and his appointment.

The popularity Syed Mahmood earned after the Judgement of *Deputy Commissioner Rae Bareli v. Rampal*.¹⁴ The 46 page judgment delivered by Syed Mahmood, when went into appeal before the Judicial Committee of the Privy Council. It much struck the eyes of its members, that they while expressing their concurrence his opinion in their judgment were said to have conveyed to the Secretary of State of India their view that so talented a person should not be wasted in the subordinate judiciary.¹⁵

¹² K.L. Mishra, "Justice Mahmood- a Tribute Allahabad High Court", available at: <https://www.allahabadhighcourt.in/event/JusticeMahmoodATributeKLMisra.pdf> (last visited on August 16, 2022).

¹³ Faculty of Law, Aligarh Muslim University, "Placement Brochure" 9 (2014).

¹⁴ Privy Council Appeal No. 3 of 1882.

¹⁵ *Sri Gur Dayal Srivastava*, "Mr. Justice Mahmood Allahabad High Court, available at: <https://www.allahabadhighcourt.in/event/MrJusticeMahmoodGDSrivastava.odt> (last visited on August 20, 2022).

Syed Mahmood being a man of cross cultural education had delivered a judgement which has earned him a reputation as a scholarly judge. Syed Mahmood's judgements highlighted his liberal interpretation of law and played a key role in furthering the principle of "justice, equity, and good conscience"¹⁶. He transformed himself into a litigant-friendly judge by considering the genuine problems of the lawyers.¹⁷

The chapter also discusses the differences between Syed Mahmood and Sir John Edge, the then Chief Justice of Allahabad High Court were largely due to variance of opinion on the working of the courts and his dissenting opinions and the stand of Syed Mahmood for independence of judges and equality of them. As a dissenting judge, Syed Mahmood could not accept the dictatorial and superior attitude of Sir John Edge and judgeship being dependent on the "frowns and smiles" of the Chief Justice, thus Syed Mahmood resigned from the Allahabad High Court as a judge in 1893.¹⁸

Chapter Four elaborately deals with the landmark judgements delivered by Syed Mahmood. His decisions are remembered because they are marked by diligence, learning, a sense of righteousness and independence, and they lack the tiresome dogmatism and repetitious clinches that are so prevalent in today's writing.¹⁹ The judgement delivered by Syed Mahmood covered various domains of law not just confining to Muslim law. The major judgments he delivered covered Procedural law, Guardianship of Minors, Adoption, Land laws, Hindu law, Law of Evidence, Transfer of Property, succession law, equity, etc.²⁰

Syed Mahmood recognized the importance of "fair trial" as a crucial component of the legal justice system for defending the rights of the accused when they were not physically present in court or represented by an attorney.²¹ In the Case of *Queen Empress v. Pohpi*,²² Syed Mahmood held that "an appeal under section 420 of the Code of Criminal Procedure could

¹⁶ *Ishri v. Gopal Saran*, (1884) ILR 6 All 351; *Lalli v. Ram Prasad* (1886) ILR 9 All 74; *Bell v. Morrison* (1828) 26 United States 351.

¹⁷ Justice M. Hidayatullah, "Justice Syed Mahmood Allahabad High Court", available at: https://www.allahabadhighcourt.in/event/Justice_Syed_Mahmood_M_Hidayatullah.pdf (last visited on August 20, 2022).

¹⁸ Abdul Shahid, "Justice Syed Mahmood-A Jurist-Ahead of Its Times- Greatness & Relevance" District Court of India, available at: <https://districts.ecourts.gov.in/sites/default/files/A%20JURIST-AHEAD%20OF%20ITS%20TIMES-%20GREATNESS%20%26%20RELEVANCE.pdf> (last visited on August 20, 2022).

¹⁹ *Supra* note 17.

²⁰ A.G. Noorani, "He stood tall" *Frontline*, January 6, 2017, available at: <https://frontline.thehindu.com/nation/he-stood-tall/article9436074.ece> (last visited on August 20, 2022).

²¹ *Supra* note 18 at 2.

²² (1891) ILR 13 All 171.

not be disposed of in the absence of the accused and the appellant must be heard in person”.²³ The Doctrine of “*audi alteram partem* and *ubi jus ibi remedium*” was also recognized by Syed Mahmood.²⁴ His dissent in the case of *Queen Empress v. Babulal*,²⁵ stressed on the rights of prisoners and how the extraction of evidence through third degree methods is in violation of their personal rights.

The Judgement delivered in the case of *Jafri Begum v. Amir Mohammad Khan*,²⁶ is a breakthrough in Muslim law regarding the question of inheritance. The main question referred to the full bench was “whether upon the death of a Mohammadan intestate who leaves unpaid debts with reference to the value of his estate, does the owner of such estate devolve immediately on his heirs” or such devolution is contingent upon and suspended till payment of such debts”. Syed Mahmood brilliantly answered this by holding that debt did not affect devolution by proceeding upon the works of “*Baizawi*” (the greatest commentator of Quran). He explained that “*Alsirajiyah and Hedaya*”, belongs more to the realm of a treatise than a mere pronouncement. As a piece of historical investigation, the judgment stands supreme for it illumines many dark corners of the Mohammadan law.²⁷

Syed Mahmood’s decision in the case of *Govind Dayal v. Inayatullah*,²⁸ is considered to be the most authoritative exposition on the concept of pre-emption. It was held that pre-emption is simply a right of substitutions and it pertinently explored the rights and obligations of the vendee.²⁹ Syed Mahmood’s decision in *Gobind Dayal*,³⁰ was recently affirmed by the Supreme Court of India in the judgement of *Ragunath D v. Radha Mohan D*.³¹

In the 2017 landmark judgement of *Shayara Bano v. Union of India*,³² wherein Supreme Court termed the practice of “triple talaq” unconstitutional, Rohinton Nariman J. quoted Syed Mahmood’s observation in the decision of *Gobind Dayal*,³³ and pointed “it is to be

²³ *Supra* note 17 at 5.

²⁴ *Ibid.*

²⁵ (1884) ILR 6 All 509.

²⁶ (1885) ILR 7 All 822.

²⁷ Vishwanth Prasa, “Some Leading Judicial Precedents of Our Court”, *Allahabad High Court*, available at: <https://www.allahabadhighcourt.in/event/SomeLeadingJudicialPrecedentsOurCourtVPrasad.html> (last visited on August 20, 2022).

²⁸ (1885) ILR 7 All 775.

²⁹ V.P. Bhartiya, *Syed Khalid Rashid’s Muslim Law* 305 (Eastern Book Company, Lucknow, 5th edn., 2017).

³⁰ *Supra* note 28.

³¹ AIR 2020 SC 782.

³² (2017) 9 SCC 1.

³³ *Supra* note 28.

remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot be readily be dissevered from each other”.³⁴

In the case of *Jangu v. Ahmad Ullah*,³⁵ delivered by a five-judge bench, “wherein the case related to the question of whether a public mosque is open for worship to all Muslims irrespective of the difference in the manner of the offering of Namaz in different sects”. Syed Mahmood referred to the decision he delivered in the case of *Queen Empress v. Ramzan*,³⁶ wherein it was held that that the ownership of a mosque vests in God, and not in any individual.

Syed Mahmood’s judgement in the case of *Indar Kaur v. Lalta Prasad Singh*,³⁷ had a progressive approach and led to the extension of the rights of a Hindu widow concerning her share of the deceased husband’s immovable property and the power of alienation of the same. Syed Mahmood read down the limitation to the power of alienation of a Hindu Widow concerning the property inherited by her upon the death of her husband by applying a harmonious reading of the “Shastras” and the “principles of equity”.

The judgements delivered by Syed Mahmood in the case of *Lekhraj Singh v. Ganga Sahain*,³⁸ and *Beni Prasad v. Hardai Bibi*,³⁹ have proved to be a breakthrough regarding the provisions on adoption as provided in the Hindu law. This is pertinently so because the judgement founding support from the Hindu religious text’s interpretation has eased the restrictions on the adoption of sons.

Syed Mahmood’s dissenting opinion in the case of *Kandhiya Lal v. Chandar*,⁴⁰ on the issue of the intersection of the law of contract and the Hindu law of inheritance is important. While answering the question on the competence of a shareholder to sue for the recovery of the entire amount due on the bond owned by several shareholders, he ruled that a shareholder could not be sued for more than what is his share in the bond.

Syed Mahmood’s decision in the case of *Nar Singh Das v. Mangal Dubey*,⁴¹ has been credited for widening the scope of the procedural laws with the acceptance of the principle

³⁴ *Ibid.*

³⁵ (1891) ILR 13 All 419.

³⁶ (1891) ILR 7 All 461.

³⁷ 1882 ILR 4 All 532.

³⁸ (1886) ILR 9 All 253.

³⁹ (1892) ILR 14 All 67.

⁴⁰ (1884) ILR 7 All 313.

⁴¹ (1883) ILR 5 All 163.

that every procedure is to be understood as permissible unless it is shown to be prohibited by the law.⁴² The relevance of the observations made by Syed Mahmood can be understood by the fact that his observation in the case of *Palakhdari Singh v. The Collector of Gorakhpur*,⁴³ finds mention in the 69th report of the Law Commission of India.⁴⁴

Syed Mahmood's dissenting opinion on the applicability of the doctrine of *res judicata* in the case of *Lutfunnissa v. Jamiatunnissa* still holds significance. While dissenting with the majority opinion, Mahmood held that the doctrine of *res judicata* bars the registration of issues just as it bars the trial of the suits, with the illustration of the reason located in the maxim "*nemo debet bis vexari pro eadem causa*". Syed Mahmood's opinion resulted in the minimization of the harassment of litigants as the opinion limited the scope of the registration of issues already adjudicated.

Chapter Five goes on to explore post-resignation phase of Syed Mahmood's life. After resigning from the judgeship he went on to fulfil his father's expectations by actively engaging in the academic and administrative affairs of M.A.O College. After the establishment of the All India Muhammadan Education Conference by Sir Syed Ahmed Khan in 1886,⁴⁵ Syed Mahmood took active participation in its proceedings by delivering lecture series.

Syed Mahmood stressed on giving equal importance to English and oriental education for the holistic development of both Hindus and Muslims. He attributed the educational backwardness of Muslims to their apathy and unwillingness to read beyond their literature and oriental subjects. Syed Mahmood's contributions as a member of Hunter's commission on Education speak out his vision and concerns about the educational advancement and welfare of Muslims in India. All the eighteen recommendations made by Hunter commission with Mahmood as its member stated that all the mentioned principles should also be applied to other communities that are facing conditions similar to those of Muslims. Mahmood also significantly contributed towards the drafting of the "Munsifs bill".

Chapter Six talks about the interfaith aspects. Syed Mahmood's educational background coupled with his father Sir Syed Ahmad Khan's social engagements helped him to attain a

⁴² *Supra* note 18 at 5,

⁴³ (1890) ILR All 1.

⁴⁴ Law Commission of India, "69th Report on the Indian Evidence Act, 1872" (May, 1977).

⁴⁵ Gulshan Zubair, "Muhammadan Educational Conference: It's Impact on the Development of Modern Education for Muslim Community in Rajasthan During 20th Century" 19 *IOSR Journal of Humanities and Social Science* 74 (2014).

composite knowledge of Sanskrit, Arabic, Persian and English languages. Syed Mahmood had exposure to cross-cultural education as his education starting from a “Maktab” eventually took him to “Cambridge”. Syed Mahmood’s father’s social engagements and inter-religion relations contributed to Mahmood’s liberal and progressive approach focused on mutual coexistence among Hindus, Muslims, Christian all other religions. Syed Mahmood gave equal importance to the study of all oriental languages. As a man of composite culture Syed Mahmood admires the teachings of Dara Shikoh, the eldest son of the Mughal Prince of Akbar, who was murdered by his brother Aurangzeb. He referred to the famous work of Dara Shikoh which explored the similarities and strengthen the inter-faith dialogue for his two books on Muslim law. The Aligarh Muslim University has carried on the legacy left behind by founder Sir Syed Ahmed Khan and has established the Dara Shikoh Centre for inter-faith understanding and dialogue⁴⁶ in its 100th year for strengthening the philosophy of national integration through peaceful coexistence.

As the first Muslim native and first North Indian native judge to be appointed as a judge of the Allahabad High Court at the age of 32 years, Syed Mahmood still holds the record of being the youngest ever to be appointed as a High Court judge. As an Indian-born jurist who was well ahead of his time, many of his dissents were later upheld by the courts and are still considered to be the law of the land. Syed Mahmood’s enduring brilliance emanates from the intellectual integrity he never wavered even in phases of strong opposition from his contemporaries.

The significance of the dissenting opinion of H.R. Khana J. in the case of *A.D.M Jabalpur* case⁴⁷ is realized today. The dissent by Khana J. was in true allegiance with his oath taken under Schedule- III of the Constitution of India. As a foresighted judge, the dissenting opinion of Syed Mahmood becomes way more important in today’s scenario where we have an independent judicial system. As a judge in the precolonial era where the judges were appointed at the mercy of the Colonial government, it requires great courage and willpower to take a stand against the majority opinion and express dissent.

The present book categorically covers the contribution of Syed Mahmood in Indian legal history. It emphasises his dissenting judgements and how his opinions helped in expanding

⁴⁶ Aligarh Muslim University, Dara Shikoh Centre for Inter-faith understanding and Dialogue, *available at*: <https://www.amu.ac.in/centres/dara-shikoh-centre-for-inter-faith-understanding-and-dialogue/home-page> (last visited on August 21, 2022).

⁴⁷ AIR 1976 SC 1207.

jurisprudence on Muslim law, Hindu Law, Civil Law, Inheritance, *etc.* It is a successful attempt tracing Mahmood's contribution to education in general and legal education in particular, by sharing insights on his efforts in the administration and working of M.A.O college and his contributions as a member of the Hunter Commission on education in colonial India. His pertinent interventions in shaping the interfaith dialogue and contributions to further communal harmony and mutual coexistence finds relevance even now and carries his legacy forward.

The authors have attempted to portray a balanced biography of Syed Mahmood by referring to Syed Mahmood's judgements and scholarly works without turning it into an eulogy. The authors have been successful in bringing out vivid details of Syed Mahmood's multifaceted personality. The personal lapses of Syed Mahmood including alcoholism, breakdown of family are also discussed at length. However, the authors were able to cover only a few judgements out of the 300 available judgements of Syed Mahmood in the Indian Law reports.

The simple and lucid language used by the authors gives a refreshing outlook to the book. The book is definitely a value addition to the readers interested in legal and colonial history. Syed Mahmood passed away in 1905. It took almost two hundred years for a biography to release in his name covering his legal accomplishments and scholarship. The authors have successfully unearthed a seminal character from the dust of history, and exhibited how the history still lingers to voice issues in the contemporary era. This book will be an enriching experience for the lawyers, judges, academicians and scholars who are interested in studying colonial Indian Legal History.

*Salman Qasmi**

* Ph.D. Scholar, Indian Law Institute, New Delhi.