Justice Syed Mahmood

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Anyone who wishes to name six greatest Indian Judges of all times, must find it difficult to omit the name of Syed Mahmood from his list. Indeed, it is a moot question how far he will go in his list before he must name him. What is the criterion by which Syed Mahmood is chosen and what are his claims to this signal position in the legal world? All Judges decide cases, render judgments and do Justice in their own way. Syed Mahmood was not alone in doing this. Obviously, it is not by deciding cases nor by disposing of a large number of them that a Judge acquires lasting title to fame. In attempting to discover the true reason of his greatness, some speak of his erudition, some emphasize his sense of justice and independence and some praise his industry. Bu t there have been Judges both before and after him, who were industrious, filled many pages in the law reports, possessed a strong sense of justice and independence and occasionally displayed erudition, but they are not regarded as great. The greatness which makes for an abiding fame must therefore depend on something quite different. It cannot even be said that Syed Mahmood was always right. He wrote a number of dissents which were not approved in his Court or outside it, although many of his dissents were later accepted. His colleagues were perhaps right but Syed Mahmood's opinions are remembered and not theirs. Lethean gulfs seem to have received them while his name shines still. It is not passion for justice nor being in the right which leads to undying fame.

The difference arises from a Judge's sense of his own duties; and really lies in this. Most Judges weigh arguments, put a brave face upon the matter and since they must give their decision, decide as they can and believe that theirs is the right opinion. There are others who first inform themselves about the legal principles, taking pains in this behalf so that they may save themselves from judging amiss. These carve for themselves a niche in human memory. Syed Mahmood was of this class. He did not elect between rival arguments. He formed his opinion after making all the necessary research for a proper application of the Jaw. In this task he mixed the wisdom of the ancient sages with the laws of today. There was no room then for the easy road to publicity available to Judges today, who, because they strike down a law or an executive action, get their names in print the next day, having sometimes carefully Included in their judgments the head-lines which they wish to appear. They gain momentary fame. It comes as cheaply as it goes out quickly. Abiding fame came to Syed Mahmood by excellence and not by the popularity of his decisions, by the high quality of his work and not from political entanglements in which the Judge figure indirectly in the rough and tumble of political factions. Not one of Syed Mahmood's judgments can be said to be political. Not one of them was sensational.

Stowell, whose judgments live through the ages as models of perspicacity and original thinking, was great because he had acquired a vast knowledge of Roman jurisprudence and the whole of classical culture. To the former he owed the grasp of civil law and to the latter the dignity and lucidity of expression and this gives him the tide of a great Judge. Syed Mahmood was another Lord Stowell. His sources were broader than Stowell's. Both are distinguished by their originality and the unerring faculty for seizing on the true essentials of a problem and of applying to the combination of circumstances the accepted propositions of law making an exception, if necessary, on logical grounds. Both lavished infinite care and industry upon their judgments. Both displayed a philosophical grasp and commanded a felicity of language. To this end they drew upon any material whether presented in arguments before them or not. They made the task of a Judge a difficult one. Coleridge in his *Table Tall* recommended all statesmen to read Grotius, Bynkershoek, Puffendorf, Wolf and Vattel. For the judge also there is a need for wide study. Judge Learned Hand once gave a reading list for a judge. He mentioned Acton and Maitland, Thucydides, Gibbon and Carlye, Homer, Dante, Shakespeare and Milton, Machiavelli, Montaigne and Rabelais, Plato, Bacon, Hume and Kant. In the task of a Judge, he said, everything turns upon the spirit in which he approaches the question before him. The reading list is much longer today. Judge Learned Hand pointed out that the words which the Judge construes are empty vessels into which he can pour nearly anything he will. "Men do not gather figs of thistles, nor supple institutions from Judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems, more than final solutions cast in generalizations of universal applicability." Knowledge, therefore, of the learning on the subject is the first requisite;

and this knowledge for a proper decision must be acquired before an attempt is made to solve the problem. And next the result must be stated in the grand manner. Cicero once said of his friend Sulpicius Rufus that he treated law 'with the hand and mind of an artist'. This is true of Syed Mahmood. A judgment, any more than a book, does not spring complete from the brain of a Judge. If it does, then it is not a judgment in the grand style. A notable judgment is the result of great industry and ratiocination, otherwise in the flow of facile utterances the real difficulties of the legal problems are in danger of being hidden out of sight. How many judgments we can name in which' idle circumlocution does duty for thought?' They are full of band-spread ideas. Analysed properly, they are found to be *verbosi in re facili, in difficili muti in angusta diffusi.*

Lord Philimore was not only a great Judge himself but also a discerner of ability in others. He recommended to the Governor General of India the appointment of Syed Mahmood as the first Indian Judge in the N.W.P. High Court (now the Allahabad High Court). Syed Mahmood was then 32 years in age. In this short period, Syed Mahmood was a student, a lawyer for seven, and a District Judge for three, years. Great must have been the promise held out by him in his short tenure as a District Judge to attract the notice of the Judicial Committee. Born in 1850, Syed Mahmood received his education at Queen's College, Benares and Christ's college, Cambridge, and was called to the Bar from Lincoln's Inn in 1872. His academic career was not outstanding but fairly successful. He acquired a profound knowledge of classical, European and oriental languages. When in 1882 he was first raised to the High Court Bench he had ten years' standing at the Bar including service for three years as a District Judge. He was barely qualified to occupy the august office of a Judge of a High Court. In our days it would be quite surprising to find a person ascending the highest rung of the judicial ladder at such an age. Lord Philimore must have thought (and rightly) that the youth of a Judge or a lawyer is not a disqualification but an asset. Syed Mahmood fortunately did not suffer from the sin of being young. Old age and experience are perhaps more necessary in a doctor than in a lawyer. The old proverbial saying is *"esto advocatus juvenis et medicus senex."* Ardour and ambition serve a lawyer. As Accursius remarked *"Quant uniore Jtanto perspicaciorer".*

Syed Mahmood's judgments are remembered because they bear the stamp of industry, erudition, his sense of justice and independence and are expressed without tiresome dogmatism, and iterated clinches and are free of parched style so common today. His method of approach was not one but multifarious. Law is capable of being investigated from diverse angles. We may consider its historical evolution, or assess its organic connection with the requirements of the age. We may observe the synthesis of its authoritative contempt, or the philosophical meaning of the basic principles which underlie its prescriptions. Syed Mahmood applied all methods to his inquiry to discover the true principle applicable to the facts before him. Although the time during which he worked as a Judge was a bare seven years, he wrote many leading judgments and many scintillating dissents. In both he shone with , the same luster. In either mood, whether speaking for the court or for himself, Syed Mahmood suffered from no false or affected modesty in using his erudition and powers of research. He was not one of those in whose case modesty is none else than inverted pride. It must have been a trying experience to be the first and lone Indian among Englishmen. He did not flinch from his duty, because to mince his words would have been fatal. Where he did not agree he boldly dissented. , “A dissent”, said Chief Justice Hughes, "is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the court to have been betrayed". Dissent in him was not born of a perverse nature but from conviction. Intellectual integrity is more clearly visible in a dissent and seldom when a Judge temporizes or shelters behind a majority opinion. The names of great Judges Harlan, Holmes, Atkin are remembered not because of the majority opinions they gave or concurred in, but because of their brilliant dissents. It is now proved that many of Syed Mahmood's dissents were right. Some of them were later accepted by other Full Benches and the Judicial Committee. Just as Mr. Justice Peckham wrote Mr. Justice Field's famous dissents into the later opinions of his Court, Syed Mahmood's dissents were rewritten or adopted as the leading opinions of the High Courts and the Judicial Committee. Faith with his oath and his judicial and moral independence are visible in his powerful and scholarly dissents. As Mr. Justice Sutherland said, the oath which a Judge takes is not a composite oath but an individual one. In passing his judgment a Judge discharges an individual duty imposed upon him by his oath which cannot be consummated justly by an automatic acceptance of the views of others, which have not convinced him or have created a reasonable doubt in his mind. He did not dissent to get a chance to speak which is a common failing of a poor Judge striving vainly for recognition as an

independent thinker, but because of fundamental differences. He demonstrated them by, a juristic approach to the problem with the scholarship which was essential to its exposition.

What was the learning on which he depended as source material? First and foremost, he was influenced by Roman Law. The study of Roman Law, which Judges today neglect and even characterise as pedantry, makes a Judge a cultured Judge. The much derided Glossators did a great deal to establish the study of Roman jurisprudence. Time was when a knowledge of the Roman system was considered an indispensable qualification for a Judge. A close acquaintance with Gaius and Justinian, Ulpian and Papinian is still regarded as the hall-mark of a polished scholar. It used to be said at one time that the knowledge of Azzo' (whose Gloss and Summa of ""-the Institutes and the Codes are still worth reading) was indispensable to those who aspired to the exalted position of a Judge-Chi non ha *Azzo, non vada a palazzo*! Today, it is not remembered that Ihring reminded his readers that Rome had thrice conquered the world, first by arms, secondly by religion and lastly by law; although Ihring's motto was 'through Roman Law, but above and beyond it.' If we can live commercially by borrowing ideas from others, we can be better for borrowing ideas about laws and institutions from others also. In *Gopal Pandey* v. *Parsottam Das*[1], Syed Mahmood explained the nature of the right of occupancy drawing upon the analogy of the Roman *nuda proprietas* and *Emphyteusis* to prove that provisions of a procedural character had really created substantive rights. In *Ishri* v. *Gopal Saran*[2], the Civil Law doctrine of *compensafioest debiti et crediti inter se contributio* was found equitable in its foundation. In *Muhammad Allahabad Khan* v. *Muhammad Ismail Khan*[3], Syed Mahmood referred to the adoption of Roman Law and, comparing it with Scottish and French laws, considered if he could draw any principle applicable to the doctrine of acknowledgment of paternity by a Muslim male. In *Kandhiyalal* v. *Chandar*[4], when Syed Mahmood dissented vigorously on the question of payment in *solido* and the rights of creditor *solidaire,* he referred to Domat on Civil Law, Pothier's Law of Contracts and Demolombe's Treatise on Contracts. In *Muhammad Salim* v. *Nabian Bibi and ofhers,*[5] he quoted extensively from the Digest to establish the plea of *excepti rei judicatae*. He was always turning to Colquhoun, Lord Mackenzie, Hunter and others. He subscribed to the full to Montesquieu's dictum (*Pensee* I,I95) 'to know modern times, one must know antiquity and each law must be followed in the spirit of all the ages.' Truly, *sine historea caecam esse jurisprudentiam.* Yet he never got lost in antiquity. To him, as to Holmes, historic continuity with the past was not a duty, it was only a necessity and he used Roman Law to inspire himself and not to follow it blindly.

Syed Mahmood was also affected by the British, Continental and American systems. He drew largely upon Coke, Bentham, Austin and Holland. From the Continental writers, he chose Pothier, Savigny and the German jurists. But, by far the greatest influence on him was that of Story. He inclined towards Equity more than towards Common Law. This was but natural. Common Law is full of technicality while Equity is liberal. The Court of Chancery was a Court of piety and was said always to be open. Of the writers on the subject of Equity, he quotes more often from Story than others. He has referred to his Equity jurisprudence in several judgments as also to his Equity Pleas, Contracts and Conflict of Laws. Syed Mahmood's famous description of the law of limitation as a 'statute of repose' was taken by him from Angel on the law of limitation, via justice Story in *Bell* v. *Morrison.*[6] In *Mangulal and others* v. *Kandhai Lal and anothers*[7], he quoted extensively from Story's Conflict of Laws and added-'I adopt every word of the rules of substantial justice here laid down as distinguished from merely technical rules of procedure.

Syed Mahmood, however, excelled himself when he dealt with a question under the personal laws of Hindus and Muslims. In dealing with cases on the Muslim Law, Syed Mahmood relie exclusively on the original texts in Arabic, which he translated for himself and sometimes for his colleagues. Thus, in *Muhammad Allabadad Khan* v. *Muhammad Ismail Khan (supra)* the judgment by Straight, J., also noted for its scholarship and close reasoning was prepared with the assistance of translations made by Syed Mahmood. Syed Mahmood in a separate judgment more than made up what was left out by Straight, J. He pointed out how in the medieval systems of

1 5 All. 1.
2 6 All. 351 .
3 10 All. 289 (F.B.)
4 7 All. 313 (F.B.)
5 8 All. 282
6 7 Peters U.S.R. 360
7 8 All. 475

jurisprudence confusion existed between rules of substance or merit (*ad litis decisionem*) and the rules regulating the procedure and the remedy (*ad litis orinationem*). He drew an analogy between the English and Muslim Law and laid down that in Muslim Law the principles of *semper praesumitur pro legitimatione puerorum* and *semper praesumitur promatrimonio* apply. The judgment is an exhaustive thesis on the subject and sets a standard in erudite exposition. In *Fida Ali* v. *Muzaffar Ali*[8], Syed Mahmood referred to an original *Hadis* related by Hasan Ibn Mahbub on the authority of Abu]aafar and pointed out the true meaning of the expression *ala Baitin* used therein. In *Agha Ali Khan* v. *Altaf Haran Khan*;"[9] *Gobind Dayal* v. *Inayatullah*[10] and *Rabim Baksh* v. *Muhammad Hasan*[11], various aspects of Muslim Law were considered with reference to the original authorities. He referred in these cases to Sharayul Islam, Mafatih, Ashbab (who commented like Broome on maxims of Muslim Law) Fakhrul Islam Bazdawi, Fathul Qadir, Durrul Mukhtar, Fatawai Alamgiri, Shamsul Aimma, Zahirul Rewayat, Fatawai Hindi, Suri Viqayah, Al Sirajayya, Kifaya (a commentary on Hedaya), Muhitus Sarkhas, Raddul Mukhtar, Fatawai Kazi Khan, etc. in addition to Birjindi, Muslim, Aini, Khassaf, Abu Zaid to say nothing of the standard works such as Bailie, Grady, Hamilton, Rumsey and others. It would take much space to be able to give even a brief idea of how these authorities were discussed, expounded and how the translations (where available) were checked and corrected. No judge before Syed Mahmood or since has shown such an acquaintance with the fundamentals of Muslim Law. Even the text books which one reads today do not contain references to these authoritative works of Sunni and Shia laws. .

Of course, the knowledge of Arabic gave Syed Mahmood a commanding position as a Muslim jurist. One would have thought that he would not be so exhaustive on the subject of Hindu Law. But in several cases on that subject too he displayed the same depth of knowledge of the original texts. In *Beni Prasad* v. *Hardai Bibi*[12] (a case involving a question relating to adoptions), Syed Mahmood, who had by then acquired sufficient knowledge of Sanskrit, considered the original texts from Mayukha and Manu and discovered inaccuracies in the translation by Mandlik pointing out that the latter had translated not the original texts of Vasishta but a reading of the Mayukha with emendations. Dealing with the Dharma Shastra of Yajnavalkya Syed Mahmood observed:

> "In considering these I have again been confronted with the difficulty of want of leisure to study these institutes and the commentary on them by Vijnyaneswara in the original and as a whole."

Syed Mahmood quoted the translation of the commentary by Colebrooke and comparing it with the original Sanskrit texts commented upon the inaccuracies of Colebrooke's translation. He called in aid the text of Nandapandita which he expounded from the original and compared it with the texts of Saunaka in Dattaka Mimansa. He then laid down that the authorities on which Nandapandita rested his prohibition did not, when examined, bear him out. He analysed Nandapandita's habit of using certain words and concluded that Nandapandita unblushingly had perverted Narada's arguments to lay a foundation for' his own propositions. He, however, accepted Mandlik's interpretation because it had the support of Witney, the grammarian, although Syed Mahmood said that he was not prepared to follow Mandlik so far as his own study of Sanskrit had carried him. One can go on in this strain from case to case involving many principles of Hindu Law. This only illustrates the research put in for accepting any particular point of view.

Syed Mahmood's diction was always equal to his erudition. It has been said that if you want to be read, still more if you want to be widely read, you must be readable. His diction was such, that I am tempted to apply Arnold's praise of Dryden's style-a prose such as we would all gladly use if we only knew how. He captured the echoes and overtones of the ancient texts and wrote in a style which Sir Ramaswami Aiyyar (himself a stylist) described as 'lambent.' 'A word' said Holmes, 'is not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and context according to circumstances and the time in which it is used.' Syed Mahmood did not base himself on a word but upon the sense. Unto his own words he poured a wealth of meaning. His lucidity was great but it carried a load of meaning. Lucidity is useless when it is empty of meaning. It can then be described as 'the negative virtue of mediocre minds'.

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8 5 All. 65 .
9 14 All. 429 F.B.
10 7 All. 775 F.B.
11 11 All. 1
12 14 All. 67 F.B.

Syed Mahmood was fearless. When the Chief Justice and his other colleagues would not reserve judgment so that he could prepare his own opinion after study, he characterized the judgment of the Full Bench as of doubtful validity. He referred to his own observations in the *Rohilkhand and Kumaun Bank* v. *Row*[13] that 'when a court, consisting of several judges, hears a case, no judgment or order can be legally passed until all those judges have conferred with each other (sic), and made up their minds together. His dissents show that he was not overborne by his English brethren although when Sir Comer Petheram was the Chief Justice, there was always an air of unanimity against him, a unanimity which in at least one case, the Judicial Committee put to shame by adopting his dissent as their own judgment.

Justice Mahmood did not hesitate to lay down new principles. Judicial law making with him was not confined to a molar to molecular motion. He recognised the situations in which judges cannot make law and the legislators won't, but in spheres open to him he did not hesitate to embark on judicial legislation. He was not content to match the colours of precedents with the colour of the case before him, to choose the nearest colour. He went ahead and laid down the principle applicable. Thus, in *Seth Chitormal* v. *shiblal*[14], he extended the doctrine of salvage in maritime law to things lost upon land. He thought that the limitation of salvage lien to maritime cases had its base in ancient maritime superstition. He recognised, however, that a judge must not rewrite a statute, neither to enlarge it nor to contract it. He avaoided interpolation and evisceration. He did not read in by way of creation nor read out except to avoid patent nonsense or internal contradiction. In *Zamir Hussain* v. *Daulat Ram*[15] Syed Mahmood boldly stated that it was no part of a judge's duty to enter into the merits and demerits of the law of pre-emption. And yet, in *Lalli* v. *Ram Prasad*[16], quoting Justice Story, he observed:

> "Law as a science would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other. "

Thus in *Queen-Empress* v. *Pobpi and others*[17] Syed Mahmood held that an appeal under section 420 of the Code of Criminal Procedure could not be disposed of in the absence of the accused and the appellant must be heard in person. He quoted the couplet of Seneca from Medea (I, I99):

> *"Quicunque aliquid statuerit parte inaudita altera-aequum licet statuerit, haud aequus fuerit," (sic)*

and matched it with a couplet from an Indian poet. It reminds us of the observation of a great judge of our times, "why should a man pay to prove his innocence?"

Syed Mahmood acknowledged ability in others. He praised Holloway and West, JJ. in *Sirbadharai* v. *Raghunath Prasad*[18], Dwarkanath Mitter, J. in *Durga Prasad* v. *Munsis*[19] and in *Gobind Dayal* v. *Inayatullaha*[20] Spankie, J.'s dissenting view was heartily accepted by him. It is only the great who can recognise greatness in others. Sir T. Muthusami Ayyar, the first Indian Judge and himself a great Judge, journeyed to Allahabad to meet his colleague.

Syed Mahmood retired prematurely in 1894. He reverted to practice but died nine years later. Thus passed away in 1903 from the legal world a luminary, the like of whom the Allahabad High Court has not seen. The profession of law has seen a decline in learning since his days. A good many of the erroneous decisions are the result of a failure to realize the historical relationship of the constituent parts of our laws. Judges are facile today; and it is said-'a corrupt judge offendeth not so highly as a facile judge'. Syed Mahmood was anything but facile. His title to fame is a combination of several circumstances. His greatness lay in the greatness of his pronouncements, the greatness of his intellect, the greatness of his knowledge and the greatness of his mind. He was great in every trait which a judge must possess. 'To be perfectly just', says Addison, is an attribute of the divine nature; to be so to the utmost of our abilities is the glory of man'. Syed Mahmood was great in the sense of a judge's oath to

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13 6 All. 468
14 14 All. 273
15 5 All. 110
16 9 All. 74
1713 All. 171 F.B.
187 All. 568.
19 6 All. 423
20 7 All. 775

decide cases to the best of his ability, knowledge and judgment.