

The Arbiter State: Governance of the Minority at the Micro-Level

By

Shiben Banerji

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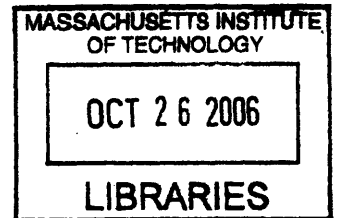
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Author \_\_\_\_\_  
Department of Urban Studies and Planning  
15/05/06

Certified by \_\_\_\_\_  
Professor Balakrishnan Rajagopal  
Department of Urban Studies and Planning  
Thesis Supervisor

Accepted by \_\_\_\_\_  
Professor Langley Keyes  
Chair, MCP Committee  
Department of Urban Studies and Planning

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ABSTRACT

This thesis examines the governance of the minority at the micro-level in late colonial India. While the colonial production of micro-level state authority was inescapably conditioned by numerous political struggles between colonial subjects, the centrality of the minority in this story of state formation and citizen making is missing from most conventional descriptions of colonial governmental rationality. This study argues that the specifically colonial formulation of the minority as a figure to be both protected and inserted on to the path to modern citizenship shaped the regulation of customary modes of charity and inheritance as well as the regulation of local government power itself. Indeed, the dual commitment to protecting and modernizing of the minority constituted the micro-level state as arbiter: absolute in its judgment in cases of conflict between subjects, even though this authority was predicated on the principles of non-interference and deliberation.

Thesis Supervisor: Balakrishnan Rajagopal

Title: Associate Professor of Law and Development



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## Introduction

We have been given a mandate which enjoins us to be sensitive to the concerns of...deprived sections and regions. We have an obligation to ensure that they too benefit from growth in full measure...However, I am convinced that the government, at every level, is today not adequately equipped and attuned to deal with this challenge and meet the aspirations of the people. To be able to do so, we require the reform of government and of public institutions. Much of the focus of economic reforms in the past decade has been on reducing the role of the government in controlling the Private Sector; controls that hampered entrepreneurial dynamism and often bred corruption. This was necessary. Yet, there are many areas, critical areas, that directly affect the quality of life of every citizen, where the government has a role, and is expected by every citizen to have a role.<sup>1</sup>

How do we analyze the politics of governance in the ex-colonial world? Alternatively, what is distinct about the organization of governmental knowledges and technologies in the ex-colonial world? One answer to this question might be that ‘development’, which almost ubiquitously implies the modernization of backward social, economic and political institutions, is a foundational justification for the postcolonial national state. A fashionable mode of evaluating the success of such a state, or its level of social, economic and political progress, is to measure the level of public participation in policy decision-making. Notably, Joseph Stiglitz, an economist of information, sees participation or the means for a large cohort to have input in decisions as a pre-requisite for the transformation of traditional societies.<sup>2</sup> To some extent, his ‘comprehensive’ approach to development draws on the influential work of Amartya Sen, who has argued that the expansion of freedom is, both, the means and ends of development.<sup>3</sup> This is an undoubtedly important moral concept, but it offers no particular insight on how the depiction of development as benign is crucial to shaping the politics of governance in the Third World.

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<sup>1</sup> Manmohan Singh, “Prime Minister’s Address to the Nation,” June 24, 2004 (<http://pmindia.nic.in/speeches.htm>)

<sup>2</sup> See Joseph Stiglitz, “Towards a New Paradigm for Development: Strategies, Policies and Processes,” The 1998 Prebisch Lecture at UNCTAD, and “Participation and Development: Perspectives from the Comprehensive Development Paradigm,” *Review of Development Economics*, 6(2), pp. 163 – 182, 2002.

<sup>3</sup> See Amartya Sen, *Development as Freedom*, (Delhi: Oxford University Press, 1999).

Of course, Stiglitz and Sen paint their respective portraits of development differently. For Stiglitz, development is incomplete unless it encompasses the modernization of social and political institutions. Sen, for his part, sees the recognition of individual agency as essential to addressing deprivation. Yet, it is in this difference of perspective that a difficulty with their general line of reasoning becomes apparent: both scholars worry that narrow definitions of sociological categories (such as community, clan or religion) might impede social, economic and political progress.

It does not seem correct to blame any lack of development on the provincialism of sociological categories. This objection does not emanate from nostalgia for 'primordial' groupings. Rather, it has to do with the ways in which the current rhetoric on participation and rights ignores the long history and sustained legal practice of classifying modes of political and social association as illegitimate and legitimate, backward and modern. This thesis argues that contemporary studies, which prescribe legal arrangements to 'give voice' to the marginalized, risk reproducing foundational assumptions of colonial authority. To be specific, mature colonial thought, in the South Asian context, described the underlying purpose of government as the modernization of economic and political arrangements. Accordingly it was claimed that the colonial state used law as an instrument to create clear property rights, undertake public works projects, and legitimate particular forms of local and national political representation. National independence, then, represented the transfer of power to frame and enforce rules that would make India modern or developed. This is the familiar imperial tale; in it Europeans brought modernity to the colonies. In the nationalist re-formulation of the same story, self-rule gave natives the juridical power to modernize sectors of the colony that had been exploited by alien domination. In both accounts, modernity is universal, homogenous and first discovered in the West. The status of



law in these two narratives is equally dubious; law is presented as a relatively coherent set of regulations used in an instrumentalist fashion by the state to direct individual, corporate and public action. By contrast, this study will show that law, as a diffused body of knowledge, constituted the *form* of the modern state in the colony.

Consider, first, that the authority of the colonial state was not founded in popular sovereignty. In the specific context of South Asia, the British affirmed colonial rule as the government of a society too disparate to self-govern. Law, thus, cast the macro-level state as the principal vehicle of political and economic development. There was yet another dimension to the role of law in shaping politics during late colonialism: it defined the governed. Specifically, law identified the governed, not as equal citizens, but as dissimilar subjects. This practice was grounded in the principle of essential cultural difference between Western societies (modern and homogeneous) and Indian society (ancient and diverse). The idea that Indian society was fundamentally different from 'normal' societies, because it was composed of innumerable artifactual groups, structured political struggles on two inseparable questions: the identity of subjects, and the conditions for producing Indians as modern citizens. For dissimilar subjects, the dream of equal citizenship was potent, but it could also serve to conceal inequalities between and amongst members of different groups. Citizen making in India, though quite possibly in other ex-colonial contexts as well, had to engage with this tension. The circuit from subjecthood to citizenship, thus, can be thought of as a series of contests over definitions of status, identity and modernity. These battles were decentralized, with many of them taking the form of legal disputes and legislative debates between members of the same social group. Law cast the micro-level state as the arbiter that could contain these conflicts, and mediate the (unequal) transformation of

subjects into citizens. Law produced this particular form of authority in the micro-level state by conceptualizing the non-citizen (or not-yet-citizen) as the minority.

This thesis examines the governance of the minority at the micro-level in late colonial India. While the colonial production of micro-level state authority was inescapably conditioned by numerous political struggles, the centrality of the minority in this story of state formation and citizen making is missing from most conventional descriptions of colonial governmental rationality. This study argues that the specifically colonial formulation of the minority as a figure to be protected, and inserted on to the path to modern citizenship shaped the regulation of customary modes of charity and inheritance as well as local government power itself.

The idea of safeguarding minority interests while at the same time integrating minorities into a national mainstream seems very familiar from the vantage of postcolonial democracy. In India's contemporary democratic polity, minority status is often based on vulnerability with respect to the general population. This sort of thinking belongs to the domain of the macro-level state, where the object of government policy (particularly the technologies of security and welfare) is an abstract general public. By contrast, law did not constitute the micro-level state to use policy to serve the general population. The mode of the micro-level state was adjudicatory. For sovereignty to eventually be popular in India, conflict over different conceptions of identity, status, and modernity had to be brought to an end. Law, thus, produced the authority of the micro-level state as absolute, even as it predicated that authority on the principles of non-interference and deliberation.

This study is a modest attempt to track the figure of the minority in two practices: charity and planning. The adjudication of these two practices, during late colonialism in South Asia, can be

thought of as a chiasmatic couple. Charity, codified as welfare enhancing, could not encompass a gift to oneself or one's immediate kin. Planning, popularly assumed to serve the public good, was actually justified as a procedure because it heeded parochial interests. The challenges posed to the governance of charity and planning were extremely dispersed. What follows is a look at, first, the ways in which law constituted and re-asserted the authority of the state in the form of the final arbiter; second, at the ways in which policy, as an arrangement of information about the general population, could intersect and obscure the ideal of equal citizenship.

The question being addressed in this thesis is methodological: how do we analyze the politics of governance in the ex-colonial world? In the autobiography of the postcolonial development state, interventionist policies are adopted to provide public security, and reduce the vulnerability of weaker sections of the general population. Implicitly the state is acting on behalf of the people; the idea of the nation has become the ideology of the macro-level state. However, the state has another career at the micro-level. Here the state is the arbiter in many scattered conflicts over the pre-conditions for, and implications of, acceding to citizenship. Focusing on the colonial production of micro-level knowledges and techniques, this thesis offers a supplement to existing studies on the formation and resilience of the national state.

## Historiography of Colonial Law and Government

Why is it analytically useful or important to write a history of the politics of government at the micro-level? Any reader searching for the sociology of the minority, the micro-level state, or the genealogy of contemporary rhetoric on participation and development is likely to be disappointed by this thesis. What this study draws out, instead, are arguments that describe the minority as a concept, and as the condition of authority at the micro-level. It urges that the politics of governance be analyzed without attributing 'state action' and 'non-state participation' to a particular essence, doctrine, or set of pre-determined beliefs. This thesis also argues for the possibility to think of the Third World as the source of theories of state and citizenship.<sup>4</sup>

The material for this thesis comes mostly from 'official sources'. Judicial opinions, legal digests, government reports, legislative proceedings as well as the correspondence, internal documents and (training) manuals that circulated within organs of the colonial state were investigated without worrying about the intentionality of legal decision-makers. Rather, these texts are used to plot confrontations that underpinned the formation of the micro-level state, and to challenge the ubiquitous idea that the state simply came to possess new instruments of power following some sort of seamless transition from mercantilism to modern welfarism.<sup>5</sup>

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<sup>4</sup> cf Partha Chatterjee's *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (New York: Columbia University Press, 2004) on the two forms of citizenship (formal and real) in the ex-colonial world.

<sup>5</sup> cf Gayatri Chakravorty Spivak, "Deconstructing Historiography," in Ranajit Guha and Gayatri Chakravorty Spivak (eds.) *Selected Subaltern Studies* (New York: Oxford University Press, 1988) on the theory of change offered by the Subaltern Studies collective. Spivak's often misunderstood "Can the Subaltern Speak?" in Carey Nelson and Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture* (Urbana: University of Illinois, 1988) posed subalternity as a limit rather than an ontology. See also Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Durham: Duke University Press, 1999) for a classic exposition of the subaltern studies critique of the hegemonic description of political association and participation in nationalist historiography.

This thesis is informed by the growing literature on the epistemological foundations of colonial authority.<sup>6</sup> It has also benefited from studies on law and governance that have pointed to the judicial enforcement of patriarchal and exploitative forms of control within indigenous society.<sup>7</sup> The subsequent essays of this thesis draw heavily on original and secondary historical research, and to a lesser extent on legal scholarship to address the methodological question posed at the beginning of the introduction.

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<sup>6</sup> For classic examples of such work in the South Asian register see Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham: Duke University Press, 1996), Bernard Cohn, *Colonialism and its Forms of Knowledge* (Princeton: Princeton University Press, 1996) and Nicholas Dirks, "Castes of Mind," *Representations* 37 (Winter 1992).

<sup>7</sup>Zoya Hasan (ed.), *Forging Identities* (New Delhi: Kali For Women, 1994) includes insightful essays on gendered definitions of community, and was particularly instructive on the question of women's rights under personal law. Mahmood Mamdani's compelling analysis of the role of law in producing racial and ethnic identity in the colonized, and in forging new modes of authoritarian control in East and Southern Africa set off this inquiry. See *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996). Similarly formative was Ritu Birla's forthcoming book on the regulation of commercial practices in late colonial India, in which Birla persuasively shows how indigenous merchant groups legitimated and furthered their own exploitative practices by appropriating the ethics of colonial governance of the market. See *Hedging Bets: Law, Market Ethics and the Staging of Capital in Late Colonial India* (Durham: Duke University Press, forthcoming).

## Sovereignty and the Minority

The formation of the arbiter state represents a particular economic and political arrangement as well as a particular relationship between government and the production of knowledge.<sup>8</sup> Understanding the conception of the minority is, therefore, crucial to the explication of power, rights and duties that were contingent on the protection of the minority, or that were deployed to modernize political and economic circumstances of the minority.

Two different conventions for describing the minority are considered here. The first convention can be termed *ethnic*, in that the state governed the minority as an ethnic subject. Colonial thought characterized Indian society as 'different' because it was a bricolage of geographically dispersed and culturally divergent groups. While nationalists accepted the premise of essential cultural difference between the colonizer and the colonized, they rejected the idea that historical and cultural difference precluded the possibility of the colonized enjoying the fruit of material progress and political maturity. This understanding of nationalism explains the creation of a modern national identity in an ex-colonial country that is precisely non-Western, and that yet provides the ideological basis for forming a national state with universalist goals.<sup>9</sup> However, the construction of national identity did not extinguish all other forms of social and political association. Less consistently clear was how equally and simultaneously a person could belong to multiple sociological groups. Even though the British studiously claimed to maintain an official policy of non-interference on all matters concerning indigenous culture and religion, the authority of the colonial state did in fact expand in the late the 19<sup>th</sup> and early 20<sup>th</sup> centuries

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<sup>8</sup> This is an important element of Foucault's thesis on governmental rationality as well as the work inspired by his lectures at the Collège de France. See Graham Burcell, Colin Gordon and Peter Miller (eds.) *The Foucault Effect: Studies in Governmentality* (Chicago: The University of Chicago Press, 1991).

<sup>9</sup> This is a crucial lesson from Partha Chatterjee's *Nationalist Thought and the Colonial World: A Derivative Discourse?* (London: Zed Books, 1986).

through adjudication on indigenous religious establishments. The disputes that prompted state intervention (typically in the form of judicial opinion or legislation) arose between members of a group, over precisely such issues as the identity of the group, and the form of control over group establishments and property. Anglo-Indian law produced ethnic identity in the minority as a measure of the relative merits of competing claims in these legal battles.

The other convention for representing the minority that is examined in this thesis can be termed *procedural*. By this logic the minority was distinctive because it did not share the dominant opinion. According to this convention, the minority had to be embedded within a voting political society in order to mature into full-fledged citizenship (with its connotation of participation in the sovereignty of the state). It is worth pausing to reflect on the appearance of authority in this emergent political society: governmental power was representative, in that it was fashioned in the image of the governed, and yet held the power of persuasion over these same subjects.<sup>10</sup> It would seem preposterous, particularly from the vantage point of development planning—which concerns itself with how to bring modernity to the decolonized world—to suggest that a colonial government could look like the colonized.<sup>11</sup> The point here is that rules, which registered the minority as political voice and economic interest, produced new forms of governmental power at the micro-level.<sup>12</sup> Though this notion of the minority need not have been strictly identitarian, it could accommodate ascriptions of political affiliation and private interest to identity. In fact, the

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<sup>10</sup> For a brilliant reading of Marx's call to track the complicity of representation as artistic trope and representation as political substitution, see Gayatri Chakravorty Spivak's chapter on "History" in *A Critique of Postcolonial Reason* (Cambridge: Harvard University Press, 1999).

<sup>11</sup> Planning literature, narrowly defined, all too often pretends that colonialism is somehow behind us and not relevant for the history of the Third World's present. Alternatively, the tone of the literature swings to the other extreme, (unwittingly) agreeing with the nationalist assertion that a universalist nation-state has to be formed in the ex-colony in order to undo the exploitation of colonialism.

<sup>12</sup> cf Stiglitz's assertion in "Participation and Development" that participation, much like A.O. Hirschman's concept of 'voice', extended beyond input in government decisions, and included influence in decision making in workplace and in capital markets.

operation of legislative bodies in British India seems to follow this template. The Indian Councils Act, 1861 and 1892, and again following the Minto-Morely reforms in 1909, assigned legislative seats to members who could represent the ‘special interests’ of such collectives as ‘Europeans’, ‘cultivators’ and ‘labour’. It was also in the working of legislative procedures on voting and rules governing parliamentary speech proceedings that minority opinion and dissent could be segregated from dominant opinion and government resolution. But was dissent, or, more broadly, the minority seen as an obstacle to government business? Perhaps not. Rather than ignore dissent or pretend it did not exist, the procedural conception of the minority as political voice and economic interest reconstituted the preferences of the minority as rights. Thus, the rights of the minority (again not necessarily conceived in culturalist terms) could be bundled, divided, exchanged or re-instated.

These are clearly not the only conventions for describing the figure of the minority. It is also not the aim of this thesis to suggest that colonialism produced a consistent or coherent model for coding the minority.<sup>13</sup> Rather, its central purpose is to supplement existing descriptions of governmental rationality in the colonial world. It does so, as the following section summarizes, by drawing out the production of law as a site for ethical struggles.

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<sup>13</sup> One of the most important contributions from French post-structuralist theory is that “the networks of power/desire/interest are so heterogeneous that their reduction to a coherent narrative is counter-productive—a persistent critique is needed” (*A Critique of Postcolonial Reason*, p. 249). Similarly, Colin Gordon writes, “Foucault holds that the state has no...inherent propensities; more generally, the state has no essence. The nature of the institution of the state is, Foucault thinks, a function of changes in practices of government, rather than the converse” (*The Foucault Effect*, p. 4).



### Chapter Summary

Chapter one, “Private Charity, Public Good,” examines charitable trust law and the regulation of the *wakf* in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. First, it outlines the juridical production of ethnic identity in colonial subjects, and describes how the application of legal principles from English trust statutes to indigenous religious endowments created new laws on the rights of beneficiaries and the duties of trustees. Second, the chapter highlights how the regulation of indigenous institutions, like the *wakf*, was related to the ideology of the market. Specifically, the judiciary approached disputes over trust property as questions concerning the intention of the trust’s author. The intentionality of charitable giving became so central to jurisprudence because it offered a standard by which a donor’s gift to his beneficiaries could be enforced as if it were a contract. Finally, the chapter shows how the native elite appropriated this underlying principle to create new legislation legitimating functions of the *wakf* that had been invalidated through adjudication in the late 19<sup>th</sup> century.

Chapter two, “Planning as Justice,” turns to the operation of land use regulation and land acquisition law during the first two decades of the 20<sup>th</sup> century. The chapter begins by describing the relationship between private property and sovereignty under the 1894 Land Acquisition Act. The subsequent sections of the chapter analyzes the legislative history of the 1915 Bombay Town Planning Act to reveal the role of public law regulation in determining the best use of land, and in creating new relationships between adjoining landowners. Indeed, the principle justification for the new act, which was the first of its kind in India and had been drafted shortly after a similar bill had been enacted in England, was its ability to ensure the extraction of land for the creation of urban neighborhoods without the pecuniary losses associated with minority opposition—which was far less avoidable under the standard land

acquisition regime. Thus, this chapter argues that planning, as a new practice of government, superseded private law relating to land acquisition.

The concluding chapter of the thesis is a recap of the broad argument that while the colonial production of micro-level state authority was inescapably conditioned by numerous political struggles, the centrality of the minority in this story of state formation and citizen making is omitted from conventional descriptions of colonial governmental rationality. This is restated through a reading of a small fragment of Dr. B. R. Ambedkar's formulation of equal citizenship. Though not an exhaustive treatment of Ambedkar's vision for India's constitutionalist politics, it points to the tension between the grounded idea that the adjudicatory role of the state could remove inequalities that were incompatible with modern citizenship on one hand, and the ideal of citizenship as universal participation in the sovereignty of the state.

## Chapter One

### **Private Charity, Public Good:** The Curious Status of the Mussalman Wakf

The procedures of charitable gifting were an important subject of judicial scrutiny and legislation in South Asia from the 1870s to the 1920s. Charity was closely identified with ‘public welfare’ within Anglo-Indian legal thought, and, consequently, the ‘proper’ objects of charity were almost exclusively limited to the creation of schools, hospitals, colleges and museums. The description of charity as a public, welfare-enhancing endeavor was enforced through a legal distinction between public trusts and private endowments. A private, family operated, endowment was an important register of an indigenous merchant family’s status. Often dedicated to an ancestor, this instrument of social gifting was a symbol of commercial acumen and, therefore, was crucial to maintaining kinship-based credit and trade relationships. Judicial rulings in the 1870s and 1880s, however, portrayed these endowments as parochial rather than charitable.<sup>14</sup>

The new regulatory regime on social gifting rested on the conceptualization of the ‘public’ as a civic sphere that was greater in its aspirations and constitution than any kinship-based group. The construction of religious community did not, however, fit neatly within this schema.<sup>15</sup> Although indigenous gifting was often rather awkwardly defined as ‘religious’, in that it may have supported a place of religious worship or may have been performed within an idiom of

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<sup>14</sup> The second and third chapter in Birla’s *Hedging Bets* provides a lucid elaboration of this point.

<sup>15</sup> A number of recent historiographical studies have examined the politics of colonial and nationalist framings of religious community and national identity. Thomas Metcalfe’s *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1994), especially pp. 132 – 148, provides a broad overview of this literature. Gyanendra Pandey’s *The Construction of Communalism in North India* (New Delhi: Oxford University Press, 1990) investigates the coding of political violence as ‘communalism’, and the establishment of state authority in response to such ‘disturbances’ of public law and order. Partha Chatterjee’s *Nation and its Fragments* (Princeton: Princeton University Press, 1993) examines the re-working of colonial definitions of community and kinship within Hindu nationalist discourse. In a different register, Romila Thapar, looking at ancient South Asian history, critiques colonial and nationalist portraits of pre-colonial societies as composed of unchanging, monolithic and discretely identifiable communities. See Romila Thapar, “Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity” *Interpreting Early India* (New Delhi: Oxford University Press, 1992).

ethical duty, colonial law distinguished a family shrine or endowment from a place of public worship. In fact, the colonial administration applied the new ideal of philanthropy (as welfare enhancing) as the ubiquitous lens through which it regulated the functioning of Hindu temples, *maths*, *dharamshalas* and *pinjrapole*. In other words, the state extended its authority over indigenous institutions by requiring that religious sites were managed as societies and associations. This expansion of colonial sovereignty, primarily through adjudication, led to the framing of rules governing who could legitimately claim an interest in the affairs of a religious endowment as well as the conduct of temple managers and endowment custodians.

This chapter examines the regulation of the Muslim *wakf*, which neither perfectly corresponded with the administration's assumptions on private family endowments nor conformed to its norms on public religious trusts.<sup>16</sup> The term *wakf* literally means to pause or to hold. In commercial terms, a *wakf* refers to property that can no longer be exchanged, bought, sold or inherited because it has been vested in God. This implied that the position of a *wakf* custodian or *mutawalli* was not co-terminus with that of a trustee of a charitable trust or Hindu religious trust—a detail that was not easily reconciled with the colonial administration's coding of the *wakf* as a Muslim endowment. Muslim merchant families often used a *wakf* to sustain the household and commercial expenses, even though the underlying assets had been vested in God, making the *wakf* all the more unrecognizable as a charitable endowment according to the standards enforced through adjudication in the late 19<sup>th</sup> century.

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<sup>16</sup> Gregory Kozlowski's *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1985) faults the British for failing to understand the operations and aims of Muslim endowments in Indian society. His central critique of colonial authority is that the legal definitions of Muslim endowments were not consonant with daily practice. Kozlowski argues that members of the Muslim intellectual and political elite were equally to blame, since they readily adopted the colonial formulation of the private-public distinction. This essay, by contrast, investigates the ways in which the native elite re-cast the private-public distinction through litigation and legislation on the validity and trusteeship of the *wakf*.

This essay is divided into three sections. The first part investigates the juridical production of territorial and ethnic identity in colonial subjects. It argues that the classification of Anglo-Mohammedan law, as a set of age-old codes derived from textual sources, necessarily went hand in hand with the creation of rules on local customs and usage. This implies that, far from extinguishing multiple forms of community, the judiciary actually expanded its authority by fashioning ethnicity as the ubiquitous lens through which it recognized the rights and privileges of the minority.

The second part of the essay extends the analysis of the judiciary's construction of trust beneficiaries from the preceding section. Specifically, it shows how the judiciary's application of English trust law doctrines in disputes involving *wakf* property established a discrete set of legal rights for *wakf* beneficiaries alongside a discrete set of rules governing *mutawalli* conduct. Notably, even when *mutawallis* challenged specific beneficiary rights or rejected particular duties they did so *within* the discursive structures of English trust law.

The last part of the essay is a reading of the Mussalman Wakf Validating Act as an example of native elite's ability to borrow the logic of modern political economy as a discourse of sovereignty. In particular, it points to how the construction of the Act rejected the British characterization of the *wakf* as an instance of Orientalist exceptionalism, and instead turned it into a locus of Muslim economic rationality.

## The Geography of Identity

Within a few years of the passage of the Charitable and Religious Trusts Act in 1920, various British Indian courts were asked to infer who, according to the Act, could seek a judicial remedy in a dispute involving a religious trust. The judiciary, citing legislative intent, declared that only a person who held a clear, substantive and existing interest in the trust could apply to the courts.<sup>17</sup> In this way, only a trust's stated beneficiaries could ever have the standing to ask a court to direct trustees to perform their fiduciary duty. In the case of Hindu temple trusts, the Madras High Court and the Privy Council were clear that a person could not hold a 'remote' or 'contingent' interest. The mere possibility that a Hindu from another place wished to visit a temple outside his place of domicile did not give that person sufficient interest. However, if someone regularly took part in temple ceremonies held within his own locality, he could be deemed a beneficiary of his local temple trust.

Why was the Charitable and Religious Trusts Act used to map the terrain separating local usage from the supra local? The answer can be traced back to the colonial administration's official policy of non-interference in the management of indigenous endowments. According to Act XX of 1863 the colonial administration "divest[ed] itself of the management of Religious Endowments"; the judiciary could, however, appoint a manager to a religious establishment, if a dispute arose between a trustee and a person interested (as a regular worshipper for example) in that specific establishment. In other words, the courts could only intervene to enforce the legal rights of a 'person interested in a religious establishment' once that person had proved the ethnic or territorial foundation of his interest.

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<sup>17</sup> See Ramachandra v. Parameswaran 42 MAD 360; Vaidyanath v. Swaminath AIR 1924 PC 221; Lakpatrai v. Durga Prasad AIR 1928 ALL 758

This legal maneuver enabled the judiciary to regulate institutions it had distanced itself from precisely by structuring its authority in a non-arbitrary manner: a civil suit involving a religious establishment could only be prosecuted once the Civil Court had established the identity and corresponding interest of the litigants. In one such case, which was heard prior to the enactment of the Charitable and Religious Trusts Act and that had the far reaching consequence of supplanting a system of community arbitration with the authority of the Civil Court, the Privy Council sought to define the ‘proper’ identity of the Muslim litigants. In the in the very first paragraph of his judgment Justice Ameer Ali declared that

The Randherias [the plaintiffs], though trying to differentiate themselves from others, form in reality a *section* of the Surati community. They are mostly Voras, and they all profess Sunni doctrines.<sup>18</sup>

Justice Ali’s definition of the Randheria community was as a sub-sect of a geographically, and perhaps historically, bound group (Suratis).<sup>19</sup> He also suggested that ‘most’ Randherias belonged to a single kinship group (Voras), and was confident that they were a Sunni community.

Would it be correct to deduce that Ameer Ali extinguished local, occupational and kinship heterogeneity by insisting that the Randherias were basically Sunnis?<sup>20</sup> While it is true that Justice Ali seemed primarily concerned with which set of religio-legal codes to apply to Randherias living in Bengal, it was only because he recognized the existence of multiple forms of community. The question he was concerned with was if any of the other, that is non-religious,

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<sup>18</sup> Md. Ismail v. Ahmed Moola AIR 1916 PCJ 132 (emphasis added)

<sup>19</sup> Randheria or Randeria refers to people who trace their origins to Rander, a trade center near Surat in Gujarat.

<sup>20</sup> cf Sudipta Kaviraj, “The Imaginary Institutions of India” in Partha Chatterjee and Gyanendra Pandey (eds.) *Subaltern Studies VII* (New Delhi: Oxford University Press, 1987), where Kaviraj argues that while no single community ascription ever exhaustively described a person in the pre-colonial period, the enumeration of definitive communities and representation in the state domain by caste or religion during the colonial period created rigid categories of political discourse and action. See also Chatterjee’s response to Kaviraj in *Nation and its Fragments*, where he asserts that the imaginative possibilities afforded by the different senses of community have not been exhausted by colonialism.

forms of community had any accepted legal implications. In other words, did tracing one's origins to Rander or Surat, or belonging to a Vora community imply following particular legal codes? Ameer Ali's verdict on this point was clear: it did not, and in this way he drew the boundaries between the different ideas of community for the purposes of this one case.

Does this mean that Ameer Ali ignored kinship-based norms on social relations? The evidence suggests otherwise. The case before Ameer Ali and his colleagues in Privy Council, which had been litigated up from the lowest levels of the judiciary, originated as a dispute among Sunnis over the system of management for a particular mosque. Ameer Ali agreed with the lower courts' reasoning that since a Randheria built the mosque and the 'lands [were] sold outright to Randherias, that they thus became the creators of the trust and were at liberty to make any lawful condition they pleased as to the management of the trust'.<sup>21</sup> As far as Ameer Ali was concerned, while the Randherias were "exclusively entitled to the management of the mosque", this was not the question before the courts.<sup>22</sup> According to him the lower courts had erred in considering the issue "as a question involving the determination of *rights* rather than a consideration of the *best method for fully and effectively* carrying out the purpose for which the trust was created."<sup>23</sup> Ameer Ali was absolutely convinced that Randherias (as a sub-section of the Surati, Vora and Sunni communities) were endowed with rights emanating from their status. His contention, however, was that these rights (as an expression of private interest) were not sufficient to guarantee the success of religious trust of 'public' import.

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<sup>21</sup> AIR 1916 PCJ 134

<sup>22</sup> Ibid

<sup>23</sup> Ibid, p.135 (emphasis added)



It is in the interstices of determining the rights of a minority (the lower courts' approach to the case) and enforcing the effective functioning of a public religious trust (the Privy Council's approach) that Ameer Ali inserts a role for the judiciary:

Generally speaking in the case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kazi, *whose place in the British Indian system is taken by the Civil Court*, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or form any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances he has complete discretion...his primary duty is to consider the interests of the *general body of the public* for whose benefit the trust is created.<sup>24</sup>

Ameer Ali charged the judicial arm of the modern state with the dual responsibility of adjudicating the merits of cultural difference *and* guarding the general welfare goals of society. Before the judiciary could ever opine on a matter of charitable law, it would have to determine if the question before the court emanated from a gap within the rules used to define cultural identity, or if the question arose from a dispute concerning fiscal management or fiduciary duty. What stands out from this particular theory of judicial intervention is that it does not make that the judiciary the guardian of minority identity. In other words, the judiciary, at least as Ameer Ali imagined it, would not have to decide on the merits of preserving cultural identity at the expense of economic productivity. Similarly, Ameer Ali did not envision that the judiciary would have to weigh an assertion of minority identity against the resolve of a national identity.<sup>25</sup>

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<sup>24</sup> Ibid

<sup>25</sup> Ameer Ali's formulation on minority rights and public welfare sits apart from the logic of contemporary Hindu chauvinist opposition to Muslim Personal Law. Whereas the Hindu right critiques Muslim Personal Law as the embodiment of Muslim insularity and its consequent threat to national welfare and integrity, Ameer Ali saw no opposition between cultural identity and economic productivity. Paola Bacchetta's study of the figure of the Muslim woman in Hindu nationalist discourse includes a vivid description of how the Rashtriya Swayamsevak Sangh (RSS) characterized Islam as backward following the reinstatement of Muslim Personal Law through the 1986 Muslim Women's (Protection of Rights on Divorce) Bill. The Bill had the effect of invalidating the Supreme Court's verdict in the Shah Bano case, which had previously granted maintenance rights to divorced Muslim women under the uniform criminal code. See "Communal Property/Sexual Property" in *Forging Identities*.

It seems too hasty to suggest that the classification of colonial subjects into religious or communal categories exhausted heterogeneity, or that personal law undermined ethnic and local identities. Rather, the courts are the production site for juridical definitions of local customs and usage. More generally, it is the legal system that creates the nomenclature of the 'sub-group'; only the courts could enforce an ethnic or local 'variation' to a general principle.<sup>26</sup> It would be far too simplistic to dismiss such knowledge-production as 'interested' and 'inauthentic'. In disputes concerning religious trusts, litigants established their *locus standi* by locating their practices, relationships, occupation and place of residence within an identitarian frame. The court, thus, recognized a class of plaintiffs as Sunni, Vora and emigrants from the Surat area. The judiciary was also left to decide the reasonableness of cultural difference, in that a court judged if Sunni doctrines were inapplicable because a person traced his origin to Surat. It is in this way that the legal system crowned itself the final arbiter of when and how a customary practice could modify personal, civil, criminal or public law.

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<sup>26</sup> An example of this is the application of Hindu codes of succession, transmission and inheritance to Muslim commercial groups from Western India. Into the early 20<sup>th</sup> century, courts identified Khojahs, Bohras and Cutchi Memons as Hindu converts, and consequently recognized their right to maintain coparcenary shares in property.

## Trusteeship

At the start of the proceedings in the Privy Council, the Randherias contended that the mosque was built as a Randheria mosque—that is exclusively for the use of the numerically small Randheria community in Bengal. They later acknowledged that the mosque had been “dedicated to religious worship by all Sunni Mohamedans, without restriction as to place of origin.”<sup>27</sup> Had this not been the case, the judiciary would have had less authority to regulate the mosque.<sup>28</sup> However, since the Randherias *had* intended the mosque to be used by all Sunnis, the Privy Council found that its governing body or trust was unambiguously a public trust in the sense conveyed by the Charitable Endowments Act.

Ameer Ali did not explicitly reference the Charitable Endowments Act in his judgment, and indeed it did not apply to the *wakf*. Nonetheless, his reasoning shared the logic of the Act, in that it sought to protect a broad class of beneficiaries—in this case all Sunnis who lived near the mosque and worshipped in it. Ameer Ali’s judgment also conferred the effect of the Charitable Endowments Act, in that it affirmed the judiciary’s right to adjudicate on a trust’s performance—even though the trust in this case was a *wakf* or a religious institution. Thus, having determined that there was no ethnic or territorial basis for excluding other Sunnis from worshipping in the Randheria mosque, the Privy Council decided that the mosque’s management had to be held to a standard akin to fiduciary duty from civil law.

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<sup>27</sup> AIR 1916 PCJ 132

<sup>28</sup> The official policy of non-interference in religious endowments, enshrined in Act XX of 1863, limited the colonial government’s ability to direct the conduct of trustees and managers of religious endowments. In his judgment, Justice Ali acknowledged that had it been shown that the mosque in question were for the sole and exclusive use of the Randheria community, the courts (as a secular, British Indian Kazi) would have had limited power to regulate the operation of the mosque.

On the basis of this newly crafted role for the judiciary, an alarmed Ameer Ali noted that no specifications existed on how trustees were appointed or retired. The Indian Trusts Act of 1882 was the only statute at the time of the Privy Council hearing that included detailed provisions for the appointment of new trustees. It required that new trustees (on the death of the original trustees) were appointed in keeping with the essential wishes of the trust's author. Similarly, the act prohibited a trustee from delegating his office unless permitted by the original authorizing instrument or trust deed. Though the Indian Trusts Act, like the Charitable Endowments Act, could not be applied to a *wakf*, its emphasis on preserving the authorial intent and basic structure of a trust through the succession of trustees is distinctively echoed in Ameer Ali's judgment in the Randheria case. Specifically, Ameer Ali suggested that worshipers, the majority of whom would probably belong to the Randheria community, would select trustees in succession to manage the mosque in keeping with the original tenets of the enterprise. Just as the Randherias had acquired exhaustive and exclusive management of the mosque through general rather than particular legal principles (clear title, possession, and an investment of labor), their rights in the mosque land and monopoly over its management were contingent on a secular legal principal (fiduciary duty).

Ameer Ali's judgment in the Randheria case was by no means a hideous exception. Indeed, courts throughout the 1920s and '30s exercised control over religious trusts by limiting their activities and procedures to the objects and norms specified in the original trust deed. This maneuver hinged on the recognition of custodians of indigenous endowments as trustees of religious trusts. While acknowledging that the position of a trustee had no precedent in either Hindu or Islamic law, legal scholarship in the early twentieth century regarded the reincarnation

of the temple manager or *wakf mutawalli* as essential to fulfilling the tripartite contract between donor, trustee and beneficiary.<sup>29</sup>

One of the most striking challenges posed to this system or trust paradigm came in the form of a dispute concerning the status and powers of the Mullaji Saheb or *Dai-ul-multaq* within the Dawoodi Bohra community.<sup>30</sup> As with the Randheria case, the court did not outright reject the possibility that the Dawoodi Bohra community had its own religio-legal codes. Instead the court weighed the Mullaji Saheb's evidence that he was the master or *malek* of the Dawoodi Bohra community against scriptural sources. While the court was ready to admit that as the spiritual leader of a Shia sub-sect the Mullaji Saheb could be considered a saint, it was unable to find any textual verification for his claim of 'Mastership'. In the eyes of the court, therefore, the Mullaji Saheb and his agents were responsible for the functioning of a *wakf* intended to benefit members of the Dawoodi Bohra community.

The Mullaji Saheb had maintained, however, that as the *Dai-ul-multaq* his position was entirely incompatible with the station of a trustee. As the representative of God on earth, he was infallible and immaculate, and therefore could not be held accountable for the *wakf* in the sense required of a trustee under the 1882 Indian Trusts Act and the 1920 Charitable and Religious Trusts Act. The Mullaji Saheb had also argued that the suit property constituted *daiwat* or the "spiritual kingdom of the Dawoodi Bohras and their general affairs."<sup>31</sup> Finally, he claimed that he was "master of the mind, body and soul of each of his followers" and therefore was "entitled

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<sup>29</sup> In a section called 'From Endowment to Trust' in *Hedging Bets*, Birla describes the invention of donor intention as a principal way in which the *mahant* and *mutawalli* were affirmed as effective trustees. Abinashchandra Ghosh's *The Law of Endowments* (2<sup>nd</sup> ed. Calcutta: Eastern Law House, 1938) is a representative example of the legal knowledge production that Birla critiques.

<sup>30</sup> Attorney General of Bombay v. Yusuf Ali Ebrahim, AIR 1921 BOM 338

<sup>31</sup> Ibid, p. 340

to take any property, from his followers, whether trust of private property.”<sup>32</sup> In sum, the Mullaji Saheb refused to accept that a permanent, irrevocable trust, as had been constructed from Elizabethan statute and embodied in the 19<sup>th</sup> century Anglo-Indian jurisprudence, had any precedent or validity in the Dawoodi Bohra community. “To hold, therefore, that [the Mullaji Saheb was] a trustee would be to *defeat the intentions* of the donors.”<sup>33</sup>

The Bombay High Court, thoroughly unconvinced by the Mullaji Saheb’s or argument, declared, “the defendants cannot produce a single instance of these extreme claims having been exercised by any Mullaji Saheb prior to the present suit.”<sup>34</sup> What the High Court did not recognize, in the midst of its search for precedent, was the Mullaji Saheb’s novel re-construction of the trust paradigm. The Mullaji Saheb rejected the applicability of Anglo-Indian trust law to the suit property using the very logic of donor intentionality. According to the Mullaji Saheb, members of the Dawoodi Bohra community had transmitted their property to him as their *malek* or *dhani*, and not as a trustee. There was nothing unnatural or unprecedented with this arrangement since “Allah has bought of the believers their persons, and their property for this, that they shall have the garden.”<sup>35</sup>

In an affirmation of colonial sovereignty, Justice Marten of the Bombay High Court constructed a genealogy of the Mullaji Saheb’s ‘extreme claims’ before outlining the public policy implications of treating Dawoodi Bohras differently:

Possibly these claims owe their origins to legends of the day when the Dais as Sultans of Yemen had sovereign, independent rights...A Dawoodi is entitled to liberty just as much as any other Shiah or Sunni is in this country...To hold that this important branch of the Shiah sect can never be benefited as a whole by what in other communities would be a

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<sup>32</sup> Ibid

<sup>33</sup> Ibid, p. 344 (emphasis added)

<sup>34</sup> Ibid, p. 345

<sup>35</sup> Ibid

valid charitable trust for the community would, in my opinion, be contrary to public policy. The Mullaji Saheb has not and never has had any Sovereign rights in India...The theory of the Mullaji Saheb's universal ownership, therefore, seems to me to be unfounded in fact and bad in law.<sup>36</sup>

In other words, the Bombay High Court sought to protect Dawoodi Bohras as minority subjects under British colonial rule. To treat them differently from other Muslims (who the British administration also designated as minorities in India) would have meant subjecting Dawoodi Bohras to the laws of an illusory sovereign. But the High Court's verdict only raises the question: did the Mullaji Saheb assert his own sovereignty? In fact, his claim of 'Mastership' was not rooted in territorial authority. Similarly, the Mullaji Saheb never even specifically alleged universal ownership; instead, and in a manner that was actually consistent with the legal treatment of *wakf* property, he maintained that the faithful should vest all their property in God. Finally, the Mullaji Saheb neither rejected Anglo-Indian juridical power over the Dawoodi Bohra community *per se*, nor did he reject its logic. Rather, he sought to exempt the community from *wakf* and charitable trust law precisely by falling back on the primacy and specificity of intention, which was itself a relatively recent product of Anglo-Indian legal scholarship on charities. Thus, according to the Mullaji Saheb, Dawoodi Bohras, as rational economic subjects, *intended* to convey their property to their *malek* rather than create a *wakf*.

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<sup>36</sup> Ibid, pp. 345 - 6

## A Rational Economic Subject

The Mullaji Saheb's argument raises another broad question: Why would it be considered economically rational to vest property in God? After all to do that would preclude the possibility of alienating the property in the future. Would this not, therefore, constrain the land market and create a situation equivalent to 'hoarding'? These questions were potent at the cusp of the 20<sup>th</sup> century. Particularly notorious was the *Rasamaya Dhur Chowdhuri v. Abul Fatah Mahomed Ishak* case, which was heard by various courts between 1889 and 1894. The case concerned land that had been settled as *wakf* properties in 1868 by Abul Fatah's father and uncle, but was transferred twenty years later to Rasamaya Dhur Chowdhuri. The *wakfnamah* or deed from 1868 permitted the Abul Fatah's father and uncle, as the *mutawallis*, to use the *wakf* properties as security to purchase other property, or exchange land with the objective of increasing the value and size of the *wakf holdings* "in order to maintain the name and prestige of the family."<sup>37</sup> By 1881, however, the Abul Fatah's father and brother had revoked the *wakf* and partitioned their property, by declaring that the original *wakf* had not been created "according to the provisions of Mohamedan Law."<sup>38</sup> Abul Fatah, acting his on behalf and for his minor brothers, subsequently instituted proceedings to prevent his heavily indebted father from transferring hitherto *wakf* property to Rasamaya Dhur Chowdhuri.

In 1889, the subordinate judge of Sylhet held that the *wakfnamah* was valid since the *wakf* supported a *madrassa* and the original *mutawallis* had described themselves as such in various documents relating to the management of the trust. The lower court also maintained that the transfer of property to Rasamaya Dhur Chowdhuri was not legal since a *wakf* was irrevocable under Islamic law. In an appeal from the lower court decree, counsel on behalf of Rasamaya

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<sup>37</sup> Indian Decisions, p. 268

<sup>38</sup> Ibid, p. 269



Dhur Chowdhuri (appellant – transferee) raised a number of questions concerning public welfare in a private law case that ostensibly concerned the legality of alienating or transferring land held in trust:

The deed is bad on the face of it. The object of the *wakf* is uncertain; the properties are not specified, so that the public might not be able to obtain any information as to what properties are the subject of the *wakf*. The *Mutawallis* are left absolutely unfettered to spend whatever they like on the beneficiaries...settlements of this kind are entirely opposed to *public policy*.<sup>39</sup>

The justices of the Calcutta High Court were clearly moved by the appellant's argument that an uncertain and vague *wakf* with little performance of charity for strangers posed a threat to the civics of the public economy. Reversing the subordinate judge's decree, the High Court declared, "it is quite clear that the purposes for which the *wakf* was made, so to speak, [were] secular rather than religious."<sup>40</sup> Drawing on the appellant's criticism that market agents could not easily obtain reliable information from the *mutawallis* on their conduct or on which properties were held through the *wakf*, the High Court noted,

it is certain that they [the *mutawallis*] had not in reality intended to give up their proprietary rights. And before very long they abandoned even the semblance of mere trusteeship, under the cover of a pretended dedication to Almighty God.<sup>41</sup>

The High Court judgment had a profound effect: it stipulated that for a *wakf* to be valid under Anglo-Mohamedan law, the trust's author or *wakif* had to clearly dedicate property in favor of a religious or charitable purpose. This dedication could not be vague or contingent upon the extinction of the *wakif's* family, though the Court accepted that a *wakif's* family could benefit from the dedicated property as long as this application of the *wakf* was temporary.

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<sup>39</sup> Ibid, p. 270 (emphasis added)

<sup>40</sup> Ibid, p. 274

<sup>41</sup> Ibid, p. 276

Abul Fatah's appeal from the Calcutta High Court judgment was followed by an unsuccessful appeal to the Privy Council. If anything the Privy Council added a powerful coda to the chorus of public policy concerns first raised in the Calcutta High Court. Dismissing the appeal, the Privy Council suggested that Abul Fatah's father and uncle had created the *wakf* as a device to circumvent the normal procedures of family settlement and inheritance.<sup>42</sup> Describing this particular *wakf* as an illusory gift to the poor (since it was remote, uncertain and small), the Privy Council stated, "that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family."<sup>43</sup> In other words, the Calcutta High Court and the Privy Council saw the religious and charitable nature of this particular *wakf* as a dubious shield from the rule against perpetuities. Sifting through different, and in some cases starkly different, legal opinions on how to constitute a valid *wakf* under Islamic law, the Privy Council struck down the validity of the *wakf* created by Abul Fatah's father and uncle because it did not provide any substantial measure of charity or relief to the poor in Sylhet. While the Privy Council refused to resolve gaps in rules on how to form a valid *wakf*, it clearly did not want the judiciary to sanction a perpetual family settlement under the guise of charity. After all public welfare was neither enhanced by 'interference' in native religious affairs nor was it enhanced by circumventing standardized procedures on gifting and inheritance.

The Privy Council's decision electrified public opinion. The colonial administration was widely criticized in newspaper articles and editorials for restraining a Muslim's right to dispose of his property in a manner of his choosing. The Indian National Congress discussed the case at its 1901 session, and passed a resolution asking the government to appoint more native judges to the

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<sup>42</sup> Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, 22 Indian Appeals 76

<sup>43</sup> Ibid

higher courts.<sup>44</sup> However, it was not till 1910 that *wakf* law was raised as an issue of legislative debate in the Council of the Governor General of India. In his first question as a member of the Council, M.A. Jinnah asked if the government was aware of the

strong feeling prevailing among Muhammadans against the present state of the *wakf* law as espoused by recent decisions in the Privy Council affecting in particular the system of 'wakf ala'l aulad'?<sup>45</sup>

Sir Harvey Adamson, replying on behalf of the government, assured Mr. Jinnah that the administration was

ready at any time to accord [its] fullest consideration to any specific proposals for legislation directed to the object of securing family settlements of a limited nature, provided that such proposals are generally approved by the Muhammedan community.<sup>46</sup>

Indeed, the debate that followed inside the legislative council as well as outside it was framed in terms of limiting perpetual family settlements and gaining majority consent to use legislation to alter the course of judicial rulings on what constituted a valid *wakf*. This is evident from Jinnah's remarks when introducing the Mussalman Wakf Validating Bill in 1911:

[Muslims] cannot under law of gift create different estates—such as life estates, remainder, vested remainder, and continued remainder. He cannot therefore make any provision of any future character for his family or his children; he has got to give away the property straight off... *Wakf* as I understand it, is analogous—somewhat analogous—to the law of trusts in the English Law, and that again is divided into two parts: it may be private trusts with ultimate reversion to charity, or it may be charitable trusts pure and simple.<sup>47</sup>

Here is the reversal of the theme that pervaded the judgments delivered by the Calcutta High Court and the Privy Council in the Abul Fatah case. Without impugning the Privy Council, Jinnah removed the question of the gift altogether from the operation of the *wakf*. Whereas the Privy Council had dismissed the validity of the *wakf* created by Abul Fatah's father and uncle

<sup>44</sup> S. Khalid Rashid, *Wakf Administration in India* (New Delhi: Vikas, 1978).

<sup>45</sup> *Report of the Proceeding of the Council of the Governor General of India* (hereafter CGGI) Vol. XLVIII, p. 185

<sup>46</sup> *Ibid.*

<sup>47</sup> CGGI Vo. XLIX, p. 480 (emphasis added)

because it made no substantial gift to a stranger, Jinnah equated the gift in Islamic law with conveyance in English law. His ‘somewhat’ analogy between the Muslim *wakf* and the English trust served as the primary reasoning for introducing legislation: the principle of substantial dedication to charity, as established by the Privy Council in the Abul Fatah case, “introduced the greatest uncertainty in our law” and consequently gave the judiciary far too much discretion.<sup>48</sup>

Thus, Jinnah’s bill was

not intended in any way to lay down any new law or new principle. [It] only intended to reproduce the Mussalman law, which [had] been disturbed by the decisions of the Privy Council. It [was] not intended to define the general law of *wakf* which must be governed by Mussalman Law.<sup>49</sup>

Jinnah did not restrict *wakf* adjudication to ‘a’ particular doctrinal text, preferring instead that disputes were resolved with reference to usage and customary practice.<sup>50</sup> Opposition to Jinnah’s Bill did not, however, emanate from concerns that local customs were irreconcilable from ‘universal’ Islamic tenets. What drew fire, instead, was the requirement that a valid *wakf* had to be registered in a district administration office. Jinnah himself presented the relevant sections of the original bill entirely benign terms:

There should be a writing, and that writing should be signed and attested by two or more witnesses and registered. [This] is only a matter of detail and not a matter of principle, [and] is simply to secure the authenticity of a document...these provisions of registration are intended to prevent fraud upon creditors, because that was one of the points which

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<sup>48</sup> Ibid, p. 481

<sup>49</sup> Ibid, p. 483

<sup>50</sup> Shortly before being appointed to the Governor General’s legislative council as a Muslim member from the Bombay Presidency, Jinnah had unsuccessfully argued that Ismaili Khojahs customarily settled their property through a *wakf* favoring all their children. Justice Beaman of the Bombay High Court expressed “doubt whether on a point of law so deeply rooted in the social and religious sentiments of the people as a *whole*, the custom of a small community would be allowed to over-ride their *ancient and universal law*” (Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy ILR 36 BOM 214; emphasis added). The court, thus, ruled that since the *wakf* was only meant to benefit the heirs of Jairajbhai Peerbhai, it contravened Islamic Law, which prohibited any Muslim from disposing more than one third of his property at will. Once again the High Court’s logic was circuitous, and its application of different legal codes was selective. In order to describe the *wakf* as a form of testamentary disposition, the court drew from the English distinction between a public trust and a private trust. In order to invalidate the *wakf*, the court drew on an Islamic doctrine on the limited testamentary power of Muslims.

was emphasized not only by the decisions of the High Courts in India but by the Privy Council also.<sup>51</sup>

This was not the first attempt to codify indigenous practice as a legitimate activity, rather than a threat to the general, public interest. In “*Ek Tabdir: Mussalmanon Ke Khandanon Ko Tabahi Aur Barbadi Se Bachane Ki*,” Sir Sayyid Ahmed Khan advised Muslims to construct a reliable *wakfnamah* as a way of ensuring the financial security of one’s descendants.<sup>52</sup> What makes Jinnah’s appeal distinct is his assertion that the registration of an unambiguous legal document would ‘properly’ establish donor-intent thus indemnifying the *wakf* from judicial reproach. It was therefore to the benefit of Muslims to adopt modern juridical procedures.<sup>53, 54</sup>

Jinnah defended the governance of an indigenous practice in utilitarian terms: government enforced accountability benefited Muslims. But was this the dominant ethic in legal disputes concerning the status and procedures of the *wakf*? The Attorney General of Bombay initiated proceedings against the Mullaji Saheb in 1917 following a dispute within the Dawoodi Bohra community concerning Mullaji Saheb’s possession and use of certain *wakf* assets. The case turned on the court’s interpretation of the powers the Mullaji Saheb could permissibly have over

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<sup>51</sup> CGGI Vo. XLIX, p. 483

<sup>52</sup> Cited in *Muslim Endowments*.

<sup>53</sup> Ultimately, the provisions mandating compulsory registration were dropped from the 1913 Mussalman Wakf Validating Act. However, new forms economic, administrative and juridical accountability were enforced on *wakf mutawallis* in subsequent legislation. For example, the 1923 Mussalman Wakf Validating Act was passed by the Governor General’s Legislative Council to ensure the “better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties.” Based on section 6 of this same 1923 Act, additional rules on accountability *wakf* were devised at the provincial level of government in the 1930s.

<sup>54</sup> New regulations governing *madrassas* in Pakistan provide an interesting contemporary counterpoint to Jinnah’s idea that Muslims benefited by registering endowments with the State. Each provincial legislature in Pakistan has created provisions requiring every *madrassa* to register with a provincial auqaf department, while the federal administration issued an ordinance to the same effect for *madrassas* located within the Federal Capital Territory of Islamabad. Every seminary will now submit an annual report of its activities, performance as well maintain annual accounts to be audited by a certified audit agency. The legal provisions have been enacted amidst concerns about the content of lessons imparted in Islamic seminaries, though not without the State promising that the newly constituted Inter-Madressah Board, “would ensure [the] introduction of modern education and obtaining of financial assistance from the federal government to run Madressahs on modern and scientific lines” (“Madressah incentives scheme to be expanded: Curricula reforms to continue”, *Dawn*, 27 July, 2004 Internet Edition).

Dawoodi Bohras. Self-identified liberals within the Dawoodi Bohra community challenged the interpretative, spiritual and temporal authority of the Mullaji Saheb, and placed their objections before the Government of Bombay in the form of a complaint on the Mullaji Saheb's use of *gulla* funds (coded as offertory box) and *wakf* properties. Thus, liberals produced law, which coded the *wakf* as welfare-enhancing as the locus for contesting the 'Mastership' of the Mullaji Saheb.<sup>55</sup> Like all liberal Muslims, the Anglo-Indian judiciary rubbished the Mullaji Saheb's claim of Mastership as unfounded in scripture. Crucially, the Bombay High Court refused to accept that the Mullaji Saheb could enjoy power equivalent to sovereignty over Dawoodi Bohras as long as they were colonial subjects. Casting its own institutional role as adjudicatory, the court 'resolved' conflict within the Dawoodi Bohra community on the principle of protecting the minority from an 'illusory sovereign' to affirm the legitimacy of colonial governance.

The Privy Council plotted a similar trope in its opinion on the management of the Randheria mosque, with the result of extending the jurisdiction of civil courts in British India. In this dispute amongst Sunnis, the highest court would have had the right to exclude all other Sunnis from having control over the mosque if their explicit intention at the time of creating the mosque was to create an establishment that only served the Randheria minority in Bengal. Since this had not been the case, the court argued that the disputed establishment should be treated as a public mosque to be managed by the standards of a public charitable trust under Anglo-Indian law. The court's reasoning was circuitous: it produced ethnic identity to mark the distance between the

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<sup>55</sup> The formula continues to have currency within the Dawoodi Bohra reform movement. Reformers have spoken in favor of government regulation of Bohra *wakf* property and obligatory taxes as a way of curbing the current Dai-ul-multaq's power. Interestingly, the Attorney General's case from 1918 is frequently cited in reformist arguments as an example of appropriate government action to protect the community from the coercive power of the current Mullaji Saheb or Dai-ul-multaq. See "Resolutions," *All World Dawoodi Bohra Conference*, Bhopal 14-16 February 2002, ([http://www.dawoodi-bohras.com/events/conf02\\_resolutions.htm](http://www.dawoodi-bohras.com/events/conf02_resolutions.htm)); Asghar Ali Engineer, "The Issues in the Bohra Reform Movement," ([http://www.dawoodi-bohras.com/issues/boh\\_reform.htm](http://www.dawoodi-bohras.com/issues/boh_reform.htm)); "Misaq or the Oath of Allegiance," in *Nathwani Commission Report*, (<http://www.dawoodi-bohras.com/issues/misaq.htm>); Saifuddin Insaf, "In defense of Asghar Ali Engineer," *The Milli Gazette*, Vol: 6 No: 05, (1-15 March 2005).

'regular' Sunni and the Randheria 'variety'. But, it also posed the conflict as one over fiduciary duty rather than over identity. The Peerbhai case (discussed in note 50) was a dispute between siblings, in which Cassamally Jairajbhai Peerbhai sued to have his late father's *wakfnamah* invalidated in an attempt to secure a greater share in family's holdings. Cassamally argued that the *wakfnamah* used to settle his father's estate contravened Islamic principles. His siblings defended the sanctity of the *wakfnamah* by arguing that it was customary for Khojah's to create equal shares in a family settlement. For its part, the Bombay High Court ruled that the *wakf* had been used as an instrument of testamentary disposition, but did not accept that a Khojah custom could override Islamic law.

On the face of it these three cases were property disputes involving members of very small merchant communities. From the perspective of India's neo-liberal present, the litigants' arguments in these cases might only stand for unsurprising instances of opportunism. But this perspective would ignore the extent to which these court cases were battles over the definition of Islam, and over who had the authority to interpret Islamic law. Did identifying as Muslim mean a commitment to a core set of beliefs? Neither the Mullaji Saheb nor Sakinabai (Peerbhai's only daughter who was represented by Jinnah) seemed to think so. They maintained that customary practice produced identity. It is this sort of ethical gesture against hegemonic descriptions of Islam that shaped governance at the micro-level.

For the most part, the colonial judiciary did not accept these norms as a form of justice itself. Cases came up before the courts because litigants sought justice; litigants were not expected to offer their own universal history of justice. The arbiter state asserted its monopoly over the supply of 'equal justice' by not pre-judging litigants' claims (about identity, custom, tradition).

Rather, it approached each dispute individually, producing ethnic identity and territorial origins in subjects as a way of situating claims with respect to each other. Such relativism was justified as the only means of assuring the minority a fair hearing—in a context where all colonial subjects could be produced as ethnic minorities. Relativism also created the way for a dominant ethic of judgment to emerge. Thus, the minority should be tried according to its customary beliefs and doctrines, but the minority could not challenge the ethic or discourse that subjected it to such authority. There *is* native agency in governance, but the rules which produce that possibility are best kept tucked away.



## Chapter Two

**Planning As Justice: Land Acquisition Under India's First Town Planning Act**

Though it would not be correct to describe the [Land Acquisition] Act as confiscatory, still it undoubtedly causes hardship to individuals because it restricts them to the market value of what is being taken from them. Although all pecuniary losses even the cost of moving and the loss on earnings resulting from interference with the good-will business and the like, are taken into account and paid for, there are many sentimental losses which cannot be paid for, because they have no market value.<sup>56</sup>

There is an aspect to the figure of the minority that represents a problem. That problem can be called opposition. As suggested in the introduction, a minority can be recognized (as an individual or as a class of individuals) because of a dissenting opinion. As the preceding passage written by F. G. Hartnell Anderson—a former Settlement Commissioner and Director of Land Records—indicates, the business of government is to ensure that government is not severely obstructed. But the passage also notes that government is not insensitive to the effects of the cause of its own actions. Specifically, land acquisition by the state is termed as an ‘interference’ or the disruption of a natural course. This is another way of ‘knowing’ the minority. Though it is necessary for the minority to be integrated into society at large (the business of government), the government does bemoan the loss of the minority.

Anderson's manual also warned revenue officials that ‘sentimental losses’ cannot be alleviated by financial compensation since there is no market value for sentiment under the 1894 Land Acquisition Act. The only method for overcoming sentimental feeling or opinion was rights-based, and this technique was not founded under India's land acquisition law. By contrast India's town planning law sanctioned state-led ‘interference’ with the ‘natural’ or pre-existing use of land provided various interests in the land were recognized as rights. This suggests that

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<sup>56</sup> F. G. Hartnell Anderson, *Manual of Land Acquisition for Presidency of Bombay* (Bombay: Central Government Press, 1918), p. 3 (emphasis added)

land need not be the only ‘thing’ being altered from a ‘natural’ state. Natural interests (like the protection of property one is attached to) were also being re-constituted into rights.<sup>57</sup> Moreover, sovereignty in the colonial state, as a form of state property ownership and authority over the disposition of private property, relied on the codification of reluctant sentiment or disagreement as the rights of the minority.

This essay is on the founding of planning as a practice of government, and in particular as a discipline for altering social arrangements. Although the idea of planning as a means of achieving social and economic inclusion is ubiquitous in the United States now, native legislators and British officials fashioned *town* planning, in the Indian context, as an important instrument of politics at the turn of the 20<sup>th</sup> century. They would never have admitted as much though. Indeed, the neat self-image of town planning was of an exercise in regulating urban growth. Thus, decisions on where dense growth was permissible and who was allowed to live next to whom were presented as technical decisions—choices that could be made without the influence of sentiment.<sup>58</sup>

This essay argues that town planning law constituted the colonial state as an authority that would promote the universal goal of sanitary urban living by instituting the power to regulate land use,

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<sup>57</sup> cf Gayatri Chakravorty Spivak, writing on nature and artifice in Mahasweta Devi’s “Choli ke Piche: Behind the Bodice”, described the “vague split” in the word ‘nature’ as “characteristic behavior on the one hand, and that part of the animate universe which is taken to be without reasonable conscious, on the other. A contrast derived from this split is used by Marx to explain ‘value:’ a contrast between ‘raw’ (material=nature) and the cooked (fabricated=commodity, the German *Fabrik* being, also, factor)” (“Introduction: Breast Stories,” *Breast Stories* (tr.) Gayatri Chakravorty Spivak, Calcutta: Seagull Books, 1998, pp. xi – xii).

<sup>58</sup> cf Nehru’s description of how “the spirit of cooperation of the members of the [National] Planning Committee was peculiarly soothing and gratifying, for I found it a pleasant contrast to the squabbles and conflicts of politics. We knew our difference and yet we tired and often succeeded, *after discussing every point of view, in arriving at an integrated conclusion* which was accepted by all of us, or most of us” (*The Discovery of India*, New Delhi: Oxford University Press, 1995, pp. 399 – 400; emphasis added). Drawing on the history and politics of the Committee, Partha Chatterjee has argued that by the 1940s national planning had emerged as a “modality of power that could operate both inside and outside the political structure constructed by the new postcolonial state” (*The Nation and its Fragments*, p. 202). Indeed, this essay presents *town* planning as an earlier exercise in the use of institutions of representation to integrate differing points of view into a synthetic conclusion.

construction and density at the local government level. However, the possibility of the state exercising this function rested on the way in which town planning law allowed the state to moderate minority opposition to planning schemes. This under-examined role of law in urban development is quite different from the instrumentalist conception of law that most planners operate with today. The notion of an arbiter state with its preoccupation with construing the minority as an object of government is detectable within the construction of town planning law. It is particularly perceptible in the law's focus on integrating minority dissent into synthetic and progressive town planning schemes.

This chapter is divided into three sections, the first of which investigates the concept of value and the concept of optimal land use as theorized by various courts in the early 20<sup>th</sup> century. The second and third sections of the essay examine the legislative history of the 1915 Bombay Town Planning Act, and in particular its enforcement of new legal doctrines governing the relationship between private property and sovereignty. Of particular interest in the second part of the chapter is the promised use of the Bombay Town Planning Act to create new relations among members of the propertied class. The concluding section of the chapter examines the relationship between the conception of the micro-level state as arbiter, and the conception of the macro-level state as vehicle for development.

## The Public Purpose of Economic Development

Anderson's manual for revenue officials contained the following advice on the correct procedure for compulsory takings: the state should not acquire land through private contract because

- (1) Sons have repudiated alienations by their father on the ground that they were a joint family and the father individually had not the power of alienation.
- (2) The person who accepts the price is found not to be the real owner
- (3) Suits have been brought to set aside the sale on the ground that undue official pressure was applied to the parties.<sup>59</sup>

In the world according to Anderson, the customary unit of Indian economic society was the Hindu joint family, a lack of transparency and accountability voided agreements, and colonial authority was not universally seen as legitimate. The first two observations could easily slide into each other, thus, augmenting their truth-value. For example, commerce is not organized contractually and kinship-based forms of property ownership make it impossible to give effect to any agreement. Anderson's third point, however, is a little more intriguing. Here the problem is not economic backwardness but a possible flaw in institutional design. This sort of problem is not the result of culture but a consequence of the colonial mission to make India (and, therefore, Indian land) productive. This imperial narrative on colonial governmental rationality, which continues to re-inscribe itself into contemporary histories that insist that colonialism brought modernity to the colonies, distinguishes the authority of the colonial state from despotic rule in culturalist and procedural terms. Thus, a modern economy should be contractual, and disputes can be settled in court. There was, however, another nascent element of the colonial state: the 'representativeness' of the state's economic goals. It is on this point that Anderson's text, and its subsequent revisions, is particularly insightful.

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<sup>59</sup> *Manual of Land Acquisition* (1918), p. 4

Take for instance Anderson's counsel on market value:

While it is not suggested that an unfairly low value should ever be offered, on the other hand the temptation to over-generosity must be equally resisted. Such generosity at the public expense reacts against the development and against the prosperity of the country in which the land-holder has also his stake.<sup>60</sup>

Anderson wrote as if the country were a joint-stock company. He refined the point in a section of the manual on 'Monopoly & Extortion':

Section 24 [of the 1894 Land Acquisition Act] Firstly, excludes any degree of urgency of need; i.e. the price is not to be measured by the *fact* that the applicant under the Act [meaning the state or private sector company authorized by the state] is obliged to have that plot and no other, for this condition exists in all acquisitions. The owner of the hillside plot will be paid as market value just the same value as he might have got if the tunnel has not been constructed at all, a merely nominal sum; whereas the owner of the corner plot may be awarded a very high price. The difference is that the monopoly in the one case existed before and independently of the need of the acquisitions, whereas the other did not.<sup>61</sup>

It is the idea of the state as a vehicle of development that bolsters this sort of transaction. The state requires the land in 'fact,' but in 'practice' would pay for it as though it could care less. It is law, which allows the state to maintain the fiction of not wanting land it requires for a project. Such law is just because all landowners, hillside and corner plot holders, had a stake in the public purse. Just compensation is guaranteed because the state has no reason to unduly hurt one its constituents and a landowner has no desire to dupe the state.

The precise mechanism by which just compensation could be administered only appeared in the second edition of Anderson's manual, which was published in 1926.

Market value in Indian law is the price which the land—for such uses as a prudent owner would make—would fetch in open auction (or free bargain at arm's length) the day before the notification [of acquisition by the state for a project], if seller and buyer are no illusions or coercions and know all about the land except the impending acquisition.<sup>62</sup>

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<sup>60</sup> Ibid, pp. 37-8

<sup>61</sup> Ibid, p. 40 (emphasis added)

<sup>62</sup> *Manual of Land Acquisition* (1926), p. 48

Thus, in a public auction the hillside owner would sell his plot unaware of its future value, and the corner plot owner would dispose of his natural monopoly but again without extracting a premium based on the state's plans for the plot. The idea of a public auction, in other words, implied a particular division of information. The state could acquire land for less than its future exchange value because of an asymmetry in information exchange. The legalist justification of this asymmetry can be summarized as follows: the state generates all pertinent information on compulsory acquisition. Knowledge of the acquisition, before the fact, is the exclusive province of the state, and the state determines the compensation due to the concerned landowner. While a landowner could challenge the *level* of compensation offered by the government in a compulsory acquisition, he could not challenge the *epistemological basis* of the calculation itself. Indeed, the only appeals from landowners that the judiciary accepted were based on private law. However, the judiciary did not shy away from justifying the state's ability to extract surplus.<sup>63</sup>

The concept of optimal land use within the practice of compulsory land acquisition is no less interesting. In a case that began at the turn of the 20<sup>th</sup> century, the plaintiff argued "that it is not

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<sup>63</sup> Notably, the judiciary insulated the state from paying speculative prices for land, even if widely publicized state policies had fueled the speculation. See 27 Madras Law Journal 106 and *Fink v. Secretary of State*, 24 ILR Cal 599. In a much written about case involving the Calcutta Improvement Trust, the Privy Council held that it was acceptable for the Trust Board to have "compulsorily purchased [land adjacent to the project site] in order that the Board may have the benefit of its enhanced value, and use any profit on the transaction to ease the burden of the public expenditure" (*Trustees for the Improvement of Calcutta v. Chandra Kant Ghosh*, 47 IA 53). These cases typically relied on *Stebbing v. Metro Board of Works*, which established that the future value arising from the acquisition was irrelevant to determining compensation, and *Galloway v. Mayor and Commonalty of London* as well as *Quinton v. Corporation of Bristol*, which established that a municipality could acquire more land than absolutely necessary for a public improvement project, with a view to the profitable disposal of the surplus land to reimburse public expenses. Within the bureaucracy, a Revenue Department resolution in 1909 (R. 9831-09) established that land acquired for one purpose could be used for another purpose or disposed off differently than originally intended. In the second edition to his manual, Anderson defended 'The Direct Basis of Valuation', whereby the state could acquire land by capitalizing its current, rather than future, rental value, by stating: "Recent sales of similar land rank very high as evidence. If we also have leases and direct evidence of rental value, there is little room for other evidence as in the trial of a culprit who is caught in the act by a policeman and confesses his guilt. Merely extenuating circumstances!" (*Manual of Land Acquisition*, p. 51). Justice in the (ex)colony comes at the hands of the state. More importantly, it is procedural rules on the valuation and compensation of land that guarantee the fair execution of the state's development function, just as it is procedural rules that guarantee the fair trial and conviction of a criminal caught red-handed by the police. In both scenarios, the state monopoly on judicial power enables the claim that the state alone is capable of maintaining public welfare.

competent for the local government to make any acquisition for a company; that such work is not of public utility within the meaning of the [Land Acquisition] Act.”<sup>64</sup> The company in question, the Bank of Bengal, had originally attempted to purchase the plaintiff’s property through a private transaction. Having failed to agree on a purchase price, the Bank of Bengal asked the government to acquire the property in order for the bank to extend its premises. This fact seemed to aggrieve the plaintiff the most. The Calcutta High Court, however, found that the determination of public benefit was between the petitioner-company (in this case the bank) and the local government.<sup>65</sup> The court further stated that

There is no definition of ‘public purpose’ in the Act, or any limitation regarding what is likely to prove useful to the public. For obvious reasons both matters are left to the absolute discretion of the local government...In our opinion section 40 constitutes the Government as the custodian of the public interests, the sole Judge of the two facts themselves, namely, whether the land is required for the construction of some work and, secondly, whether that work is likely to prove useful to the public. The only other person concerned in the matter is the company which makes the application for the land.<sup>66</sup>

The court, insisting that its own institutional role was simply to affirm the policy formulation role of the bureaucratic administration, revealed two vital features of Indian land acquisition law. First, land acquisition was a matter of government policy, and therefore government discretion. Second, an affected party was limited in his or her grievance to remedies from private law. Thus, a landowner could object to the compensation being offered but not to the purpose of the taking. In determining compensation, private landowners had to be information-disadvantaged as a way for the state to strive for economy in public expenditure, and they were to be excluded from the entire process of determining optimal land use. Holding a stake in the public economy was not an obviously profitable position under the 1894 land acquisition regime.

<sup>64</sup> Ezra v. Secretary of State, 30 ILR Cal 26

<sup>65</sup> “There is no provision in [the Act] that any other person should be summoned or required to attend at the enquiry contemplated” (Ibid, p. 49). cf Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group, Case no.: Appeal (civil) 1519 of 2006, <<http://judis.nic.in>>

<sup>66</sup> Ibid, p. 50 (emphasis added)

### Good Schemes Make Good Neighbors

There was another dimension to the plaintiff's charge against the government in the Bank of Bengal case. The contract between the government and the bank could be terminated after a ten-year period; the plaintiff contended that no public purpose could be satisfied by such a temporary arrangement. The court's response was less than enthusiastic:

The Act nowhere says that, whether the land is acquired for a public purpose or for a company, it should be for a permanent public purpose or for a permanent company. If the contention of the plaintiff is given any effect to, it would render impossible for the Government to acquire lands for any company under any circumstance, because there is always the possibility of the company being wound up. The question whether the contract between Government and the Bank of Bengal is terminable at the end of 10 years is a matter which in our opinion, *the plaintiff has no concern, for he obtains value of the property* and is not concerned any further with any question relating to the permanency or otherwise of the purpose for which it is acquired.<sup>67</sup>

Aside from reiterating the usefulness of the government lending its regulatory authority to the private sector as a way of promoting growth, the court's opinion illustrated another important dimension of a modern economy: the subject-position of the modern economic subject. The plaintiff in the Bank of Bengal case was only a property holder. His interest in the matter was restricted to the level of compensation he received from the government. The court did not recognize the plaintiff as a legislative subject, in that he had no way of participating in economic policy debates or approving of government decisions by voting. Even as an economic subject, the court limited his position to that of a private party; no level of interest he may have held in the maintenance of general public welfare gave him the *locus standi* to prosecute a case against the government for setting an economic development goal that did not have an obviously public purpose. In other words, the plaintiff could not cite public policy concerns as a way of challenging or amending the agreement between the government and the bank.

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<sup>67</sup> Ibid, p. 52 (emphasis added)



The conception of a property holder was quite different, however, under India's first town planning act. Drafted within four years of the enactment of the English Town Planning Act, the Bombay Town Planning Act contained a powerful expression of the principle of 'betterment.'<sup>68</sup> Betterment, simply described, allowed the government to recoup some fraction of all costs associated with acquiring and improving land by charging landowners who benefited from an improvement scheme. The Bombay and Calcutta improvement trust acts included a provision on betterment whereby the government could levy a fee on adjoining landowners whose property increased in value because of a publicly financed street improvement project. Town planning schemes, framed under the new Bombay Town Planning Act, were to be financed by recouping 50% of the betterment—here defined as the difference in between the value final plot after the completion of the town planning scheme and value of the original plot acquired for the scheme. If the property holder had been construed as an economic subject with a narrow interest in compensation under the 1894 Land Acquisition Act, the logic of betterment created the possibility for landowner to claim an interest in the outcome of an improvement scheme. Specifically, a landowner could claim this interest as a neighbor; as the owner of adjoining property in the case of a street improvement scheme, or as a member of a neighborhood formed through a town planning scheme.

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<sup>68</sup> Robert Home offers an account of how the recovery of betterment under the English statute was relatively constrained when compared to the practice adopted in British India. See Robert Home, "Why was land readjustment adopted in British India but not in Britain? A historical exploration." Workshop on Land Readjustment. Boston: Lincoln Institute of Land Policy, 21-22 March 2002. It should be mentioned that while the 1894 Land Acquisition Act specifically restricted any application of the principle of betterment (Clause 6 of Section 24 on "Matters to be neglected in determining compensation" stated, "any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put"), the Bombay and Calcutta improvement trust acts, which predated the Bombay Town Planning Act, provided for the cost of acquisition to be offset by the valuation of benefits accrued to the individual private property owner by virtue of the public improvement undertaken by the government.

## Tyranny of the Majority

The conception of a property holder as a 'neighbor', or less vaguely, as one member of a planned, urban community does not reconcile perfectly with the idea of the development state. On one hand, it would seem that the principle of pooling fragmented land holdings into a coherent urban neighborhood was an efficient instrument of urban development state. However, such a perspective would ignore the extent to which town planning law created more than roads and buildings. Under town planning law, landowners were not just individuals whose rights in land had to be exchanged for their cash value *individually*. Rather, the new law defined landowners in a notified area as a group. Their interests, much like their individual parcels of land, could be measured and demarcated in relation to one another. Thus, the Chairman of the Bombay City Improvement Trust, J.P. Orr, speaking in favor of the draft bill on making and executing town planning schemes assured the Bombay legislative council that

The general effect of the procedure contemplated by the Bill is to compel owners of many small intermingled holdings to so co-operate so as to secure the development of the whole area of these combined holdings under the control of the Local Authority as if it belonged to a single owner. Every owner will find his wishes consulted in the general development, but the interests of the majority will not be sacrificed to those of a recalcitrant minority. Disturbance of possession will be reduced to a minimum and will be directed towards improvement in shape of building sites and in access to them from public roads.<sup>69</sup>

Under the standard land acquisition regime, no landowner could have claimed a right to express his wishes or opinion on the future use of his land. His interest was confined to the level of compensation offered; no court would admit that a landowner had an interest in determining the purpose of acquisition. Under the Bombay Town Planning Act, not only were landowner interests to be recorded, but a minority distinguished from among those voices for their dissent.

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<sup>69</sup> *Report of the Proceedings of the Bombay Legislative Council* (hereafter BLC) Vol. LII, Bombay: Government Central Press, 1915, p. 209.

There had been no room for dissent on public policy grounds under the 1894 land acquisition regime, as the Calcutta High Court asserted in its dispensation of the Bank of Bengal case. Town planning law, by contrast, operated on the premise that this sort of dissent could be converted into rights. Now a ‘recalcitrant minority’ was integrated into a town planning scheme; it enjoyed ownership and co-development rights in a re-constituted plot. The minority acquired these rights by compulsorily contributing land *and* 50% of the betterment. If it had no desire or no means, as was often the case in the early town planning schemes created out of agricultural area outlying Bombay city, to use or occupy its share of the reconstituted plot, the minority could dispose of its share and profit 50% of the betterment value—just as any developer would. This was the perverse ‘choice’ that planning law brought to a recalcitrant minority: it could enjoy the benefits of living in a town planning scheme, or it could enjoy the profit of selling a share in a reconstituted plot it co-developed.

Planning law had superseded private law on land acquisition. Prior to the enactment of the Bombay Town Planning Act, a private property owner could only expect compensation for his plot at the level offered through a simulated public auction, *sans* perfect information. The town planning act transformed his status from a compelled seller into a forced co-developer. This recognition of dissent as right (to extract surplus) was a constitutive element of the arbiter state. A new practice of government was founded on the refusal to recognize dissent as opposition to authority. Elision of this sort was the product of thinking that colonialism brought modernity to the colonies. In this specific instance, the idea played out as colonial law bringing public health, improved housing and economic development to India. The role of law, according to this narrative, was significant in two registers. First, constitutional law dictated that provincial legislative assemblies, because of their ‘intimate knowledge of local conditions’ had exclusive

purview over enacting and amending public health, housing and local economic development law. Emerging from this point is the second role of law: law as instrument. Thus, individual bills and acts passed at the provincial level were thought of as instruments for planners to use in their program to build productive and sanitary cities.

If this sort of an instrumentalist conception of law is shed, then it is possible to catalog ways in which a planner is different from the generic form of a bureaucrat. This approach also means abandoning any the pretence that planning is a rational-technocratic exercise—a conceit that has justified wrenching transformations in postcolonial India. Instead, as the following look at the legislative history of the 1915 Act shows, town planning contained the potential to shape politics.

Take for instance the stated objective of the town planning act mentioned in one of the first government documents on the subject: the act was intended to impose

certain liabilities on landlords, including the necessity of building in conformity with the alignment, the bringing of sites to a certain level, the erection of homes of a suitable type and harmonious architectural design and the limitation of the area actually occupied by the buildings to a certain proportion of the whole site area.<sup>70</sup>

From the perspective of the contemporary practice of urban design, the government's intention appears to be nothing more than formulating an urban code with by-laws on setbacks, height controls and design regulations. In other words: an entirely objective exercise. However, the final version of the draft town planning bill did not contain any specific regulations of this sort. It instead empowered public sector planners, working with private sector developers, to evolve such provisions within the specific context of individual town planning schemes. In other words, the interests of landlords would shape the 'liabilities' fixed on them. In a memorandum to the

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<sup>70</sup> General Department Resolution R.3022 dated 14<sup>th</sup> June 1909.

Bombay Development Committee written five years later, Orr, perhaps unintentionally, polished the argument for not establishing a single standard for all town planning schemes:

sanitary houses...those best lighted and ventilated are preferred to older insanitary buildings, [and] the owners of the latter will suffer some loss; but they cannot expect the public purse to compensate them for this loss; for it never would have occurred, had they not preferred immediate higher profits. There is however a difference between such cases of *free* supply and demand and cases in which the law interferes with the habitation of dwellings that fall short of a higher standard of sanitation.<sup>71</sup>

According to Orr, it was only necessary to compensate a landowner for regulatory changes if those changes were introduced suddenly and without consultation, or in his words, if the law was altered “unreasonably”.<sup>72</sup> Orr’s test for reasonableness, thus, was a test of the representativeness of regulation. As long as the government consulted property owners and recorded their sentiments, any individual landlord or tenant could vacate possession of property they could not afford to or did not want to bring into conformity with a new standard. Later the same year, when the Orr spoke in defense of the draft town planning bill in the Bombay Legislative Council he noted that while the government could not move the poor, it could “make more room for them where they are.”<sup>73</sup> This implied using town planning law to order suburban development in a way that would be palatable for Bombay’s growing middle and upper classes. The state’s monopoly over planning law, coded as “sanitary control”, would enable private individuals or societies to convert fragmented agricultural holdings into new neighborhoods thereby providing some “indirect relief from [Bombay’s] urban troubles.”<sup>74</sup>

Native legislators pounced on the suggestion that numerous small agricultural holdings on the outskirts of Bombay city would be converted into residential suburbs. Balkrishna Sitaram Kamat

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<sup>71</sup> *Report of the Bombay Development Committee*, Bombay: Government Central Press, 1914, pp. 360-1.

<sup>72</sup> *Ibid*, p. 361

<sup>73</sup> BLC LII, p. 208

<sup>74</sup> *Ibid*, pp. 209, 208

from Poona argued that petty agriculturalists would not be able to meet the fiscal burden of financing 50% of betterment, which under the draft town planning bill would have been determined by an arbitrator. Though appreciative of the opportunity that petty agriculturalists would have to benefit from large public works and considerably improved land, Kamat thought it best if the “Local Body and the private owners [could] come to a compromise between themselves” on the level of compensation, thus doing away with need for an arbitrator to fix the betterment value.<sup>75</sup> Similarly, Gokuldas Parekh insisted that

in respect of lands which are in the vicinity of a notified area...if the improvements are not needed for the area itself but are to be undertaken for the benefit of the municipality...it would not be proper to transfer the area to the latter and make the voice of its property holders impotent. In such cases...the proper course would be to take up the area under the Land Acquisition Act.<sup>76</sup>

In effect, both Kamat and Parekh sought to preserve features of the private law regime on land acquisition in the face of nascent public law on town planning. Kamat, unlike Parekh, did not want the 1894 Act itself to be applied to *mofussil* or the provincial parts of the Bombay Presidency; that would “dispossess” a petty landowner and preclude him from enjoying “the advantages which he might get in the long-run if any proposed scheme comes into operation.”<sup>77</sup> Kamat’s contention was that compensation for the takings should be determined through free negotiations between government authority and private property owner. This mechanism restored a landholder to the status of an economic subject, as it had been narrowly defined under following the 1894 Act. Under that regime, a private property rights holder had no ability to express an opinion on the how his land, once acquired by the state, should be used. In this sense, Kamat’s argument simply missed the ways in which town planning law could fundamentally

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<sup>75</sup> Ibid, p. 197

<sup>76</sup> Ibid, p. 1039

<sup>77</sup> Ibid, p. 198

alter relations between adjoining property owners, agriculturalists and the state, the municipality and the province.

Parekh, for his part, explicitly sought to preserve the relationship between private property and sovereignty as enumerated by the land acquisition statute and case law. He thought the government should finance suburban development by acquiring more land than was physically required for a project, and selling the surplus to speculative bidders. He saw this mechanism as preferable to compelling landowners to become constituents in a town planning scheme. However, Parekh arrived at his larger objection to the capture of *mofussil* land by municipalities by relying on the very logic of town planning law: it should be “possible by some means to ascertain the desire in reference to the town planning [scheme] of the majority of the property owners.”<sup>78</sup> Archer Hill, a key official in the Government of Bombay responsible for drafting the town planning bill, ridiculed his stance as

a very aristocratic point of view to take, [when] the general point of view should be that improvements in town building and so forth should properly be for the benefit of the populace at large and not for the property owners or the majority of them.<sup>79</sup>

The debate between Parekh and Hill reveals a connection between the two conceptions of the state. It is eerie how the premise that the minority should be consulted (state as arbiter) could so easily flip into a jingoistic claim that government attended to the populace at large (state as vehicle of development). Understanding the co-existence of these two possibilities might be easier if we consider the autobiography of planning. After all, whether documenting subjective interest or stating objective goal, the planner was a removed technocrat. Even as planning law created hitherto non-existent opportunities for altering social and legal arrangements, these new

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<sup>78</sup> Ibid, p. 1039

<sup>79</sup> Ibid, p. 1051

state powers were disguised by the self-representation of planning knowledge as rational and scientific. Hence, planning action could be coded in terms of progressive goals like decongestion for the sake of public health, and zoning could be conjured as a 'natural' instrument of such action. In fact its naturalness meant that there was no shame in Orr admitting that zoning in the manner of his decongestion plan from 1914 implied class-based segregation. As a planner, Orr could not concern himself with the moral or political dimensions of such a decision. His job was just to report the costs and benefits accrued. Thus, whenever the state decided to create a new urban settlement, majority and minority opinion was recorded so that rights could be pooled, exchanged or re-instated. Whenever an objection was raised to the politics of the scheme, its aims were cast as loftier and grander in scale than the scheme itself.



## **Conclusion:** Arbiter of India's Destiny

There is a view that the problem of the Depressed Classes is a social problem and that its solution must be sought for in the social field. I am surprised that this view prevails even in high quarters. I am afraid that those who hold this view forget that every problem in human society is a social problem. The drink problem, the problem of wages, of hours of work, of housing, of unemployment insurance are all social problems. In the same sense the problem of untouchability is also a social problem. But the question is not whether the problem is a social problem. The question is whether the use of political power can solve that problem. To that question my answer is emphatically in the affirmative. True enough that the State in India will not be able to compel touchables and untouchables to be members of one family whether they liked it or not. Nor will the State be able to make them love by an Act of the Legislature or embrace by order in Council of the Executive. But short of that the State can remove all obstacles which make untouchables remain in their degraded condition. If this view is correct, then no community has a greater need for adequate political representation than the depressed classes.<sup>80</sup>

Dr. B.R. Ambedkar perhaps provided the most explicit elaboration of the role of law in constituting an arbiter state. Ambedkar had envisioned an interventionist arbiter state, which could build new institutions of government, at least as early as the 1920s when he was a member of the Bombay Legislative Council. Ambedkar's staunch opposition to separate electorates from this period is by now almost completely lost in the history of the Communal Award settled by Ramsey McDonald in 1932. While much has been written about the Gandhi's fast-unto-death following the announcement of the Communal Award as well as Ambedkar's subsequent accession to the Poona Pact, whereby members of the oppressed classes would contest a reserved number of 'Non-Mohammedan seats', Ambedkar's opposition to the segregation of Muslim and non-Muslim seats is less well known. Consider, for example, the following passage from his dissenting note to the report submitted by the Government of Bombay to the Indian Statutory Commission (more commonly known as the Simon Commission):

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<sup>80</sup> Bhimrao Ramji Ambedkar, "The Distribution of Seats," *A Report on the Constitution of the Government of Bombay Presidency* (<http://www.ambedkar.org/ambcd/14.%20Dr.%20Ambedkar%20with%20the%20Simon%20Commission%20Preface.htm#c2>)

the case for communal electorates cannot be sustained on any ground which can be said to be reasonable. What is in its favour is feeling and sentiment only. I do not say that feeling and sentiment have no place in the solution of political problems. I realise fully that loyalty to Government is a matter of faith and faith is a matter of sentiment. This faith should be secured if it can be done without detriment to the body politic. But communal representation is so fundamentally wrong that to give in to sentiment in its case would be to perpetuate an evil. The fundamental wrong of the system, has been missed even by its opponents. But its existence will become apparent to any one who will look to its operation...it is an universally recognised canon of political life that the Government must be by the consent of the governed...[and] communal electorates are a violation of that canon. For, it is government without consent. It is contrary to all sense of political justice to approve of a system which permits the members of one community to rule other communities without their having submitted themselves to the suffrage of those communities.<sup>81</sup>

Ambedkar was an early proponent of universal adult franchise. The property qualification for enfranchisement had entirely locked out the Depressed Classes from electoral politics during late colonialism. The limited extent to which members of the Depressed Classes belonged to provincial legislative assemblies was the result of nomination and not election—an unacceptable situation as far as Ambedkar was concerned. Yet, Ambedkar’s embrace of equal citizenship does not seem to have stemmed from a pure ideal of liberal politics that was above or somehow divorced from ‘feeling and sentiment.’ Equal citizenship, according to him, could not be based on equality without regard for history or sociological construction. Rather, it could only be based on the recognition of equality between members of different groups. The role of law, therefore, was to fashion a state that ensured this principle through protective and affirmative measures. The practice of obtaining the ‘consent of the governed’ necessarily had to be a practice of securing consent of the minority. Franchise had to be universal, and electorates joint.

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<sup>81</sup> Bhimrao Ramji Ambedkar, “Electorates,” *A Report on the Constitution of the Government of Bombay Presidency* (<http://www.ambedkar.org/ambcd/14.%20Dr.%20Ambedkar%20with%20the%20Simon%20Commission%20Preface.htm#c5>)

However, for government to be truly responsible it had to legislate to remove inequality. According to Ambedkar this would only be possible if legislative seats were reserved for minorities, as the following passages from another section taken from the same dissent show:

In making my suggestions for the recasting of the electoral system I have allowed myself to be guided by three considerations: (1) Not to be led away by the fatal simplicity of many a politician in India that the electoral system should be purely territorial and should have no relation with the social conditions of the country, (2) Not to recognise any interest, social or economic, for special representation which is able to secure representation through territorial electorates, (3) When any interest is recognised as deserving of special representation, its manner of representation shall be such as will not permit the representatives of such interest the freedom to form a separate group.

I am for the abolition of all class electorates, such as those for (1) Inamdars and Sardars, (2) Trade and Commerce, whether Indian or European, (3) Indian Christians, and (4) Industry; and merge them in the general electorates. There is nothing to prevent them from having their voice heard in the Councils by the ordinary channel. Secondly, although I am for securing the special representation of certain classes, I am against their representation through separate electorates. Territorial electorates and separate electorates are the two extremes which must be avoided in any scheme of representation that may be devised for the introduction of a democratic form of government in this most undemocratic country. The golden mean is the system of joint electorates with reserved seats. Less than that would be insufficient, more than that would defeat the ends of good government.<sup>82</sup>

Ambedkar's figuration of the minority merits its own study, and his essays on the origins and annihilation of untouchability critically illuminate the writing and pedagogy of history itself. For example, Ambedkar did not suggest that untouchability existed in time immemorial; it had a specific history that was verifiable. In his own telling of this history, Ambedkar imagined a primordial utopia—a common trope in the autobiography of Indian nationalism. By contrast, whenever members of the Simon Commission attempted to challenge Ambedkar's view that the condition of the Depressed Classes had not significantly improved over the preceding twenty year, he would re-state his point by describing individual cases of atrocities against low-caste Hindus and members of other oppressed groups. Unfortunately, very little analytical material on

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<sup>82</sup> Ibid

Ambedkar has been written, and this thesis does not fill that lacuna. However, it is important to note that Ambedkar rejected the idea that social reform could undo the degradation of the minority, even if that degradation had a specific history. Moreover, government could only be legitimate if its institutions made it possible for the minority to speak and be heard.<sup>83</sup>

Compare this theory of the state, as government of the minority, to the notion of the ‘representativeness’ of the public economy discussed in chapter two. Under the 1894 Land Acquisition Act the only remedies available to individual property owners affected by a compulsory taking came from private law. The justification for this practice was the ‘stake’ that all landowners supposedly had in the public economy. This principle dictated both the level of compensation owed by the state, even in cases of compulsory takings for a private sector firm, and the judiciary’s insistence that the purpose of a taking was unimpeachable. After all a property owner, as stakeholder in the public or general economy, benefited doubly from the forced acquisition of his land: he received ‘fair compensation’ and was at least a passive witness to the economic growth spurred by the state-sponsored improvements to his former land. The 1915 Bombay Town Planning Act, on the other hand, did not cast landowners as passive beneficiaries of development. It treated them as co-developers of modern, planned communities. Crucially, planning was not to be practiced following the mere recital of benefits potentially accrued to the public. More accurately, planning law empowered the state to transform petty landowners into co-developers with a new class of rights by imploring the state to take notice of

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<sup>83</sup> Ambedkar reinforced this point in his dissent when describing the principle of reserving legislative seats the Depressed classes, “I do not think that the arithmetical theory of representation can be agreed to. If the Legislative Council was a zoo or a museum wherein a certain number of each species was to be kept, such a theory of minority representation would have been tolerable. But it must be recognised that the Legislative Council is not a zoo or a museum. It is a battle ground for the acquisition of rights, the destruction of privileges and the prevention of injustice...all those who lay exclusive stress upon efficiency as the basis for recruitment in public services do not seem to have adequate conception of what is covered by administration in modern times. To them administration appears to be nothing more than the process of applying law as enacted by the legislature” (Ibid).

sectional interests. Thus, the translation of minority opinion into minority rights was the condition of town planning.

The rhetoric of the ‘representativeness’ of the public economy could now be supplemented by the rhetoric of representation. Individual landowners belonged to a cohort under town planning law. Their input, by direct representation and eventual payment of 50% of the betterment charge, was necessary in order to complete a town planning scheme. Those who did not wish to belong to a future town planning scheme could dispose of their rights, which had been pluralized under the new regime from simple ownership to ownership with additional development rights. Town planning was just because the minority benefited doubly: its voice was represented and its potential compensation far more handsome than it would have been under the 1894 land acquisition law. However, the justification of the change in government practice from land acquisition to town planning fell back on far more familiar appeals to the ‘public interest’. Even though town planning law did not justify an individual exercise in town planning in terms of the benefits accumulated by the majority of participating landowners, the proponents of town planning rationalized the 1915 act as more important than just an instrument to serve the inhabitants of any one town planning scheme. It brought sanitary living and the image of a modern urban landscape to the ‘populace at large.’

Returning to Ambedkar’s writing from the late 1920s, the promise of representation seems far more transformative. Representation at the provincial and central level was a key way in which equal citizenship between members of different communities would be achieved. The structure of representation by universal adult franchise, joint electorates and reservations implied that equality could only be achieved if members of different communities were respected *as* members

of their respective communities. Indeed, the point of legislation or the logical result of representation in this manner, according to Ambedkar, was the enforcement of such equality in every sphere of public life.

Ambedkar first dreamt of citizenship at a time when South Asians were subjects. It is almost too easy to point to the role of law in shaping the politics of equal citizenship in place of the rule of colonial subjects. Still, reading Ambedkar prompts a re-evaluation of the argument that the institutions of colonialism exhausted the heterogeneity of pre-colonial politics. From the discussion in chapter one, it would seem that the ethics of regulating the *wakf* as an indigenous endowment were non-interference in native custom and preservation of donor intent. Though adjudication in *wakf* property disputes was a form of state intervention in ‘indigenous religious affairs’ and the primacy of donor intentionality was invented by contemporaneous legal scholarship, the regulation of the *wakf* did not erase customary practice and replace it with a modern, monolithic Islamic or English legal regime on endowments. On the contrary, the cases involving the Randheria and the Mullaji Saheb illustrate how the courts in British India produced ethnic identity in colonial subjects. The judiciary crafted this knowledge as a standard for measuring the validity of what it termed ‘local usage and custom’, which were distinct from any universal principle or law. In both cases, however, the courts found that the dispute before them did not emanate from a disagreement over the implication of a specific local custom. In doing so, the judiciary established the colonial state as the ultimate authority of when and how customary practice could alter personal, civil, criminal or public law.

The native elite’s appropriation of the ethics of governing the *wakf* as an endowment or trust did not imply the modernization of a traditional institution. The Mussalman Wakf Validating Bill,

for all its author's protestations, was not just the exposition of pre-modern Islamic law. It insisted on an entirely new guarantee: the specificity of donor intent in the form of a trust registration deed. Though excluded from final version of bill enacted in 1913, the rules on registration re-emerged in the 1923 Mussalman Wakf Validating Act and in administrative rules on the creation and operations of a *wakf* enacted at provincial level in the 1930s. Nonetheless, the new law did not limit or even prescribe *what* a donor's intent should be in order for a *wakf* to be valid. It did not collapse the heterogeneity of customary practice by insisting on conformity to one general standard applicable to all Muslims in British India.

Both essays in this thesis document how law produced the micro-level state as the arbiter in disagreements over the making of citizenship. Nonetheless, even in a state setup that emphasized its distance from the substantive basis of these disagreements, the form of governance could frustrate any attempt to create a participant citizenship. Thus, the vast majority of South Asians remained, and in some glaring ways perhaps remain, subjects. In tracking the declension of subjecthood in categories such as Muslim and neighbor, an important and relatively un-examined feature of colonial government rationality came into focus: legal debates on identity and modernity had conjured the figure of the minority as an object of citizen making. Moreover, the texts of these debates acknowledged the minority as the maker of his or her own path to citizenship. Both nationalist and colonial legal thought theorized an adjudicatory role for the state in this process of citizen making. This is quite different from the conception of the macro-level state, where policy conjures the general population as the object of government. It gets confusing when policy pluralizes the objects of government into multiple sociological groups, including into officially recognized minority and vulnerable groups. This thesis would claim that minority-specific policies represent a different arrangement of the

relationship between government and knowledge when compared to the formation of the arbiter state. The latter produces specific knowledges and techniques to manage citizen making. Policies that target the minority, in contrast, are more closely related to the nation as pedagogy. Thus, the nation is progressive and indivisible.

Implicitly policy and citizen making also represent two different stories about sovereignty. Recognizing the tension between these two conceptions of sovereignty has been a driving impetus of this study. Again, the cited passages from Ambedkar's deposition before the Simon Commission can orient us towards the implications of this tension. Ambedkar was sure that the role of the national state was to intervene in the production of equal citizenship. This was the only way in which caste inequality and untouchability could be abolished. He refused to accept the position, voiced most notably by Gandhi, that untouchability was a 'social' problem internal to Hinduism, which could painlessly be resolved through 'social' reform. Ambedkar went as far as to suggest that the national state would only be legitimate if it forced India's upper classes and upper caste Hindus to recognize the downtrodden as equals. It seems morally wrong, at least in the Indian context, to classify the politics of citizen making as a series of (peculiar) attempts by nationalists to 'co-opt' the minority. To view the politics of governance from that lens is to silence the ethical struggles, which sited in law, resist its instrumentalist use.<sup>84</sup>

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<sup>84</sup> Popular talk ubiquitously condones India's 'factionalism'. Immediately prior to the Indian government introducing structural adjustment policies (without even pretending to have a popular electoral mandate to do so), this talk was coded as 'casteism'. The poorly formed National Front coalition led by V.P. Singh had supposedly resurrected the 1980 Mandal Commission Report (which amongst its many recommendations advocated for the expansion of affirmative action through public sector job quotas for low-skilled backward classes) to shore up support for his government in the face of unpopularity amongst upper caste Hindus. Now with all the buzz about India's role in the 'knowledge economy', affirmative action in India is coded as a threat to (global) economic efficiency. For a US media example in the see Miranda Kennedy, "Indian students protest affirmative action plan," <http://marketplace.publicradio.org/shows/2006/05/12/PM200605126.html> (May 12, 2006). See also "Protecting islands of excellence," *The Hindu* (April 11, 2006) for the same argument told by a progressive Indian media outlet.



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