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| Module code:TRDL7068 | Student ID number: 29001081 | Educational support needs: No. |
| Dissertation title: Sir William Jones (1746-1794) and Islamic Studies. | | |
| Supervisor: Dr. Gary Bunt | Word count: 20,732. | |
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SIR WILLIAM JONES (1746-1794) AND ISLAMIC STUDIES.

Summary.

The dissertation considers the life and work of Sir William Jones, a significant figure in the field of Orientalism and a judge in the Bengal Supreme Court. The life and career of Jones is described, with emphasis on his interests in the Arabic, Persian and Sanskrit languages. A review of literature relating to Jones gives a comparative account of how his work and actions were perceived by commentators and how those perceptions changed in more recent studies of his work. The major part of the dissertation deals with the work of Jones in translating legal texts, with particular attention paid to his last work on Mohamedan laws of intestacy, as part of the plan to administer native laws. The work is considered in the context of the Shari'a and Islamic jurisprudence, the work of Muslim jurists and their function. Consideration is given to the impact of his work, and that of others on the development of Anglo-Mohamedan law. Jones's contribution to the early development of Oriental studies is evaluated. The significance of Jones to Islamic Studies is assessed, showing that his work and actions were instrumental in affecting the laws of a Muslim society by the introduction of colonialist concepts and practices. The dissertation contains a Glossary of Key Terms and a Bibliography.

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Note..

In this dissertation, the following systems have been adopted :-

- Referencing. The Referencing System is that of the University of Wales, Trinity St. David, School of Theology, Religious Studies and Islamic Studies “Referencing Guide 2010-2011” based on the Modern Humanities Research Association system, published as the MHRA Style Guide¹
- Arabic terms and abbreviations. Arabic words are rendered in English forms and have been CAPITALISED on the first occurrence to indicate that they are defined and explained in the “Glossary of Key Terms” found at the end of the dissertation.² Abbreviated words or terms are explained in the text on the first occurrence and are also included in the “Glossary of Key Terms”.
- Place names. Modern names have been rendered in the form current during the lifetime of William Jones; Calcutta is used instead of Kolkata.
- Source Materials. The Letters and Works of William Jones have been collected and edited by Garland Cannon. Where Jones’s material is referred to in this dissertation, references will be made, unless otherwise specifically referenced, to the collections as follows,
The Collected Works will be used for Cannon, Garland, ed. *The Collected Works of Sir William Jones* (New York, New York University Press, 1993) being the *Works of Sir William Jones by Lord Teignmouth in thirteen volumes* (London, printed for John Stockdale, Piccadilly and John Walter, Paternoster Row, 1807). Vols.i-xiii.
The Letters will be used for Cannon, Garland, ed. *The Letters of Sir William Jones 1746-1794* (Oxford, at the Clarendon Press, 1970), Vols. i and ii, pp. 977.

¹ MHRA *Style Guide* December 2009.
<http://www.mhra.org.uk/Publications/Books/StyleGuide/download.shtml> (Accessed 28 September 2010).

² This follows the methodology adopted by Wael B. Hallaq in *An Introduction to Islamic Law* (Cambridge, Cambridge University Press, 2009), p. 3.

Part 1 Introduction.

This introduction deals with the broad sweep of the life and work of William Jones and the purpose of this dissertation. A man of Welsh descent and proud of his family connections in Anglesey, Jones's ultimate contribution to knowledge was his work on the cultures of Persia and India, cumulating in the productive period he spent as a judge in the British territories in Bengal. This dissertation is intended to consider the work of Jones in the context of Islamic studies; it should be noted that consideration of Jones's work on Hindu and Sanskrit studies are not included, as they properly fall as part of a separate area of study.

The contours of Jones's life resemble those of others of his class and age. After being educated at Harrow and Oxford, and acting as a private tutor, he was called to the Bar and practised as a barrister until he was appointed a judge in the service of the East India Company (referred to hereafter as EIC). Outside that formal landscape, however, he found new worlds that were extraordinary for his age and times. Wherever his interests and curiosity led him, he sought knowledge. An autodidact, with restless mental energy, as a boy, he found for himself the cultures of the East. He later wrote, "I hold every day lost, in which I acquire no new knowledge of man or nature."³ Application, an unusual intelligence, and the availability of manuscripts in the Bodleian library, enabled him to discover and then share his exhilaration at his discoveries. He brought to the West a panorama of cultures that rivalled and, in some cases, outstripped what the West could offer at that time. He became the gatekeeper for the traffic of literature and ideas about the East: Persian poetry was revealed by him to the West, his Sanskrit translations opened new fields of knowledge, philology, revealed by him, showed the inter-relationships between

³ Franklin, Michael J., *Orientalist Jones* (Oxford: Oxford University Press, 2011), pp. 396 at p. 283. Also Cannon, Garland *The Life and Mind of Oriental Jones Sir William Jones, the Father of Modern Linguistics* (Cambridge: Cambridge University Press, 1990), pp. 409, a biography of his life.

languages. Initially, his cultural discoveries were paramount but Jones's later works took a more practical turn, aimed at the furtherance of British interests in India.

His neo-classicist approach, founded securely in the classics and using as tools the mental equipment taught to him from an early age, made reversion to the original seminal works of Greek and Latin authors natural to him. The tropes and philosophical filters that tied him to classical techniques gave him frames of action and reference that were to become a *vade mecum* for revealing the texts to the West. However, beneath the carapace of the romantic aesthete, Jones possessed more utilitarian streak. As a judge, he was determined to provide his courts, his employer and the legal system installed to govern Bengal with the means to out-manoeuvre native lawyers. A pragmatist, he forsook his overt support for contemporary Whig ideals of emancipation and empathy for settlers in the American possessions, he was determined to control the subject peoples to the advantage of the Empire. Admiration for, and delight in, Indian, Mughal and Persian classical literature and learning preceded the determined, methodical, rational means of ruling India so that the West was able to understand and manage what was revealed. He was active as a judge in a period of conflict and wars against Mughal and Indian rulers, and he could not have been unaware, from contact with his fellows in Calcutta, of contemporary events, such as Clive's wars. He cannot have been unaffected by the atmosphere and attitudes amongst his fellows towards the land they ruled; the ethos of living and working in Bengal was to enforce British interests and influence.

Jones has been acclaimed variously as a Polymath, an Orientalist, a Jurist, an Arabist, among many other appellations. In summarising his lasting contribution, it can be said that Jones was regarded as the father of Orientalism, a philologist who was among the first to postulate the common root of Indo-Euro languages, the founder of learned societies to present the knowledge and culture of civilisations unknown to the West. As a translator of poetry and literature, he put into idioms understandable to Western readers, works that had not been previously even imagined, but, in doing so, he changed not only in language and the nuances of the original meaning but also its metaphors, idioms and images so that the product became neither of the East or the West but an "Anglo- something."

The lasting effects of his considerable energy and efforts over a relatively short period of activity may be summarised in some important fields of study :

- Philology. He gave the basis for modern philology and anthropological linguistics.
- Law. Anglo-Muhammadan law was virtually created as a result of a few translations. His work on the law of inheritance was an important contribution to a new jurisprudence in India. One scholar claimed that, as a result, Islamic law in India died.⁴
- Civil knowledge. The formation of the Asiatic Association of Bengal at the initiative of Jones was the most important means for bringing knowledge of India to the West and to India itself.

The particular aim of this dissertation is to consider Jones's work in translating Islamic legal texts, the place of those translations in the context of Islamic SHARI'A law and their effects on the law in Bengal and India. Jones, with a few others, can be referred to as the initiators of a new system of law, later known as Anglo — Muhammadan law, that soon became the standard civil law of India. It might be speculated what would have been the position if the Mughal, Muslim or Hindu laws had not been translated and supplanted? The question is obviously hypothetical because the presence of the British inevitably brought change. But the FIQH and shari'a had been resilient over centuries, juristic techniques (such as QIYAS, IJTIHAD and ISTIHSĀN) had been developed over centuries, adapting the laws to changing circumstances in accordance with those concepts. It is entirely possible that changes would have come about, with the advent of the modern nation state, modernism on a global scale and the enactment of statist legislation. The older laws might have been supplanted over time but, conceivably, they would have been resilient for a longer period. Arguably a state system of law, when implemented, might have been more grounded in the shari'a and the Muslim norms of society. Jones and his fellow judges imported British practices, court etiquette, procedures and expectations of conduct that were initially inimical to the native lawyers and indigenous jurisprudence and practices, but they were soon adopted in mimicry of the colonial powers.

The assessment of Jones by scholars and commentators changes over time, from the portrayal of the polymath of the early years to a more sober realisation of

⁴ Derrett, J. Duncan M., *Religion, Law and the State in India* (Delhi and Oxford: Oxford University Press 1999), p. 18.

the impact of his work, particularly with regard to his work in Bengali, later Indian, law. The celebrated romantic writer and poet of the Augustan era is now regarded more for his creation of learned associations than his literary output. Little academic work has been undertaken on the subject of the impact of his translations of Islamic legal texts.

This paper explores the work of Jones in the field of Muslim law within the context of Islamic studies and it is appropriate to understand the meaning of that context. Notwithstanding the ubiquitous use of the term 'Islamic Studies' historically and currently, there have been few attempts to describe or define it. Perhaps the most useful is the pragmatic approach of the Higher Education Academy-Islamic Studies, which stated, "Islamic Studies is an umbrella term for the academic study of Islam, Muslim cultures and societies and Islamic knowledge through a variety of subject areas and perspectives."⁵ The eclectic interests of Jones, spanning wide areas of knowledge, seem to fit well into this description, although the concept of the term would have been unknown to him and his fellows in the late eighteenth century.

⁵ The Higher Education Academy – Islamic Studies www.heacademy.ac.uk/ourwork/universitiesandcolleges/Islamicstudies.

Part 2. Jones: His life and career.

This section is intended to provide an outline of the life and major works of Jones, being an overview and context for the more detailed consideration of his work in later sections. It draws on the work of Cannon⁶ and Franklin⁷, who, as major biographers of the subject, fully cover the subject.

Born in Llanfihangel, on the Island of Anglesey in 1674 or 1675, Jones's father, William Jones senior, showed great intellectual ability from an early age and, encouraged by Viscount Bulkeley, moved to London to develop his talents. There, his great skills in mathematics and navigation were eventually widely recognised, including by his election to the Royal Society and forging friendships with leading intellectuals of the time, including Newton, Johnson and Halley and by his acceptance into society.⁸ William Jones senior, a widower, married Mary Dix on 17th April, 1737 and to them William Jones junior was born on 28th September, 1746 in Beaufort Buildings, Westminster. Mary Dix was herself an able intellectual who, following the death of William Jones senior in 1749, when William Jones junior was three years old, assumed the tasks of educating her son. Such was his progress that he won a scholarship to Harrow in 1753.

At Harrow, he studied Greek and Roman classical authors⁹ but, out of curiosity, also studied Hebrew and Arabic calligraphy and there began his interest in Arabic scripts, language and literature. Education in the classics at an early age had a considerable impact on his later attitude to literature, especially that of the East, the effect of which lasted throughout his life and had a clear influence in his later writings. Interest in Eastern literature continued when he was at Oxford and there he was able to access papers in the Bodleian Library, although the amount of material

⁶ Cannon, Garland, *The Life and Mind of Oriental Jones The Father of Modern Linguistics* (Cambridge: Cambridge University Press, 1990), pp .409, p. 1 et seq.

⁷ Franklin, Michael J., *Sir William Jones Writers of Wales* (Cardiff: University of Wales Press, 1995) pp. 137, Chapter 1; *Orientalist Jones* (Oxford: Oxford University Press 2011) pp. 396 at p. 42 et seq.

⁹ Jones, Alan, 'Sir William Jones as an Arabist' in *Sir William Jones 1746 – 1794 A Commemoration* (Oxford: Oxford University Press, 1998), pp. 69 -80 (p. 69).

available was small.¹⁰ Following his interest in the Arabic language, he moved swiftly to the study of Persian poets. Compared with the extent of contemporary knowledge of the East, he was regarded by 1768 as an expert in Arabic and Persian, although it appears that he treated Arabic as a dead language, no different from Greek or Latin.¹¹ Whenever possible, he sought out original sources of Islamic writings, favouring what he considered to be the authentic original Islamic works as being the equivalent in authenticity to Greek and Roman authors, but their respective cultures, religious practices and contemporary praxis were altogether different. His aptitude for languages enabled him to take, albeit somewhat unwillingly, a commission from Christian VII the King of Denmark to translate from the Persian a manuscript of the history of Nader Shah, published in 1770¹². This was followed, in 1771, by his first work of significance, the Grammar of the Persian Language, (*Kitab-i Shakaristan Dar Nahvi-Zaban-i Parsi, Tasnif-i Yunus Uksfurdi*),¹³ his *Traite sur la Poësie Orientale*¹⁴ and his famous, but erroneous, letter to Anquetil du Perron on Zoroastrianism.¹⁵ In 1782 he published “*The Moallakat or Seven Arabian Poems which were suspended on the Temple at Mecca, with a Translation and Arguments*.”¹⁶ His translation of the Moallakat was in keeping with his practice of seeking the oldest, available text. In fact, the original is a series of verses, displayed on the pre-Islamic Ka’ba in Mecca, were composed for the community before the reception of the Qur’an by Mohammad and they would later have been regarded as coming from the period of ignorance (JAHILIYYA, “before the coming of the Koranic revelation”)¹⁷, not an acceptable to true Islamic culture.

¹⁰ Franklin *Orientalist Jones* p. 62 . Pococke’s collection manuscripts in the Bodleian included the Mohamedan Law of Succession, a document he had obtained from Aleppo.

¹¹ Jones , Alan p. 70.

¹² Cannon, *The Collected Works*, Vols. xi and xii, The published translation also included an English translation of the Introduction to the History, a description of Asia and a short history of Persia. Nader Shah, Afghani conqueror of Persia, invaded India in 1739, defeating the Mughal army and then occupied Delhi, taking back to Persia considerable amounts of Moghul treasure (including the Peacock Throne, manuscripts, paintings, gold, silver and jewels) but leaving the Mughal system in a state from which it disintegrated into smaller ruling dynasties. Losty J.P. and Malini Roy ‘*Mughal India Art, Culture and Empire*’ (London, British Library 2012) p. 23.

¹³ Cannon, *The Collected Works*, Vol. v.

¹⁴ Cannon, *The Collected Works*, Vol. xii.

¹⁵ Cannon, *The Collected Works*, Vol. x.

¹⁶ Cannon *The Collected Works*, Vol. x.

¹⁷ Berkey, Jonathan P. *The Formation of Islam Religion and Society in the Near East 600-1800* (Cambridge: Cambridge University Press 2003),pp. 286, p. 39.

It has been suggested that, while having a greater sympathy or empathy with the poetic works he translated than other translators of Oriental or Arabic writings, Jones, nevertheless, had no real insight into the historical or geographical aspects of the societies of which he treated.¹⁸ A number of reasons may have accounted for this. There was a general lack of available material that would comprised a corpus of knowledge amongst those interested in Arabian and Eastern literature, the immature state of academic or scientific awareness of the East and the prevailing literary attitude which placed classical studies to the fore, literature being viewed through the lens of Greek and Roman cultures and studies. Nevertheless, the contribution Jones made to the understanding and appreciation of Oriental literature was considerable, leading to him being described as “the father of our studies of Arabic poetry.”¹⁹ Jones was producing translations for Western readers, in keeping with the contemporary Western genre of romantic and lyrical verse. Compromises were inevitable: in the translation of a GHAZAL of Hafiz, “*A Persian Song*,” he introduces the literary figure girl for poetic effect but there is no mention of a girl in the original.²⁰ His work attracted an avid readership, ensuring the acceptance of Oriental poetry and, increased their popularity. Jones’s pioneering work made him, without doubt, the leading influence for the realisation in the West of Eastern cultures and civilisations.

Up to 1783, his exposure to literature was confined by availability. He had read the Qur’an and Arabic poetry but it seem that he was not aware of Islamic jurisprudence, the schools of Islamic studies, the SUNNI and SHI’A communities or of the SUFI approach or even of Shari’a law. Studying the Pocock collection, Jones became fascinated by the “close linguistic relationship between Arabic and Persian”²¹ He became familiar with Firdausi’s *Shahnamah*, the history of the Persian kings. Partial knowledge, however, sometimes led to mistakes; Jones wrote a critical letter concerning the translation by Anquetil du Perron of the Zend Avasta in which he displayed a lack of understanding of Zoroastrianism.²² Similarly he misjudged, in his 1782 translation of the Law of Succession, the realities of law operating in

¹⁸ Jones, Alan, p. 75.

¹⁹ Jones, Alan, p 80.

²⁰ Cannon, *The Collected Works, Vol. v*, p 315; Jones, Alan., p. 71.

²¹ Franklin, Michael, *Oriental Jones*, p. 62.

²² Cannon, *The Collected Works, Vol. x*. Published in Paris in 1771.

Bengal.²³ That work will be explored in more detail later in the dissertation. Jones' interest in the classical works at that period, and an example of his later interest in the law of inheritance, may be found in his translation "*The Speeches of Isaeus in causes concerning the Law of Succession to Property at Athens*" published in 1779.²⁴ It is said that this was the single complete translation of the work until 1929.²⁵

After leaving Oxford Jones was constantly worried about the means to support himself and to provide for his future. Taking the appointment of tutor to Viscount Althorp (second Earl Spencer) provided him with a livelihood and the opportunity to immerse himself further in literature and translations. He was a supporter of the Whig tendency and became embroiled in the debates concerning the American colonies and their movement for independence. He associated with Benjamin Franklin and others, so much so that he fell from favour among those whose support could have given him access to positions of wealth. He unsuccessfully sought political office at election by contesting the Parliamentary seat of the Oxford Colleges. A temporary disagreement with the Spencer family, concerning the tuition of Viscount Althorp, caused Jones to turn to law for a livelihood, being admitted to Lincoln's Inn in 1774. For some years, he practised on the Wales and Oxford circuit. His earnings from his practice at the Bar were adequate (in fact, he earned well on the West Wales circuit) but he desired the financial security that would enable him to spend more time in scholarly pursuits.

In 1775, he was made a Commissioner of Bankruptcy, partially alleviating his financial insecurity, but the desire for a more lucrative appointment led him to seek judicial office. He became aware of the work of Warren Hastings, appointed

²³ Cannon, *The Collected Works*, Vol. xiii, p. 159.

²⁴ Cannon, *The Collected Works*, Vol. ix p. 1., An Athenian, Isaeus (c. 420 –c 350 BCE) was a pupil of Isocrates, teacher of Demosthenes (author of the Philippics, written in opposition to the increasing power of King Philip of Macedon). His speeches were intended as material for those who wished to argue their cases before the Athenian court; eleven speeches survived, all of which dealt with the law of inheritance. The work of Isaeus was the most important authority for Athenian testamentary law.

²⁵ Fynes, Richard, 'Sir William Jones and the Classical Tradition' in *Objects of Enquiry: The Life, Contributions and Influences of Sir William Jones (1746 -1794)* ed. By Garland Cannon and Kevin R. Brice (New York, New York University Press, 1995) (p. 49).

Governor General in 1773 of the territories administered by the EIC in Bengal. Hastings proposed a plan for the administration of law on the principle that Indians should be governed by their own laws. He accordingly instructed officials of the Company to translate works from Persian and Arabic that were of use in the administration of the country, as well as other works of wider appeal. This attitude found a resonance with Jones who, as a barrister had empathised with position of Welsh litigants subject to a legal system with which they were unfamiliar, and could see similarities in India. For a number of years he had unsuccessfully sought ways of advancing his interests. Jones had contributed to Burke's work on legislation for Bengal and became convinced that his future career lay in joining the judiciary in India. Jones identified an opportunity to use his legal skills and his cultural interests in the development of the law for the administration of justice in the EIC courts. He wrote, "I have an additional motive for wishing to obtain office in India where I might have some prospect of contributing to the happiness of millions, or at least of alleviating their misery, and serving my country essentially, whilst I benefitted my fellow creatures."²⁶ His repute in Farsi and Arabic and his knowledge of the emerging laws to be administered in Bengal were factors in favour of appointing him, in 1783, a judge to the Bengal Supreme Court.

He arrived in Calcutta in 1783 to assume his judicial work, both as a judge and as a Justice of the Peace. He soon realised that considerable work was already being undertaken locally in translating texts, in gathering information about Bengal and studying all aspects of the culture and nature of the country but in a disparate way. He proposed to bring these studies together by the formation of the Asiatic Society of Bengal,(ASB), an act that was to be one of Jones's lasting achievements. The Association first met in January 1784 and, by establishing the organisation, Jones set the course for the scientific study of all aspects of life in the country in an ordered, comprehensive way. Its studies that were recorded in *Asiatic Researches* for which he acted as editor until his death. His legal writing consisted chiefly in his second work on the law of succession, a translation from the Arabic of AL

²⁶ Arberry, A.J., *Asiatic Jones The Life and Influence of Sir William Jones (1746-1794) Pioneer of Indian Studies* (Published for The British Council by Longmans, Green & Colt., London, 1946) pps. 39. p.18. ²⁶ Cannon, *The Collected Works*, Vol. viii, p.197.

SIRAJIYYAH , published in 1792.²⁷ He also worked on the translation from Sanskrit of Hindu laws that was published in 1794, after his death ,as *The Institutes of Hindu Law or the Ordinances of Manu*.²⁸

Jones's ambition was to save sufficient funds from his salary as a judge to give him the means to retire to Britain in order to pursue scholarly interests but unfortunately illness cut short his life and he died in Calcutta on 27th April 1794, aged 48.

His varied interests developed over his lifetime. His early classical education imbued him with the value of original material, expanding his interest to encompass Oriental literature. A growing appreciation of the organisation of political society caused him to become involved with the principles of governance. Experience as lawyer prompted his legal writings and the British presence in Bengal gave him the opportunity to seek judicial office and to contribute to the administration of the law. As he moved through these phases, in a period when few scholars or writers were producing material concerning the East, he became recognised as an authoritative figure in Eastern studies. His outstanding contribution was his innovatory work in bringing the culture of the East to the attention of the world.

²⁷ Cannon, *The Collected Works*, Vol. viii, p.197.

²⁸ Cannon, *The Collected Works*, Vol. xii.

Part 3. Literature Review .

This review of literature is a consideration of the way in which academics have considered the literary and legal output of Jones's works. The aim will be to ascertain the areas and occasion of this scholarship, to evaluate the respective contributions, to see how the approaches link to Islamic studies and, finally, to offer a critique of modern commentaries on his work. It will track the changing considerations accorded by scholars to Jones and his work.

The academic literature on Jones tends to reflect the times of the writing, bearing in mind that Jones was active during a comparatively short period, from about 1760 to 1794, the period during which he was working of his and the sheer variety of his interests. His early interest in Eastern cultures was novel; his translations and writings were received with acclamation by publications of that time (for example *The Gentleman's Magazine*, *the Monthly Review*)²⁹ but contemporary writing about his work was not academic but celebratory. Lord Teignmouth published a compendium of his works in 1807 but that work was not intended to be an academic study.³⁰

Academic writing on Jones, is silent until the mid-twentieth century when publications began to appear, especially on the occasion of his bicentenary in 1946. These works, characterised by their brevity and generally celebratory nature, reflected, at a time of political movements towards Indian independence, the intention to mark the contributions made by the British Empire to India. A forerunner of more studied writings on Jones appeared in 1933 with an article by Arberry on *British Orientalists*,

²⁹ Franklin, *Orientalist Jones*, p. 362.

³⁰ Lord Teignmouth *The Works of Sir William Jones* Thirteen Volumes, (London, printed for John Stockdale, Piccadilly; and John Walker Paternoster Row, 1807) now in Cannon Garland, *The Collected Works of Sir William Jones* (New York, New York University Press 1993) Vols. I-XIII

which celebrated Jones's important contribution to British Orientalism.³¹ The tenor of this appreciation was expressed later in 1942 by Hewitt, who described Jones as changing "our whole conception of the Eastern world"³² In the face of what, for Hewitt, had been a descent of Jones into oblivion in the West, the essay draws attention to his positive qualities. Despite the relative meagre quantity of Jones's literary output, Hewitt wrote of Jones, "whose influence on poetry and public opinion and general culture,(were) both more extensive and more permanent" than his contemporaries, as being under-rated and obscured by later poets, such as Tennyson.³³

As the tide towards Indian independence moved forward, so did more appreciative writing about Jones appear. Following an article on *Persian Jones*, Arberry wrote a popular work designed to celebrate Jones and to acclaim the "immense value" of Indian civilisation and his work in bringing Indian culture to the West.^{34 35} There was a conscious effort to mark the beneficial influence of Britain on India in a period of critical change. A spate of academic writings, prompted by the bi-centenary of his birth, appeared in 1946. Efforts were made to glorify paradoxically, in academic terms, the actions of a leading contributor to the actual establishment of the colonial power from which, at the same time, India was preparing for independence. It raises the issue whether a "minor poet" who had an "unremarkable legal career who hardly entitled many remembrances as a lawyer from the point of view of posterity, apart from his writings about the law" would have received such prominence, apart from some of his translations and the political events in India and Britain.³⁶ Apart from these, Hewitt's fear appears to be justified.

A major effort in this celebratory field was that of the School of Oriental and African Studies of the University of London, which, in the bulletin of 1946, published nine articles on aspects of his work.³⁷ These included his work as an Arabist, a translator

³¹ Arberry, A.J. *British Orientalists* (London: William Collins, 1933), pp. 47

³² Hewitt, R. M. *Harmonious Jones, Essays and Studies by Members of the English Association*, Vol. xxvii, 1942 (Oxford, at the Clarendon Press 1943), pp. 42-59 at p. 43.

³³ Hewitt, p. 43.

³⁴ Arberry, A. J., *Persian Jones* in *Asiatic Review* Vol.,xi, April 1944.

³⁵ Arberry, A.J., *Asiatic Jones The Life and Influence of Sir William Jones (1746-1794)*

³⁶ Ibbetson, David, *Sir William Jones as a Comparative Lawyer in Objects of Enquiry: The Life, Contributions and Influences of Sir William Jones (1746-1794)* pp. 19-42 at p. 20

³⁷ *Bulletin of the School of Oriental Studies* XI 1943-46 (Cambridge, Cambridge University Press, 1946)

of poetry, his influence on Sanscrit studies, as a jurist, a member of the Royal Society and a student of Chinese language. Tritton wrote that of Arabic “his knowledge was sketchy”, especially in his early work.³⁸ When his fame later rested on his expertise in Arabic in the translation of *Al Sirájiyyah*, (published 1792), Tritton acknowledges that the work was “of a finished scholar who is master of his subject.”³⁹ From the point of view of translation, this comment is perhaps correct, but it does not assess the impact of the translation, a task taken up by others. The essay by Brian Vesey-FitzGerald on “*Sir William Jones, the Jurist*” is one of the earliest analyses of the legal works and filled a gap in academic writing.⁴⁰ According to Ibbetson, “This is the only serious treatment of Jones’s legal works.”⁴¹ Vesey-Fitzgerald, echoing Hewitt, regrets that Jones’s neglect, which “speaks poorly for English appreciation of a great scholar that so little of it has ever seen the light of publication.” In his short essay, he offers no jurisprudential or forensic analysis. This was to be left to later scholars and this dissertation offers a contribution to that approach.

It appears that there followed somewhat of a hiatus in academic studies concerning Jones but later the gap was filled by attention given to him in America. This was, possibly due to the American interest in his early works as a fervent advocate of American independence, his association and friendship with Benjamin Franklin, and his political pressure on the Government to cease the war and grant freedom to the American colonies. Jones, at one stage, even contemplated emigrating and settling in the colonies. This resulted in many works by American academics, especially at the University of New York where the collected works were kept. The major modern contributor in this field was Garland Cannon, one of the leading specialists on the works of Jones who has written extensively on the subject.⁴² His annotated bibliography was one of the first modern catalogues of the extant writings.⁴³ This

³⁸ Tritton, *Bulletin*, SOAS, p. 695.

³⁹ Tritton *Bulletin* SOAS, p. 698.

⁴⁰ Vesey-Fitzgerald, S. G., *Sir William Jones the Jurist* in *Bulletin* SOAS, p 807.

⁴¹ Ibbetson, p, 20,

⁴² Cannon, Garland *The Life and Mind of Oriental Jones: Sir William Jones, the Father of Modern Linguistics* (Cambridge, Cambridge University Press, 1990) p. 387 ;A list of books and articles by Cannon appears in *Sir Williams Jones’s Indian Studies* in the *Journal of the American Oriental Society*, Vol. 91, No. 3, (July- Sept 1971) pp. 418-425.

⁴³ Cannon, Garland *Sir William Jones :Orientalist: An Annotated Bibliography of His Works* (University of Hawaii Press, 1952) pp. 88.

was followed by a collation of the letters.⁴⁴ He later edited the collected works, including the work of Lord Teignmouth, his correspondence and the addresses to the court in Calcutta and to the ASB.⁴⁵ Augmented by later discoveries of additional letters from the Althorp collection, those collections of Jones's output comprised the sources for studies of Jones. Cannon published numerous books and articles between 1952 and 1994 on various aspects of Jones's work as well as collaborating with others. He published the first biography of Jones in 1964, later described by Cannon as "a somewhat sketchy narrative . It lacked the necessary historiography at that time of the intercivizational encounter between Britain and India."⁴⁶ In 1990, he published a more comprehensive account of Jones's life and ideas.⁴⁷ The other major biographer of Jones and author of academic studies on the subject is that by Michael J. Franklin who published six works on Jones between 1998 and 2011, including two biographies,⁴⁸ and collaborating with Cannon in one piece.⁴⁹

The two most recent biographies of Jones , that of 1990 by Cannon and that of 2011 by Franklin, bear comparison. Cannon bases his work on an almost literal account of the letters and works, the book being a chronological account of his life as reflected in the extant works, adhering at all times closely to the subject matter. This is admitted by Cannon: "My work isan account of Jones's life and ideas which stand for themselves."⁵⁰ Cannon's approach at summarising the events in Jones's, life leads sometimes to somewhat enigmatic statements.⁵¹ By seeking to cover almost every aspect of the writing and events, there is no differentiation between areas meriting close examination and others of mundane or of lesser significance. The book is useful for chronicling actual events and accessible sources but does not

⁴⁴ Cannon, *The Letters*.

⁴⁵ Cannon, *The Collected Works*.

⁴⁶ Cannon, *The Life and Mind of Oriental Jones*, Preface, p. vii.

⁴⁷ Cannon, *The Life and Mind of Oriental Jones*.

⁴⁸ Franklin, Michael J., *Sir William Jones (Writers of Wales)* (Cardiff; University of Wales Press, 1995) pp. 137 and Franklin, Michael J., *Orientalist Jones* (Oxford: Oxford University Press, 2011), pp. 396

⁴⁹ Cannon, Garland and Michael J Franklin 'A Cymrodor Claims Kin in Calcutta : An Assessment of Sir William Jones as Philologist, Polymath, and Pluralist' *Transactions of The Honourable Society of Cymmrodorion* NS 11 (2005), pp. 50-69.

⁵⁰ Cannon, *The Life and Mind of Oriental Jones*, p. XV.

⁵¹ Cannon, *The Life and Mind of Oriental Jones*: "On 22 November he spoke for two and a half hours in Westminster Hall on a knotty problem, the following morning on a public question, and on the next day on a great cause." p. 142

impart a feeling of the nature of Jones as a person, nor does it go into a deeper analysis of the more important issues arising from of his life and work.

More valuable as a consideration of of Jones and as a source of critical comment is Cannon's 'Introduction'. Here he addresses the subject of Orientalism, rather than treating it as a theme throughout the book and analyses the views held of Jones by Mills, Macaulay and Said whose attitudes negatively affected the more appreciative views held of him. He notes that Said, in a comprehensive survey of writing on Orientalism, actually "pays comparatively little attention to India and Jones", stating that Said's omitted any consideration of the "vast influence of the 1786 Calcutta lecture had on comparative linguistics in Europe as a whole."⁵²

Franklin takes an altogether different approach. His biography published in 2011 is presented on a themed basis, has a more informal and flowing style and provides interest in the form of anecdotes and asides, giving a feeling of the period, and of Jones as a person. It contains many references to the connections of Jones with Wales and incidents of his visits there. Cannon's may be a more academic work, covering the objective and external aspects of Jones and his actions, whereas Franklin's is a relaxed biography of an important and interesting character. For academic purposes, the collected letters and works are readily available for study and Cannon's biography, by simply reproducing them in summary, adds little by way of detailed analysis. A better understanding, and a more entertaining account of Jones, may be gained from Franklin. His final chapter, "*Indo-Persian' Jones and Indian Pluralism*" draws conclusions upon the phenomenon of Jones in India.⁵³ His suggestion that the attempts by Jones to "reconfigure the binaries of imperialism" by placing emphasis on "cultural synthesis and syncretism"⁵⁴ as a way of reconciling Western and Eastern cultures, sits uneasily with the official EIC policy of political and economic domination and judicial control. Franklin even describes Jones as an "invading imperialist".⁵⁵ Franklin's claim, that "to see Jones's role in Hasting's Orientalist regime as bringing Europe and a distant sub-continent much closer philosophically and linguistically is to honour the invading West's contribution to

⁵² Cannon, *The Life and Mind of Oriental Jones*, p. xv.

⁵³ Franklin, *Orientalist Jones*, pp. 333-361.

⁵⁴ Franklin, *Orientalist Jones*, p. 343.

⁵⁵ Franklin, *Orientalist Jones*, p. 356,

India”,⁵⁶ seems an ex post facto rationalisation of what could have not been apparent during his lifetime. According to Dalrymple, Hindu culture, unlike Islam, was less accessible to the British because the Hindus regarded the British as untouchables, initially resisting social intercourse with them.⁵⁷ It was only after the influence of the EIC became stronger that Indians acquiesced to the new invader.

Franklin’s treatment of Jones’s translations of legal texts, from the point of view if the student of Islamic studies, is rather disappointing. Referring to *The Mahomedan Law of Succession to the Property of Intestates*, published in 1782, Jones’s first attempt at translating a text for use by the EIC, Franklin comments, “ Jones’s book marked real progress in the struggle against prejudiced representations of the East.”⁵⁸ He, however, omits any references to the later serious criticisms of the work and the clear deficiencies of the translation recognised, amongst others, by Jones himself. Of greater significance to Islamic studies is the total omission of any reference to the translation *Al Sirajiyah* of 1792, which did merit consideration , it being one of the most important works by Jones in Bengali law. The 1782 work was of ephemeral interest, the later work had profound effects on the entire laws of the Indian sub-continent, as will be explored later in this dissertation.

Both biographies, and Franklin’s earlier monograph⁵⁹ are celebratory, in the sense of acclaiming the contribution of Jones, leaving aside more critical and specific evaluations of his works. The reputation of Jones rests largely on his work on linguistics and philology, accordingly due reference and attention is paid to those areas. The authors seem not to possess expertise in the legal aspects of Jones ’s works, an assumption made on the basis of omission of jurisprudential analysis, and it follows that their general statements made attesting to the value of the legal works are seen to be somewhat unfounded when closer attention is given to them. For the purpose of this paper, and in the context of Islamic Studies, greater attention will be given to the academic treatment of translations by Jones of legal texts, in an attempt to fill part of the lacunae earlier identified.

⁵⁶ Franklin, *Orientalist Jones*, p, 357,

⁵⁷ Dalrymple, William, *White Mughals* (London, HarperCollins, 2002) pp. 580 p. 40.

⁵⁸ Franklin, *Orientalist Jones*, p. 186.

⁵⁹ Franklin, Michael J., *Sir William Jones*.

Recognised legal works on Islamic law pay little direct attention to Jones's works.⁶⁰ Hallaq describes Jones as the "foremost Orientalist" and the proposer to Hastings of creating a digest of laws.⁶¹ Hallaq demonstrates the way Anglo-Muhammadan law developed, basing his comments in part on the work of Jones. Derrett's work on Hindu law⁶² offers an analysis similar to those of other writers concerning the problems of translating and their application to indigenous laws through the lenses of the Western tradition. Mukherjee's works are based on his doctoral thesis, while broadly covering the same ground, are useful contributions to the literature about Jones.⁶³ Written before Said's *Orientalism*⁶⁴ of 1978, Mukherjee does not deploy the Saidian analysis that became a later convention, being concerned, rather, with the personality of Jones and the effects of his works on British attitudes towards India. He assesses that the greatest contribution made by Jones was the foundation of the "Asiatick Society of Bengal" and making Indians themselves aware of the value of their own civilisation, and by imbuing in the Indian people a national pride, so created an Indian renaissance. He draws attention to the dichotomy of attitude among the British between their views at home and the reality of governing, and to the rationalising that was required of a liberal thinker in order to reconcile his political principles to the application of law in a conquered land. Mukherjee considered that Jones had little impact on the creation of law; that his Digest (1794) was 'of little practical value',⁶⁵ that he had little effect on European thought and negligible impact on the Romantic poets.⁶⁶ However, he stated that, "Jones

⁶⁰ Schacht, J., *Introduction to Islamic Law* (Oxford, at the Clarendon Press, 1964); Coulson *A History of Islamic Law* (Edinburgh, Edinburgh University Press, 1964); Dien, Mawil Izzī, *Islamic Law From Historical Foundations to Contemporary Practice* (Edinburgh Edinburgh, University Press, 2004) pp. 178

⁶¹ Hallaq, Wael B., *Shari'a Theory Practice Transformations* (Cambridge, Cambridge University Press 2009), pp. 614, p. 373.

⁶² Derrett, J. Duncan M., *Religion, Law and the State in India* (Delhi, Oxford, Oxford University Press, 1999), pp. 615.

⁶³ Mukherjee, S. N., Sir William Jones and the British Attitudes towards India in *Journal of the Royal Asiatic Society of Great Britain and Ireland* (April 1964 Parts 1&2) pp. 37-47, and *Sir William Jones: A study in Eighteenth Century British Attitudes to India* (Cambridge, Cambridge University Press 1968), pp. 141.

⁶⁴ Said Edward W., *Orientalism* (London, Penguin Modern Classics, 1978, re-printed 2003) pp. 396

⁶⁵ Mukherjee, *A Study*, p. 139.

⁶⁶ Mukherjee, *A Study*, p. 140.

occupies a larger place in the history of the British attitude towards India than has hitherto been recognised.⁶⁷

Chowdhury's work, on the administration of estates on death and the methods for identifying legal representatives of the deceased, is designed to be a practitioner's reference book, in which he recognised Jones as 'the first European to translate into English the most authentic work on the Muslim law of inheritance' but without offering any analytical or critical comment.⁶⁸ As Jones translated the exact text, and that the text was recognised as being of sacred provenance, it is clear that criticism would not be appropriate. Sastry, in considering Jones's work in the context of English literature, regards him as actually having created an extension of that particular canon, Jones having made "a significant expansion of English literature."⁶⁹ His chapter on the legal writings rather glosses over their impact and is uncritical of the practical effect, giving an almost laudatory account: Jones strove, "with the passion and imagination of a pioneer, to bring England and India together, and build bridges of understanding between them."⁷⁰

In the 1990's a number of articles were published that dealt with the legal work of Jones, especially with the translations. In 1995, Strawson wrote on the way in which Indian law developed from English texts,⁷¹ followed in 1996 by an useful work by Anderson.⁷² Both started from the premise that the act of translation did not merely change the language but actually created law, taking further the Saidian interpretation of Orientalist methodology as being not only essentially reductive but also concurrently a potent force for societal change. Strawson refers to others who translated texts, referring to the earlier work of Charles Hamilton (*al-hiddaya al-marghinani* which was published under the title *The Hidayya*), a translation from

⁶⁷ Mukherjee, *A Study*, p. 3.

⁶⁸ Chowdhury A. B. M. Sultan Alam, *The Problem of Representation in the Muslim Law of Inheritance* in *Islamic Studies*, (Islamabad, 1962), Vol. 3.3, pp. 375-391, p. 375.

⁶⁹ Sastry, L. S. R. Krishna, *Sir William Jones: Interpreter of India to the West* (Hyderabad Booklinks Corporation, 1998), pp. 147.

⁷⁰ Sastry, p. 102.

⁷¹ Strawson John, *Islamic Law and English Texts in Law and Critique* Vol. II, No 1, Spring 1995 (Deborah Charles Publications, Liverpool, 1995), pp. 21-38.

⁷² Anderson Michael R., *Islamic Law and the Colonial Encounter in British India* in *WLUML Occasional Paper* No. 7, June 1996 reprinted from Arnold, David and Peter Robb (Eds.) *Institutions and Ideologies: A SOAS South Asia Reader* (London: Curzon Press Ltd., 1993), pp. 165-185.

the Persian at the behest of Hastings.⁷³ That work did not, however, include the laws on inheritance which was Jones's important contribution to written law. Strawson surveys the hinterland of translation (including Dow's translation *History of Hindustan*, 1772), giving a descriptive and historical perspective, rather than a legal analysis of the works. Anderson tackles the legal subjects by writing on the role of law in the establishment and maintenance of colonial power, touching on the existing juridical elements in Bengal, how they were used and overtaken by the intervention of the new legal regime. He deals briefly with the translations and the legal text books that followed the translations in the succeeding century. His work is useful and fills a gap in the academic study of the consequences of the translations but is not a detailed legal analysis of the writings themselves.

In an useful and penetrating analysis, Teltscher provides insights into a modern assessment of Said's hypothesis, applied to the case of Jones, as well as treating the essential problems of translation.⁷⁴ Her Chapter, *Jones and the Pandits*,⁷⁵ is a trenchant account of the paradoxes that emerged from the initial rejection of Bengali lawyers, the emerging western admiration of their ancient texts, the diligence of the translations, (Jones was eventually acknowledged as being tantamount to a Brahmin), and reinforcing the archetypical stereotype of the status of the sages of classical antiquity. In her examination of the subject "the tradition of hagiography will form one of my avenues of investigation."⁷⁶ By relating the translations to colonial rule, she concludes, "that whatever his intentions, however manifold his talents, in mastering Indian traditions, Jones cleared the way for a tradition of mastery."⁷⁷

A more recent article⁷⁸ by Young points to the dilemmas posed to translators and the paradoxes that ensued. Hastings aimed not to force British law onto India but his administration demanded direct involvement in its law. He aimed to use indigenous laws, but the effectiveness of British law overwhelmed it; original reliance on

⁷³ Strawson, p. 26.

⁷⁴ Teltscher, Kate, *India Inscribed European and British Writing on India 1600-1800* (Oxford, Oxford University Press, 1995) pps 280

⁷⁵ Teltscher, p. 197.

⁷⁶ Teltscher, p. 195.

⁷⁷ Teltscher, p. 223.

⁷⁸ Young, Robert, Sir William Jones and the Translation of Law in India in, ed. by Marco Wan *Reading The Legal Case: Cross Currents Between Law and the Humanities* (Routledge, Abingdon, 2012), at pps. 80-89.

native lawyers for advice mutated, through mistrust, to requiring them to change their paradigms. Incorrect assumptions were made regarding sacred texts, utility overtaking respect. Young's analysis appears sound, that the "translation of laws is a cultural translation," and this gives a lead for further analysis.

In summary, this review has demonstrated how recent revisionist writings contrast with the earlier panegyrics, in that they tend to offer a more realistic account of the impact of Jones on India, and that they show how his works may be considered in the context of modern Islamic studies.

Part 4 Jones's works on Arabic Writings and their place in Islamic Studies

This part will examine the work of Jones in translating texts, comments of other writers and the consequences of that work. As indicated in the introduction, a wide definition of Islamic Studies is adopted for the purposes of this paper.

1. Jones's interest in the Law in India.

In the early period on British presence in India, from the period of the reign of Akbar the Great, (ruled from 1605) to the rule of Aurangzeb (1658-1707), the EIC traded with the Mughal rulers and acceded to local laws and their structures of governance.⁷⁹ After the ascendancy of the EIC over the Nawab of Bengal, following the Battle of Plassy in 1757, the Company assumed extensive powers of governing. Warren Hastings, appointed Governor of Bengal in 1772, implemented his plan for the legal system whereby the governance of Bengal was to be re-structured by having at its apex a Council, supported by a Bengal Supreme Court, staffed by English judges. At a lower level, courts staffed by Muslim judges, QADI, administered the law. The the Judges of the Supreme Court were to consult with local QADIS and MUFTIS upon issues of Muslim law.⁸⁰ This was the start of the influence of British law on Bengali, and later Indian, administrations. As Hallaq has noted, “ The embryonic notions of imbuing Indian legal traditions with Anglicising elements began as early as 1772 when a new doctrine propounded by Hastings declared that wherever native laws were deemed silent on a matter, British principles of “justice, equity and good conscience “ would apply. “⁸¹

The EIC assumed direct responsibility for the administration of civil justice in Bengal in 1772, accordingly, lawyers from Britain were recruited as judges to adjudicate on civil matters in the King's courts, established by the Regulation Act 1773.⁸² The jurisdiction of Bengal courts, specified in the Administration of Justice Act 1772, was extended in 1781 by adding to it the law of succession, and enacting that the

⁷⁹ Hallaq, *Shari'a*, p. 371.

⁸⁰ Hallaq, Wael B., *An Introduction to Islamic Law* (Cambridge, Cambridge University Press, 2009), pp. 200, p.85.

⁸¹ Hallaq, *Shari'a*, p. 383.

⁸² Majeed, Javed, *Ungoverned Imaginings James Mills' History of British India and Orientalism* (Oxford, Clarendon Press, 1992) pp. 225 at p .16.

usages of Hindus and Muslims in inheritance and contract were to be recognised.⁸³ The Bengal Judicature Act 1782 further provided that “all causes involving inheritance and succession to lands, rents, and goods and all matters of contract and dealing between party and party, should be determined in the case of Mohamedans.....by the laws and usages of Mohamedans (and in the case of Gentoos by the laws and usages of Gentoos.)⁸⁴ Jones, agreeing with these developments wrote, “I should hardly think of instructing the Gentoos in the maxim of the Athenians”⁸⁵

His acknowledged expertise in Arabic and Farsi and his experience as a lawyer placed Jones in a favourable position to provide an account of the law that could be of advantage for the EIC. By so doing, he would be well placed to seek a position in India, enabling him to put aside savings from his earnings to fund future pursuits. That opportunity motivated him to embark on his first attempt to write an authoritative treatise on the law of succession.

His first Islamic law translation, published in London in 1782, was of an original work of 1312, *The Mohamedan Law of Succession to the Property of Intestates in Arabick, engraved on copper plates from an Ancient Manuscript with a verbal translation and explanatory notes.*⁸⁶ The work was said by Jones to epitomise the system of Zaid Alfaradhi, being “*Faradh’ei*, a man skilled in the *farayaidh*, or *sacred ordinances* contained in the Alcoran”⁸⁷ It was found in a manuscript collected by Edward Pococke (1604-91) at Aleppo, which Jones discovered in the Bodleian library at Oxford.⁸⁸

The translation, comprised a Preface, followed by the law set out in in Roman Characters, and the law in the English translation. (Omitted from *The Collected Works*, published in 1993, is the law in the Arabic, on plates.) It included a text containing a summary of the laws of inheritance in loose metre and occasional rhyme. It, comprised the causes of inheritance (wedlock, collateral relation, descent),

⁸³ Majeed, p. 17.

⁸⁴ Franklin, p. 186..

⁸⁵ Cannon *The Letters* Vol. ii, p. 482.

⁸⁶ Cannon *The Collected Works* Vol. viii.

⁸⁷ Cannon *The Collected Works* Vol. viii, p 185

⁸⁸ Franklin, p. 186.

the incapacities for inheritance (servitude, homicide and difference of faith), the ten kinds of men and seven kinds of women qualifying to inherit.

In the Preface Jones remarked, that “...it appears indubitable that a knowledge of Mohamedan jurisprudence (I say nothing of Hindu learning) and consequently of the language by Mohamedan writers is essential to a complete administration of justice in our *Asiatick territories*.”⁸⁹

Jones excuses the format of the work in the structure of loose metre and rhyme (it was intended to be memorised by students of law) and wrote that “it was never my intention to compose a perfect work” on laws of inheritance and so omitted a commentary, referring the reader to the Qur’an for further detail. He also considered that the work would encourage the reading of Arabic script.⁹⁰ Jones’s letters contain few references to the work or the derivation of the source. He does not explain the reason for choosing that particular manuscript. He sent a copy of the work to Viscount Althorp with his letter of 1st. March, 1782, not expecting it to be read.⁹¹ A copy was sent to Edmund Burke on 17th March, 1782, but in the covering letter did not discuss the work, preferring, instead, to write on judicial appointment to the court in Bengal, in keeping with his efforts to secure a judicial appointment for himself.⁹²

At an early stage of learning about the Orient, Jones’s exposure to Islamic law would have been derived by his reading of the Qur’an but without an understanding of the phenomenon of the fiqh, SUNNA or of the Shari’a. His early readings were an exploration of the Arabic and Farsi languages and a discovery of the poetry of the East; not a dedicated study of Islamic law. It was only later, having gained some appreciation of the importance of Islamic law, that Jones improved his approach. His early knowledge of Arabic was “sound but hardly wide or deep” and , for Jones, “a dead language, no different from Latin or Greek.”⁹³

Vesey-Fitzgerald, in one of the few analyses of Jones’ legal writings, wrote of that translation,

⁸⁹ Cannon, *the Collected Works*, Vol. viii, p. 162.

⁹⁰ Cannon, *The Collected Works*, Vol. viii, p. 165.

⁹¹ Cannon, *The Letters*, Vol. ii, p. 515.

⁹² Cannon, *Letters*, p. 520.

⁹³ Jones, Alan, ‘Sir William Jones as an Arabist’ in *Sir William Jones 1746-1794 A Commemoration* (Oxford, Oxford University Press, 1998), pp. 69-80 at p. 70.

“..it has been unkindly but truthfully said that it is almost as obscure as the original –led to it by the Dutch⁹⁴ – the work is the foundation of the Shafi’i law of inheritance in Netherlands’ East Indies and his remarks show that he was at the time completely ignorant of the distinction between the various schools of Sunni law , of the predominance of the school of Abu Hanifa in India and even of the fact that the word Imam is used by Sunnis and Shi’as with entirely different connotations. The work has therefore been rightly neglected .”⁹⁵

The explanation given by Cannon for the need for the 1782 work, and its nature, points to the profound change that was to be brought about by interposing a western practice of law on a wholly different culture, religion and philosophical jurisprudence. Cannon refers to the perceived unsatisfactory practice of judges having to rely on native lawyers for information on Muhammadan inheritance laws, so that their judgments were “ based on reports of men rather than individual cases before the judge...so the book would give judges summary references in English of inheritance laws for the first time .”⁹⁶

While any additional to the body of knowledge that would encourage students to learn and read Arabic was itself highly desirable, the work presented by Jones was not the best for that study, bearing, as it did, mistranslations, and ignoring the Hanafi school followed in Bengal, was of little use to local lawyers. In Cannon’s view the 1782 book “ caught the spirit of the law.”⁹⁷ and , in his opinion “there is little to correct his general ideas” as expressed in the translation.”⁹⁸ While the former opinion might be acceptable in a very general sense, the latter is erroneous in relation to the law. Jones himself later recognised that this work was unsatisfactory. Morley , in a legal history of India, referred to “the literal translation which is almost as obscure as the original.”⁹⁹ Tritton wrote that, “It cannot be called a good piece of work”¹⁰⁰, The choice of the work was unfortunate not only as it was

⁹⁴ Possibly his correspondent on Oriental matters ,Schuster

⁹⁵ Vesey-Fitzgerald, p. 814

⁹⁶ Cannon, *An Annotated Bibliography*, p. 32.

⁹⁷ Cannon, *The Life*, p. 160.

⁹⁸ Cannon, *An Annotated Bibliography*, p. 32

⁹⁹ Morley, William Hook, *The Administration of Justice in British India, its Past History and Present State, comprising an Account of the Laws Peculiar to India* (London, Williams and Northgate, 1858) p. 303.

¹⁰⁰ Tritton,A.S., *The Student of Arabic* in the Bulletin of The School of Oriental and African Studies, (BSOAS University of London, 1946)XI 1943-46 p. 698

not an authoritative source, but was a tract of Shi'a law, not recognised generally in Bengal.¹⁰¹

Jones's later experience in India, with direct exposure to the operation of the law, working in the presence of Indian lawyers, and learning from them, enabled him later to recognise the shortcomings of the earlier work. He wrote, in the 1792 Preface to *Al Sirajiyah*, that without "a native assistant or even a marginal gloss, I could not then interpret the many technical words, which no dictionary explains, except in their popular senses."¹⁰² He described the 1782 work as "my literal version of the tract by Almutakanna (sic), seems for pages together like a string of enigmas."¹⁰³

After many years of seeking office, Jones was appointed, in 1783, a judge of the Supreme Court in Bengal. A feature of the jurisdiction of the court was that it combined civil and criminal jurisdictions, unlike the High Court of England.¹⁰⁴ Jones had been accustomed to the single jurisdiction when practising as a barrister in the Welsh circuit. Until 1836, when it was abolished and the judicial structures assimilated into the English system, the court of Great Session in Wales was vested with civil and criminal jurisdictions. He had therefore experience in a wide variety of cases when he appeared in Cardigan, Haverfordwest and Carmarthen. Another feature was his experience of appearing in actions in which monoglot plaintiffs, defendants, accused and witnesses were part of proceedings that they did not understand, and were subject to a law imposed on them. The position was not dissimilar in Bengal. It is possible that Jones was not unsympathetic to the persons appearing before the Bengali courts. He realised that, to properly meet the demands of the Hastings policy of enabling native law to be administered, additional legal material was needed. He wrote to Macpherson "My great object, at which I have long been labouring, is to give our country a complete digest of Hindu and Mussulman law."¹⁰⁵

His objective was to be realised in the terms of his education and how it might be delivered – by reverting to the classical model. Writing to Lord Cornwallis, successor

¹⁰¹ Morley, p 303.

¹⁰² Cannon, *The Collected Works*, Vol. viii, p. 203.

¹⁰³ Cannon, *The Collected Works*, Vol. viii, p. 203.

¹⁰⁴ Derret, J. Duncan M., *Religion, Law and the State of India* (London, Faber & Faber, 1968) p. 223-

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¹⁰⁵ Arberry, p. 22, *The Letters*, Letter of 6th May, 1785.

to Hastings as Governor of India, he proposed to undertake “ a complete digest of Hindu and Mohamedan laws, after the model of Justinian’s inestimable pandects, compiled by the most learned of native lawyers, with an accurate verbal translation of it into English.”¹⁰⁶ He proposed to concentrate on the law, stating in the preface to his edition of Hatifi’s *Laila Majnum*, “ I have no intention of translating any other book from any language except the law Tract of Manu and the new Digest of Indian and Hindu Laws.”¹⁰⁷

2. Jones in India.

Jones arriving in India in September 1783 immediately took up his position as a judge of the Supreme Court at Fort William, Calcutta. Jones recognised that his appointment to the judicial bench, and his position in the EIC establishment, changed the way he should act. He abandoned the political activities in which previously he had freedom to engage and assumed the aspect of a responsible member of the judiciary and of the EIC. Henceforth his duty lay in advancing the interests of the company and in making the law, as enacted by Westminster legislation, operate effectively in the Supreme Court in Bengal. In his inaugural address to the Grand Jury of the Court on 4th December 1783, he stated that the Supreme Court should ensure that the “British subjects resident in India be protected , yet governed, by British laws, and that the natives of those important provinces be indulged in their own prejudices, civil and religious, and suffered to enjoy their own customs unmolested.”¹⁰⁸ Apart from the rather patronising attitude shown in the statement, his address indicates an early intention to administer law according to local customs, however this did not operate later entirely as he envisaged.

Jones’s most important contribution to the understanding of the East was the creation of the Asian Society of Bengal, modelled on the organisation of which he had close personal experience, the Royal Society, of which he was elected a Fellow in 1772. He established the Asiatic Society of Bengal (ASB) in January 1784 for the purpose of conducting “an enquiry into the history and antiquities, arts, sciences and

¹⁰⁶ Arberry, p. 25, *The Letters* , Memorandum to Lord Cornwallis dated 18th March, 1788.

¹⁰⁷ Arberry, *Asiatic Jones*, p 26.

¹⁰⁸ Cannon, *The Life*, p. 202.

literature of Asia.”¹⁰⁹ The Society became a vehicle for him to express his views, especially on law. Addressing the Second Anniversary Discourse of the ASB on 24th February, 1785, Jones was critical of the practice of law in Bengal, “If some standard law tracts were accurately translated from the Sanskrit and Arabick, we might hope in time to see so complete a Digest of Indian laws that all disputes among the natives might be decided without uncertainty, which is in truth a disgrace, though satirically called a glory, to the forensic science.”¹¹⁰ Confirming his intentions, in a letter to Macpherson of 6th May 1785, Jones wrote, “My greatest object, at which I have long been labouring, is to give our country a complete Digest of Hindu and Musselman law.”¹¹¹

In his charge to the Calcutta jury, on 10th June 1785, Jones said jurors should view crimes severely but criminals compassionately, and that,

“they should avoid by all means the slightest imputation of injustice among those, to whom it is the lot of Britain to rule, and, by giving them personal security, with every reasonable indulgence to their harmless prejudices, to conciliate their affections, while we promote their industries, so as to render our dominion over them a natural benefit.”¹¹²

He considered that he was in a favourable position to meet his objective of providing legal materials, having learned Arabic and Sanscrit. He also had a clear intent: “as it cannot be expected that future judges be expected to take the trouble to learn two difficult languages, I wish to see compiled a complete Digest of Hindu and Mussulmen laws, on the great subjects of Contracts and Inheritance.”¹¹³ He was not willing to rely on Indian lawyers whom he distrusted. He wrote, “Pure integrity is hardly to be found among the pandits and Maulavis, few of whom give opinions without culpable bias, if the parties can have access to them. I therefore always make them produce original texts, and see them in their own books.”¹¹⁴

¹⁰⁹ Arberry, *Asiatic Jones*, p. 30.

¹¹⁰ Cannon, *The Collected Works*, Vol. iii, p 20.

¹¹¹ Arberry, *Asiatic Jones*, p. 22.

¹¹² Cannon, *The Life*, p. 228.

¹¹³ Cannon, *The Life*, p. 258.

¹¹⁴ Cannon *The Letters* p. 720 Letter of 24th October 1786 to C.W. Broughton Rose .

He hoped to achieve his objective by publishing his own translation of the law, his aim being to “ to see compiled and printed a complete Digest like that of Tribonius¹¹⁵, consisting solely of original texts arranged in a scientific method.”¹¹⁶

Thus, although his classical references were accurate, there was a fundamental difference between the classical work and the treatise he prepared. Whereas Tribonian was working on the law of Rome, in respect of which he was a lawyer, as well as a Roman citizen and was dealing with his own domestic law, Jones was an outsider. He had a superficial and partial knowledge of the Islamic law and Hindu law, did not share the religious beliefs as those of the inhabitants of India and was not steeped in the methodology of the fiqh. Jones was to impose his interpretation of their law on an alien people, Tribonian codified the law of his own people.

Jones's approach was based on a conflict, the nature of which he might not have been aware, or, if aware, certainly did not overtly acknowledge it in his letters or writings. Jones depended on the validity of linguistic translation, but, paradoxically, “the whole rationale of his legal work was at the same time founded on a principle of cultural untranslatability. This, however, did not prevent a profound cultural translation from taking place.¹¹⁷ The philosophies underlying the different cultures came into collision. Young points out that Jones, in the Preface to Manu, wrote that customs of peoples (*manners*) were not translatable but should relate to the manners or the culture of the people. However, such manners could only be discovered by translation, and that inevitably imposed the lens or filter of the

¹¹⁵ "Tribonian". *Encyclopædia Britannica*. *Encyclopædia Britannica Online*. Encyclopædia Britannica Inc., 2013. Web. 19 May. 2013

<<http://www.britannica.com/EBchecked/topic/604766/Tribonian>>.

Tribonian (c 500-547 CE), a jurist working during the reign of Justinian 1, revised the legal code of the Roman Empire. Born in Pamphylia, he was a lawyer in Constantinople, appointed by Justinian in 528 as one of the commissioners to prepare a new imperial legal code, *Corpus Juris Civilis*, released in 529. Tribonian was the president of the commission that prepared the Digesta of 533, being a compilation of the old legal tracts writings (also called Pandectae or Collections). The full Codex Justinianus was released in 534. He also supervised the writing of the Institutiones of 533 by the law teachers Dorotheus and Theolipius.

¹¹⁶ Cannon, *The Letters*, Letter of 24th October, 1786 p. 721.

¹¹⁷ Young, p. 81.

translator on those manners.¹¹⁸ Common law was built on the demands for the secular administration of justice in a post-feudal society, the philosophy of which was expressed by secular lawyers. This fundamentally contrasted with the Sharī'a, which, as the religious law of Islam, was founded on sacred texts, explained by religious jurists in the service of Allah. The outward attributes of both systems had some superficial resemblance, laws were administered by institutions and judges for the resolution of disputes and there were lawyers knowledgeable in text-based laws. This encouraged a mistaken view of their compatibility. The reductive view of the indigenous laws ignored the culture and manners that Jones acknowledged were essential to those societies. Despite his professed empathy for culture and manners, imposing, in effect, a cultural translation going beyond the linguistic interpretation of texts, changed the way in which law was seen, used and developed, creating "a form that was wholly alien to it."¹¹⁹ It "entirely destroyed the mediated and more personalised system that had operated during the time of the Mughals" to such an extent that the "project of the colonialist respecting the form of indigenous law has been described as never more than a legal fiction."¹²⁰ The scholastic interest of Jones in the culture of the East became subsumed, in the case of the law, by the pragmatic demands of his position in Bengal and the interest of EIC.

3.0 *Al Sirajiyah*

3.1 Background to the Text.

Jones's aim of providing a legal text for use in the courts was fulfilled in the publication in 1792 of "*Al Sirajiyah or the Mohammedan Law of Inheritance with a commentary by Sir William Jones.*"¹²¹ The work took the form of a Preface (of

¹¹⁸ Young, p. 83.

¹¹⁹ Majeed J. *Ungoverned Imaginings James Mills : The History of British India and Orientalism* (Oxford at the Clarendon Press 1992) pps 225, cited in David Ibbetson, *Sir William Jones as a Comparative Lawyer*, pp. 19-42, in Garland Cannon and Kevin R. Brine eds. *Objects of Enquiry :The Life, Contributions and Influences of Sir William Jones (1746-1794)*, (New York, New York University Press, 1995).

¹²⁰ Young, p. 88.

¹²¹ Cannon, *The Collected Works*, Vol. viii, p. 197. "Published by Joseph Cooper at Calcutta and sold for the benefit of insolvent debtors. 1792."

thirteen pages),¹²² extracts from *Al Sirajiyah* translated from Arabic¹²³ into English and a commentary by Jones¹²⁴.

The choice of this original text was attributed by Jones to the fact that Hamilton's *Hidaya* did not deal with the law relating to inheritance, and thus there was a gap in the legal authorities available.

In considering the content of *Al Sirajiyah* some preliminary points may be noted :

- The translation, as described in The Preface, was based on the writings of Shaikh Siráju'ddin , of Sejávend, and Sayyad Sharīf, of Jurján in “ Khwárezm near the mouth of the Oxus said to have died , at the age of seventy six years , in the city of Shīráz.”¹²⁵ It appears that the translation is, firstly, of the substantive work *Al Sirajiyah*, the *Sirajiyah* (otherwise al *Sadjāwandī*) and, secondly, of the commentary on that work by Sharif, (the *Sharifiyyah* or *Shurafiyyah*, as described by later legal writers). Siradj al-Dīn Abū Tāhir Muhammad b. Muhammad (Mahmud) b. Abd al-Rashid was a Hanafi jurist writing in about 60/1023 CE. According to Brill, nothing is known of his life. His *Kitāb al Fārā īd, known as al-Farā īd al Siradiyya* on the law of inheritance, was, and is still, regarded as the standard work in the field. It has been commented upon, re-printed, glossed, shortened, organised, and has also appeared in Persian and Turkish.¹²⁶
- “Khwárezm” seems to refer to the modern Khurāsān, an extensive area in modern north east Iran, encompassing parts of Turkmenistan and Uzbekistan, once Transoxiana and part of greater Persia. For centuries this was an area of great Islamic influences and teachings. Associated with it are cities such as Mashhad, an important centre for Shi'a pilgrimage, and Bokhara, the home of Al Bokhari, a compiler of the HADITH. The area had links with Shiraz, encapsulating the close connection with Persian

¹²² Cannon, *The Collected Works*, Vol. viii, pp. 199-210.

¹²³ Cannon, *The Collected Works*, Vol. viii, pp. 213-265.

¹²⁴ Cannon, *The Collected Works*, Vol. viii, pp. 266-322.

¹²⁵ Cannon, *The Collected Works*, Vol. viii, p. 199.

¹²⁶ Sellhiem, R., Brill Encyclopaedia of Islam, Second Edition (Leiden). According to Almaric Rumsey, in his preface to the 1869 edition of the translation, “little is known of the compiler” but Rumsey attests to the work as being of “considered to be of the highest authority.”

scholarship. The teaching and scholarship of the area spread across the Muslim world, including India.

- A previous translation of both works, from Arabic to Persian and then into English, had been undertaken at the order of Warren Hastings by Maulavi Muhammed Kásim, a work which Jones describes as “must appear excellent and would be really useful, to such as had not access to the Asiatick originals.”¹²⁷ The original translation by Kásim was extensive, comprising some six hundred pages, comprising text, commentary, and notes of the translator. According to Jones the translation had a “turgid and flowery dedication” and the translator having erred, although understandably, on the side of “clearness, which has made the work “tediously perspicuous.”¹²⁸
- Jones was able to translate from the original Arabic, abbreviating the text to about fifty pages.¹²⁹ The work was intended, according to Jones, for “men of business... Practical utility being the ultimate object in this work, I had nothing to do with literary curiosities.”¹³⁰

3.2 Initial legal issues.

Laws of inheritance were of fundamental importance to society. It was through their operation that control over property, leading to wealth, power, prestige and influence could be maintained. However, as the Shari’a provided that all property belonged to God,¹³¹ believers were enjoined to use property only in accordance with the precepts of that law. In the case of inheritance, two guiding principles applied, according to Sunni jurists, firstly that no bequest could be made to an heir¹³² and secondly that the bequeathed wealth should not exceed one-third of the estate, after payment of debts and funeral expenses.¹³³ Thus, the provisions and the operation of the law, in deciding to whom and how the net estate was to be distributed, was a critical element in the fortunes of families and individuals, and fixed liability for payment of taxation. Marriage and inheritance were incidents that provided stability

¹²⁷ Cannon, *The Collected Works*, Vol. viii, p. 200.

¹²⁸ Cannon, *The Collected Works* Vol. viii, p. 201.

¹²⁹ Cannon, *The Life*, p 341. Commentators have expressed the view that greater extracts should have been translated (Cannon p 342, because of its “very excellence “BSVF p. 814

¹³⁰ Cannon, *The Collected Works*, Vol. viii, p. 202.

¹³¹ Hallaq, p. 231, Qur’an 3:180.

¹³² Hallaq, p. 290 : “a golden rule represented in the legal maxim and *hadith* “*lā wasiyyata li-wāriṭh.*”

¹³³ Hallaq, p. 291.

and continuity to pre-Islamic tribal societies and to the Muslim world after the Prophet, accordingly laws governing them were of particular importance.

The text sought, in addition, to resolve the question concerning the rights of Mughal rulers over property of intestates dying without qualifying heirs. Jones refers in the Preface to the question whether the the Mughal sovereign, according to the constitution, was the owner of all land not granted to his subjects or his heirs. Jones was of the opinion that the assertion that the ruler owned all, made by of an unnamed “ foreign physician and philosopher”, ¹³⁴ was incorrect. As a lawyer in eighteenth century, Jones would have been familiar with the common law concepts relating to the Anglo-Norman feudal law of land ownership, in which theoretically ownership of all land was vested in the Crown, and interest in estates (and relative rights of possession) gave title to landowners as tenants of the Crown. His analysis of the question combines his learning as common law lawyer with his knowledge of Shari’a. In favour of his proposition, that the Mughal prince did not have ultimate ownership in the goods or lands of his people, Jones refers to the words of Muhammadan lawyers, the reasoning of Sayyad Sharif, (one of the authors of the work translated,) the Qur’an, and the words of the Prophet. All of which, according to Jones, in summary, indicate that all property (lands, rents, and goods) are alienable and inheritable, that there is no difference between realty and personalty, and that a man may bequeath property and rights to his heirs, with absolute rights of ownership, possession and rights of alienation. He suggests that even the most intransigent rulers (Omar –“ferocious but religious,” Aurangzeb – “the bloodiest of assassins and most avaricious of men”) would abide by the rules of the shari’a as well as “the placid and benevolent ALI.”¹³⁵ Jones uses the term “escheats” in his analysis, being the common law theory, based on feudal law, that the estate of an deceased intestate vested in the Crown *in bono vacantia*. In the Indian case, Jones states that the goods of an intestate without heirs would not vest in the Mughal ruler but would be vested in funds used for the relief of the poor. The practical effect of the proposition, that property was owned by individuals, was to identify the persons liable to pay land taxes to the EIC. The value of the translation, therefore, for the EIC was that it provided it, through its judges, a means to understand and

¹³⁴ Cannon, *The Collected Works*, Vol. viii, p. 206.

¹³⁵ Cannon, *The Collected Works*, Vol. viii, p. 208.

administer the disposition of property, a vital interest to the profits of the company and to raise revenue for the administration of the country.

So far as the quality of the work is concerned, in contrast to the Laws of 1772, the work of 1792 has been recognised as superior :

“Jones’ fame rests secure on his two great translations made in India. The Shirjiyyah, a translation of the principle Hanafi treatise on Inheritance and the Laws of Manu from the Sanskrit. Of the first by its very excellence has more or less killed later efforts in the same field. It remains to this day (1946) the basis of which all judicial interpretation of this branch of the law in India has been built, and one may only regret that he did not see fit to include , if not the whole, at any rate, larger excerpts from it, rather than a mere summary of its commentary, the Shirjiyyah. At the date of Jones’ death a digest in four volumes of the Shi’a law had been completed under his supervision, and it speaks poorly for English appreciation of a great scholar that so little of it in a translation by Ian Baillie, (copies of which are now very rare) has ever seen the light of publication.”¹³⁶

However, more contemporaneous writers were less enthusiastic, preferring the commentary to the Sirajiyyah. Wilson, referring to the translation, wrote, “Few works of Mohammadan law attracted the interest of English scholars; few additions have been made to Sir William Jones’s translation of Sirajiyyah and Hamilton’s Hidayah” but a great want existed that was filled by Macnaghten.¹³⁷ In 1825 William Hay Macnaghten published a work, “*Principles and Precedents of Mohammodan Law*”¹³⁸, incorporating Jones’s translation of 1792, which became the basis for a number of subsequent works on the laws of inheritance.¹³⁹ The first was by Baillie, published in 1832.¹⁴⁰ This was highly regarded, Morley, writing in 1858, describing Baillie’s work that it filled the need and “ until the appearance of this last treatise, Sir William Jones’s translation of the Sirajiyyah was undoubtedly of considerable utility to the

¹³⁶ Vesey-Fitzgerald, p .814.

¹³⁷ Wilson H.H., (ed.) *Principles of Hindu and Mahammodan Law Republished from the Principles and Precedents of the Same by the late Sir William Hay Macnaghten* (London, Williams and Northgate, 1860)

¹³⁸ Macnaghten, William Hay, *Principles and Precedents of Mohammodan Law (Calcutta, 1825)*,

¹³⁹ Macnaghten (1793-1841), as Sir William Macnaghten, was the chief adviser to the Governor General of Afghanistan executed in 1841 in the disastrous First Afghan War. Dalrymple, William *Return of King : The Battle for Afghanistan* (London, Bloomsbury, 2013).

¹⁴⁰ Baillie, Neill Benjamin Edmonton, and Ali Ibn Muhammad *The Mohammedan Law of Inheritance according to Aboo Huneefa and His Followers* (Baptist Mission Press , 1832).

English judge, as supplying in a great measure the omission of the Hiyadiyyah, but it has become quite superseded by Mr Baillie's clear and comprehensive exposition of this intricate and important part of Mohammedan law."¹⁴¹ In the same vein, Sloan wrote, "No writer, that I am aware, has treated the Mohammadan law of Inheritance excepting Sir William Jones who translated the Sirajiyah, a celebrated work on that subject but being a version of scientific Arabic ... the style of his work is necessarily abstruse, so much so, that a knowledge of the original language is almost requisite to the study of the translation. In his abstract translation of the commentary, (the Surafeeah) he has introduced such illustrations only as appeared to him (who was thoroughly acquainted with the text) necessary to facilitate the understanding of it."

¹⁴²This comment was, in part, to support the approach of Macnaghten who relied extensively on court precedents.¹⁴³ The editors of the works concluded that the Sirajiyah was of little practical value without the commentary, the Shurafiyyah. Jones had translated part of the commentary but, as Grady wrote, "it is therefore not a matter of surprise that its translation by Sir William Jones should be almost unknown by English lawyers and be, perhaps, never referred to in Her Majesty's Supreme Court of Judicature in India. With the assistance of the Shurafeeah, it is brought within reach of the most ordinary capacity and if the abstract translation of that commentary, for which we are also indebted to Sir William Jones, had been more copious, nothing further would have been requisite to give the lay reader a complete view of this excellent system of jurisprudence."¹⁴⁴

From the later commentators, it appears that, as Jones's work of 1792 was superseded firstly by that of Macnaghten in 1825 and then by subsequent writers, it

¹⁴¹ Morley, p.304.

¹⁴² Sloan, William ed. *Principles and Precedents of Mohammadan law by William Hay Macnaghten (Calcutta 1825)* (2nd Edition Sloan, William (Ed.)) (Madras, Athenium Press, London Allen & Co., 1860).

¹⁴³ Macnaghten was proud of his knowledge of the Shari'a: "I have gained a complete victory over the Moollas who have since freely admitted that my knowledge of the Mohomedan Law is superior to their own." British Library, Oriental and India Office Collections, IOR L/PS 5/162, quoted in Dalrymple p. 236.

¹⁴⁴ Grady, Standish Grove, and William Hay Macnaghten *A Manual of the Mahomedan law of Inheritance and Contract, comprising the doctrines of the Soonee and Sheea Schools, and based upon the text of Sir William Hay Macnaghten's Principles and Precedents, together with the decisions in the Privy Council and High Courts of the Presidencies of India* (London, W. H. Allen & Co 1869)

enjoyed a comparatively short period of authority. However its abiding historical significance, and interest in Islamic studies, lies more in how it instigated the development of Mohammadan law, than the actual translation. Despite the comments of legal writers, it seems that the work maintained its interest, being advertised for sale in the Indian press as late as 1906, 114 years after its first publication.¹⁴⁵

4.0 Shari'a Law and Practice and the effects of the translation.

An understanding of the the context and operation of Islamic law will help in the understanding statements by Jones in the Preface. The main features of the context may be identified as follows .

4.1 Schools of law (MADHHAB)

Jones writes of the authors that, 'their compilations have equal authority in all the *Mohammedan* courts which follow the system of Abū Hanīfah.....'¹⁴⁶

His recognition of the Hanafi Madhhab shows a more sensitive approach than that found in the 1782 translation, as it was the juristic code of interpretation of the Shari'a appropriate to Bengal. Hanafi influence had become predominant in the Middle East and the Indian sub-continent, while SHAFI'I law was predominant in southern Arabia and south-east Asia.¹⁴⁷ The actual founder of the Hanafi school was Ash-Shaybani who attributed his authority to Abu Hanīfa. ¹⁴⁸ (d. 767). He was a leading scholar in Kufa, (now in Iraq), from whom the legal school took its name and one of the founders of the Sunni tendency. The characteristics of the Hanafi Madhhab point to belief in Islam as being more important than adherence to ritualistic practices, that Muslims should be more concerned with practical devotion,

¹⁴⁵ " Al Sirajjiyya or the Mohamedan Law of Inheritance Reprinted from the translation by Sir William Jones. With notes and Appendix. By Almeric Rumeby. Second Edition. Revised with additions. Rs.48 1890 Advertised by Thacker Spink &Co , Calcutta Advertised in Thacker's *Guide to Calcutta* by Rev, W. K. Firminger, (Calcutta 1906)

¹⁴⁶ Cannon, *The Collected Works*, Vol. viii, p. 199.,

¹⁴⁷ Coulson, N.J., *A History of Islamic Law* (Edinburgh, University of Edinburgh Press, 1964) pp. 264 p. 101, Gunn, T., *Jeremy Shaping an Islamic Identity: Religion, Islamism and the State in Central Asia* (Sociology of Religion) (Oxford: Oxford University Press) Vol. 64, Special Issues (Autumn 2003 pp. 389 – 410.

¹⁴⁸ Coulson, p. 50.

that it is acceptable to read the Qur'an in languages other than Arabic, emphasis being placed on the consent of the community and private opinion over strict adherence to the Sunna. Hanafi teaching was relatively tolerant in terms of punishment, divorce and almsgiving, being less discriminatory towards women, open to mysticism and philosophical in nature. In the interpretation of the law, according to Coulson, "The outstandingly distinctive feature of Hanafi legal theory, as opposed to the Shafi'is and Hanbalis, was their recognition of supplementary sources of law. Freedom and flexibility of legal reasoning was the keynote of the Hanafi principle of *Istihṣān* (or juristic preference), and to a lesser degree of the Maliki principle of *Istislah* (consideration of the public interest)."¹⁴⁹

The significant difference of approach between the different schools indicates the importance in the choice of the texts, and the weakness of the 1782 work. Coulson adds that, "a fundamental character of Hanafi was the freedom of juristic speculation".¹⁵⁰ The significance of this point is the relative flexibility in the interpretation of the law by the Hanafi Madhhab. This flexibility was removed by the application of the exact words of a text and the introduction of *stare decisis*.

4.2. Interpretation of Shari'a : IJTIHAD by the ÚLEMA

The functions of the Úlema were to advise on the law applicable to cases before the courts. Jones wrote,

although Abu Hanīfah be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown to Abu Yūsuf and the lawyer Muhammed that, when they *both* dissent from their master, the *Musulman* judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason and founded on the better authority.¹⁵¹

By this sentence, Jones glimpsed a fundamental aspect of the operation of Islamic law. Jones had described the imposition of statute law on society, criticising it as corrupt and influenced by the interest of a few legislators, he being in favour of the common law created incrementally by judges. The adoption by the EIC of a 'code' of laws had an impact not altogether different from legislative decrees.¹⁵² The book was intended for English judges in Bengali courts, to be used as definitive authority. Hallaq points out that, unlike a uniform and ubiquitous code of law,

¹⁴⁹ Coulson, p. 91.

¹⁵⁰ Coulson, p.98, 99.

¹⁵¹ Cannon, *The Collected Works, Vol. viii*, p.203.

¹⁵² Hallaq, *Introduction*, p. 86 "The texts were concise enough to qualify as codes."

“Islamic law depended in both theory and practice on the co-operation of the customary (‘URF) and royal law (SISYĀSA SHARIYYA). Nowhere did the law operate exclusively... nor ..was Islamic law self-declaratory, in that it did not pronounce itself.....Islamic law was not systemic according to the European perception of the world.”¹⁵³ While Islamic law might not take the form of a ‘clear and accessible code’, an adept in the fiqh would be equally able to to operate within that law ,with the same facility as any other lawyer in their own legal system.¹⁵⁴ Tellingly, “Islamic law cannot be said to have internal uniformity, since plurality of opinion –the so-called *ijthadic* pluralism- is its defining feature *par excellence*.”¹⁵⁵

Islamic jurists relied on four sources of the law : the primary sources of the Qur’an (the word of Allah), the Sunna (the demonstrative proofs of Mohammad’s prophecy), and consensus and qiyas as deductive methods. Outside these sources, correct interpretation of the fiqh depended on probability. A jurist, MUJAHID, in stating his interpretation of the law in a particular case, would exercise his judgement, based on the methods of his school, his learning and experience.¹⁵⁶ His conclusion might differ from another jurist, but the opinion of each was equally valid, hence the cardinal maxim “ All qualified jurists (*mujahids*) are correct.” ¹⁵⁷ Hallaq comments further, “This individual *ijthād*- that is the *ijthād* of the individual *mujahid* - explains the plurality of opinion in Islamic law, known as *khilāf* or *ikhtilāf* .”¹⁵⁸As each case could engender a number of opinions, there was no monopoly of jural truth. It was for the qadi to choose the version of the law he would apply in a case, based on what he considered to be the strongest and most authoritative opinion (*fatwa*) presented to him.¹⁵⁹ Thus, in the Sharī’a, *ijthadic* opinion, as the foundation of legal doctrine, causes Islamic law to differ fundamentally from the law found in state-created codes or non-Islamic organisations and is not secular law in the Western sense.¹⁶⁰ It was not the law recognised by the judges of the Bengal Supreme court, hence the collision between the system that Hastings proposed and the law in operation in the country.

¹⁵³ Hallaq, p. 368.

¹⁵⁴ Hallaq, p. 368.

¹⁵⁵ Hallaq, p. 368.

¹⁵⁶ Hallaq, p. 82.

¹⁵⁷ Hallaq, p. 82.

¹⁵⁸ Hallaq, p. 82.

¹⁵⁹ Hallaq, p. 82.

¹⁶⁰ Hallaq, p. 110.

The work reduced the function of the Maulevis and Pandits, and removed the discretion of the Qadis in the district courts.¹⁶¹ Despite the aims of the statute, and the intention of Hastings, to apply appropriate laws to Muslims and Hindus, in reality the relevant law was administered through the practices of the common law. Rules of evidence and procedure were to be those with which English judges were familiar. Jones was concerned with the question of the appropriate oaths by plaintiffs and defendants to be used in proceedings. Common law practice required oaths as a matter of routine procedure. In Islamic practice, requiring a defendant to take an oath was at the discretion of the plaintiff (*MUDDA'Ī*), exercised only in special circumstances, as a denial of the facts by the defendant would contradict the truth already known to Allah¹⁶². Since Islamic law was grounded in the sources of religion, oaths were of greater religious significance, being a transcendent attribute of the relationship between the individual and Allah.¹⁶³ Adoption of common law requirements in the procedure of courts cut across established practices. The introduction of an officially approved text, tantamount to a legal code, imposed a homogenised single statement of the law of succession, affecting the function of the jurists and the discretion of the qadis.

4.3 Precedent (*Stare decisis*) versus Fatwas.

There was a fundamental difference in approach between the function of the Qadi in considering juristic opinions (fatwas) and that of Supreme Court judges who followed the common law doctrine of case law or precedent. For legal authority outside statute, common law judges relied on previous judicial decisions, (*stare decisis*), as recorded in law reports, as being binding on subsequent similar facts. A fatwa, the product of *ijtihad*, as explained above, was adopted by a qadi for guidance in a case was one among the many that were possible, but chosen because of the authority of the jurist who produced it. Thus Shari'a law was to be found in the "juristic corpus of the school",¹⁶⁴ expressed in individual fatwas of the mufti from their understanding of the law.

Using precedents was, however, long recognised in Shari'a; the Sunnah and Hadiths " may be looked on as a great body of precedent, a large proportion

¹⁶¹ Hallaq, p. 375.

¹⁶² Hallaq, p. 173.

¹⁶³ Hallaq, p. 174.

¹⁶⁴ Hallaq, p. 178 and Strawson p. 20. (Footnote 71)

consisting of decisions passed by the Prophet on questions relating to the religion and law which he promulgated. In addition to this, the numerous collections of the Fatwas (sic) of celebrated lawyers form a mass of precedent hardly surpassed, in bulk at least, in the legal literature of any nation, and constantly referred to as authoritative in all Mohammedan Courts of Justice.”¹⁶⁵ Grady described native laws that treat of the “*Ilm al Fatawa* or science of decisions. They are very numerous , amounting to several hundred, the greater portion of them are unknown or never used in India. They comprise part of the *Ilm al Fikh*. They consist simply of the recital of the decisions of eminent lawyers in particular cases and form a body of precedent , having various authority and serving for the guidance of lawyers in subsequent decisions much in the same way as our reports of decide cases in England.”¹⁶⁶ An example of a collection of Fatawa is *Al Fatawa* by *Al-Alamgiriya*.¹⁶⁷

Jones compared the authority of the authors of *Al Sirajiyah* with the English common law lawyers Littleton and Coke, claiming that there is a “wonderful analogy between the works of the old *Arabian* and *English* lawyers, and between their several commentators”.¹⁶⁸ The analogy does not appear valid , as the respective functions of the jurists in the two jurisdictions differed and the function of case law (*stare decisis*) differed from the operation of *ijtihad*. Hallaq suggests that it is debatable whether Jones genuinely misunderstood the nature of Islamic law or whether he “feigned” such a misunderstanding in order to facilitate the introduction of his version of the law¹⁶⁹. (There have been another reason : as the work was primarily intended for an English audience, the analogy made in order to better engender confidence in the judiciary of the validity of *Al Sirajiyah*.)

¹⁶⁵ Morley, p. 333

¹⁶⁶ Grady, p. xli

¹⁶⁷ Bazmee, Ansari A. S., Brill Encyclopaedia of Islam (Leiden) Second edition Brill on line 2013. “*Al Amgiriyyah* was a compendium of Hanafi law ranking only to al-Marghīnānī’s *Hidāya*, compiled by order of Aurangzeb during the years 1075-1083 (1664-1672). The intention was to arrange in systematic order the most authoritative decisions by earlier legists which were scattered in a number of *fiqh* books and thus provide a convenient work of reference. The Board in charge of the compilation was presided over by *Shaykh Nizām* of Burhānpur (d. 1090/1679) who had four superintendents under him, *Shaykh Wadjīh* al Din of Gopāmaw, *Shaykh Djalīl* al Dīn, Muhammad of Maḥlīshr, Kadi Muhammad Husayn and Mullā Hāmid, both of Djawnpur, each of them being assisted by a team of ten or more *Ūlāmā*. The book has repeatedly been re-printed”.¹⁶⁷

¹⁶⁸ Cannon, *The Collected Works*, Vol. viii, p. 199.

¹⁶⁹ Hallaq, p. 373.

Jones had little confidence in the functions of the muftis or maulevis in the courts. He considered that the Pandits (Hindu lawyers) were seeking to mislead judges, that confusion and conflict led to inefficiencies in the conduct of business. In the view of English commentators, the system of fatwas was “unsettled and unreformed...and encompassed with doubt and difficulty.”¹⁷⁰ declared that he would not rely on the written opinion of a native lawyer.¹⁷¹ Through his legal writings, Jones intended to break down the Indian monopoly over legal knowledge and to assert British power and restore what he considered to be the true Indian legal tradition.¹⁷² By relying on an authoritative text, judges could give judgements which would give direction for later decisions. The unwillingness to rely on fatwa as legally binding authority created a vacuum filled by reliance on decisions of the British courts in India, as in the common law tradition. The contrast between the two systems has been summed up as “ All the Fatawa are persuasive authorities of great value but the Kazi (court) is free to adopt the opinion most consonant to reason and authoritative principles, but the doctrine known to English law as ‘precedent’ was not embodied in the fabric of Islamic law as understood in India in early times.”¹⁷³ The use of case law as part of the new approach is may be seen from the comment by Grady, “The judges of the Presidency Courts¹⁷⁴ were barristers sent out from England to preside in the Supreme Courts and they administered justice within the small extent of territories comprised within their jurisdiction. Although they were required to administer Mohammedan and Hindoo systems, of laws, yet that which they really did administer was the law of England.”¹⁷⁵ It is probable that such judges relied on case law, in keeping with the common law usage, and so the doctrine of precedent was incorporated within Anglo-Mohammadan law. Jones’s text gave the courts the authoritative reference by which later cases would be decided and a body of case law built upon it.

¹⁷⁰ Morley, p.331.

¹⁷¹ Morley , p.331 quoting a letter from Jones of 19th March ,1788, Works, Vol iii, (London 1799)

¹⁷² Teltscher, Kate, *India Inscribed: British Writing on India 1600-1800*, pp. 192-228, in *in Sir William and the Pandits: The legal Research, Poetry and Translations of William Jones*, (Oxford: Oxford University Press 1995) pp. 280, at 197.

¹⁷³ Fyzee Asaf A.A., *Mohammadan Law in India* in *Comparative Studies in Society and History*, Vol.5, No.4, (July 1963) (Cambridge ,Cambridge University Press) pp.401-415 ,p.406.

¹⁷⁴ Courts established in Presidencies of Madras , formed in 1640, Bombay, formed in 1687 and Bengal in 1690, being extensive areas of India.

¹⁷⁵ Grady, Introduction p.xxxix

5.0 Consequences on the operation of Shari'a.

Jones assumed that it was possible to identify an original source of 'law' as a valid statement of what the law should be, and, in so doing, creating an erroneous supposition that Muslims lived in a "timeless existence".¹⁷⁶ In the language of Said,¹⁷⁷ such a reductive approach to the Muslim tracts fixed the statement of the law of one era as being appropriate for all time. Hallaq quotes with approval the conclusion of Anderson that "the translations "engendered the notion of an essentialist, static Islam, and incapable of change from within."¹⁷⁸ Not only did the work dismiss the works of the mujahid in ijihad, but abrogated the Hanafi'i tradition of a flexible approach to interpretation, as discussed above. According to Strawson, "English texts do not merely present Islamic law: they construct it."¹⁷⁹ Jones's idealised law was intended to provide the authoritative statement. Approval of it by the governing power made it the closest version possible to an officially sanctioned statement of the law. Jones realised his personal ambition of creating a "Digest"; however the law, in the way presented by him, was not the law as practised by those to whom the law applied.

A secondary effect arose from the medium, a printed book. Access to manuscripts containing writings on fiqh and fatwas for centuries had been confined to the Úlema Mughal rulers.¹⁸⁰ The availability of the law in a form accessible to those who could afford it removed its former aura of exclusiveness. The translation, and others printed publications produced by the governing class, represented a major step in changing the nature of handling knowledge in Indian society; "print was revealing colonial society to itself."¹⁸¹ The form introduced a concept that it was normal to have legal documents available to all, and that the law was no longer any different from

¹⁷⁶ Hallaq, p. 374 quoting, in relation to Hindu law, Cohn Bernard in *Colonialism and its Forms of Knowledge : The British in India* (Princeton, NJ: Princeton University Press, 1996) p. 71.

¹⁷⁷ Said, Edward W., *Orientalism* (London ; Penguin Modern Classics 1978, reprinted 2003) pp. 396.

¹⁷⁸ Hallaq, p. 376, and Anderson *Legal Scholarship and the Politics of Islam in British India* in R. S. Khare ed., *Perspectives on Islamic Law, Justice and Society* (Lanham, MD: Rowan & Littlefield, 1999) 65-91.

¹⁷⁹ Strawson, p. 21.

¹⁸⁰ Bloom, Jonathan M., *Paper Before Print The History and Impact of Paper in the Islamic World* (New Haven and London, Yale University Press, 1900 generally.

¹⁸¹ Franklin, Michael J., *Orientalist Jones*, p. 234.

other areas of knowledge.¹⁸² As the functions of the Úlema changed, Anderson suggests that the device of the textbook itself also reduced the ambit of practice and knowledge : it “minimised doctrinal difference and presented the shari’a as something that it had never been : a fixed body of immutable rules beyond the realm of interpretation and judicial discretion.”¹⁸³ Emphasis on a code or written tract raises the importance of the text as being the definitive source. Empirical development of the Hanafi madhhab had endowed the law with a capability to meet the needs of a developing society, while maintaining the grounding in the four Sources of Islamic religion and law. Increased attention given by the proto-state and the law to the printed texts as sources of authority gave an impetus to regarding the pre-eminent methodology as being the strict and literal interpretation of texts.¹⁸⁴ Majeed pointed out that, as a result, “ in many ways courts now followed the shari’a more closely than before, so the result of the conquest by a non-Muslim power was that the administration of criminal justice was actually nearer to Islamic law than under the Mughal rulers .”¹⁸⁵ It is reasonable to conclude that a similar result was seen also in civil law, the courts giving close attention to the printed texts for the basis of their judgements, thus reliance on the authority of text material for ascertaining the truth added to the status and perceived veracity of texts.

Jones’ original intentions, before 1782, were expressed benignly; meaning to be of assistance, honouring the laws of Bengal, “ with the reverential interest of a newcomer.”¹⁸⁶ The effect of the translation of Al Sirajiyah was to introduce a system of laws that would transform the legal structure both immediately and for the future. His reputation among EIC hierarchy was such that his work and statements established the attitude and practice that would be followed across the system of government throughout India. Laws of inheritance and succession went to the heart of control of land, wealth, influence and native political standing. A seemingly innocuous and benevolent act of translating bore far-reaching consequences, as the

¹⁸² Gilmartin, David *A Networked Civilisation?* p. 58 in cooke , miriam, and Lawrence, Bruce B., ed. *Muslim Networks from Hajj to Hip Hop* (University of North Carolina Press, 2005) pp. 325.

¹⁸³ Anderson, p 14.

¹⁸⁴ Anderson, p. 20

¹⁸⁵ Majeed, *Ungoverned Imaginings*, p. 27.

¹⁸⁶ Cannon, *The Life*, p. 320 citing Macartney’s letter of 12th October, 1783, *The Private Correspondence of lord Macartney*, Camden 3rd. Series, ed. C. Collin Davies (London, 1950), 77:223.

dynamic moved towards more invasive and control of the the country, removing the political and legal influence of the Mughal governing classes.

6.0 The Legal Texts Translated.

The initiative taken by Hastings to provide texts in English for the use by the judges in the courts spawned a number of translations. Officials (Halhed amongst others) of the EIC set to work on Persian and Indian manuscripts. Alexander Dow's translation of Ferishta's work , published in 1772 under the title "*History of Hindustan*" showed the civil society existing when , that the EIC first arrived in India. It related a society with strict impartiality of the courts, established by Shah Jehan (1627-1656 CE), and the adherence to strict Sunnism by Aurangzeb (1656-1717 CE), confirmed by his compilation Fatatwa and his provision of muftis to provide free legal advice to the poor. The Mughal system of law, according to Dow, in his essay "*An Enquiry into the State of Bengal*", was observed throughout the centuries, being "rendered sacred in the eyes of the people that no prudent monarch would choose to violate .. by wanton act of power."¹⁸⁷ EIC translators revealed to the West an Indian society that had a well-established, sophisticated and vibrant legal system. The task undertaken by the translators, in attempting to communicate Islamic law to their readers, was to explain it through their own familiar cultural and legal references. Strawson claims that they were not "conspirators attempting to misrepresent the law"¹⁸⁸ but their intentions to state the law was affected by their aim to provide a system of law for their rule of the country and their distrust of the law as it was represented to them by native lawyers. This duality was incipient in their understanding and approach.

The translation by Charles Hamilton, of *al-hidadaya al marghinani*, the earliest complete text of Islamic law in English, was published in four volumes under the title "*The Hedaya*" in 1791.¹⁸⁹ Described as "the influential compilation of Hanafi

¹⁸⁷ Strawson, p. 35.

¹⁸⁸ Strawson, p. 36.

¹⁸⁹ Strawson, p 22. The translation was published in London by Bensey. The complete title was *al-hiddaya fil Forou* (the Guide on Particular Points). The work had been commissioned by Ali Ibn Abu Bakr al-Hasan Ahmad al-Kuduri during the late 12th century CE. Described as 'easily the most popular reference for the Hanafi school' by Farhat J. Ziadeh in S. Mahmassani, *Falsafta al-Tashri fi Islam* (Leiden, E.J. Brill 1961) p. 49 .

opinion,” it was translated by three maulevis from Arabic to Persian and then, by Charles Hamilton, into English, according to the Hastings pattern. The original work was by a mujtahid, an authoritative jurist. Strawson writes that the text “ gives the lie to the idea that Islamic law was particularly rigid or fixed in time.”¹⁹⁰ The work did not, however, cover issues of inheritance, considered by the EIC as being one of the politically important areas of law. Al Sirajiyah translated, directly from the Arabic by Jones, filled the gap.¹⁹¹ The two works were followed by works considered above, by Macnaghten, Baillie, Morley, Sloan, Wilson and Grady , all consolidating the impact of Anglo-Mohammadan law. The effect of these translated works was considerable, as they became recognised references for authoritative decisions by the courts. Anderson does not underestimate the wide reaching effects of the early translations:

“ Together, these three translations formed the textual basis of Anglo-Muhammadan law. Their inadequacies and blatant errors have been partially recorded in court cases and commentaries but sustained research on the ideological basis of their rendering remains to be pursued. It is not surprising that those few texts which were translated came to be treated as authoritative codes rather than as discrete statements within a larger spectrum of scholarly debates.”¹⁹²

Despite Jones’ early attraction to, and embrace of, all things Indian and Hindu, he arguably set in motion a change that would eventually displace the law he thought he was safeguarding. His motive might have been benign but was intended also to provide the EIC with a means to control Indian society by legal influence. According to Derrett, “If Hindu law ‘stagnated’ under the British, Islamic law died. After numerous adjustments during the formative period and the elimination of criminal law and evidence and absorption of contract and civil wrongs the texts were found to supply ascertainable rules to meet most situations.”¹⁹³ The result of this led to what was later known as Anglo-Muhammadan Law , a law administered to Indian society, inherently structured to meet the needs of the colonialist government.¹⁹⁴ The ethos, accessibility, ubiquity and disinterested application of the new law led to the

¹⁹⁰ Strawson p. 26

¹⁹¹ According to Cannon, p. 383,(fn. 9), Al Sirajiyah was reprinted by William Amer (London 1869) and a second edition published in Calcutta in 1890.

¹⁹² Anderson, p. 14.

¹⁹³ Derrett, p. 18.

¹⁹⁴ Hallaq, p. 379.

rigidification of Shari'a¹⁹⁵ and by the appointment of judges trained in English law, indigenous laws were displaced so that "common law and equity inevitably infiltrated more and more into the Islamic law as applied in India".¹⁹⁶

As indicated above, the act of translation caused a paradigm shift in the substance and administration of the law, transferring the jurisprudential philosophy of one culture into the norms of another: "Islamic law became represented by the English" in the language of Said.¹⁹⁷ Jones "established a method that was to be followed not merely by the British but also by many Indian Muslims in the century and half that followed, and so Islamic law became encapsulated within the English framework."¹⁹⁸ The occlusion of the two approaches becomes, for Strawson, "not merely an inevitability but a necessity. The colonial practice interacts with legal theory and so shapes its objects of study. It is from this source that legal Orientalism merges with western jurisprudential tradition and seems so naturally part of it."¹⁹⁹

Thus what began as an amateur's excitement and interest in things 'Arabick' turned into a steam of work that profoundly affected the legal system of India and beyond, creating a hybrid system with heavy Western overtones. According to Strawson, the "Orientalist discourse becomes one of the pillars of colonialism itself".²⁰⁰ Schacht shows that gradual incremental changes, rather than "positive legal changes which were few" developed into the substantive law of the sub-continent, creating a legal system "substantially different from the strict Islamic law of the shari'a."²⁰¹ The British intention was to bring the rule of law into the administration of its colony, to give certainty and a pragmatic solution to meet its perceived needs. In seeking to rescue Islamic law from "the apparent chaos and despotism of the Orient"²⁰² it failed to take account of the strengths and value of the Mughal system of fiqh but gave instead the colour of its own laws. Strawson says that, "It is ironic that the

¹⁹⁵ Hallaq, p. 381

¹⁹⁶ Schacht, Joseph, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1964) pp. 303, p 95.

¹⁹⁷ Strawson, p. 37, Said, *Orientalism* *ibid*

¹⁹⁸ Strawson p. 36. He cites (at fn. 59) S. Ameer Ali, "Mohammedan Law (Calcutta, Thacher Spink, 1892), A. Rahmin, "The Principles of Mohammedan Jurisprudence (Calcutta Baptist Mission Press 1905), F. Bodruddin Tayabji, "A Handbook of Mohamedan Law (Mylapore, Madras, Madras Weekly Notes 1914. "They usually begin with excellent introductions to Islamic law and then change track into a positivist exposition which seems unrelated to the former."

¹⁹⁹ Strawson, p. 37.

²⁰⁰ Strawson, p. 31.

²⁰¹ Schacht, p. 95.

²⁰² Strawson, p. 36.

Orientalist discourse , by denying the diverse traditions of Islamic law and jurisprudence, has so constricted the view of human rights , that they are presented as entirely western.”²⁰³ Views on the value of this approach vary. Schacht takes the view that the creation of the Anglo- Muhammadan law was beneficial : “This law, and the jurisprudence based on it is a unique and a most successful and viable result of the symbiosis of Islamic and English legal thought in British India.”²⁰⁴ Trautmann wrote, “His (Jones) gift to Indians was their own law put in a form that was accessible and certain”.²⁰⁵ The commercial and political motivation that informed the attitude of empire builders in Britain and the administrators in Bengal displaced their sympathy for the ethics of the indigenous society that they ruled. Strawson draws attention to the picture created by Springborg of a pre –colonial society : “Far from being the victims of oriental despotism, the average citizen in these communities enjoyed a degree of legal and economic freedom, personal and corporate rights and immunities which compares favourably with those of the citizen in a modern “democratic” state.”²⁰⁶ The life of the average ‘subject’ in eighteenth and nineteenth century Britain could be contrasted with this view of Indian society

7. Conclusion.

The effects of Jones’s translations and his outlook on the law operating in India may be considered a case study in how the legal system of the coloniser overrides existing law. An existing sophisticated and functioning society was changed by the apparently simple and benign act of translating what was regarded as its legal authorities. The action of imposing an foreign interpretation of texts, combined with the application of law, indicates the difference between practical empathy and domination, the attrition of utility upon religion, the power of efficacy against a personal and transcendent outlook, an attitude of superiority based on Western classicism imposed upon an equally ancient culture. The EIC acquisition of control over territories in India could be compared , or even justified by, with the earlier Mughal invasion of the Hindu civilisation. However Mughal adherence to Islam and the Shari’a operated with tolerance of Hinduism, it did not seek its wholesale change

²⁰³ Strawson, p 38.

²⁰⁴ Schacht, p. 96.

²⁰⁵ Trautmann, Thomas R. *The Lives of Sir William Jones* in *Sir William Jones 1746-1794* pp. 93 - 121, in A. Murray, ed., *Sir William Jones 1746-1794 A Commemoration*. (Oxford, Oxford University Press 1998), p. 102.

²⁰⁶ Strawson, p. 38, quoting P. Springborg ,*The Contractual State: Reflections on Oriental Despotism* in *History of Political Thought VIII* (1987) 395-433, at p. 399 .

nor seek to amend sacred Hindu and Sanscrit texts. Jones's Sirajiyah was overtaken by later works but it is of importance as it set a trend and created a demand for more detailed, more authoritative works throughout the nineteenth century, changing the law fundamentally. It is striking that Jones's work, with merely two other translations, caused such a lasting transformative effect on the Shari'a and created the Anglo-Mohammadan laws of India.

Part 5 Jones's contribution to Oriental Studies.

The dominant influence in modern understanding of Oriental Studies emanates from Edward Said's work *Orientalism*.²⁰⁷ It is against his analysis and conclusions in that work, and the work of later scholars, that what is considered today as Orientalism is generally assessed. Jones was writing two centuries before the publication of that work; up to the time when Jones began to interest himself in Arabian and Persian cultures, there was little by way of 'Orientalism' that could be recognised in its modern usage. Arberry points out that in about 1683 the term connoted membership of the Eastern or Greek Church and that Macaulay described 'Orientalists' as those persons, in India, who advocated education based on Indian learning and literature, whilst 'Anglicists' were those who advocated that education there should be taught through the medium of English.²⁰⁸ The Laudian Chair in Arabic at Oxford had been held by a number of distinguished scholars, including Hyde and Pococke, the latter having donated Arabic manuscripts to the Bodleian. The Qur'an had already been translated by George Sale, an early scholar of Arabian studies.²⁰⁹ However, Jones, in his short life made significant advances in gaining knowledge of Eastern cultures, ranging from the youthful excitement at the discovery of Arabic and Persian verse to the mature and measured Discourses to the Asiatic Society of Bengal.

Jones's place in Orientalism has been much considered in academic writing. For Arberry, it is as an "universal linguist par excellence that William Jones lives in the annals of fame : he was truly the father of British Orientalism."²¹⁰ The most important event of the eighteenth century from the Orientalist standpoint, according to Arberry, was the formation by Jones of the Asiatic Society of Bengal in 1784, "an event of capital importance, for here we find the first beginnings of a scientific movement which was destined to spread to all parts of the world."²¹¹ Cannon, referring to Jones's scholarship and translations, wrote that they "drastically changed

²⁰⁷ Said, Edward W., *Orientalism*, (London, 1978).

²⁰⁸ Arberry, *British Orientalists*, p. 8.

²⁰⁹ Arberry, *British Orientalists* p. 16.

²¹⁰ Arberry, *British Orientalists*, p. 30.

²¹¹ Arberry, *British Orientalists*, p. 30.

the West's view of India" and introduced "the vast oriental knowledge that has been interpolated into the body of total Western thought."²¹²

Most commentators on the influence of Jones draw attention to the Preface to his Grammar of the Persian Language, published in 1771.²¹³ Described as "the most informed and eloquent apologia *pro litteris orientalibus* which had yet been penned, perhaps that has ever been penned,"²¹⁴ showed that Jones had "established himself as the foremost exponent of Oriental studies in England and as a scholar and writer of rare attainments."²¹⁵

Jones opened doors on the Oriental cultures in such a way that he "altered our whole conception of the Eastern world."²¹⁶ The impact of the pioneering work of Jones was not confined to Europe but was an influence that worked to modernise India itself, in contrast to the remainder of the Arab world, which had no champion of his stature.²¹⁷ Trautmann refers to Jones's work as not only revealing the culture of India to the west but actually enabling India to find its place in the world.²¹⁸ Javed Majeed, putting Oriental renaissance in a wider context, wrote, "Jones's work is important, if not central, since it was the arrival of Sanskrit texts in Europe in the eighteenth century and early nineteenth century that had an effect similar to that produced in the fifteenth century by the arrival of Greek manuscripts and Byzantine commentators after the fall of Constantinople."²¹⁹

Adulatory appreciation is not, however, universal. Said's main thesis was that, by revealing how Western writers interpreted the East, they could be shown to present false versions of the cultures they described and that, through their work, they aimed at the domination of those cultures. He wrote, "Taking the late eighteenth century as a very roughly defined starting point, Orientalism can be discussed and analysed as the corporate institution for dealing with the Orient – dealing with it by making

²¹² Cannon, *The Life*, p. xiii.

²¹³ Cannon, *The Collected Work*, Vol. x.

²¹⁴ Arberry, *Asiatic Jones*, p 33

²¹⁵ Arberry, *Asiatic Jones*, p 10

²¹⁶ Hewitt R. M., Harmonious Jones in *Essays and Studies by Members of The English Association* (Oxford, at the Clarendon Press, 1943), Vol. XXVIII, 1942, pp. 42 -59 at p. 43.

²¹⁷ Cannon *The Life*, p. xvi. He quotes with approval the comments of David Kopf in his *British Orientalism and the Bengal Renaissance* (Berkeley and Los Angeles, California University Press, 1969) p. 275.

²¹⁸ Trautmann, p. 101.

²¹⁹ Majeed, p .45.

statements about it, authorising views about it, describing it, teaching it, ruling over it; in short, Orientalism as a Western style for dominating, restructuring and having authority over the Orient.”²²⁰

Describing Jones as a “pioneer in the field”²²¹ Said recognises the quality of works such as his as having “pre-eminence.”²²² As a result of these writings, “Europe came to know the Orient more scientifically, to live with it with greater authority and discipline than ever before.”²²³ Said considered that , until the nineteenth century western Orientalism carried with it a “problematic attitude “ towards Islam, based on viewing it through the lens of the church. The term Orientalism “ was most rigorously understood as applying to the Islamic Orient” leaving the Asiatic East as generally denoting the “distant and exotic.”²²⁴

Said wrote that the scientific studies of Sanskrit, Indian religion and history were developed by Jones “ by way of his prior interest and knowledge of Islam.”²²⁵ However, it is noteworthy that in Jones’s writings, there are hardly any references to the subject of Islam as a religion or a system of philosophy. In keeping with his general thesis, Said regards Jones’s work in portraying the East as reductive : “codifying, tabulating, comparing”²²⁶ and that his activities in India were “ to gather in, to rope off, to domesticate the Orient and thereby turn it into a province of European learning.”²²⁷ Said, however, did acknowledge Jones’s mastery in Arabic, Hebrew and Persian, describing him as an “ indefatigable scholar “. Said recognised that the creation of the Asiatic Society of Bengal was Jones’s main achievement and he concurs with Arberry that Jones’s prowess in the arts and sciences of the country rendered him “ the undisputed founder of Orientalism.”²²⁸

Said’s thesis of the reductive nature of Orientalists, and of the work of Jones, was later echoed by Strawson, who wrote, in the context of legal studies and the more

²²⁰ Said, Edward W. *Orientalism* (London, Penguin Classics 1978) pp. 396 , p. 3 .

²²¹ Said, p. 8.

²²² Said, p. 18.

²²³ Said, p. 22.

²²⁴ Said, p. 74.

²²⁵ Said ,p. 75..

²²⁶ Said, p. 77.

²²⁷ Said, p. 78.

²²⁸ Said, p. 78.

modern understanding of them, “The long history of legal Orientalism has obscured the character of Islamic law for both sides of the former imperial divide.”²²⁹

There cannot be any doubt that, in the history of the revelation of the societies of the Islamic and Indian world, their cultures, religions and laws, Jones stands as a major figure of his time. He was instrumental in the opening to the West the civilisations of the East. However, Jones ‘s lasting contribution to Orientalism, to the study of Bengal and later of many Eastern civilisations, was his initiative in forming the Asiatic Society of Bengal. By encouraging officials working in Bengal to contribute works on eclectic subjects arising from their observations and experiences, the Society was the vehicle that gave lasting value and which, by the quality of the essays, published under its auspices in *Asiatick Researches*, validated the study of Oriental civilisations as a scholarly canon.

²²⁹ Strawson, p. 38.

Part 6. An assessment.

Jones wrote to Earl Spencer , on 17th August , 1787, “It is my ambition to know *India* better than any other European ever knew it.”²³⁰ In the context of interest in the cultures of the East in the eighteenth century, Jones stands as a pioneering figure, bringing new knowledge and exposing the West to the civilisations of the East. Hewitt has shown that there was a widespread feeling that the imitative forms of, and classical allusions to, Greek and Roman works were becoming satiated and there was an appetite for new exciting worlds.²³¹ Jones fed the appetite for material from Persian and Arabic poetry, in so doing becoming the acclaimed gatekeeper of Oriental literature in Britain and Europe . So great was his influence that “ he altered our whole conception of the Eastern world.”²³² Therein lies his reputation. His death from illness contacted at the comparatively early age of forty eight , forestalled what might have been an even greater contribution to the understanding of India and its civilisation.

Different approaches may be taken in evaluating Jones’s contribution. A majority of commentators adopt the tone of his contemporaries, as published in journals of the day,²³³ recognising that a new authority had appeared. This was so because little contemporary material was available. In the West as manuscripts were rare and few scholars wrote or published on the East, the appearance of one who showed a knowledge of Arabic and Persian, providing material in translation, offering poetry in a novel idiom with innovative imagery was certain to be acknowledged as a new force.

He was described variously as a polymath , and the father of Orientalism ,especially after the publication of the “ *Grammar of the Persian Language*” in 1771. Later

²³⁰ Cannon, *The Letters*, p. 751.

²³¹ Hewitt, p. 48.

²³² Hewitt, p. 43.

²³³ Cannon, *The Life*, p. 40. Also Gentleman’s Magazine, (1773-1867) ,Eclectic Review (1805).

writers continued this adulatory vein ; he was described as an ‘excellent Arabic and Persian scholar’ and his influence was noted as, ‘the appearance of a genius and the grouping around him of a school. The name of this genius was Sir William Jones , a man universally recognised as one of the greatest linguists ever born.’²³⁴

As well as the importance of the establishment of the Asiatic Society of Bengal, Arberry writes that his most important discovery was, however, the recognition of the relationship between Sanskrit and other languages, now called Indo-Euro. “But it is as the “universal linguist” par excellence that William Jones lives in the annals of fame: he was truly the father of British Orientalism.”²³⁵

Whilst Jones’s early significant works and actions were acclaimed, his legal translations were of mixed value. The first attempt in 1782 was not a success. The more substantial work *Al Sirájjiyyah* of 1792 was of importance, not necessarily because of its intrinsic jurisprudential value, but by reason of the effect it, and a very few other legal texts, had on the development of law in the territories administered by the EIC and later by the British Empire. This dissertation has explored the impact of that work on the long established and sophisticated Islamic legal system, how it negated important features of that system and changed for all time the nature of law and its administration in India. Jones was possibly unaware of what was to follow; his aim of seeking to provide English judges with material to help them had major consequences for India and its laws.

Jones’s place in Islamic studies has to be considered in the modern and more nuanced approach , revealed by recent commentators, differing from the acclamatory writing associated with celebration of anniversaries. Jones’s bequest to Islamic studies, and indeed to the understanding of the civilisations of India, lie less in his concrete actions but more in the quality of his leadership and foresight in encouraging inquiry into ,and the study of , the world of India and the East. His genuine excitement at discovering new knowledge and his wish to understand and transmit knowledge remained throughout his life, as is shown by his unstinting work with the Asiatic Society of Bengal and as editor of its publications. His contribution lies as an discoverer of the new and as a medium to instil in others an interest in

²³⁴ Arberry, *British Orientalists*. 29.

²³⁵ Arberry, p. 30.

India. The horizons that he discovered were wide. The linguistic connections between families of languages was an insight of revolutionary innovation, to which can be traced the basis of modern linguistic studies.²³⁶

The legacy of Jones is mixed. In the 'softer' areas of literature, philology and learning his contribution may be regarded as an innovator who opened new horizons. In the more 'difficult' areas of law and judicial administration, although he was a figure of significance, he but might not be regarded as sympathetically by reason of the change in direction he imposed on the prevailing legal system. It is arguable that the outcome was overall beneficial for Bengal and India, as it modernised ways of thinking, and provided new opportunities. Whatever was lost from the nature of the prevailing law, was in fact justified in bringing to India itself an awareness of the value of its civilisation and bringing to the world the knowledge of that civilisation.

A re-translation of the text of *Al Shirjiyyah* and a comparison with Jones's translation might provide some insights into the quality of the actual translation, but that approach is unlikely to be of practical use or possibly of only limited interest, taking into consideration the fact that it has been absorbed into the body of Indian law. Of greater interest are the issues surrounding the work, its provenance, and their significance in the context of Islamic law. These areas have been generally neglected in academic writing on Jones and his work, despite its major significance to India and the part Jones took in influencing, perhaps unintentionally, the shape of Indian jurisprudence for a long period after its publication. This dissertation has described the major features of Jones's career and work, with particular reference to his major work of translating *Al Shirjiyyah* and the profound impact of that publication on the law of the Indian sub-continent to the present day.

227. Pagel, Atkinson, Calude, Meade *Ultraconserved words point to deep language ancestry across Eurasia*" Proceedings of the National Academy of Sciences 6th May 2013 PNAS 2013 128726110v-201218726

Glossary of Key Terms and Abbreviations.

| | |
|----------------------|---|
| <i>Alim</i> | A learned man, a jurist. Plural 'Ulema, see below |
| ASB | Asiatic Society of Bengal. |
| Consensus | The agreement of mujtahads. third source of law. g172 |
| EIC | East India Company |
| <i>Fatwa</i> | Legal opinion issued by a mufti (see below), although formally non-binding, Qadis adhered to Fatwas, as they were deemed authoritative statements on particular points of law. |
| <i>Fiqh</i> | Islamic jurisprudence or legal doctrine. |
| <i>Ghazal</i> | Persian love lyric/poem Dalrymple |
| <i>Hadith</i> | Prophetic traditions or reports of what Mohammad had said, done or tacitly approved with regard to a particular matter. The literary expressions and context-specific accounts of the sunna. |
| <i>Ijtihad</i> | legal methods of interpretation and reasoning applying complex methods and principles of interpretation, by which the mujahid derives or rationalises law on the basis of the Qur'an, the sunna and/or consensus; a judges evaluation of customary practices as they bear on a case under consideration. |
| <i>Istihsan</i> | Juristic preference; a method of inference preferred over qiyas and taking as its basis alternative textual evidence on the grounds that the preferred evidence leads to a more reasonable result that does not involve undue hardship. |
| <i>Istislah</i> | Consideration of the public interest. A method of inference that does not resort directly to a revealed text as the foundation of reasoning rather drawing on rational arguments grounded in the five universals of the law – protection of life, mind, religion, private property and family. |
| <i>Jahiliyya</i> | eriod of "ignorance" before the coming of Islam. |
| <i>Mudda'ī</i> | Plaintiff or claimant |
| <i>Madhhab</i> | a legal school (pl. <i>madhāhib</i>). |
| <i>Mufti</i> | A jurisconsult , usually a learned jurist who issued fatwas, a jurist capable of issuing one degree of ijtihad or another. . |
| <i>Mujahid</i> | A highly learned jurist who is capable of ijtihad. Mujahids are of various ranks, the highest of which is reserved for the one who is said to have fashioned the very methods and principles that he and others in his madhhab apply, while those who are loyal to, and capable of applying , these principles belong to lower ranks. |
| <i>Mulavis</i> | Muftis in Bengal |
| <i>Qadi</i> | A magistrate or judge of the Shari'a court who also exercised extra-judicial functions, such as mediation, guardianship over orphans and minors and supervision and auditing of public works, registration of waqfs. When faced with difficult cases, the Qadi petitioned a mufti who provided a fatwas on the basis of which he rendered a decision. |
| <i>Qiyas</i> | The fourth source of Islamic law; a general term referring to various methods of legal reasoning, analogy being the most common; other methods subsumed under qiyas are the syllogistic, relational, a fortiori, e contrario and reducto ad absurdum arguments. |
| <i>Pandits</i> | Indian (Hindu) lawyers |
| <i>Shafi'i</i> | A legal school, a legist loyal to the principles and substantive law of Shafi'ism. |
| <i>Shi'a</i> | The tradition emanating from the adherents of Ali, in contrast to the Sunni tradition. |
| <i>Shari'a</i> | Islamic law based on the Qur'an and Hadith. |
| <i>Stare decisis</i> | A doctrine of English courts to the effect that judges should stand by precedents and established legal principles and apply them to all future cases where the facts are substantially the same |
| <i>Sisaya</i> | The ruler's governance according to the juristic political theory; discretionary legal |

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| <i>shar'iyya</i> | powers of the ruler to enforce Shari'a court judgements and to supplement the religious law with administrative regulations; the ruler's extra-judicial powers to prosecute government officials on charges of misconduct. |
| <i>Sufi</i> | A tradition of mystical interpretation of Islam. |
| <i>Sunna</i> | The second , but most substantial, source of Islamic law ; the exemplary biography of the Prophet. The Teachings of Mohammed . |
| 'Ulema | Referring to the learned class, " the ones possessing knowledge" being a "community of learned men". Essentially the Islamic clergy, being the body of men with sufficient knowledge of the Qur'an , the Sunna and the Shari'a to make decisions on matters of religion and law. (Dalrymple) Includes the legists (mufti, mujahid, qadi or law student); in this technical sense , the word is of later provenance, probably dating to C12th or thereabouts. Sing. Alim, a learned man. |
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| urf | Customary law |

Terms based on "Glossary of key terms" on

"An Introduction to Islamic Law" Wael B. Hallaq (Cambridge, Cambridge University Press) 2009, pp. 171-178; terms used in Wael B. Hallaq "Shari'a Theory Practice Transformations (Cambridge, Cambridge University Press) 2009 (various pages); "The Formation of Islam" Jonathan P. Berkey see above; William Dalrymple.

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